

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

(Civil Jurisdiction)



2019/HP/1785

BETWEEN:

J & M ADVOCATES (*Suing as a firm*)

PLAINTIFF

AND

GLENCORE INTERNATIONAL AG

DEFENDANT

**BEFORE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN
CHAMBERS, ON 2ND MARCH, 2020.**

*For the Plaintiff: Mr. J. Madaika & Ms. S. Kalima - Messrs. J & M
Advocates*

For the Defendant: Mr. A. Imonda - Messrs. A. Imonda & Company

RULING

CASES REFERRED TO:

1. *New Plast Industries vs. The Commissioner of Lands and the Attorney General* (2001) Z.R. 51;
2. *Leopold Walford (Zambia) Limited vs. Unifreight* (1985) ZR 203;
3. *Attorney General & Another vs. Lewanika & Others - SCZ Judgment No. 2 of 1994;*
4. *Champ Health Solutions vs. ER 24 EMS (PTY) Limited & Mopani Copper Mines - Appeal No. 89 of 2015;*
5. *Joseph Gereta Chikuta vs. Chipata Rural Council* (1974) Z.R. 241;
6. *B.P Zambia PLC vs. Zambia Competition Commission, Total Aviation and Export Limited and Total Zambia Limited* (2011) Z.R. 222;
7. *Zambia Revenue Authority vs. Jayesh Shah* (2001) Z.R. 60; and

8. *Phillip K. R. Pascall, Arthur Mathias Pascall, Clive Newall, Martin R. Rowley, First Quantum Minerals Limited and FQM Finance Limited vs. ZCCM Investments Holdings Plc - Appeal No. 92 of 2018*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *The High Court Act, Volume 3, Chapter 27 of the Laws of Zambia;*
2. *The Rules of the Supreme Court, 1999 Edition, London Sweet & Maxwell;*
3. *The Legal Practitioners Act, Chapter 30 of the Laws of Zambia;*
4. *Practice Direction No. 4 of 1977; and*
5. *Statutory Instrument No. 69 of 1998, The High Court (Amendment) Rules 1998.*

1 INTRODUCTION

1.1 The Defendant herein has raised two preliminary issues, which requires this Court to interrogate the mode of commencement of this action and whether or not the Writ of Summons should be set aside for not following the correct procedure before being issued.

2 BACKGROUND

2.1 The genesis of this matter is that by amended Writ of Summons and Statement of Claim issued on 26th November, 2019, the Plaintiff seeks the following reliefs: -

1. *An order that the Plaintiff is entitled to collect and recover their fees for work done from May, 2016 to August, 2019, on behalf of the Defendant under cause number 2015/HPC/0560 as per the agreed rates stated in the engagement letter between the Plaintiff and Defendant and that the advocates are entitled to payment for all attendances including attendances for Court, follow-ups, travelling out of town and all other legitimate attendance by the Plaintiff on behalf of the*

Defendant on the basis of the lawyer-client relationship that existed between the parties;

- 2. An Order that the non-submission of monthly fee notes does not vitiate Defendant's liability to pay the fees duly accrued by the Plaintiff as same was by tacit agreement through conduct of both parties not a cardinal term of the contract and it was never expressly stated to be a basis upon which payment was anchored;*
- 3. An Order that the amount due and payable for the period under (1) as lawyer-client costs be determined by summary procedure under Order L Rule 3 of the High Court Rules without need for trial;*
- 4. An Order for the Plaintiffs to settle a Bill of Costs upon the hourly rates agreed in the engagement letter and for the taxing master to determine the amount due and payable to the Plaintiff by the Defendant for all work done from 2016 until the termination of the engagement between the parties and that the taxed sum be immediately payable less the deposit of US\$35,000.00 that was tendered by the Defendant in 2016;*
- 5. Interest on all sums found due;*
- 6. Any other Order the Court may deem fit; and*
- 7. Costs of these proceedings to be included in the taxation process.*

2.2 According to the Statement of Claim, the Defendant who is based in Switzerland, engaged the services of the Plaintiff in relation to a matter under cause number 2015/HPC/0560 and in accordance with the Legal Practitioners (Contentious Matters) Costs Order, 2001. The parties agreed upfront on an hourly rate and the

issuance of interim bills in accordance with the agreed rates, which terms were reduced in an engagement letter. In May, 2019, an itemised bill was forwarded by the Plaintiff to the Defendant, which was disputed by the Defendant. The settlement negotiations between the parties reached a deadlock, which resulted in the termination of their relationship. To date, the said bill remains unpaid, thus the Plaintiff claims the reliefs stated above.

