IN THE HIGH COURT FOR ZAMBIA **2019/HPC/0440**

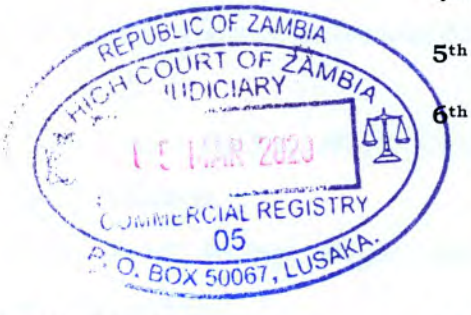
AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Commercial Division)

BETWEEN:

SAVENDA MANAGEMENT SERVICES LIMITED	**1st PLAINTIFF**
EAGLE TRADING INTERNATIONAL LIMITED	**2nd PLAINTIFF**
KUMAHA HOLDINGS LIMITED	**3rd PLAINTIFF**
SAVENDA CONSTRUCTION	**4th PLAINTIFF**
ESTHER C MPOHA	**5th PLAINTIFF**
CLEVER MPOHA	**6th PLAINTIFF**



AND

STANDARD CHARTERED BANK ZAMBIA PLC **DEFENDANT**

Before Lady Justice B.G. Shonga this 3rd day of March 2019

For the Plaintiff, Mr. T. Gausi, Mr M. Phiri, Messrs. Mweemba Chashi & Partners

For the Respondent, Mr. M. Chileshe, Messrs. Eric Silwamba, Jalasi & Linyama

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RULING

Cases Referred to:

1. ***Mutantika and Another v Chipungu SCZ Judgment No. 13 of 2014 (unreported).***

11. ***Order 18, rule 10 (1) of the White Book.***
12. ***Bullen and Leake's Precedents of pleadings, Stevens and sons, 7th Edition (1915), p. 4.***
13. ***Black's Law Dictionary, 10th edition, Bryan A. Garner, Thomson Reuters, at p. 1216***
14. ***Order 6, rule 2 sub rule 5, White Book.***
15. ***Order 20, rule 1, White Book.***
16. ***Section 10 of the High Court Act, Chapter 27, Volume 3 of the Laws of Zambia.***
17. ***Order VI, rule 2, High Court Rules, High Court Act, Chapter 27, Volume 3 of the Laws of Zambia.***
18. ***Article 133 (1), the Constitution of Zambia (Amendment) Act, 2016.***
19. ***section 3 (1) of the High Court Act, Chapter 27, volume 3 of the Laws of Zambia.***
20. ***Order LIII, High Court (Amendment) Rules, 2012, High Court Act, Chapter 27, Volume 3 of the Laws of Zambia.***
21. ***Section 6 (1), the Constitution of Zambia Act No. 1 of 2016.***
22. ***Section 1, High Court Act, Chapter 27, Volume 3 of the Laws of Zambia.***
23. ***Brady v Barrow Steel Works Ltd (1965) 2 All E.R. 639.***
24. ***Byrne v Kanweka (1967) Z.R. 105 (C.A).***
25. ***Order 18, rule 7 paragraph 1, White Book.***
26. ***Odgers on High Court Pleadings and Practice, twenty-third edition, D. Casson, London Sweet & Maxwell, 1991 at 143.***

1.0 The Application

On 21st October, 2019 the defendant filed a summons to set aside the originating process for irregularity. The summons was stated to be issued pursuant to ***Order VII, rule 1; Order IX, rule 1;and Order LII, rules 1 and 3 of the High Court Rules, High Court***

Act, Chapter 27, Volume 3 of the Laws of Zambia as read with the following Orders of the ***Rules of the Supreme Court, 1965, Supreme Court Practice, 1999 edition (White Book): Order 6, rule 2, sub-rule 4; Order 6, rule 2, sub-rule 5 and Order 18, rule 7.***

Eight grounds were set out in the summons as the basis for the application. In summary, the grounds are clustered as follows:

i. The court lacks jurisdiction.
ii. The writ of summons is stale, incompetent and irregular.
iii. The plaintiffs are not entitled to liquidated claims.
iv. The cause of action is inconsistently pleaded.
v. The statement of claim offends the rules of pleadings and bears a non-existent cause number.

