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**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**
(Commercial Jurisdiction)

2018/HPC/0381

BETWEEN:

NARENDRA DESAI

VIRENDRA DESAI



1ST PLAINTIFF

2ND PLAINTIFF

AND

ENM HOLDINGS ZAMBIA LIMITED

ERROL NEAL MOLVER

GANAPATI NARASIMHA PAI

1ST DEFENDANT

2ND DEFENDANT

3RD DEFENDANT

**Before Hon. Mr. Justice Bonaventure C. Mbewe on the 5th day of
June, 2019.**

For the 1st and 2nd Applicant : *Mr. M. Ndalameta with
Ms. D. Nalishuwa of
Messrs. Musa Dudhia and
Co.*

For the 1st, 2nd and 3rd Defendants : *Mr. S. Kaonga from
Messrs. Theotis Mataka,
Legal Practitioners*

RULING

Cases referred to:

1. *Colin v. Duke of Westminster* (1985) 1 ALL ER 463
2. *Arthur Nelson Ndhlovu v. Al Shams Building Materials Company Limited and Jayesh Shah* (2002) ZR 48
3. *Development Bank of Zambia v. Sunvest Limited* (1995-1997) Z.R 187
4. *Sydney Chibwe and Others v. Gift Chapa and Another* (2012/HP/152)
5. *Vandervell Trustees Ltd v. White* (1970) 3 All ER 16
6. *Zulu v. Avondale Housing Project Limited* (1982) Z.R 172
7. *Davies v. Gas Light and Coke Co* (1909) 1 CD 248
8. *Multinational Gas and Petroleum Co. v. Multinational Gas and Petrochemical Services Ltd* (1983) 2 ALL ER 563
9. *Foss and Harbottle* (1843) 67 ER 189

Legislation and Other Authorities referred to:

1. *The High Court Act, Chapter 27 of the Laws of Zambia*
2. *The Rules of the Supreme Court of England, 1965 (White Book), 1999 Edition, Volume 1*
3. *The Limitation of Actions Act, 1939 (English Act)*
4. *The Companies Act, Act No. 10 of 2017 of the Laws of Zambia*
5. *The Companies Act Chapter 388 of the Laws of Zambia*
6. *Halsbury's Laws of England, 4th Edition, Vol. 28, Paragraph 882*

INTRODUCTION AND BACKGROUND

This action was commenced on 7th November, 2018, by the Plaintiffs, Narendra Desai and Virendra Desai, against ENM Holdings Zambia Limited, Errol Neal Molver and Ganapati Narasimha Pai.

Prior to filing of the Originating Summons, an application was made ex-parte, by the Plaintiffs, for leave to issue Originating Summons and serve the said summons by way of substituted service on the 2nd Defendant in South Africa, filed on 18 September, 2018 for which my brother, his Lorship Mr. Justice Sunday B. Nkonde S.C. granted leave by Order dated 3rd October, 2018.

Further applications for misjoinder filed on 22 January, 2019 and an application to file an affidavit in opposition out of time filed on 7th May, 2019 were struck out by my brother Hon. Mr. Justice Nkonde, prior to my taking up hearing of the matter. On 15th May, 2019, the parties agreed to dispense with a full hearing of the application to restore the misjoinder application and the application to file the affidavit in opposition to the main Originating Summons application out of time. I granted an Order restoring the misjoinder application to the active cause list, as well as leave to file the affidavit in opposition out of time and to treat the affidavit in opposition dated 30th April, 2019 as the official affidavit in opposition for use in these proceedings.

APPLICATIONS DEALT WITH BY THIS COURT

The following applications were therefore before this Court, and I opted to hear all of them on the same day as I was of the view that they were related and could be dealt with as such, to expedite an already delayed matter; namely:

1. An Originating Summons filed on 7th November 2018;
2. Summons for Misjoinder pursuant to **Order 14, Rule 5(2) of the High Court Rules, Chapter 27 of the Laws of Zambia** filed on 22 January, 2019.
3. Notice of motion to raise preliminary issue by way of summons to determine matter on a point of law pursuant to **Order 14A Rule 1** as read with **Order 33 Rule 3 and 7 of the Rules of the Supreme Court of England 1965 (White Book), 1999 Edition** filed on 30th April, 2019;
4. Notice of Motion to Raise Preliminary Issue and Dispose of case on a Point of Law pursuant to **Order 14A, Rule 1** of the as read with **Order 33 Rule 3 and 7 of the Rules of the Supreme Court of England 1965 (White Book), 1999 Edition** filed on 13th June, 2019.

I heard verbal submissions on the Notice of Motion of 30th April 2019 and owing to shortness of time, proceeded to give directions for filing of any additional documents and submissions on the Originating

Summons and the Summons for Joinder applications, as well as allowed the Defendants to file a further Notice of Motion (being the Notice of Motion of 13th June, 2019) which I informed the Parties that I would determine from the filed documents. The Parties agreed to have the application for misjoinder heard with the Originating Summons application, which agreement I endorsed with my Order therefor.

1. NOTICE OF MOTION TO RAISE PRELIMINARY ISSUE OF 30TH APRIL, 2019

This application by the Defendants', is made pursuant to **Order 33, Rule (3) and (7) of the Supreme Court Rules, 1965 (White Book) 1999 Edition, Vol. 1** and is supported by an affidavit and a list of authorities and skeleton arguments all filed into Court on 30 April 2019.

