

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

**2013/HPC/476**

**BETWEEN:**

LYSOS IMPORT AND EXPORT LIMITED

PLAINTIFF

**And**

BRANDS AFRICA CORPORATION LIMITED

1<sup>ST</sup> DEFENDANT

VAMBIRI INVESTMENTS LIMITED

2<sup>ND</sup> DEFENDANT

***Before the Hon. Mr. Justice Justin Chashi in Chambers on the 23<sup>rd</sup> day of October, 2013***

*For the Plaintiff:*

*A. D. A. Theotis (Mrs), Messrs Theotis Mataka  
and Sampa Legal Practitioners*

*For the 1<sup>st</sup> and 2<sup>nd</sup> Defendants:  
Practitioners*

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**RULING**

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**Cases referred to:**

- 1. Chikuta v. Chipata Rural Council (1974) Z.R. 241*
- 2. New Plast Industries v. the Commissioner of Lands and the Attorney General (2001) Z.R. 51*
- 3. Shell & B.P. Zambia Limited v. Conidaris and Others(1975) Z.R. 174*
- 4. American Cyanamid v. Ethicon Ltd [1975] 2 W.L.R. 316.*
- 5. Godfrey Miyanda v. The High Court (1984) Z.R. 62*
- 6. NFC Africa Mining Plc v. Techno Zambia Limited (2009) Z.R. 236*
- 7. Leopold Walford (Z) Limited v. Unifreight (1985) Z.R. 203*

**Legislation referred to:**

- 8. The High Court Rules, Chapter 127 of the Laws of Zambia*

9. *The Arbitration Act No. 19 of 2000*
10. *The Arbitration (Court Proceedings) Rules of 2001*
11. *The Companies Act, Chapter 388 of the Laws of Zambia*
12. *The Supreme Court Practice (White Book), 1999*

The Plaintiff, **Lysos Import and Export Limited** commenced this action on the 2<sup>nd</sup> day of October, 2013 against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants namely **Brands Africa Corporation Limited** and **Vambiri Investments Limited**, respectively by way of Writ of Summons accompanied by a Statement of Claim seeking the following reliefs:

1. *A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are liable to make good the difference in the lost gross profit that had been projected and which never materialized as a result of the loss of the Proctor and Gamble agency as well as non-activation of other promised agencies;*
2. *In the alternative, a declaration that the shareholding structure should be redressed on the basis of the financial year, 2012 gross profit results and that the Shareholders' Agreement be terminated and the business operated in accordance with the Articles of Association and normal business practice;*
3. *In the further alternative, that the business be dissolved in accordance with Clause 17 of the Shareholders' Agreement;*
4. *A declaration that Clause 10 of the Shareholders' Agreement be strictly observed;*
5. *A declaration that the 1<sup>st</sup> Defendant provides to Farmers Wood Manufacturers and Transport Limited the agreed shareholders' guarantee;*
6. *An order for an interim injunction to restrain the 1<sup>st</sup> Defendant from changing the bank signatories to the Company's account pending determination of this matter;*
7. *Any other relief the Court may deem fit; and*
8. *Costs.*

Attendant to the Writ of Summons in pursuance of the sixth relief, the Plaintiff filed *ex parte* summons for an order of interim injunction. The summons was supported by an affidavit of even date deposed to by **Andreas Savva Damalis** in his capacity as Director of the Plaintiff Company, in which affidavit he asserts that the Plaintiff and the Defendants entered into an agreement to merge the operations of the Plaintiff and the 2<sup>nd</sup> Defendant on the 1<sup>st</sup> day of October, 2011. A copy of the Shareholders'

Agreement to that effect has been produced and marked "**ASD1**". The deponent asserts that in pursuance of the said Shareholders' Agreement, the parties incorporated the 1<sup>st</sup> Defendant Company in which the Plaintiff and the 2<sup>nd</sup> Defendant hold 35% and 65% of shares respectively.