The summons was filed together with an affidavit in support deposed by one Bwalya Mulenga, Legal Counsel in the employ of the defendant bank, list of authorities and skeleton arguments.

The application attracted opposition from the plaintiffs, who filed an affidavit in opposition deposed to by the 6th plaintiff, list of authorities and skeleton arguments on 3rd December, 2019.

In turn, the defendant filed an affidavit in reply deposed to by Rose Nyendekazi Kavimba, the head of legal and company secretary in the defendant bank.

2.0 The Background

On the 18th day of September, 2019 the plaintiffs instituted proceedings against the defendant by dint of a writ of summons, filed together with a statement of claim in the Commercial Registry of the High Court in Lusaka.

On 23rd October, 2019 the plaintiff filed an amended writ of summons which bears the following caption:

> *Amended once without leave of court on 23rd of October 2019 pursuant to Order 20 Rule 1 (1) of the Rules of the Supreme Court, (White Book), RSC. 1999 Edition, volume 1.*

The amended writ changed the description of the registry from "commercial registry" to "commercial list registry" and recast the jurisdiction from commercial to civil. It also incorporated the physical addresses of each of the plaintiffs, which addresses were omitted in the original writ. In addition, the testimonium clause that was incomplete in the original writ was corrected to include the date that the writ was tested in the name of the Chief Justice, being 23rd October in the year of our Lord Two Thousand and Nineteen, being the date the amended writ was filed.

The associated amended statement of claim varied the title on the document by correcting the cause number to correspond with the cause number that was endorsed on the original writ, 2019/HPC/440; changed the description of the registry to

"commercial list registry" and substituted the word "commercial" with the word "civil" to describe the jurisdiction; and corrected the plot number, being the address of the 1st plaintiff in the last line of paragraph 1 of the statement of claim. No changes were made to the claims in the statement of claim.

Both the original and amended writ contain the same endorsements, being claims which arise from finance agreements in relation to loan accounts 3022982, 3174902 and 2860703.

The statement of claim contains 49 paragraphs which I do not propose to set out *ipsissima verba*. For purposes of this application, it will suffice to note that paragraph 20 of the attendant statement of claim states that on 18th September, 2016 the 1st plaintiff and the defendant executed facility letters (the "2016 September Facility Letters") in relation to the financing of what is referred to as the Merkaba assets, additional financing for purchase of new equipment and working capital. Paragraph 31 states that the 2016 September Facility Letters were amended, and their terms restated by facility letters of 27th March, 2017 (the "2017 March Facility Letters).

3.0 Jurisdiction

Since the plaintiff has questioned whether this Court has jurisdiction, I must, as a *sine qua non*, consider whether I possess the necessary jurisdiction to entertain these proceedings.

The proposition that the Court lacks jurisdiction is founded on paragraph 8 of the affidavit in support of the application which reads:

> *"That I am advised by counsel for the defendant and verily believe that this action has been commenced using the wrong law as the facility letter dated 28th day of March, 2017 that amended and reinstated the facility letter dated 8th day of September, 2016 and is referred to in paragraph 31 of the statement of claim subjects proceedings that arise out of the facility letter of 28th day of March, 2017 to English Law."*

Riding on the back of the deposition, the defendant submitted that the Court is not clothed with the requisite jurisdiction to entertain this matter.

In rebuttal, the plaintiffs relied on paragraph 9 of the affidavit in opposition which reads as follows:

> *"That I am advised by counsel and verily believe that the veracity of the contents of paragraph 8 are questionable as the defendant's affidavit does not exhibit the document upon which it relies for the assertion and/or allegation."*

The defendant countered by exhibiting the Facility Letter in the affidavit in reply under paragraph 7 which reads as follows:

> *"That I am advised by counsel for the defendant and verily believe that this action has been commenced using the wrong law as the facility letter dated 28th day of March, 2017 that amended and reinstated the facility letter dated 8th day of September, 2016 and is referred to in paragraph 31 of the statement of claim subjects proceedings that arise out of the facility letter of 28th day of March, 2017 to English Law. There is now shown to me a copy of the facility letter dated the 28th day of March, 2017 and the same is exhibited hereto and marked "RNK1"*

The plaintiffs' contention, as revealed in its skeleton arguments, is that the failure by the defendant to exhibit the agreement that houses the jurisdiction clause offends ***Order V, rule 17 of the High Court Rules, High Court Act, Chapter 27, Volume 3 of the Laws of Zambia,*** which requires a deponent who deposes to his belief in any matter of fact that is derived from any source other than his own personal knowledge to explicitly set forth the facts and circumstances forming the ground of his belief.