In this application, the Defendants seek the following questions to be addressed by this Court;

- 1. Whether the Plaintiffs can pray to this Honourable Court for the Defendants to render accounts for a period in excess of six years from the date the right accrued in 2015 to the date of commencement of this action in 2018 in light of Section 2(2) of the*

Limitation of Actions Act 1939 AND if the Court determines that the Plaintiffs are statute barred from praying for such reliefs the Defendants pray that the Court make an Order to that effect and the claims be dismissed with costs to the Defendants.

2. Whether the prayer for financial statements, minutes for meetings and other documentation for the period between 2005 and 2013 is statute barred and offends the provisions of Sections 2(1) of the Limitation of Actions Act 1939

AND if this Court determines that the Applicant's reliefs are statute barred, the Defendants pray that they be dismissed with costs.

The Defendant's combined list of authorities and skeleton arguments in support of this application, state that the application is premised on **Order 33, Rule 3 and Rule 7 of the Rules of the Supreme Court of England 1965, (White Book) 1999 Edition Volume 1** which reads as follows;

Rule 3:

“The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the

cause or matter, and may give directions as to the manner in which the question or issue shall be stated.”

Rule 7:

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

The Defendants, go on to submit, that this matter can be dismissed or disposed of if it is proven, that the issues before the Court can be determined without the requirement for a full trial.

The Defendants, contend that the prayer by the Plaintiff in their Originating Summons to render an account for the period between 2005 and 2015 is statute barred in accordance with **Sections 2 (1)(a) and (2) of the Limitation of Actions Act, 1939** which provide as follows;

“(1) (a) 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; actions founded on simple contract or on tort.

(2) An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the Action.”

The Defendants, go on to posit that the relationships between a company and its members is founded in contract law citing **Section 21 of the Companies Act, Act No. 10 of 2017 of the Laws of Zambia** which reads;

“Subject to this Act, the incorporation of a company shall have the same effect as a contract under seal between the Company and its members from time to time and between those members themselves, in which they agree to form a company whose business will be conducted in accordance with the application for incorporation, the certificate of share capital from time to time, the articles of the company from time to time, and this Act. (Underlined for emphasis only.)

The Defendants, argue that the rights that the Applicants seek to enforce, are contractual and therefore the action should have been brought within six years from the date of the occurrence of their grievance in non-submission of accounts for the years 2005 to 2015. The Defendants, submit that this Court does not have the jurisdiction to grant the Plaintiffs the reliefs prayed for, as they are founded in contract or tort and have been caught up by the limitation placed on commencement of contract actions in **Sections 2 (1)(a) and (2) of the Limitation of Actions Act, 1939.**

The Plaintiffs, have argued against this application in their skeleton arguments in support of Originating Summons filed on 3rd June, 2019 under Sub-heading 6 – Preliminary argument on case being statute barred. They submit, that the Defendants arguments are unfounded and untenable at law and rely on **Section 2 (3) of the Limitation Act** which provides that;

“An action upon a speciality shall not be brought after the expiration of twelve years from the date on which the cause of action accrued: provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.”

The Plaintiffs define the category of “specialities” taking the definition from **Halsbury’s Laws of England, Volume 28, 4th Edition, Para. 882** as including “*a bond, contract under seal, a deed, a covenant and a statute*”.

The Plaintiffs submit that their client’s claim is a specialty arising under statute for production of documents required to be comprised in accounts of the Company (the 1st Defendant), for all accounting periods from date of incorporation and is thus derived from **Section 278 and 279 of the Companies Act, No. 10 of 2017**. The Plaintiffs, submit that the production of the company records derives from a requirement under **Section 278 of the Companies Act** and is therefore statute based and is a specialty under **Section 2(3) of the Limitation Act** and should be subject to the 12 year limitation period. That the Plaintiff’s action is not statute barred, as their right of action accrued in 2010 when they became shareholders on 8th November, 2010, the date from which they were entitled to be furnished with annual financial statements of the 1st Defendant Company. The case of **Colin v. Duke of Westminster (1)** is relied on in support of this submission.

The Plaintiffs, argue in the alternative, that **Section 356 of the Companies Act** requires a company to keep records and books for

period of 10 years which would entitle the Plaintiffs to accounts for the period of 2008 to 2018.

The Plaintiffs, argue that granting the Defendants application for statute bar, would be allowing estoppel against statute which is contrary to settled law. They cite the case of **Arthur Nelson Ndhlovu v. Al Shams Building Materials Company Limited and Jayesh Shah (2)** in which the Supreme Court held that;

“The position of the law is clear. There can be no estoppel against a statute. A litigant can plead the benefit of statute at any stage.”

The Plaintiffs, pray to the Court to allow the Plaintiffs enforce the provisions of the **Companies Act** for production of the records they seek.

RULING

I thank the parties for the spirited arguments in support of and against this application all of which I have considered. **Order 33, Rule 3 and Rule 7 of the Rules of the Supreme Court of England**

under which the Defendants have raised this preliminary issue, gives this Court jurisdiction to hear the Defendants application.