2.3 The originating process was served on Mopani Copper Mines Plc, who were the Defendant's representatives in the lawyer-client relationship with the Plaintiff, which relationship now stands terminated.

3 PRELIMINARY ISSUES RAISED

3.1 Subsequently, on 28th November, 2019, the Defendant filed Summons to set aside originating process, pursuant to **Order XI, Rule 4** of **The High Court Rules**¹, as read with **Order 2, Rule II** and **Order 14A** of **The Rules of the Supreme Court**², which I scheduled for hearing on 19th February, 2020.

3.2 The preliminary issue raised by Learned Counsel for the Defendant Mr. Imonda, is that this Court is wanting in jurisdiction as the mode of commencement of the proceedings invoked by the Plaintiff is incompetent and that the originating process was issued without prior authority of the Court as no leave was obtained to issue

the same for service out of the jurisdiction as required under **Order X, Rule 15** and **16** of **The High Court Rules**¹.

- 3.3 In support of the preliminary issues raised, an Affidavit in Support was deposed by ALICK GONDWE, a legal practitioner employed by Mopani Copper Mines Plc, who was nominated as local agent by the Defendant, due to the special relationship that the Defendant has with Mopani Copper Mines Plc. It is averred *inter alia*, that upon perusal of the originating process, it became apparent that the Plaintiff's action ought to have been commenced by Originating Summons and not Writ of Summons. It is further averred that the Defendant is based in Switzerland as indicated on the originating process and yet leave to issue the originating process for service out of jurisdiction was not obtained by the Plaintiff.
- 3.4 The Plaintiff responded by filing an Affidavit in Opposition deposed to by SACHIKUNKA MUHUMPU KALIMA, an Advocate in the Plaintiff firm, who averred *inter alia* that the special relationship between the Defendant and Mopani Copper Mines Plc has always been known to the Plaintiff thus the originating process being served on Mopani Copper Mines Plc as local agent of the Defendant and in accordance with the express written instructions and agreement between the Plaintiff,

Defendant and Mopani Copper Mines Plc. It is further averred that by the Defendant engaging Advocates herein, this demonstrates that the originating process was properly received by the Defendant.

4 SUBMISSIONS

4.1 The Defendant filed herein its skeleton arguments, in which this Court's attention was drawn to **Order VI, Rule 1** and **2** of **The High Court Rules**¹, which provides as follows: -

"1. Except as otherwise provided by any written law or these Rules every action in the High Court shall be commenced by Writ of Summons endorsed and accompanied by a full Statement of Claim.

2. Any matter which under any written law or these Rules may be disposed of in Chambers shall be commenced by an Originating Summons."

4.2 The Defendant further made reference to **Order L, Rules 2** and **13** of **The High Court Rules**¹, which provides as follows: -

"2. No practitioner shall commence any suit for the recovery of any fees for any business done by him until the expiration of one month after he shall have delivered to the party to be charged therewith or sent by registered letter to or left for him at his office, place of business, dwelling-house or last known place of abode a bill of such fees, such bill either being signed by such practitioner (or, in the case of a partnership, by

any of the partners, either in his own name or in the name of the partnership) or being enclosed in or accompanied by a letter signed in like manner referring to such bill.

13. All applications made under these Rules to refer any bill to be taxed and settled shall be by summons in the matter of the practitioner concerned."

4.3 The Defendant also cited **Order XXX, Rule 11 (h)** of **The High Court Rules**¹, which provides as follows: -

"The business to be disposed of in chambers shall consist of the following matters, in addition to the matters which under any other rule or by statute or by the law and practice for the time being observed in England and applicable to Zambia may be disposed of in chambers:

(h) All applications for the taxation and delivery of bills of cost and for the delivery by any Advocate of deeds, documents and papers."