At this stage, I draw attention to ***Order V, rule 15 of the High Court Rules, High Court Act, Chapter 27, Volume 3 of the Laws of Zambia,*** which reads as follows:

> "an affidavit shall not contain extraneous matter by way of objection or prayer or legal argument or conclusion."

In my view, paragraph 8 of the affidavit in opposition and paragraph 7 in the affidavit in reply contain legal arguments. I say so because rather than merely stating a fact, the paragraphs advance an argument by asserting that the plaintiffs used the wrong law to institute these proceedings. The argument is, to me, legal in nature as it delves into the area of conflict of laws.

Similarly, the plaintiffs' response, housed in paragraph 9 of the affidavit in opposition, is tainted by the deposition that the veracity of the contents of paragraph 8 are questionable because the defendant's affidavit does not exhibit the document upon which it relies for the assertion and/or allegation. This deposition speaks to the lawful viability of the attestation in the affidavit in support. It appears to me that the plaintiffs were lured into incorporating legal arguments in the affidavit in opposition to counter the legal arguments in the affidavit in support.

In terms of ***rule 16 of Order V, of the High Court Rules, High court act, Chapter 27, Volume 3, of the Laws of Zambia***, an affidavit shall contain only a statement of facts and circumstances to which the witness deposes, either from personal knowledge or from information which he believes to be true. Consequently, it is not, in my view, the Court's responsibility to decipher facts from legal arguments contained in affidavit evidence before it.

Since the identified depositions contain legal arguments, I find that they fall foul of ***Order V, rule 15*** and I will disregard them. In so doing, I am fortified by the approach taken by the Supreme Court in the case of ***Mutantika and Another v Chipungu SCZ Judgment No. 13 of 2014 (unreported)***[1] where the court ordered and directed that paragraphs 12, 16, 18, 19 and 20 of the

affidavit in opposition in that action be expunged from the said affidavit because they contained legal arguments.

Flowing from the slighting of paragraph 8 of the affidavit in support and paragraph 7 of the affidavit in reply, there is no evidence before court to support a finding that this Court lacks jurisdiction to preside over these proceedings.

Even if I were to take the offending paragraphs as compliant, my perusal of exhibit **"RNK1"** reveals that clause 26 of the Master Credit Terms reads as follows:

"26. Governing Law and Jurisdiction

> *a) This Agreement and all non-contractual obligations arising in any way out of or in connection with this agreement are governed by English Law and each borrower irrevocably submits to the non-exclusive jurisdiction of the English courts"*

Given that the clause speaks to submission by the borrowers to the non-exclusive jurisdiction of English courts, the clause is evidently a non-exclusive-jurisdiction clause. According to the learned authors of ***Black's Law Dictionary, 10th edition, Bryan A. Garner, Thomson Reuters, at p. 1216*** a non-exclusive-jurisdiction clause is a contract provision specifying the courts in which the parties may bring claims arising out of the contract but not limiting the parties to those courts. My understanding, therefore, is that disputes arising from the 2017 March Facility

letters may be taken to the English courts but, without prejudice to the right to take such disputes to the courts of any other jurisdiction if appropriate. Consequently, this Court's jurisdiction has not been ousted.

For the aforementioned reasons I find that this Court is clothed with the requisite jurisdiction to hear and determine this matter, inclusive of this interlocutory application.

4.0 Contentions relating to the writ of summons

4.1 Whether the original writ of summons is stale

The defendant contends that the original writ of summons is stale because it was issued in 2018. I have scrutinized the testimonium clause of that writ and accept that it referred to the year of our Lord Two Thousand and Eighteen as the year it was tested in the name of the Chief Justice.