The Defendants, rely on the **Companies Act, CAP 388** which is a repealed law and has been replaced by the **Companies Act No. 10 of 2017**. The new **Companies Act, No. 10 of 2017** re-enacted the old **Section 21** quoted by the Defendants as **Section 17**, which section starts with the words, **“Subject to this Act, the incorporation of a company shall have the same effect as a contract under seal between the Company and its members from time to time and between those members themselves.”** This clearly makes the contractual rights and duties in the relationship formed by incorporation among the members, subordinate or subject to the provisions of the Act. **The Companies Act** does impose certain duties and responsibilities on the members in their capacity as members as well as in their capacity as directors or executive officers, in the event that they take up such additional roles within the company. This case pertains to the duties and responsibilities imposed on the 1st Defendant Company and the members and executive officers namely; Errol Neal Molver and Ganapati Narasimha Pai by statute. There is therefore need to distinguish the duties conferred on the members by contract which are spelt out in the articles or any other side agreements such as shareholder agreements or share sale agreements, and those imposed by statute.

What the Applicants have brought this action to enforce, are the duties imposed by statute.

Section 2 (3) of the Limitation Act and not **Section 2 (1) (a) and (2)** is the correct section in the Limitation Act that applies to the Plaintiffs case, as Section 17 of the Companies Act makes the relationship one of specialities when it states **“Subject to this Act, the incorporation of a company shall have the same effect as a contract under seal between the Company and its members from time to time and between those members themselves.”**
(Underlined for emphasis only.)

Contracts under seal are included in the specie of speciality actions as set out in **Halsbury’s Laws of England**. The fact that **Section 17** clearly states that the act of incorporation has the effect of a contract under seal and the fact that I hold that the Plaintiffs are by this action claiming the production of documents and records which are required to be carefully maintained by statute leads me to the firm conclusion that the correct limitation period is that of 12 years and not six years as argued by the Defendants. This is better explained by reading **Section 30 of the Companies Act No. 10 of 2017** which sets out the records that must be kept at a company’s registered officer when provides;

“(1) A company shall, at its registered office, keep the following records;

(a)The articles of association

(b)A register of -

a. Members indicating separately

b. Beneficial owners, specifying the particulars in Section 12(3) (e);

c. Debenture holders; and

d. Any other security holders;

(c)the full names and addresses of the current directors;

(d)Minutes of all meetings and resolutions of shareholders for the preceding 10 years;

(e)An interests register

(f) Minutes of all meetings and resolutions of directors and director’s committees within the last 10 years;

(g)Copies of all financial statements for the preceding 10 years;

(h) The accounting records for the preceding 10 years;

(My underlining for emphasis only)

Section 58 of the Companies Act No. 10 of 2017, requires annual financial statements to be on the agenda of an annual general meeting for a company, which means that the 2nd and 3rd Defendants herein, were duty bound to have the financial statements audited and tabled at the annual general meetings held every year within 90 days of the end of each financial year of the 1st Defendant. All these are statutory obligations and the correct period of limitation that applies to them is **Section 2 (3) of the Limitation Act**.

Section 356 of the Companies Act which has been posited to only allow the maintenance of records and books for 10 years reads as follows;

“A company shall retain records or books required to be kept in accordance with this Act for a minimum period of ten years and in accordance with the Financial Intelligence Centre Act, 2010” (my underlining for emphasis only)

This law provides a minimum period for keeping the records and does not direct the companies to destroy their records at the stroke of 10 years. The use of the word “minimum” envisages that Companies will keep the records for a longer period than 10 years.

I therefore hold that the application to raise a preliminary issue by the Defendants is misconceived and without merit. I therefore hereby accordingly dismiss the Defendants' application with costs, to be taxed in default of agreement.

2. THE NOTICE OF MOTION TO RAISE PRELIMINARY ISSUE OF 13TH JUNE, 2019.

The Notice of Motion to Raise Preliminary Issue filed on 13th June, 2019 is addressed herein as the arguments were brought out at the hearing of 5th June, 2019 though the actual documentation for and against followed later.

The Notice of Motion to Raise Preliminary Issue filed on 13th June, 2019, is made pursuant to **Order 14A, Rule 1** as read with **Order 33 Rule 3 and 7 of the Rules of the Supreme Court of England 1965 (White Book), 1999 Edition** and asks this Court to determine the question;

“Whether the commencement of this matter by the Plaintiff’s amounts to a multiplicity of actions and an abuse of court process when the Plaintiffs have commenced a similar action in the Republic of South Africa.

AND that if this Honourable Court determines that the Plaintiff's commencement of this action amounts to a multiplicity of actions and is an abuse of Court process, the Defendant's pray that this action be dismissed with costs."

The Defendants, in support of their Application to raise preliminary issue, filed an affidavit deposed to by Mr. Steven Kaonga and a combined list of authorities and skeleton arguments all dated 13th June, 2019.

The affidavit of Steven Kaonga, deposes that the Plaintiffs have commenced two separate actions in the Republic of South Africa involving the same parties. The deponent deposes, that the Plaintiffs could and can obtain the reliefs prayed for in these proceedings in South Africa in these proceedings. The affidavit exhibits copies of the proceedings in South Africa. The affidavit attests, that it would be inimical and prejudicial to the administration of justice if the Plaintiffs are allowed to continue dragging the Defendant before different courts.