4.5 The Defendant argues that the claims by the Plaintiff relate to taxation and delivery of bills of costs and as such the Plaintiff ought to have commenced the action by Originating Summons and not Writ of Summons, as provided in the above cited provisions of the law. It is contended that since the law provides for commencement of the action by Originating Summons, this action was wrongly commenced and therefore the Court has no jurisdiction to entertain the action. To fortify their contention, the case of **New Plast Industries Limited**

vs. Commissioner of Lands and Attorney General¹
was cited.

4.6 The Defendant further submitted that the originating process indicates that the Defendant is based in Switzerland and as such the Plaintiff ought to have obtained leave of the Court to issue the Writ of Summons for service out of the jurisdiction, which leave is mandatory. It is contended that since the correct procedure was not followed, the originating process is liable to be set aside. Reliance was placed on ***Order X, Rules 15*** and ***16*** of ***The High Court Rules¹***. The Defendant also called in aid the case of ***Leopard Walford Zambia Limited vs. Unifreight²***, where it was made clear that obtaining leave to issue for service out of jurisdiction is mandatory.

4.7 The Defendant also submitted that the Plaintiff's action ought to be dismissed with costs and made reference to ***Order XI, Rule 1(4)*** of ***The High Court Rules¹***, which provides as follows: -

"Any person served with a Writ under Order VI of these rules may enter conditional appearance and apply by Summons to the Court to set aside the Writ on grounds that the Writ is irregular or that the Court has no jurisdiction."

4.8 On 17th January, 2020, the Plaintiff filed herein skeleton arguments in opposition to the Defendant's application, in which it is submitted, *inter alia*, that the reliefs sought by the Plaintiff relate to more than just the referral of the

matter for taxation which is subsequent to the Court making orders as relate to reliefs (1) (2) and (3) of the Amended Writ of Summons and Statement of Claims. That in *casu*, the Plaintiff also seeks a determination of whether it is entitled to payment for all attendances including follow-ups and travel out of town and whether non submission of monthly fee notes disentitles the Plaintiff to payment of legal fees for work duly conducted. It is contended that in such circumstances, the correct mode of commencement is by Writ of Summons as the issues sought to be determined by the Plaintiff go beyond just taxation.

- 4.9 It has been argued by the Plaintiff that the Defendant has misread **Order L Rule 13** of **The High Court Rules**¹, by adding the word "*Originating*" which does not appear in the statute as the statute states that any application under that Order must be by Summons and not Originating Summons. It is contended that where the Act requires an action to be commenced by Originating Summons, it clearly states so as is the case under **Order XXX Rule 14** of **The High Court Rules**¹. That where the Act refers to "*Summons*", it means that the statute is speaking of interlocutory summons and not Originating Summons. It is also contended that there is no ambiguity, unfairness or other deficiency in the literal meaning of the words contained in **Order L Rule 13** of

The High Court Rules¹, for the Defendant to add words that do not appear in the statute. To fortify its contention, I was invited to the case of ***Attorney General & Another vs. Lewanika & Others***³.

4.10 On the issue of the Court not obtaining leave of the Court for issue for service out of jurisdiction, the Plaintiff contends that the case of ***Leopold Walford (Z) Limited vs. Unifreight***² is distinguishable from the case in *casu*, in that the originating process was not served out of jurisdiction but on Mopani Copper Mines Plc, who have confirmed that they have a special relationship with the Defendant as they were nominated by the Defendant to be their representatives in the relationship with the Plaintiff, thus no leave was required as alleged by the Defendant.

4.11 It is further submitted by the Plaintiff that the entire lawyer client relationship between the Plaintiff and Defendant took place within Zambia, with the matter that the Plaintiff had conduct of on behalf of the Defendant being instituted in Zambia, having arisen from a transaction that took place within Zambia. That the Plaintiff executed the agreement within Zambia as did Mopani Copper Mines Plc and as such, by agreement, Mopani Copper Mines Plc became local agent for the Defendant. It is contended that service on Mopani Copper Mines Plc was proper as it is an authorised agent

of the Defendant and that this suit is restricted to a cause of action arising within Zambia. That in the circumstances, the service falls within the ambit of **Order X Rule 14** of **The High Court Rules**¹, which provides as follows: -

"Where the suit is against a defendant residing out of but carrying on business within the jurisdiction in his own name, or under the name of a firm, through an authorised agent, and such suit is limited to a cause of action which arose within the jurisdiction, the writ or document may be served by giving it to such agent, and such service shall be equivalent to personal service on the defendant."