In addition, I observed that the said writ did not bear the date on the day on which it was issued. In my view the omission offended ***Order VI, rule 3 of the High Court Rules, High Court Act, Chapter 27, Volume 3 of the Laws of Zambia***, which provides as follows:

> *"Every writ of summons shall bear the date on the day on which it shall be issued, and shall be tested in the name of the Chief Justice..."*

On the other hand, I did observe that the writ bore a Commercial Registry date stamp of 18th September, 2019. Above that, the writ was assigned cause number 2019/HPC/440. The significance of the cause number is discernible from the notes contained in the prescribed forms that are set out in the ***First Schedule of the High Court Act, Chapter 27, Volume 3 of the Laws of Zambia***.

Form H.C. 1 sets out a form tiled *"General Title of Writs and Other Documents in a Suit"*. Form H.C. 2 sets out the form to be used for writs of summons for the principal registry. With respect to the cause number forming part of the general title, the notes endorsed on Form H.C. 1 reveal that the cause number comprises a combination of numbers and letters used to identify each case. The number is placed on the top right-hand corner and note c directs as follows:

> *"here put in the year, letters and number. In an action commenced in the Principal Registry at Lusaka the letters shall be HP. In action commenced in Ndola, Livingstone or Kitwe District Registry the letters shall be HN, HL, or HK respectively."*

Following the establishment of the Commercial Court as a division of the High Court in 2016, the Commercial Registry, in line with the prescribed form uses the first four digits to indicate the year the case was filed. The next three letters are used to designate the registry and division. As an example, the letters HPC are broken down as follows, HP to comply with the prescribed form denotes that the writ was issued out of the High

Court for Zambia at the Principal Registry in Lusaka. The letter (C) reflects that the matter is one filed in the Commercial Division. The next series of digits is the actual sequential number of the case beginning from 0001 in the current year. These processes germinate from ***Direction no. 3 of Section 8, the Duties and Functions of Assistant Registrars and Deputy Assistant Registrars Directions, High Court Act, Chapter 27, Volume 3 of the Laws of Zambia***, which states that the duties and functions of the assistant registrar at each registry of the High Court shall, with respect to civil causes generally, include to issue all writs and originating process and to keep and maintain a civil causes register in which shall be entered, *inter alia*, the cause number.

I also inspected the affidavit in support and espied that the affiant of the affidavit in support attested that the plaintiffs caused to be issued originating process by way of writ of summons on the 18th day of September, 2019. This deposition feeds a backlash narrative that the writ was in fact issued in 2019. Thus, the affidavit evidence tendered in support is at odds with the ground now under consideration.

Given the above deposition of the affiant of the supporting affidavit, and considering that the original writ bears a commercial registry date stamp of 18th September, 2019 and noting that the first four digits of the cause number are 2019, I am satisfied that the writ was issued on 18th September, 2019.

Consequently, I find that this action was originally instituted by writ of summons taken out on 18th September, 2019.

Turning to consider whether the original writ was stale before it was amended, ***Order IX, rule 1 of the High Court Rules, High Court Act, Chapter 27, Volume 3 of the Laws of Zambia*** reads, in part, as follows:

> *"No original writ of summons shall be in force, for more than twelve months from the day of the date thereof, including such date; but if any defendant therein named shall not have been served therewith the plaintiff may, before the expiration of the twelve months, apply to the Court or a Judge for leave to renew the writ..."*

My understanding of ***Order IX, rule 1*** is that a lifecycle of a writ is twelve months from the date it was issued and becomes stale at the expiry of the twelve months unless it is renewed with leave of the Court or a Judge upon meeting the test for renewal set out in the rule.

Aside the above, the first paragraph in the memorandum subscribed on the original writ reads, in part, as follows:

> *"This writ is to be served within twelve calendar months from the date thereof..."*

Thus, in the terms of the memorandum on the writ, the writ was required to be served within twelve calendar months from the date of issue. By affidavit of service filed into court on 24th September, 2019 and deposed to by Theophilus Tukwayo Gausi, counsel for the plaintiff, it was deposed that the

defendant was served with the writ of summons and statement of claim on 24th September, 2019. Service was therefore implemented with a period less than one month from the date the writ was issued.

Based on my finding that the original writ was filed on 18th September, 2019 and accepting the unopposed affidavit of service, it is with ease that I find that the original writ of summons was not stale, having been served within twelve calendar months from 18th September, 2019. Consequently, I opine that at the time the amended writ was filed, the original writ was not stale.