The Plaintiffs, filed an affidavit in opposition to this application and skeleton arguments all filed on 25th July, 2019. The affidavit is sworn

by Virendra Desai and deposes that the Plaintiffs are not pursuing the same claims against the same parties in this action and in the actions in the High Court of South Africa. One action includes a third person named Anand Alis Hitan Narendra Desai as co-applicant and is against a company named Asset Protection International South Africa Proprietary Limited and the 2nd Defendant, as Defendants and goes on to detail some of the reliefs that are claimed in that action. The affidavit attests that in the other action in South Africa, the Plaintiffs herein seek, in that action against the 2nd Defendant, a liquidated amount and interest. It is deposed that the Plaintiffs cannot obtain in the South African actions, the relief they seek in this action, which current action is focused on the 1st Defendant, ENM Holdings Zambia Limited and the duties of the 2nd and 3rd Defendants in relation to their directorships of the said company and there is no risk that they will obtain decisions from the Courts in South Africa and in Zambia which will undermine each other and there is nothing to stop them from seeking relief from different jurisdictions.

The Plaintiffs skeleton arguments filed on 25th July, 2019, posit that the Defendants application, is misguided and lacks merit as there is no multiplicity of actions as submitted by the Defendants. They cite the case of **Development Bank of Zambia V Sunvest Limited (3)**, and distinguish it arguing that the Plaintiffs herein instituted separate proceedings seeking different reliefs in different

jurisdictions against different parties for the most part. They also rely on the case of **Sydney Chibwe and others V Gift Chapa and another (4) (unreported)**, wherein they submit that this Court refused to find that an action amounted to a multiplicity of actions where the actions concerned different subject matter and different parties with different interests.

RULING

The Applicant makes this application under **Order 14A Rule 1 of the Rules of the Supreme Court, 1999 Edition** which reads;

- (1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that –**
 - a. Such question is suitable for determination without full trial of the action; and**
 - b. Such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.**

- (2) **Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.**
- (3) **The Court shall not determine any question under the Order unless the parties have either –**
- a. **Had the opportunity of being heard on the question; or**
 - b. **Consented to an order or judgment on such determination**

I have considered the affidavit evidence and skeleton arguments and authorities cited by both parties for and against the Notice of motion of 13th June, 2019 and looking at **Order 14A Rule 1 of the Rules of the Supreme Court, 1999** which I have set out above, I find that this Court has the jurisdiction to hear the application at hand, on the question of whether the action is an abuse of process for multiplicity of actions owing to the Plaintiffs having commenced similar actions in South Africa. If determined in favour of the Defendants, the question for determination will completely settle the entire cause or matter as set out in **Order 14A, Rule 1 (a) and (b)**.

I have read and considered the affidavit evidence and skeleton arguments made for and against the application by the parties and

agree with the Plaintiffs' affidavit evidence and submissions, which clearly show that the claims in the South African actions are different from those that this Court has been called upon to adjudicate and there are parties who are in the South African actions, who are not party to this action as well as a party who is not in the South African actions who is party to this action i.e. the 3rd Defendant. On the totality of the evidence, law and authorities on the matter of multiplicity of actions, I do not find that there is any risk or likelihood of the Courts in the two jurisdictions handing down judgments or rulings that would conflict or undermine each other. I accordingly find that the Respondent's application and arguments are misconceived and devoid of merit and hereby dismiss this application by the Defendants with costs to the Plaintiff, to be taxed in default of agreement.

3. SUMMONS FOR MISJOINDER OF THE 3RD DEFENDANT

The 3rd Defendant's application for misjoinder is made by summons pursuant to **Order 14, Rule 5 (2) of the High Court Rules, Chapter 27 of the Laws of Zambia** supported by an affidavit and a list of authorities and skeleton arguments all filed into Court on 30 April, 2019. The 3rd Defendant prays for an Order that he be removed from these proceedings and that his name be struck out of the Originating Summons and the Affidavit in support thereof and all subsequent proceedings therein.

The affidavit of Steven Kaonga, filed in support of the application for misjoinder deposes, that the 3rd Defendant ceased to be a director or agent of the 1st Defendant Company and exhibits as “SK1” a copy of a notice of change of directors or secretaries which document shows that the 3rd Defendant resigned as a director of the 1st Defendant Company on 14th November, 2018.

The skeleton arguments rely on **Order 14, Rule 5 (2) of the High Court Rules, Chapter 27 of the Laws of Zambia** which reads;

“The Court or a Judge may, at any stage of the proceedings, and on such terms as appear to the Court or a Judge to be just, order that the name or names of any party or parties, whether as plaintiffs or as defendants, improperly joined be struck out.”

The 3rd Defendant, asks this Court to remove him as a party to these proceedings submitting that the affidavit evidence shows that he is not a proper person to be joined to these proceedings as he is no longer a director in the 1st Defendant Company, and the Plaintiffs cannot get the reliefs they seek against him.

The Plaintiffs, on 28th January, 2019 filed skeleton arguments in opposition to the 3rd Defendant's application for mis-joinder. The Plaintiffs, argue that the 3rd Defendant should remain a party to the action as they seek relief from him as a director of the 1st Defendant Company as he was an officer of the Company during the period relevant to these proceedings as at the time the action was commenced, 7th November, 2018, he was still a director as he resigned on 14th November, 2018. The Plaintiffs, submit that they seek an Order of this Court compelling the Defendants, which includes the 3rd Defendant, to produce the 1st Defendant's accounts and the 3rd Defendant therefore has sufficient interest to remain a party to the action as he was a director at the time the action was commenced and at the relevant period relating to the 1st Defendant's accounts and it would be just and convenient to dismiss the 3rd Defendant's application so that the rights between the parties can be fully and effectively determined once and for all.