4.12 It is also submitted that should the Court be inclined to agree with the Defendant that the originating process ought to have been served on the Defendant who is truly and justly indebted to the Plaintiff, then the breach should be curable as was held in the case of **Leopold Walford (Z) Limited vs. Unifreight**². Reliance was also placed on the recent Supreme Court decision of **Champ Health Solutions vs. ER 24 EMS (PTY) Limited & Mopani Copper Mines**⁴, where the Supreme Court refused to accept the reasoning that failure to obtain leave to serve outside jurisdiction was a ground upon which an action can be dismissed and reversed the High Court Judge's Order dismissing the action. The Supreme Court also sent the matter back to the High Court with

instructions that the Plaintiff if necessary could apply for leave before the High Court Judge and thereafter the matter should proceed to trial.

4.13 Based on the foregoing, the Plaintiff prayed that the Defendant's application be dismissed for lack of merit.

4.14 The Defendant replied to the Plaintiff's arguments by filing arguments in reply on 4th February, 2020, in which it reiterated its arguments, save to state that reference was made to **Sections 76, 77 (1) and (3), 78 (1) and 81 (3) of The Legal Practitioners Act³** for its contention that the reliefs sought by the Plaintiff relate to the disputed bill of costs and thus fall within the jurisdiction of a Taxing Officer. The Defendant further submitted that by indicating the Defendant's address, which is out of jurisdiction and 42 days within which the Defendant was to enter appearance, the Plaintiff intended to issue and serve the originating process out of jurisdiction. Reliance was placed on **Practice Direction No. 4 of 1977⁴**, which provides as follows: -

"Where a Writ or notice of such Writ is to be served out of the jurisdiction pursuant to Order X, rule 15, of the High Court Rules, Cap. 50, the time within which an appearance must be entered shall be forty-two days."

(Counsel's emphasis)

It was also submitted that had the Plaintiff intended to serve the originating process on Mopani Copper Mines Plc, then it would have reflected the address of Mopani

Copper Mines Plc as the local agent and 21 days for entering appearance as specified in ***Practice Direction No. 4 of 1977***⁴. The Plaintiff still maintains that the fact that the Defendant has a special relationship with Mopani Copper Mines Plc does not in itself imply that Mopani Copper Mines Plc will, in all cases, be a local agent of the Defendant and that having a special relationship does not necessarily mean having an agency relationship. Based on the foregoing, the Defendant's prayer was that the action be dismissed with costs.

- 4.15 On the return date, the Defendant's Learned Counsel Mr. Imonda made the application and relied entirely on the Affidavit in Support and skeleton arguments. Learned Counsel for the Plaintiff Mr. Madaika also relied entirely on the Affidavit in Opposition and skeleton arguments, which he reiterated in his *viva voce* submissions. In augmenting his submissions, Mr. Madaika submitted that the cause of action herein is for collection of a debt and not for taxation, which is ancillary to the collection of the debt, thus the matter has been properly commenced. He further submitted that this action emanates from costs that were incurred in an action where the parties had agreed to the mode of communication and it follows therefore that the documents must be served in the manner agreed. He contends that the matter cannot be

dismissed where service is irregular as that is capable of being cured.

5 **FACTS**

- 5.1 I have carefully considered the issues raised by the Defendant, the Affidavit evidence of both parties and submissions by Learned Counsel. I have also considered the authorities cited, for which I am indebted to Counsel.
- 5.2 I have been moved to determine whether or not the mode of commencement of this action by Writ of Summons is appropriate having regard to **Order VI, Rules 1 and 2, Order L, Rule 2 and 13, Order XXX Rule 11 (h) of The High Court Rules¹** and the reliefs sought by the Plaintiff. I have also been moved to determine whether the originating process is irregular for want of leave of the Court to issue and serve process out of jurisdiction. I will thus proceed to consider the issues as raised.