It is also asserted that the parties further agreed that they would assign the various agencies which they owned to the 1<sup>st</sup> Defendant and that it was projected that the annual gross profit of the 1<sup>st</sup> Defendant would be **K10, 473, 481.74**. That it was on the basis of the anticipated gross profit that the foregoing shareholding ratio was agreed. However, the deponent asserts that the actual gross profit for 2012 was lower than anticipated and he attributes the same to the fact that the 1<sup>st</sup> Defendant lost the Procter and Gamble agency, one of its biggest agencies and to its failure to activate some of the agencies which it undertook to activate.

It is further deposed that the 1<sup>st</sup> Defendant obtained an overdraft facility from Banc ABC in order to facilitate its operations which facility was secured by a third party property belonging to **Farmers Wood Manufacturers Limited** as agreed by the parties. According to the deponent, the parties agreed with the said third party that the Plaintiff and the 1<sup>st</sup> Defendant's sister company, **Brands Africa Zimbabwe** would provide shareholders' guarantees for any loss of the third party property and pay for the usage of the property as collateral. He further asserts that in breach of the agreement, the 1<sup>st</sup> Defendant has failed to provide the shareholders' guarantee or to pay the agreed usage fee.

It is the deponent's evidence that the 1<sup>st</sup> Defendant is now insolvent as a result of the loss of the Procter and Gamble agency and the failure to activate other agencies it undertook to activate. He asserts that the 1<sup>st</sup> Defendant has been mainly paying suppliers of its preferred agencies to the detriment of suppliers of the agencies introduced by the Plaintiff in contravention of Clause 10 of the Shareholders' Agreement. That this has resulted in total or intermittent stoppage of supplies from the Plaintiff's agencies.

Further, the deponent asserts that he is the signatory to the 1<sup>st</sup> Defendant's bank account with Banc ABC and that in his capacity as such; the 1<sup>st</sup> Defendant has been requesting him to sign cheques for what he terms as "non-essential" payments to its creditors in breach of Clause 10 of the Shareholders' Agreement. His assertion is that he has refused to sign cheques for such payments because the company is insolvent. That on the

29<sup>th</sup> day of September, 2013, the 1<sup>st</sup> Defendant called for a Board of Directors' meeting which meeting was scheduled to be held on the 2<sup>nd</sup> day of October, 2013 in order to appoint additional signatories to the account so as to circumvent his refusal to sign cheques. According to the deponent, the notice for the said meeting is irregular as it does not comply with the seven days' notice period stipulated by the Shareholders' Agreement.

It is the deponent's position that if the 1<sup>st</sup> Defendant proceeds with the meeting and appoints additional signatories, it will be able to make non-essential payments contrary to Clause 10 of the Shareholders' Agreement thereby exacerbating the insolvency of the company. That there is need therefore to restrain the 1<sup>st</sup> Defendant from appointing additional signatories so as to avert the irrecoverable financial harm to the company which may be occasioned thereby.

The deponent further deposed that the Shareholders' Agreement provides that any dispute between the parties should be referred to arbitration and that the Plaintiff has already notified the Defendants of its intention to refer the matter to arbitration. It is his assertion that since the arbitral tribunal has not yet been constituted; the Plaintiff believes that it may be too late to wait for the arbitral tribunal to be constituted in order to obtain an injunction hence this action.

On the basis of the foregoing evidence, this Court granted an *ex parte* order of injunction on the 2<sup>nd</sup> day of October, 2013 as prayed pending the *inter parte* hearing of the application which was scheduled for the 15<sup>th</sup> day of October, 2013.

The 1<sup>st</sup> Defendant entered conditional appearance on the 4<sup>th</sup> day of October, 2012 and filed an affidavit in opposition to the Plaintiff's application for an injunction on the 9<sup>th</sup> day of October, 2013 which affidavit was deposed to by **Paulo Dos Santos** in his capacity as General Management Consultant of **Brands Africa Limited** which is said to be a Zambian subsidiary of the 1<sup>st</sup> Defendant. On the same date, the 1<sup>st</sup> Defendant filed summons to stay proceedings and refer the parties to arbitration and to discharge the injunction or dismiss the matter pursuant to **Section 10 of the Arbitration Act**<sup>9</sup> and **Rules 1 and 2 of Orders 2 and 14A of the White Book**<sup>12</sup>. In support of the summons is an affidavit of even date also deposed to by the said **Paulo Dos Santos**. Each of the two affidavits was filed with accompanying skeleton arguments.