4.2 *Whether the cause of action is inconsistently pleaded in the writ of summons and the statement of claim*

By paragraph 6 of the affidavit in support, it was deponed that the endorsements on the writ of summons are at variance with what is carried in the statement of claim. The affidavit did not articulate any particular inconsistency. In its skeleton arguments the defendant submitted that the variances in the pleadings offend ***Order 18, rule 10 (1) of the White Book*** which prohibits a party from making allegations of fact, or raising any new ground or claim which is inconsistent with a previous pleading of his.

In response, the affiant of the affidavit in opposition attested that the claims are identical.

I have examined the writ of summons and statement of claim. The writ of summons is endorsed with twenty-three separate claims contained in twenty-three paragraphs, numbered (i) to (xxiii). The statement of claim, on the other hand, contains claims contained in twenty-five paragraphs number (i) to (xxv). My first observation is that the claims numbered (i) to (xii) in the writ of summons are identical to the claims numbered (i) to (xii) in the statement of claim.

My next observation is that the claims numbered (xiii) and (xiv) in the writ of summons are contained in the statement of claim as claims numbered (xiii) and (xiv) albeit they have been classified under the wording "in the alternative". The statement of claim goes on to repeat claims in paragraphs (vi), (vii), (viii), (x), (xi) and (xii) of the writ of summons as paragraphs (xv) to (xx) of the statement of claim as part of the claims in the alternative. Thereafter, the statement of claim incorporates the claims that appear as endorsements numbered (xv) to (xxiii) in the writ of summons as claims numbered (xxi) to (xxv) in the statement of claim. It is clear to me that the increase in the number of paragraphs in the statement of claim is not due to additional claims but the repetition of the claims forming part of the claims in the alternative. Thus, my examination of the writ of summons and the statement of claim reveals that there

is no new cause of action in the statement of claim and there is no claim in the statement of claim that is not articulated under the endorsements on the writ of summons. That being the case, and in the absence of any inconsistency that has been expressly identified by the defendant in the affidavit in support, I cannot arrive at the conclusion that the plaintiff has offended ***Order 18, rule 10 of the White Book***. Consequently, this ground withers at its vine and fails.

4.3 Whether the plaintiffs are entitled to pursue liquidated claims

Under this ground, the defendant submitted that the plaintiffs' cause of action is anchored on the tort of negligence. The proposition is premised on the defendant's reading of the following claims endorsed on the writ of summons, namely: paragraph (iii) which reads: "reimbursement of wrongful principal and interest repayments recovered on loan accounts 2860703, 3022982, and 3174902, excess interest charged on the overdraft as a result of the wrongful recoveries, interest compounded on these wrongful recoveries, amounting to K9, 237, 575.27; paragraph (iv) which reads: reimbursement of monies expensed on storage costs of the assets at USD13, 826 per month for 24 months amounting to USD331, 824; paragraph (v) which reads: reimbursement of monies expensed on hiring costs for replacement equipment at K150, 000 per month for 29 months amounting to K4, 494, 993.14. The defendant also takes issue with the claims in the alternative,

specifically paragraph (xiii) which reads: wasted expenditure as a result of storage costs incurred while awaiting performance of the contract at USD13, 826 per month for 24 months, amounting to USD331, 824.14; and paragraph (xiv) wasted expenditure as a result of the hire of equipment while awaiting performance of the contract at K150, 000 per month for 29 months amounting to K4, 494, 993.14.

The plaintiff counters by, *inter alia*, referring to the erudition of the learned authors of ***Bullen and Leake's Precedents of pleadings, Stevens and sons, 7th Edition (1915), p. 4***, which reads:

> *"it should be added, however, that causes of action for wrongs arising out of contract, that is, claims for breach of some duty arising out of a contract, partake to some extent the character of both breaches of contract and of torts, and such actions, therefore cannot be considered as falling exclusively within either category."*

I must state that I am confounded by this ground as there is no direct claim for negligence on either the writ of summons or the statement of claim. I perceive both the writ of summons and the statement of claim to premise the plaintiffs' action on wrongs arising out of the contractual relationship between the parties that was birthed by specific facility letters. Perhaps the explanation advanced by the erudite above that such breaches partake to some extent the character of both breaches of contract and of tort explains the defendant's appetite to seat the cause of action in the land of the tort of negligence.