6 **THE LAW**

6.1 Mode of Commencement

6.1.1 Civil procedure rules are enacted to govern the methods and practices used in civil litigation. To this end, **Section 44 (1) (a) of The High Court Act¹** provides as follows: -

"Rules of court may be made, by statutory instrument, under this Act for the following purposes:

- (a) for regulating and prescribing the procedure (including the method of pleading) and the practice to be followed in the Court in all causes and matters whatsoever, including matrimonial causes and matters, in or with respect to which the Court has for the time being jurisdiction (including the procedure and practice to be followed in the principal registry and in district registries), and any matters incidental to or relating to any such procedure or practice, including (but without prejudice to the generality of the foregoing provision) the manner in which and the time within which, any applications which under the provisions of this or any other written law are to be made to the Court;..."
(Court's emphasis)

6.1.2 In considering the issue raised, of whether or not the mode of commencement of this action by Writ of Summons is appropriate, I addressed my mind to **Order VI Rule 1 and 2**, as amended by **Statutory Instrument No. 69 of 1998, The High Court (Amendment) Rules 1998⁵**, which is couched as follows: -

- "(1) *Except as otherwise provided by any written law or these Rules, every action in the High Court shall be commenced by Writ of Summons endorsed and accompanied by a full statement of claim.*

(2) Any matter which under any written law or these Rules may be disposed of in chambers shall be commenced by an originating summons." (Court's emphasis)

6.1.3 It is clear from the above cited law that every action in the High Court is supposed to be commenced by Writ of Summons with the exception of what may be provided for under any written law or the High Court Rules.

6.1.4 The Supreme Court of Zambia, in the case of ***New Plast Industries vs. The Commissioner of Lands and the Attorney General***¹, held as follows: -

"...It is not entirely correct that the mode of commencement of any action largely depends on the relief sought. The correct position is that the mode of commencement of any action is generally provided by the relevant statute. Thus, where a statute provides for the procedure of commencing an action, a party has no option but to abide by that procedure..." (Court's emphasis)

6.1.5 The principle espoused above is what was affirmed in the earlier case of ***Joseph Gereta Chikuta vs. Chipata Rural Council***⁵, where the Court held as follows: -

"There is no case where there is a choice between commencing an action by a writ of summons or by originating summons. The procedure by way of originating summons only applies to those matters which may be disposed of in chambers.

Where any matter is brought to the High Court by means of an Originating Summons when it should have been by writ, the Court has no jurisdiction to make a declaration." (Court's emphasis)

6.1.6 The Supreme Court re-affirmed this position in the case of ***B.P Zambia PLC vs. Zambia Competition Commission, Total Aviation and Export Limited and Total Zambia Limited***⁶, when it held as follows: -

"The mode of commencement of any action depends generally on the mode provided by the relevant statute... Since the dispute leading to this appeal arose from the decision of the Commission which was exercising this power under the Competition and Fair Trading Act, the applicable statute was the Act and not Order 53 of the Rules of the Supreme Court because the statute prescribes the mode of commencement."
(Court's emphasis)

6.1.7 What is clear from the above cited authorities, is that the mode of commencement of any action depends generally on the mode provided by the relevant statute. In my considered view, this is consonant with ***Order VI Rule 1 of The High Court Rules***¹, cited above, which recognises that statute may provide for the mode of commencement of an action other than what the said Order provides, which is commencement by Writ of Summons.

6.2 Service of Process

6.2.1 In determining this issue, I have addressed my mind to **Order X, Rules 15 and 16 of The High Court Rules¹**, which lays down conditions that precede such applications as this one before me. In my view, **Order X, Rule 16 of The High Court Rules¹**, is the most relevant in the application under consideration.

6.2.2 Looking at the provision of the said **Order X, Rule 16 of The High Court Rules¹**, the procedure to be followed is that, before a Writ can issue, leave of the Court must be obtained. The procedural steps to be taken, therefore, are that a Writ must be prepared but that before it can be issued, an application must be made, with the Writ attached thereto, for leave to issue the Writ for service out of the Court's jurisdiction; but, even then, only after the Court's leave has been obtained shall the Writ be issued. This was the holding of the Supreme Court in the case of **Leopold Walford (Z) Limited vs. Unifreight²**.