The Plaintiffs rely on the cases of **Vandervell Trustees Ltd V White (5)** on a party to be added to an action being a person against whom some relief is claimed by another party to the action, and **Zulu v Avondale Housing project Limited (6)** which sets out the duty of the Court to adjudicate upon every aspect of the suit between the parties so that the matter in controversy is determined in finality.

RULING

I have read the application, the arguments filed in support and against as well as the authorities relied on and find that the reliefs sought against the 3rd Defendant relate to the period that he was director in the 1st Defendant Company and as such he is properly joined to the action as he was privy to the operations of the 1st Defendant and was a person responsible for ensuring that the affairs of the 1st Defendant Company were properly carried out including records and financial statements of the 1st Defendant Company were properly maintained and necessary meetings held in accordance with the law up to 14th November, 2018 the date that he resigned as a director of the 1st Defendant Company. In the circumstances it will not be in the interest of justice to remove the 3rd Defendant from these proceedings.

I therefore refuse to exercise my discretion to Order that the 3rd Defendant be removed or struck out as a party to this action.

4. ORIGINATING SUMMONS

The Applicant herein filed an Originating Summons pursuant to **Sections 278 and 279 of the Companies Act No. 10 of 2017** and **Order XLIV, of the High Court Rules, CAP 27 of the Laws of Zambia** on 7th November 2018 seeking an order that;

- 1. The Defendants do within 14 days from the date of the order to be made herein make good their default in failing to lay before the Company in the General Meeting and to deliver to the Plaintiffs copies of the documents required to be comprised in the accounts of the Company for all the accounting periods from the date of incorporation;*
- 2. Any other relief that the Court may deem fit; and*
- 3. The Defendants do personally pay the costs of and incidental to this application.*

The Originating Summons, is supported by an Affidavit deposed to by both Plaintiffs and a List of Authorities and Skeleton Arguments. The Plaintiffs, depose that they have been, from 8th November, 2010, holders of 26% and 25% shareholding in the 1st Defendant Company, a limited liability company incorporated on 15th February, 2005. At the date of commencement of the action the 2nd and 3rd Defendants were directors responsible for its day to day affairs. The registered office of the company is in Lusaka. The affidavit deposes, that the Company has not provided any annual financial statements to the Plaintiffs nor has it held any annual general meetings leading the deponents to be concerned that the Company has not been filing statutory returns or paying taxes in accordance with the law.

The Plaintiff's affidavit goes on to depose that on 18th July, 2018, they, acting through their lawyers Messrs. Musa Dudhia and Co, issued a Notice pursuant to **Section 278 of the Companies Act**. The Notice required the Company to prepare for inspection, its annual reports and financial statements dating back to 2010. Upon undertaking the said inspection, the said lawyers were given draft copies of unsigned and unaudited financial statements for 2012 and 2013 and the following information was noted to be missing from the 2013 statement, namely; details of shareholders that have lent the company money and how much is owed to them, whether the company provided security for the money borrowed and terms and tenure of the applicable interest rate on the said shareholder loans. It is deposed, that the Advocates were told that accounts for the years 2014 to 2015 would be provided by 28th July, 2018 and those for 2016 and 2017 would be made available in mid-August 2018. The Company has failed to provide the requested documents despite repeated requests for the said accounts. The affidavit exhibits various correspondence and documents mentioned therein.

The Plaintiffs' list of authorities and skeleton arguments in support of the Originating Summons are dated 3rd June, 2020. The Plaintiffs set out the duty of the 2nd and 3rd Defendants under **Section 164 of the Companies Act, Chapter 388**, to present annual accounts of the company. The Plaintiff cite **section 279 of the Companies Act No. 10 of 2017** and list the documents required to be provided for

inspection under this section and argue that the Plaintiffs have a clear and incontestable right to be supplied with the documents and records they seek.

Section 279 of the Companies Act. No. 10 of 2017 reads as follows;

“For the purposes of Section 278, the records to be made available for inspection include –

- (a) Minutes of meetings and resolutions of members**
- (b) Copies of written communications to shareholders or to holders of a class of shares during the preceding five years, including annual reports, financial statements and group financial statements;**
- (c) Beneficial ownership records;**
- (d) Certificates given by directors;**
- (e) Records relating to directors; and**
- (f) The interest register, where applicable**

The Plaintiffs rely on the case of **Davies v. Gas Light and Coke Co (7)** to support their arguments, which case held that only a member of a company could require a copy of the Register and enforcement

of that right was by way of ordinary action and not under a specially prescribed statutory procedure.