Since causes of action arising from alleged wrongs that emanate from a contract do not necessarily always fall exclusively within the category of contract or tort, the pivotal question becomes whether the claims in question constitute a liquidated demand or damages that require assessment.

Black's Law Dictionary, 10th edition, Bryan A. Garner, Thomson Reuters, at p. 1216 ascribes the following definition to the term liquidated claim, also referred to as liquidated demand:

> *"1. a claim to an amount previously agreed on by the parties or that can be determined by operation of the law or by the terms of the parties' agreement. If the ascertainment ...requires investigation beyond mere calculation, then the sum is not a "debt or liquidated demand", but constitutes "damages"."*

Also, the defendant itself illumes that ***Order 6, rule 2 sub rule 5 of the White Book*** explicates that liquidated amounts must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. In my view, based on the wording of the claims in issue, the amounts claimed are for refunds that are capable of being ascertained as a mere matter of arithmetic. I do not see any estimates nor do I perceive the need for further investigation beyond calculation. Consequently, I opine that the claims in issue are liquidated claims which the plaintiffs are entitled to pursue by incorporating them in the writ of summons. Consequently, this ground meets a fate of failure.

5.0 Grounds addressed by the amended writ of summons

The defendant took issue with the following elements in respect of the original writ of summons and statement of claim:

i. That the writ is not endorsed with the plaintiff's full address.
ii. That cause number 2019/HC/440 endorsed on the statement of claim is irregular.
iii. That the writ of summons and statement of claim are irregular as the title indicates the forum as the commercial registry instead of referring to the commercial list registry.

The record reflects that the objections raised by the defendant were addressed in the amended writ of summons and statement of claim. The defendant, however, suggested that the amended writ and statement of claim are not properly before court. The suggestion is not supported by any legal argument.

The plaintiff disagreed and referred me to ***Order 20, rule 1 of the White Book***, under which a plaintiff is entitled to amend the writ once, without leave of court, at any time before pleadings are deemed closed provided the amendments do not consist of:

a) the addition, omission or substitution of a party or an alteration of the capacity in which a party to the action sues or is sued; or

b) the addition or substitution of a new cause of action; or

c) an amendment of the statement of claim indorsed on the writ.

Order 20, rule 1 of the White Book, it is suggested, is applicable as a default mechanism where the High Court Rules are deficient. That suggestion is supported by ***section 10 of the High Court Act, Chapter 27, volume 3 of the Laws of Zambia***. In this regard, Zambian superior courts have relied on different rules of Order 20 of the White Book in making determinations. A case in point is the case of ***Rosemary Bwalya & Others v Mwanamuto Investments Limited SCZ Judgment No. of 2012***[2] where the Supreme Court held that the originating summons may be amended pursuant to Order 20, rule 5 of the white Book. I am therefore inclined to tread the path already travelled by the Supreme Court. I will adopt the practice in this case.

In applying ***Order 20, rule 1***, I scrutinised the amendments in this case and observed that they do not purport to add, omit or substitute a party, nor do they alter the capacity in which a party sues or is sued. They do not add or substitute a new cause of action, nor do they amend the statement of claim indorsed on the writ. Resultantly, I am satisfied that the amended writ and amended statement of claim are not caught up by the

limitations contained in ***Order 20, rule 1***. I accordingly find that the plaintiffs were at liberty to amend the original writ in accordance with ***Order 20, rule 1 of the White Book***. That being the case, I hold that the amended writ and statement of claim are properly before Court. Thus, the objections have been effectively overtaken by the amendments and the associated objections are effectively stemmed at the root.

The objects raised have illuminated one procedural matter which, in my view, requires some detailed discourse. I refer to the glaring inconsistencies surrounding how various litigants title writs and other court documents. ***Order VI, rule 2 of the High Court Rules, High Court Act, Chapter 27, Volume 3 of the Laws of Zambia*** requires every writ of summons to be in the appropriate form as set out in the First Schedule, with such variations as circumstances require.