The deponent to the two affidavits which were filed on behalf of the 1<sup>st</sup> Defendant concedes that the parties entered into a Shareholders' Agreement as asserted by the Plaintiff. However, he disputes that the loss of the Procter and Gamble agency was as a result of any fault on the part of the Defendants. He denies that the bank overdraft facility which the 1<sup>st</sup> Defendant obtained from Banc ABC was meant to facilitate the operations of the company because, according to him, the facility was activated several weeks after the company had commenced its operations.

The deponent also denies the Plaintiff's assertion that the 1<sup>st</sup> Defendant is insolvent. Instead, his assertion is that the 1<sup>st</sup> Defendant is solvent although the refusal by the said **Andreas Savva Damalis** to sign cheques for the purchase of products from the 1<sup>st</sup> Defendant's suppliers has made it impossible for the company to supply its customers' requirements. That an urgent Board meeting to appoint additional signatories therefore became necessary. From the deponent's evidence, it appears that the Board of Directors' meeting was already held and new signatories to the bank account in issue were appointed. In that regard, the deponent asserts that if the *ex parte* injunction which the Plaintiff obtained is not discharged and if the newly appointed signatories are not allowed to execute their function, the company is likely to suffer damage.

He further asserts that since the parties agreed to arbitration as the mode of dispute resolution, the issuance of the Writ of Summons and Statement of Claim and the application for an interim order of injunction are irregular and legally incompetent.

In his skeleton arguments, Counsel for the Defendants argued that the Plaintiff is not entitled to obtain an order of injunction and cited a plethora of authorities to support his argument. He urged the court to discharge the *ex parte* order of interim injunction which was obtained by the Plaintiff on the 2<sup>nd</sup> day of October, 2013. Counsel contended that in terms of **Order 6 Rule 2 and Order 30 Rule 11 (b) of the High Court Rules<sup>8</sup>**, any action founded on a document or instrument and where the rights of a party can be determined by construction of such document or instrument, must be commenced by Originating Summons. That since the Plaintiff's claim herein is founded on the construction of the Shareholders' Agreement; the action should have been commenced by Originating Summons and not Writ of Summons and Statement of Claim. According to Counsel, this Court has no jurisdiction to entertain this matter because the Plaintiff instituted these proceedings using a wrong mode of commencement. In that respect,

Counsel drew the Court's attention to the case of ***Chikuta v. Chipata Rural Council***<sup>1</sup> in which the Supreme Court held *inter alia* that where any matter is brought to the High Court by means of an Originating Summons when it should have been commenced by Writ; the Court has no jurisdiction to make any declarations.

Counsel for the Defendants also referred this Court to the case of ***New Plast Industries v. the Commissioner of Lands and the Attorney General***<sup>2</sup> in which the Supreme Court held that the mode of commencement of any action is generally provided by the relevant statutes.

It was Counsel's further argument that the proceedings herein should be stayed and the parties should be referred to arbitration in accordance with Clause 28.1 of the Shareholder's Agreement which provides that any dispute relating to the agreement must be determined through arbitration. In the alternative, Counsel urged the Court to dismiss the action for want of jurisdiction.

In opposing the 1<sup>st</sup> Defendant's application to stay proceedings and refer the parties to arbitration, Counsel for the Plaintiff also filed skeleton arguments on the 14<sup>th</sup> day of October, 2013 in which she argued that this Court does have power under ***Section 11 (1), (2) and (4) of the Arbitration Act***<sup>9</sup> to grant an injunction or other order before or during arbitral proceedings where a party requests for an interim measure of protection from the Court. Her argument was that Clause 28.1 of the Shareholders' Agreement referred to by the Counsel for the Defendants merely states that parties have to resolve disputes through arbitration but does not make provision for any measure to be taken when an urgent matter arises. That in terms of Clause 28.8 of the Shareholders' Agreement, the parties consented to the jurisdiction of the High Court over any dispute affecting them.