The Plaintiffs, go on to lay out details of the order they seek from this Court as follows;

1. *That the Defendants shall furnish the Plaintiffs with the 1st Defendants signed annual financial statements and accounting records for all the accounting periods from 2005 made up in accordance with Part XII of the Companies Act No. 10 of 2017, including notes disclosing;*
 - a. *The shareholders who have lent the 1st Defendant money, how much is owed to them, whether the 1st Defendant provided security, the applicable interest rate and tenure of the loans; and*
 - b. *The investments held by the 1st Defendant*
2. *That the Defendants shall furnish the Plaintiffs with the documents referred to above within 14 days from the date of Judgment;*
3. *If it is found that the documents provided by the defendants do not meet the requirements set out above, the Defendants will*

have a grace period of 10 days within which to remedy the default, and in default of compliance at the end of the grace period, the Plaintiffs will be at liberty forthwith to issue process for committal for contempt.”

The Plaintiffs submit that the Defendants have not complied with **Order 28 rule 7 (2) of the Rules of the Supreme Court of England** in making their counter claim and cannot be allowed to spring a surprise on the Plaintiffs in this regard.

The Plaintiffs argue against the Defendant’s attempt to tie the Defendants compliance to the statutory duty under **section 279** to monies they claim ought to be paid back them by the Plaintiffs.

The Defendants filed an affidavit in opposition to Originating Summons sworn by one Errol Neal Molver the 2nd Defendant herein. The affidavit Errol Neal Molver attests that he is South African national and the Managing Director of 1st Defendant Company for which he is responsible for the day to day operations and is also the 2nd Defendant in these proceedings. The deponent does not deny the Plaintiffs assertion that they are shareholders in the 1st Defendant Company and that they would be beneficiaries from the 1st Defendant’s investments as shareholder in Spar Zambia, Pam Golding and PABS. The deponent avers that the Plaintiffs shares were

not bought from the 1st Defendant Company but from him and as at the date of deposing to the affidavit, the Plaintiffs had not fully paid for the shares and were indebted to him for the shares. That the Plaintiffs were required to advice on the operations of Spar Stores which duty they have not discharged. The affidavit deposes that the 3rd Defendant has ceased to be a director of the 1st Defendant and exhibits as "EM1" a PACRA Notice of Changes in Directors or Secretaries.

The affidavit deposes that the exhibit "ND-VD3" exhibited to the Plaintiffs affidavit is a speculative document made to illustrate the 1st Defendant Company's growth potential and the contents must not be understood to be *sacro sanct*. The affidavit deposes that the 1st Defendant Company has adhered to and complied with all statutory requirements and the Plaintiffs assertions and concerns are unfounded and misconceived and the Plaintiffs have always been provided with 1st Defendant's periodical financial statements to *circa* 2012/2013 and the Plaintiffs have slept on their rights to demand for documentation until July 2018. The deponent deposes that the Defendants have no objection to furnishing the Plaintiffs with the signed annual records and financial statements for the period 2012 to 2018 but the documents before that period require a 3rd party to undertake the requisite audits and prepare annual records and financial statements. The Defendants depose that compiling old records for a company that has relocated its offices on several

occasions is difficult and challenging hence their delay in furnishing the Plaintiffs with documents requested for.

The deponent goes on to depose that it is unreasonable and unjust for the Plaintiffs to claim for any documents or records made prior to 2012 and that the Plaintiffs are indebted to him in the sum of USD600,000.00 for debt recovery he undertook for them and the debt owed to him should be settled at the same time or before the accounts requested for are furnished to them including a debt for share transfer.

The Defendants also filed combined skeleton arguments and list of authorities in support of their affidavit in opposition on 20th June, 2019 which starts by arguing that the Plaintiffs are statute barred from producing accounts for the period 2005 to 2013. The Defendants go on to aver that in the event that this Court rules that the Plaintiffs' claims for the accounts are not statute barred, they are not entitled to rights existing prior to their becoming shareholders i.e. 2010 and are not therefore entitled to accounts before 2010. The Defendants go on to argue that by **Section 356 of the Companies Act Chapter 388** allows them to keep records and not furnish them to shareholders whose enforcement of their rights is statute barred and further that a member is not entitled to sue for accounts based

on **section 356** but rather regulatory authorities are the ones that can prosecute the 1st Defendant Company for breach of the law.

The Defendants go on to argue that the 2nd and 3rd Defendants as Directors do not owe the Plaintiffs any duty and are not their agents as only the 1st Defendant Company is entitled to sue the 2nd and 3rd Defendants for breach of duty and therefore the two defendants are improperly cited as parties to the action. The cases of **Multinational Gas and Petroleum Co. v. Multinational Gas and Petrochemical Services Ltd (8)** and **Foss and Harbottle (9)** are relied on to advance the above argument.

The Defendants go on to also argue that the Plaintiffs have not satisfied the prerequisite to move the Court under **Section 278 of the Companies Act** as the supporting affidavit to their application that the Plaintiffs hold a suspicion that the Defendant has failed and has not made available for inspection the records indicated in **Section 279** and the application is therefore premature or has not met the pre requisite and should therefore be dismissed with costs.

It is lastly, contended by the Defendants that they are not precluded from raising a counter claim which counter claim is that the Plaintiffs are indebted to the 2nd Defendant and the 2nd Defendant has a right to hold on to any of the Plaintiff's entitlements and rights as lien or

self-remedy for the amounts owed. The Defendants pray that the action be dismissed and the Plaintiffs be made to pay the 2nd Defendant the amount of USD600,000.00 they claim is owed to him. The Defendants rely on **Order 28, Rule 7 (2) of the Rules of the Supreme Court of England** in laying their counter claim.