I take pause to interpolate the import of the 2016 constitutional amendments. By ***Article 133 (1) of the Constitution of Zambia (Amendment) Act, 2016***, the High Court for Zambia is established. By ***Article 133(2), the Constitution*** also establishes the divisions of the High Court. Article 133 (2) reads:

> *"There are established, as divisions of the High Court, the Industrial Relations Court, Commercial Court, Family Court and Children's Court."*

In consonance with the Constitution, ***section 3 (1) of the High Court Act, Chapter 27, Volume 3 of the Laws of Zambia*** was amended in 2016 to read as follows:

> *"The Court consists of the following divisions:*
>
> a) *the Industrial Relations Court*
> b) *the Commercial Court*
> c) *the Family Court*
> d) *the Children's Court and*
> e) *such other specialised Court as the Chief justice may prescribe by statutory instrument." (Court emphasis)*

The wording of section 3 (1) of the High Court Act shows that the Commercial Court is a specialised court. The Rules that are applied by the Commercial Court go further to reveal that the Commercial Court is a specialised court with jurisdiction to hear commercial actions. The primary Rules governing commercial actions are the High Court Rules, as amended by the ***High Court (Amendment) Rules, 2012, High Court Act, Chapter 27, volume 3 of the Laws of Zambia, in particular Order LIII.***

As regards the commencement of actions, rule 2 (5) of Order LIII directs as follows:

> *"A commercial action shall be commenced and filed in the Registry"*

The term Registry is defined under Rule 1 of Order LIII as:

> *"the Commercial List Registry established under rule 3"*

Rule 2 (1) of Order LIII requires there to be a Commercial List in which commercial actions in the Court shall be entered. Rule 3 (1) establishes the Commercial List Registry, to be administered by a Registrar of the Commercial List.

However, I draw attention to ***Section 6 (1) of the Constitution of Zambia Act No. 1 of 2016*** which reads as follows:

> *" Subject to the other provisions of this Act, and so far as they are not inconsistent with the Constitution as amended, existing laws shall continue in force after the commencement of this Act as if they had been made in pursuance of the Constitution as amended, but shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution as amended."*

On the strength ***section 6 (1) of the Constitution of Zambia Act No. 1 of 2016***, the terms *"Commercial List"* and *"Commercial List Registry"* which existed prior to the establishment of the commercial division have been construed to mean "Commercial Court" and "Commercial Court Registry" because the High Court now has a Commercial Court as one of its divisions.

I also draw attention to ***section 1 of the High Court Act, Chapter 27, Volume 3 of the Laws of Zambia***, the interpretation clause, which defines the word "Principal Registry" as: *"The office of the Registrar at Lusaka"*. I take the position, therefore, that an action filed in a registry at Lusaka is a filing in the Principal Registry. This is consistent with the notes endorsed on Form

H.C 1 in the First Schedule of the High Court Act that I earlier referred to. The said Form bears the following general title on the top left-hand corner:

> ***"IN THE HIGH COURT FOR ZAMBIA***
> ***At the***

Considering the foregoing, I consider that the correct way to endorse the title on a writ of summons and other documents in a suit filed in the Commercial Registry is as follows

> ***"IN THE HIGH COURT FOR ZAMBIA***
> ***At THE PRINCIPAL REGISTRY***
> ***HOLDEN AT LUSAKA***
> ***(COMMERCIAL DIVISION)"***

This means that the amended writ and statement of claim remain defective in title. This notwithstanding, my view is that the defect is curable. In this regard I am entranced by the English case of ***Brady v Barrow Steel Works Ltd (1965) 2 All E.R. 639***[3]. The case involved a writ which had a defect in title by failing to indicate the division of the High Court. The writ was issued out of a district registry but omitted the words "Queen's Bench" from the title. On appeal from an order setting aside the writ, its service and all subsequent proceedings, it was held that the non-compliance was curable under RSC, Order 2, r.1

because it was a breach of a rule of practice and not a fundamental breach, such as would make the writ a nullity.