Counsel further submitted that the Plaintiff is entitled to the injunction as prayed and cited the cases ***Shell & B.P. Zambia Limited v. Conidaris and Others***<sup>3</sup> and ***American Cyanamid v. Ethicon Ltd***<sup>4</sup> to support her argument. She urged the Court not to dismiss the matter and contended that the Plaintiff is only seeking an injunction pending the constitution of an arbitral tribunal and has not neglected or refused to be subjected to arbitration.

As regards the mode of commencement of the action before this Court, Counsel contended that the ***Arbitration Act***<sup>9</sup> does not provide for the mode of commencement of an action for the purpose of obtaining an interim

measure of protection pending arbitral proceedings and that therefore **Order 6, Rule 1 of the High Court Rules<sup>8</sup>** applies. That this matter cannot be disposed of in Chambers as it is highly contentious and that the Plaintiff is not requesting the Court to determine any question of construction of the Shareholders' Agreement.

At the *inter parte* hearing of the matter on the 15<sup>th</sup> day of October, 2013, Counsel for the parties indicated that none of the parties was averse to the 1<sup>st</sup> Defendant's application to refer the parties to arbitration in accordance with the documents which were filed on their behalf. I therefore only proceeded to hear the Plaintiff's application for an injunction.

In arguing the application, Counsel for the Plaintiff relied on the affidavit evidence and skeleton arguments which were filed in support of the application. She submitted that the application was made pursuant to **Order 27, Rule 4 of The High Court Rules<sup>8</sup>** as read with **Section 11 of the Arbitration Act<sup>9</sup>** which Section gives this Court jurisdiction to grant an interim measure of protection to a party pending the appointment of an arbitral tribunal.

It was further argued by Counsel that the 1<sup>st</sup> Defendant's affidavit in opposition to the Plaintiff's application mainly deals with substantive issues which should be left for arbitration. According to Counsel, the Plaintiff's application focuses on the need for an injunction. She contended that there is need for an injunction because the 1<sup>st</sup> Defendant Company is in an insolvent position and the Defendants have admitted that the facility which the company obtained from the bank was under threat and that the company is facing financial challenges. According to Counsel, as far as the Plaintiff is aware, the bank facility has since expired and there is no guarantee that it will be renewed if the third party succeeds in withdrawing its collateral.

It was Counsel's contention that although the 1<sup>st</sup> Defendant has exhibited an email from the bank giving a conditional approval of the extension of the overdraft facility, there is no evidence that has been adduced to show that these conditions have been met or that a formal extension on bank letterhead has been signed. That to continue issuing cheques from the company which is insolvent is not only irresponsible but is also illegal. According to Counsel, if the Plaintiff's director for signatory **Mr. Andreas Savva Damalis** was notified formally that an extension on the facility had

been granted by the bank, he would have no issue signing cheques and there would be no need of appointing further signatories.

Counsel prayed for the confirmation of the injunction which was granted *ex parte* in favour the Plaintiff pending arbitral proceedings in order to protect the 1<sup>st</sup> Defendant from being put in a far worse financial position or from becoming more insolvent. She also prayed for costs.

In his response, Counsel for the Defendants relied on the two affidavits and accompanying skeleton arguments which were filed on behalf of the 1<sup>st</sup> Defendant. In addition, he submitted that the Defendants oppose the Plaintiff's application on three grounds.

Firstly that the application for an injunction being made on the basis of Writ of Summons and Statement of Claim is legally incompetent in a situation like this one where there is no dispute that the matter is subject to arbitration. He contended that while it is correct that this Court has jurisdiction to grant an injunction or any other interim measure of protection pending the appointment of an arbitrator, an application for such relief has to be made in conformity not only with **Section 11 of the Arbitration Act<sup>9</sup>** but also **Rule 9(1) and (3) of the Arbitration (Court Proceedings) Rules<sup>10</sup>**. It was his submission that **Rule 9(1) of the Arbitration (Court Proceedings) Rules<sup>10</sup>** provides that an application for an interim measure of protection pending the appointment of an arbitral tribunal must be made by Originating Summons. According to Counsel, the affidavit in support of such Originating Summons must contain the information prescribed under *Rule 9 (3)* of the said rules and the Originating Summons itself must be in a prescribed form as set out in the First Schedule to the Rules which also prescribes the form of the certificate of urgency which must be filed. Counsel argued that the Plaintiff in this matter has ignored the mode of approaching the Court and on the basis of the cases of ***Chikuta v. Chipata Rural Council<sup>1</sup>*** and ***New Plast Industries v. The Commissioner of Lands and The Attorney General<sup>2</sup>*** cited in his skeleton arguments, the Plaintiff's application for an injunction is legally incompetent and this Court cannot sustain it.