The Plaintiffs, on 27th May, 2019, filed an affidavit in reply to the Defendants' affidavit in opposition which attests that the Plaintiffs investment in the 1st Defendant was in not only three companies but also included Freedom Park Investment and PGE, that the return of allotment exhibited as "ND-VD1" showed that they purchased their shares from the 1st Defendant and not the 2nd Defendant, the consideration of which was the loan advanced to the 1st Defendant. The Plaintiffs deny that they were required to provide advice on Spar Stores. The Plaintiffs aver that the investment projection exhibited as "ND-VD3 in their affidavit in support was not speculative as the 2nd defendant was certain of the investment the Plaintiffs would re-coup and exhibit a letter of 7th June, 2011 which contains the 2nd Defendant's assurance that the investment would double in a period of seven years if he was allowed to have complete management of the Plaintiff's investments. The Plaintiffs attest that they have never been provided with any minutes of accounts, have never attended any general meetings or been invited to any and that the only annual reports and financial statements they were provided with through the

request by their Advocates were drafts for the period 2012 to 2013. The Plaintiffs dispute the Defendant's counter claims.

The affidavit in reply is supported by skeleton arguments in reply filed on 11th July, 2019 in which the Plaintiffs argue that they have not based their application on **Section 356 of the Companies Act** but **Section 278 and 279 of the Companies Act** and their reference to **Section 356** is an analogy to draw attention to the fact that the Act is clear that a company's records ought be kept for at least 10 years as opposed to six years. They also contend that **Section 335 (1) of the Companies Act** allows a shareholder of a company to bring an action against a director for breach of a duty owed to the member when it reads;

“(1) A member or former member of a company may bring an action against a director for breach of a duty owed to the member or former member.”

The Plaintiffs submit that this section entitles them to sue the 2nd and 3rd Defendants for their failure to make annual reports and financial statements available for inspection as required by **Sections 278 and 279 of the Companies Act.**

The Plaintiffs distinguish their claim from the rule in **Foss v. Harbottle (9)** which states that the company itself is the proper claimant for any wrong alleged to have been done to a company whereas in the matter *in casu*, the Plaintiffs do not allege a wrong done to the 1st Defendant but is merely for the Defendants to produce documents.

RULING

To understand the importance that this case raises on obligations of companies and duties of directors, I have to highlight some of these provisions set down by law that relate to this case here starting with the duties imposed on members and directors under the following sections of the **Companies Act**:

Section 30 of the Companies Act No. 10 of 2017 spells out the records that must be kept at a companies registered officer provides;

“(1) A company shall, at its registered office, keep the following records;

(i) The articles of association

(j) A register of -

- a. Members indicating separately**
 - b. Beneficial owners, specifying the particulars in Section 12 (3) (e);**
 - c. Debenture holders; and**
 - d. Any other security holders;**
-
- (k) the full names and addresses of the current directors;**
 - (l) Minutes of all meetings and resolutions of shareholders for the preceding 10 years;**
 - (m) An interests register**
 - (n) Minutes of all meetings and resolutions of directors and director's committees within the last 10 years;**
 - (o) Copies of all financial statements for the preceding 10 years;**
 - (p) The accounting records for the preceding 10 years;**
 - (q) Copies of instruments creating.....**
 - (r) Any other document or record as may be prescribed by the Minister.**

(3) The documents required to be maintained in accordance with this section may be kept in electronic form.”

A company acts through its members and directors and any executive officers to whom they delegate some of their powers, who are charged with ensuring adherence to the provisions of the Act. The parts of **Section 30** which I underlined for emphasis, clearly

show that among records which the Plaintiffs are seeking the 2nd and 3rd Defendant to produce and the section uses the word “shall” thereby making it mandatory that these records must be found at any time that a person wishes to inspect them whether under **Section 278 and 279** or for any other reason or at any other time. **Section 30(3)** of the **Companies Act** allows maintenance of these records in electronic form when it states;

(3) The documents required to be maintained in accordance with this section may be kept in electronic form.”

Therefore if the paper versions cannot be located, the electronic versions can be used.

The Defendants have breached this basic statutory requirement for maintaining records of the 1st Defendant Company imposed by Section 30. There is no exception granted in the law for moving offices or passage of time as pleaded by the Defendants in their affidavit. The obligation is mandatory meaning that it charges the Directors or executive officers of a company to take extra care to preserve and therefore be able to produce the company records as and when required to do so either in paper or electronic form.

Section 57 of the Companies Act requires a company to hold an annual general meeting within ninety days of the end of each financial year. **Section 56 (2)** even makes provision for holding such meeting by teleconferencing or electronically. **Section 57(3)** does provide for exception to dispense with the holding of annual general meeting upon the meeting of certain conditions which include notifying the Registrar of Companies beforehand.

Section 58 (a) of the Companies Act lists, among the mandatory business to be conducted at an annual general meeting, the consideration and approval of the financial statements and annual report.

Section 104 (1) provides that; **“A director shall not act, or agree to the company acting in a manner that contravenes this Act or the articles.”**

Section 105 reads; **“Subject to this Act, a director shall –**

(c) when exercising powers or performing duties of a director –

(i) act in good faith and in the best interests of the company; and

(ii) exercise the degree of care, diligence and skill that may reasonably be expected of a person carrying out the functions of a director.”