I am persuaded by the reasoning adopted by the English courts and I adopt it. I consider that a defect in title is a material irregularity which can be cured by amendment. In the case of ***Byrne v Kanweka (1967) Z.R. 105 (C.A)***[4] the Court of appeal acknowledged that the High Court holds the power to amend pleadings under ***Order XVI, rule 1 of the High Court Rules***. The Court further held as follows:

> *"The High Court's power to amend pleadings of its own motion is generally discretionary but becomes obligatory where amendments are necessary to ensure a fair trial or to identify the real question in controversy between the parties."*

From the holding, I discern that I am vested with a general discretionary power to amend pleadings *sua sponte. In casu,* I opine that it is in the interest of the administration of justice to order that the title of the writ of summons and statement of claim in this action be amended to read as follows:

> **"IN THE HIGH COURT FOR ZAMBIA**
> **At THE PRINCIPAL REGISTRY**
> **HOLDEN AT LUSAKA**
> **(COMMERCIAL DIVISION)"**

The amendment will serve to clearly identify the correct registry and division of the High Court under which these proceedings are being heard, whilst correcting a curable defect so as not to

stifle hearing the matter on the merits. In addition, it ought to engender consistency among those who ply their trade in the High Court.

6.0 Whether the statement of claim offends the rules of pleadings

It is the defendant's contention that paragraphs 20, 22, and 31 of the statement of claim contain evidence as opposed to material facts. The defendant submitted that in terms of ***Order 18, rule 7 paragraph 1 of the White Book*** every pleading must contain a statement, in summary form, of material facts on which the pleading party relies but not the evidence by which it is to be proved.

The plaintiff accepted the rule but highlighted paragraph 2 of ***Order 18, rule 7/2*** which reads as follows:

> *"Without prejudice to paragraph (1), the effect of any document... referred to in the pleading must, if material, be briefly stated, and the precise words of the document... shall not be stated, except in so far as those words are themselves material."*

I reviewed the contentious paragraphs and observed that in paragraph 20 of the statement of claim the plaintiff pleaded that the 1st plaintiff and the defendant executed facility letters in September, 2016 in relation to the financing of assets and the provision of additional financing for the purchase of new equipment and working capital. The paragraph goes on to

capture extracts of the terms of facility letters. A similar approach is taken in paragraph 31 with respect to facility letters executed in March, 2017.

In relation to paragraph 22 of the statement of claim, it reads as follows:

> *"In any event, one of the specific terms of "Term loan 2" was that payment was to be made directly to the supplier, however, payment, was made from the current account of the 1st plaintiff. Again, for this reason and those given in paragraph 21 above, "Term loan 2" was never in existence."*

To determine whether the paragraphs in issue contain evidence, it is important to distinguish a pleading from evidence. According to ***Odgers on High Court Pleadings and Practice, twenty-third edition, D. Casson, London Sweet & Maxwell, 1991 at 143***:

> *"the fact in issue between the parties is the factum probandum, the fact to be proved, and therefore the fact to be alleged."*

The erudite explicate that the method or manner that a party will employ to prove the fact in issue constitutes the evidence, *facta probantia.* In other words, evidence comprises facts by means of which proves the fact in issue. Such facts, it is explained, will be relevant at the trial, but they are not material facts for purposes of pleading.

Based on the above distinction, I agree that paragraphs 20 and 31 contain evidence in so far as they elaborate the terms of the facility letters. In my opinion the detailed terms will be relevant

at trial to prove the existence, extent and obligations that flow from the pleaded contractual relationship, if any.

On the other hand, I do not accept that paragraph 22 contains evidence because in it the plaintiff merely summarises its pleading relating to the purported non-existence of "Term Loan 2".

In light of the forgoing I consider that paragraphs 20 and 31 of the statement of claim offend the rule that evidence shall not be pleaded. Consequently, I order that the offensive portions of paragraphs 20 and 31 of the statement of claim be struck out. Specifically, in paragraph 20, beginning with the words *"The facilities read, in part, as follows: ..."* and in paragraph 31 beginning with the words *"The 2017 March Facility Letter read, in part, as follows: ..."*

Bearing in mind that seven out of the eight grounds raised were found to be devoid of merit and bearing in mind that the last ground was cured by having the offensive portions struck out from the statement of claim, the application to set aside the originating process fails and is dismissed.

Costs are awarded in favour of the plaintiff, to be taxed in default of agreement.

Dated at Lusaka this 5th day of March, 2019

B.G. SHONGA
JUDGE