The second ground on which the Defendants oppose the Plaintiff's application according to Counsel is that, even assuming that the Plaintiff was entitled to approach the Court to obtain an injunction, the issuance of a Writ of Summons and Statement of Claim for a matter of this nature is legally incompetent. Counsel submitted that under **Order 6 of the High Court Rules<sup>8</sup>**, a Writ of Summons and Statement of Claim can only be used as a

means for commencing proceedings in cases where no other rule or law has prescribed the mode of commencement. He then reiterated his contention in the skeleton arguments that since the dispute in this matter is about interpretation of the rights of the parties under a Shareholders' Agreement, in terms of **Order 30, Rule 11 (b) of the High Court Rules**<sup>8</sup> this is a matter which should have been commenced by Originating Summons. That based on the authorities cited above, this Court has no jurisdiction to entertain the Plaintiff's application.

Thirdly that this is not an appropriate case in which to grant an injunction in the manner sought by the Plaintiff. Counsel submitted that as admitted by the Plaintiff and its Counsel, the Plaintiff has refused or neglected to effect payments in favour of the 1<sup>st</sup> Defendant's creditors and is now injunctioning the appointment of an additional signatory who would facilitate the payment of the company's debts. According to Counsel, the effect of that is that the company is unable to undertake its normal business transactions and is at a risk of closure.

In response to the Plaintiff's allegation that the 1<sup>st</sup> Defendant is insolvent, Counsel submitted that the question of insolvency is a legal technicality which the Plaintiff has not demonstrated or proved before this Court. He argued that under **The Companies Act**<sup>11</sup>, a Company would be insolvent if it is unable to pay its debts as they fall due or if it is unable to pay its creditors as they demand for their payments. According to Counsel, the 1<sup>st</sup> Defendant will only get into the position of insolvency because of the action by the Plaintiff of refusing to pay its creditors and if the injunction remains in force for a long time. His contention was that the financial difficulties or poor performance of the 1<sup>st</sup> Defendant, which is attributed by the Defendants to the Plaintiff, does not at law constitute insolvency. That as noted by Counsel for the Plaintiff, the 1<sup>st</sup> Defendant has managed to persuade the bank as shown by exhibit "**PDS3**" in the affidavit in opposition to the injunction and the bank is willing to extend the overdraft facility.

Further, in response to the Plaintiff's assertion that the notice which was given for the Board of Directors' meeting to appoint additional signatories contravenes the Shareholders' Agreement, Counsel submitted that Clause 12.2 of the Shareholders' Agreement allows for a shorter notice to be given in cases where the Board has to transact urgent business. It was his contention that the appointment of additional signatories was deemed and does qualify as an urgent matter.

Counsel for the Defendants concluded his oral submissions by urging the Court to discharge the *ex parte* injunction which was granted in favour of the Plaintiff on the 2<sup>nd</sup> day of October, 2013. His contention was that if the injunction is not discharged the actions by the Plaintiff would cause difficulties and irreparable damage to the 1<sup>st</sup> Defendant. Counsel also prayed for costs.

In reply, Counsel for the Plaintiff reiterated that the issues herein are hotly contested as can be seen from the affidavits of the parties and that as such this matter cannot be disposed of in Chambers. She submitted that if however the Court is of the view that the mode of commencement of this action was irregular, the irregularity is curable under **Order 2, Rule 2 of the White Book**<sup>12</sup> and as such should not frustrate the Plaintiff's claim.

As regards the Defendants' assertion that the 1<sup>st</sup> Defendant is solvent, Counsel submitted that without an approved bank overdraft facility, the company is unable to meet the demands of payments from its suppliers and that to continue making payments on an unapproved facility would merely put the company more in debt. Counsel reiterated that if the Defendants showed to the Plaintiff that the facility has been formally approved, it would have no issue signing cheques.