They find that there is no argument advanced by the Defendants in opposition to the Plaintiffs application that holds water or is based on a sound interpretation of the law. I find that the 2nd and 3rd Defendants breached or abrogated their statutory duties as Directors as enshrined in all the Sections of the **Companies Act** which I have cited above *inter alia*. From the affidavit evidence of the Plaintiffs especially exhibits “ND-VD3” in the Plaintiffs affidavit in support and “ND-VD 2” in the Plaintiffs affidavit in reply, it is manifestly clear what the 2nd Defendant was inviting them to invest in and the terms of this investment. It is also very clear that the 2nd Defendant was not speculating, or his statements speculator contrary to his assertion in the affidavit in opposition, in the “selling” of the return to be recouped by the investment the Plaintiffs were making. He even went to the extent of undertaking to be responsible for any shortfall in the projected return of 12% in his letter of 7th June, 2011 in “ND-VD2”. The Defendants cannot now be claiming that they do not have or know where the records of the company are or arguing for time to prepare these statements as the company is still registered and a going concern.

It is not in dispute that the 1st Defendant is a holding company whose primary business is the ownership of shares in other companies which leads me to believe that there is not much day to day accounting work or documentation required to produce the annual financial statements, a duty which is required to be undertaken by qualified external auditors. In the event the Defendants have really lost or misplaced the audited annual financial statements of the 1st Defendant, they can still obtain copies of the said statements from the respective auditors assuming that they actually appointed auditors for this purpose. The affidavit of Errol Meal Molver deposes to a delay in furnishing the Plaintiffs the documents requested for as a result of the 1st Defendant relocating offices and not impossibility. The Defendants are therefore able to furnish the documents which they have been compiling since 2018 from all accounts.

I find that the Plaintiffs satisfied the requirements of **Sections 278 and 279**. The 2nd Defendant in Paragraph 19 of his affidavit deposed that the Defendants have no objection in furnishing the Plaintiffs with signed annual records and financial statements for the period 2012 to 2018 which is an admission that they will furnish the documents and the Court notes that this did not require the intervention of the Court to make them do this, the Defendants are obliged by statute to maintain these documents and to avail these documents to members of the Company on demand. The 2nd and 3rd Defendant are reminded of their duties as directors in **Section 104**

of the Companies Act, namely to act in good faith and in the best interests of the company; and exercise the degree of care, diligence and skill that may reasonably be expected of a person carrying out the functions of a Director. Being a Director or member of Companies comes with duties and responsibilities for which each such person is personally liable for.

The fact that breaching of provisions of the **Companies Act** is accompanied by criminal sanction, does not take away the right of a member to take civil action against the directors thereof for breach of duty as provided in **Section 335 (1) of the Companies Act** which provides;

“(1) A member or former member of a company may bring an action against a director for breach of a duty owed to the member or former member.”

I find the 2nd Defendant’s counter claim for the amount of USD600,000 has to fail, as they have not complied with **Order 28, Rule 7 (2) of the Rules of the Supreme Court of England** and in any case no evidence in support of the said debt alleged to be owed to him has been produced by the 2nd Defendant before this Court. Such evidence could have included a share sale agreement or any other document evidencing the same. The terms of the transaction between the

parties in “ND-VD1” in the Plaintiff’s affidavit in support of Originating Summons whose terms are very clear. I dismiss the Defendant’s counter claim that the documents claimed to be produced in this action should only be done so upon payment of an alleged debt owed to the 2nd Defendant as the Defendants cannot tie such a condition to a statutory duty.

I therefore hereby find that the Plaintiffs have proved their case on a balance of probabilities and I hereby order the Defendants to produce to the Plaintiffs in compliance with **Section 279 of the Companies Act**, and more specifically as prayed by the Plaintiffs, Order the following ;

1. That the Defendants shall furnish the Plaintiffs with the 1st Defendants signed audited annual financial statements and all accounting records for all the accounting periods from 2005 made up in accordance with Part XII of the Companies Act No. 10 of 2017, including notes disclosing;

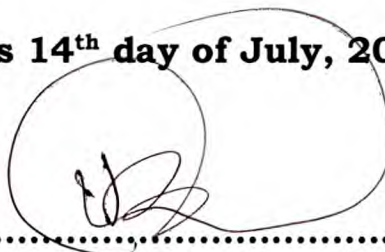
- a. The shareholders who have lent the 1st defendant money, how much is owed to them, whether the 1st Defendant provided security, the applicable interest rate and tenure of the loans; and**
- b. The investments held by the 1st Defendant**

2. That the Defendants shall furnish the Plaintiffs with the documents Ordered to be furnished in 1 above, within 14 days from the date of Judgment;
3. In the event it is found that the documents provided by the Defendants do not meet the requirements set out above, the Defendants will have a grace period of 10 days within which to remedy the default, and in default of compliance at the end of the grace period, the Plaintiffs are granted leave, forthwith to issue process for committal for contempt.”

I award costs of this action to the Plaintiffs, to be taxed in default of agreement.

I deny the Defendants leave to appeal this Ruling.

Delivered at Lusaka this 14th day of July, 2020.



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Bonaventure C. Mbewe
HIGH COURT JUDGE