6.2.3 **Order 11, Rule 4 (2) of The Rules of the Supreme Court²**, provides as follows: -

"...if a writ is to be served abroad then, unless the conditions referred to in that rule and in O.11, r.1 (2)... are complied with, so as to permit such service without leave, it is necessary to obtain leave to issue the writ

and also to serve it abroad. But this does not require leave to issue to be obtained merely because the defendant, or one of the defendants, is shown by the writ to be outside the jurisdiction. A writ can, in such a case be issued without leave, but it will be marked appropriately by the court to ensure that it is not valid for service in a country for which leave is required. This is convenient if there are other defendants who can be served without leave. If it is later desired to serve abroad where leave is needed, the plaintiff applies for leave to issue a concurrent writ and to serve it outside the jurisdiction." (Court's emphasis)

6.2.4 While it can be argued that non-compliance with the law would merely be an irregularity, which should not have the effect of nullifying the proceedings as the same is curable, in the case of **Leopold Walford (Zambia) Limited vs. Unifreight**¹, the Supreme Court directed the amendment of the Writ by endorsement thereon of the Plaintiff's address and thereafter, that the Court's leave must be sought and obtained for the issue of the amended Writ and the service thereof outside the Court's jurisdiction. Silungwe CJ., (as he then was), in the said Supreme Court case that I have referred to above, held that, as a general rule, breach of a regulatory rule is curable and not fatal depending upon the nature of the breach and the stage reached in the proceedings.

7 **ANALYSIS**

7.1 In the present case, a perusal of the reliefs sought by the Plaintiff clearly shows that there are a number of issues that will require to be heard and determined by the Court before the matter is referred for taxation. The Statement of Claims reveals that there are potentially contentious matters that will require the settling of pleadings and the leading of evidence in a particular way. The Statement of Claim further reveals that there was an agreement entered into by the parties in respect to their relationship, which agreement is an engagement letter. In my view, a valid agreement of this nature can never be subject to taxation as the reliefs sought in relation to this agreement entails that evidence be adduced and interrogated, thus it takes it out of the realm of a Taxing Officer. An agreement such as this takes the issue of costs payable by a client to the Advocate, out of the jurisdiction of a Taxing Officer as contemplated under **Section 78(1) of The Legal Practitioners Act³** and the basis for this is that, this Court will have interrogate and determine other matters over and above just remuneration.

7.2 I am cognisant of **Order 30, Rule 11 (h) of The High Court Rules¹**, which provides that "*All applications for the taxation and delivery of bills of cost*" are matters that are to be disposed of in chambers. However, in *casu*, the

reliefs sought go way beyond taxation. The Court will first have to hear and determine those claims, before the matter can referred to taxation. Looking at the reliefs sought and endorsed on the Writ of Summons and Statement of Claims by the Plaintiff, it is my view that this action was properly commenced by Writ of Summons.

7.3 This now brings me to the issue raised under service of originating process. **Order X, Rules 15 and 16 of The High Court Rules¹**, provide that: -

"15. When service out of the jurisdiction allowed
Service out of the jurisdiction of a writ of summons, originating summons or originating notice of motion, or of a notice of such writ of summons, originating summons or notice of motion may be allowed by the Court or a Judge whenever-

(a) The whole subject-matter of the action is land situate within the jurisdiction (with or without rents or profits), or the perpetuation of testimony relating to land within the jurisdiction; or

(b) Any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction, is sought to be construed, rectified, set aside, or enforced in the action or matter; or

- (c) *Any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; or*
- (d) *The action is for the administration of the personal estate of any deceased person, who at the time of his death was domiciled within the jurisdiction, or for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of Zambia; or*
- (e) *The action is one brought to enforce, rescind, dissolve, annul or otherwise affect a contract or to recover damages or other relief for or in respect of the breach of a contract-*
 - (i) *made within the jurisdiction; or*
 - (ii) *made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction; or*
 - (iii) *by its terms or by implication to be governed by Zambian law;**or it is one brought in respect of a breach committed within the*

jurisdiction of a contract wherever made, even though such breach was preceded or accompanied by a breach out of the jurisdiction which rendered impossible the performance of the part of the contract which ought to have been performed within the jurisdiction;
or

(f) The action is founded on a tort committed within the jurisdiction; or

(g) Any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; or

(h) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction; or

(i) The action is by a mortgagee or mortgagor in relation to a mortgage of personal property situate within the jurisdiction and seeks relief of the nature or kind following, that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, re-conveyance, delivery of possession by the mortgagee; but does not seek (unless and except so far as

permissible under paragraph (e)) any personal judgment or order for payment of any moneys due under the mortgage.