I have carefully considered and fully addressed my mind to the application by the Plaintiff, the affidavit evidence by the parties to this cause, the skeleton arguments and the oral submissions by both Counsel and I am indebted to both Counsel for their spirited arguments.

In my considered view, the issue of jurisdiction which was raised by Counsel for the Defendants should have been raised as a preliminary issue although Counsel argued it as an alternative argument in his skeleton arguments. I have taken this view because if indeed this Court has no jurisdiction to entertain the Plaintiff's action, it would follow that the Court would be precluded from pronouncing itself on the merits of not only the Plaintiff's application for an interim injunction but also the Defendants' application to stay these proceedings and refer the parties to arbitration. In the case of **Godfrey Miyanda v. The High Court**<sup>5</sup>, the Supreme Court defined the term jurisdiction as follows:

***"The term "jurisdiction" should first be understood. In one sense, it is the authority which a court has to decide matters that are litigated before it; in another sense, it is the authority which a court has to take cognisance of matters presented in a***

***formal way for its decision. The limits of authority of each of the courts in Zambia are stated in the appropriate legislation. Such limits may relate to the kind and nature of the actions and matters of which the particular court has cognisance or to the area over which the jurisdiction extends, or both.***

Therefore if a Court has no jurisdiction, it basically means that it has no authority whatsoever to decide the matter in question. What emerges from this definition is that in order for a Court to have the requisite jurisdiction, the matter in question must be within the scope of the matters that can be determined by such court and must be presented before it in a formal way as prescribed by the appropriate legislation.

In this matter the evidence adduced on behalf of the Plaintiff and the submissions by Counsel for the Plaintiff show beyond doubt that the Plaintiff commenced these proceedings for the purpose of obtaining an interim injunction pending the determination of the substantive dispute among the parties by the arbitral tribunal which is yet to be constituted in accordance with Clause 28.1 of the Shareholders' Agreement. The deponent to the affidavit in support of the Plaintiff's application deposed that the Plaintiff has already notified the Defendants of its intention to refer the matter to arbitration and commenced this action because the Arbitral tribunal has not yet been constituted and the Plaintiff fears that it might be too late to wait for the Arbitral tribunal to be constituted in order to obtain an injunction.

It must be noted from the outset that an arbitration clause such as the one aforementioned does not oust the jurisdiction of the High Court in that a party bound by the clause may still opt to commence proceedings in the High Court in a matter involving a dispute such as the one at hand subject to an application by either party to stay such proceedings and refer the parties to arbitration under **Section 10 of the Arbitration Act**<sup>9</sup>. Indeed parties cannot by contract oust the jurisdiction of the Courts. If a party commences an action in the High Court where there is an arbitration clause, **Order 6 of The High Court Rules**<sup>8</sup> applies insofar as the mode of commencement of the action is concerned. Sub-rules (1) and (2) of Order 6 read 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.***

The general rule therefore is that all actions in the High Court must be commenced by Writ of Summons endorsed and accompanied by a full Statement of Claim which general rule is subject to the exception that where any rule or law specifies another mode of commencement such other mode must be employed.

As earlier mentioned, the Plaintiff herein commenced these proceedings for the purpose of obtaining an interim injunction pending the determination of the substantive dispute by an arbitral tribunal which is yet to be constituted. **Section 11 of The Arbitration Act<sup>9</sup>** pursuant to which the Plaintiff is seeking the injunction enacts as follows:

***“(1) A party may, before or during arbitral proceedings, request from a court an interim measure of protection and, subject to subsections (2), (3) and (4), the court may grant such measure.***

***(2) Upon a request in terms of subsection (1), the court may grant-***

***....***

***(c) an interim injunction or other interim order; or***

***(d) any other order to ensure that an award which may be made in the arbitral proceedings is not rendered ineffectual....***

***(4) The court shall not grant an order or injunction under this section unless-***

***(a) the arbitral tribunal has not yet been appointed and the matter is urgent;....or***

***c) the urgency of the matter makes it impracticable to seek such order or injunction from the arbitral tribunal;”***

Rule 9 of **The Arbitration (Court Proceedings) Rules<sup>10</sup>** makes provision for the mode of commencement of an action under Section 11. It reads:

