IN THE COURT OF APPEAL OF ZAMBIA HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No. 234/2019

BETWEEN:

INVESCO LIMITED **APPELLANT**

AND

THE COCA COLA COMPANY LIMITED **1ST RESPONDENT**
SCHWEPPES HOLDINGS LIMITED **2ND RESPONDENT**

CORAM : Chashi, Chishimba and Sichinga JJA
On 29th April, 2021 and 21st July 2021

For the Appellant : Mr. E. C. Banda, S.C. & Mr. T. Chibeleka of Messrs ECB Legal Practitioners.
Mr. K. B. Wishimanga of Messrs AM Wood & Co.

For the Respondents : Messrs Chibesakunda & Company Advocates

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J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court

CASES REFERRED TO:

1. William David Carlisle Wise v E. F. Harvey Limited (1985) ZR 179
2. Kafumuyeke Mukelabai v Esther Nalwamba, The Commissioner of Lands and The Attorney General (2013) Vol. 2 ZR 312
3. Carm Investments Limited v Circolo Italian Di Lusaka SCZ/8/204/2015
4. Zeppa v. Woodridge Heating and Air Conditioning Limited 2019 ONCA 47

5. Donovan v Gwetoys Limited (1990) 1 WLR 472
6. African Banking Corporation Zambia v Mubende Country Lodge Limited SCZ Appeal No. 116/2016
7. Henry Kapoko v The People SCZ No. 43 of 2016
8. Harkness v Bell Asbestors & Engineering Limited (1966) 3 All ER
9. City Express Services Limited v Southern Cross Motors Limited (2007) ZR 263
10. Cook v Gill (1873) LRS. CP/07
11. Mwanza v Harrington & Others SCZ Appeal No. 154/2015
12. Birkett v James (1977) 1 All ER 801
13. Access Bank (Zambia) Limited v Group Five/ZCON Business Park Joint Venture (Suing as a firm) SCZ/8/52/2014

LEGISLATION CITED:

1. Rules of the Supreme Court (Whitebook) 1999 Edition
2. The Limitation Act, 1939.
3. The Law Reform (Limitation of Actions) Act, Chapter 72 of the Laws of Zambia.
4. The Constitution of Zambia (Amendment) Act No. 2 of 2016
5. The High Court Act, Chapter 27 of the Laws of Zambia.

OTHER WORKS REFERRED TO:

1. Halsbury's Laws of England, 4th Edition. Vol. 28. (1979)
2. Black's Law Dictionary, 10th Edition
3. John Salmond, Jurisprudence by Glanville L. Williams. 10th Edition, (1947)

1.0 INTRODUCTION

1.1 This appeal arises from an interlocutory ruling rendered by Justice Evaristo Pengele on 27th September, 2019 arising from

a preliminary issue raised on a point of law. The court upheld the point of law on account of the claims being statute barred and consequently, struck out two of the claims sought by the appellant in the Writ of Summons and Statement of Claim.

2.0 **BACKGROUND**

2.1 By Writ of Summons dated 4th December, 2018, the appellant commenced an action against the respondents seeking several reliefs, of relevance to this appeal, are the following claims:

(1) Damages for loss of revenue caused by the abrupt suspension of the core brands, which suspension, has to date not been lifted by the defendants; and

(2) ***Damages for the loss in stocks of the core brands held by the Plaintiffs, and for the investment made and idle plant capacity for the core brands, the subject of the abrupt suspension.***

2.2 Before the matter could proceed to trial, the respondents filed a Notice of Motion to raise a preliminary issue on a point of law pursuant to Order 14A of the Rules of the Supreme Court, 1999 Edition. They sought determination of the following questions:

(i) Whether the Plaintiff's (Appellant herein) claims, set out below, and the portions of the Plaintiff's pleadings that relate thereto should be struck out for being an abuse of court process on the basis that the said claims are statute barred –

(a) Damages for loss of revenue caused by the abrupt suspension of the core brands, which suspension, has to date not been lifted by the defendants; and

(b) Damages for the loss in stocks of the core brands held by the Plaintiffs, and for the investment made and idle plant capacity for the core brands, the subject of the abrupt suspension.