16. Application for leave to serve out of jurisdiction

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. The affidavit shall state-

- (a) the grounds upon which the application is made and the facts which bring the plaintiff's case within the class in respect of which service out of the jurisdiction may be allowed;**
- (b) that the deponent is advised and believes that the plaintiff has a good cause of action or right to relief;**
- (c) in what place or country the defendant resides or probably may be found;**
- (d) whether the defendant is a citizen of Zambia or not." (Court's emphasis)**

7.4 The Plaintiff has not sought leave of this Court to issue and serve Writ of Summons and Statement of Claim out of jurisdiction. Its argument is that it was not necessary to obtain such leave, as Mopani Copper Mines Plc, on

whom the originating process was served, was a local agent for the Defendant in the agreement, which is the basis of this action. On the other hand, the Defendant has argued that if indeed Mopani Copper Mines Plc was the local agent for the Defendant, then the Writ of Summons ought to have been endorsed with the local agent's address and it would have indicated 21 days for entering appearance. It is further argued that, the fact that the address endorsed for the Defendant is out of jurisdiction and 42 is days indicated for entering appearance, proves that the Plaintiff intended to serve the originating process out of jurisdiction. It is also argued that whilst Mopani Copper Mines Plc has a special relationship with the Defendant, that does not in any way entail that they have been appointed as local agent herein.

7.5 The Plaintiff placed reliance on **Order X Rule 14** of **The Rules of the Supreme Court**¹, which provides that: -

"Where the suit is against a defendant residing out of but carrying on business within the jurisdiction in his own name, or under the name of a firm, through an authorised agent, and such suit is limited to a cause of action which arose within the jurisdiction, the writ or document may be served by giving it to such agent, and such service shall be equivalent to personal service on the defendant."

- 7.6 I am inclined to agree with the Defendant that its having a special relationship with Mopani Copper Mines Plc, does not entail that Mopani Copper Mines Plc, has instructions to act a local agent in this matter. In any case, the engagement letter, under which Mopani Copper Mines Plc acted as agent for the Defendant was terminated and in such circumstances, the Plaintiff ought to have served the originating process directly on the Defendant. Accordingly, I find that the originating process was not properly served on the Defendant as the Plaintiff ought to have followed the procedure laid down in the law.
- 7.7 **Order X, Rule 16** of **The High Court Rules**¹ cited above, lays down conditions that must precede the issuance of originating process where the Defendant is out of jurisdiction. It is this **Order X, Rule 16** of **The High Court Rules**¹ that is, in the view of this Court, relevant to for determination of application under consideration.
- 7.8 Looking at the provision of the said **Order X, Rule 16** of **The High Court Rules**¹, the procedure to be followed is that, before a Writ can issue, leave of the Court must be obtained. The procedural steps to be taken, therefore, are that a Writ must be prepared but that before it can be issued, an application must be made, with the Writ attached thereto, for leave to issue the Writ for service out of the Court's jurisdiction; but, even then, only after

the Court's leave has been obtained shall the Writ be issued.

7.9 It is quite clear that the starting point for the Plaintiff ought to have been first to obtain leave of the Court or a Judge to issue for service out of the jurisdiction a Writ of Summons. I concur with the Defendant that the indication of 42 days and the endorsement of the Defendant's address, which is out of jurisdiction, is a sure indication that the Writ was intended for service out of jurisdiction. A perusal of the Court Record shows that the Writ that was intended to be served out of jurisdiction on the Defendant has already been issued. The necessary leave of the Court was not obtained prior to issuing the Originating Process on 7th November, 2019, which was amended on 26th November, 2019.

7.10 The Supreme Court in the case of ***Leopold Walford (Zambia) Limited vs. Unifreight²***, pronounced itself on the provisions of ***Order X, Rule 16***, which I have referred to above, when it stated that: -

"The question is whether leave of the High Court is required to issue a writ, etcetera, before or after the writ has been issued. The rule as set out above is quite explicit and the procedure to be followed is that before a writ can be issued, leave of the Court must be obtained. The procedural steps to be taken, therefore, are that a writ must be prepared, but before it can be issued, an application must be made, with the writ

attached to, for leave to issue the writ for service out of jurisdiction; but, even then, only after the Court's leave has been obtained shall the writ be issued.