***(1) An application under section eleven of the Act, to a court for an interim measure of protection shall be made to a Judge of the High Court by originating summons.***

***(2) An application for an interim measure of protection in the course of an application for the stay of proceedings may be***

***made to the Court before which those proceedings are held and by ordinary summons....”***

Therefore, as correctly argued by Counsel for the Defendants, a party bound by an arbitration clause who commences an action in the High Court under **Section 11 of the Arbitration Act<sup>9</sup>** must do so by way of Originating Summons. However, if one party commences an action in the High Court for the determination of the substantive dispute which ought to be referred to arbitration and the other party makes an application to stay the proceedings and refer the parties to arbitration pursuant to **Section 10 of the Act**, either party can make an application under Section 11 by ordinary summons as in the case of an interlocutory application in accordance with **Sub-rule 2 of Rule 9** aforesaid. I therefore totally agree with Counsel for the Defendants that the Plaintiff employed a wrong mode of commencement of the action herein.

Since the action was commenced for the purpose of obtaining an injunction, the Plaintiff should have approached this Court by Originating Summons as opposed to Writ of Summons and Statement of Claim. It is also interesting to note that by the endorsement on the Writ of Summons and Statement of Claim, the Plaintiff prayed for numerous declaratory reliefs which if granted would essentially have the effect of determining the main dispute among the parties thereby rendering arbitration impossible. One can only wonder how the Plaintiff expected this Court to make such declarations based on its application for an injunction in a contentious matter such as this one as correctly contended by Counsel for the Plaintiff.

Having commenced the action in the manner that the Plaintiff did, this Court has no jurisdiction to consider the merits on the Plaintiff's application. The case of **Chikuta v. Chipata Rural Council<sup>1</sup>** which Counsel for the Defendants cited is instructive on the point. In reaffirming its decision in that case in the recent case of **New Plast Industries v. the Commissioner of Lands and the Attorney General<sup>2</sup>**, the Supreme Court held as follows:

***“We therefore hold that this matter having been brought to the High Court by way of Judicial Review, when it should have been commenced by the way of an appeal, the court had no jurisdiction to make the reliefs sought. This was the stand taken by this court in Chikuta v Chipata Rural Council where we said that there is no case in the High Court where there is a choice between commencing an action by a writ of summons. We held in that case that where any matter is brought to the***

***High Court by means of an originating summons when it should have been commenced by a writ, the court has no jurisdiction to make any declaration. The same comparison is applicable here. Thus, where any matter under the Lands and Deeds Registry Act, is brought to the High Court by means of Judicial Review when it should have been brought by way of an appeal, the court has no jurisdiction to grant the remedies sought. On this ground alone, this appeal cannot succeed.”***

Similarly this matter was not presented before this Court in a formal and proper way as prescribed by the rules of this Court thereby taking away the jurisdiction of the Court. As was held by the Supreme Court in the case of ***NFC Africa Mining Plc v. Techno Zambia Limited***<sup>6</sup> “***rules of the Court are intended to assist in the proper and orderly administration of justice and as such they must be strictly followed***”. Although in the case of ***Leopold Walford (Z) Limited v. Unifreight***<sup>7</sup>, 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***”, the rules on the mode of commencement of actions as can be seen from the foregoing authorities are not merely regulatory but mandatory as they go to jurisdiction and as such any breach thereof is fatal and incurable contrary to Counsel’s contention that the Plaintiff’s breach herein is not fatal. Therefore, this Court cannot pronounce itself on the merits of this matter.

For the foregoing reasons, the *ex parte* order of injunction which was granted in favour of the Plaintiff on the 2<sup>nd</sup> day of October, 2013 is hereby discharged. The Plaintiff’s application is accordingly dismissed as this Court lacks jurisdiction to determine the same. If the Plaintiff has confidence in the merits of its application, no law precludes it from recommencing the action following the correct procedure.

The Defendants’ costs shall be borne by the Plaintiff. Same to be taxed in default of agreement.

Leave to appeal is hereby granted.

**Delivered at Lusaka this 23<sup>rd</sup> day of October, 2013.**

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Justin Chashi  
**HIGH COURT JUDGE**