In this case, there was no compliance with Rule 16 or Order X since the writ was issued before the Court's leave could be obtained..." (Court's emphasis)

7.11 I have also had an opportunity to peruse **Order 11, Rule 4 (2)** of **The Rules of the Supreme Court**², which provides as follows: -

"...if a writ is to be served abroad then, unless the conditions referred to in that rule and in O.11, r.1 (2)... are complied with, so as to permit such service without leave, it is necessary to obtain leave to issue the writ and also to serve it abroad..." (Court's emphasis)

7.12 In the case of **Leopold Walford (Zambia) Limited vs. Unifreight**², the Supreme Court held that, as a general rule, breach of a regulatory rule is curable and not fatal depending upon the nature of the breach and the stage reached in the proceedings.

7.13 The case in *casu*, is still in the preliminary stage of proceedings and there is no amendment sought on record, as was the case in the **Leopold Walford (Zambia) Limited vs. Unifreight**² case. The question that I ask myself is that what is the proper effect of a breach of **Order X, Rule 16**¹?

7.14 In responding to the above question, I have drawn my attention to the holding of the Supreme Court in the cited

case of **Leopold Walford (Zambia) Limited vs. Unifreight**² that: -

"As a general rule, breach of regulatory rule is curable and not fatal, depending upon the nature of the breach and the stage of proceedings."

7.15 In the said case, the Supreme Court found that the contravention of **Order X, Rule 16**¹ was not fatal but curable. The Supreme Court took a similar approach in the case of **Zambia Revenue Authority vs. Jayesh Shah**⁷, when it held that: -

"Cases should be decided on their substance and merit. The Rules must be followed but the effect of a breach will not always be fatal if the rule is merely regulatory or directory." (Court's emphasis)

7.16 I further make reference to the recent Court of Appeal Judgment in the case of **Phillip K. R. Pascall, Arthur Mathias Pascall, Clive Newall, Martin R. Rowley, First Quantum Minerals Limited and FQM Finance Limited vs. ZCCM Investments Holdings Plc**⁸, where it was held as follows: -

"...the process is two pronged. Firstly, one has to issue the Writ of Summons out of jurisdiction (exhibiting a copy of the writ) and once leave is granted, the writ is then filed and then the Plaintiff can apply to serve process out of jurisdiction. Having found that the defect was curable, we cannot fault the learned Judge in refusing to dismiss the cause of action as rightly pointed out by the learned Judge, no default Judgment

was obtained by the Plaintiff; the Defendants entered conditional appearance and then raised issues and as such no prejudice was suffered."

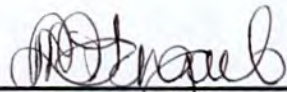
8 CONCLUSION

- 8.1 I find and hold that the Plaintiff invoked the proper mode of commencement of this suit.
- 8.2 Being guided by the cited authorities, I find that the Plaintiff ought to have complied with the provisions of **Order X, Rule 16¹** before issuing the Writ of Summons against the Defendant. However, I consider the irregularity to be that of a regulatory rule which is not fatal but can be cured depending on the stage of proceedings and whether the breach or irregularity causes prejudice to the Defendants.
- 8.3 It is my considered view that this matter is still in its preliminary stages. I am further of the view that no prejudice or injustice will be occasioned to the Defendant if the defect is cured.
- 8.4 Accordingly, I will exercise my discretion under **Order III, Rule 2 of The High Court Rules¹** and deem the Writ of Summons and Statement of Claim to have been issued with leave of the Court as provided under **Order X, Rule 16¹**. The defect in not obtaining leave of the Court to issue the Writ of Summons for service out of jurisdiction has now been cured and I hereby grant the Plaintiff leave

to serve the originating process out of jurisdiction via courier service with proof of delivery.

- 8.5 For the foregoing reasons, I uphold the issue raised by the Defendant only to the extent that service of originating process on the Defendant was irregular. In the circumstances of this case, I make no order as to costs.
- 8.6 Leave to appeal is granted.

Delivered at Lusaka on 2nd March, 2020.



**P. K. YANGAILO
HIGH COURT JUDGE**