2.3 The respondents contended that the cause of action in respect of the appellant's claim for damages relate to the alleged suspension of production of 500ml core brands, accrued at the latest, in November 2008, being more than 10 years prior to the commencement of the proceedings. Further, that the claim relating to damages for the suspension of production of sparkling beverages accrued at the latest, in August 2012, being over 6 years ago before the proceedings commenced. On the above basis, it was contended that the two claims are statute barred.

2.4 In its pleadings, the appellant averred that pursuant to the Standard International Bottler's Agreement(s) (SIBA) and/or a manufacturing agreement with the Respondents, Invesco was entitled to manufacture, prepare, distribute and sell the respondents' core brands in 500ml PET bottles. The said core

brands being defined as Coca Cola, Diet Coke, Fanta Orange and Sprite. This entitlement was suspended in November 2008 while the production of sparkling beverages was suspended in August 2012 by the respondents.

2.5 The court below considered the issue of when the two causes of action arose. Whether the appellant's contractual right to claim for damages for the alleged breach by the respondents arose upon the appellant being informed of the suspension of the core brands and the sparkling beverages, or upon the issuing of the termination letters by the respondents. The respondents relied on the provisions of **section 2 of The Limitation Act, 1939** as read with the **Law Reform (Limitation of Actions) Act Chapter 72 of the Laws of Zambia**.

2.6 In opposing the motion, the appellant, in the first instance, contended that the respondents had not filed a notice of intention to defend prior to raising the motion under **Order 14A of the RSC** and had entered a conditional memorandum of appearance. The fact that only portions of the appellant's claims as opposed to the entire pleadings had been challenged was argued to be inappropriate as an application under Order 14A

is required to show that the application intends to bring the entire matter to its finality.

2.7 As to when the cause of action arose in relation to the two claims, the appellant took the view that it only arose when the respondents purported to serve fresh letters of termination of the agreements on 18th January, 2018. This is because there was an ongoing business transaction between the parties which culminated into various discussions and meetings on compensation for the idle plant machinery, remaining stocks and transfer of assets to other bottling partners of the 1st respondent.

2.8 The appellant also contended that the motion was premature and would muzzle the presentation of the other claims in the action.

3.0 **DECISION OF THE HIGH COURT**

3.1 Judge Pengele considered the motion and arguments before him. With respect to the regularity of the motion, the learned Judge reviewed several authorities and noted that the issue of limitation of period is a point of law, that as a defence, can be raised by a party even after that party has entered appearance and filed a defence. Further that a defence must be raised

timeously as the party relying on **The Limitation Act, 1939** will not be permitted to invoke it if the defence is raised late in the proceedings as a fall back defence after it becomes clear that the party is likely to lose the case on the merits.

3.2 On this basis, the learned Judge held that the respondents are entitled to bring the motion notwithstanding the fact that having filed a notice of motion, they proceeded to enter appearance and filed a defence. Further, that it was settled law that one cannot set up an estoppel against a statute.

3.3 The court below considered whether **Order 14A of the RSC, 1999** can only be invoked when the application has the potential of bringing the entire matter to finality and not where only portions of pleadings are attacked. The court below stated that the provision sets up two conditions that must be satisfied before determining any question of law. The first being that the question of law must be suitable for determination without the need for a full trial and secondly, that the determination must be one that would finally determine the entire cause or matter or any claim or issue in the matter.

3.4 The court below stated further that from a reading of **Order 14A Rule 1(b)**, it is evident **Order 14A** can be invoked not only where

the application could determine the entire matter to finality but also where the application could lead to the final determination of any claim or any issue in the main action or matter. Therefore, the court below held that the respondent's notice of motion was properly before it as it sought the final determination, on a point of law of the two contested claims in the main action.

3.5 The learned Judge proceeded to determine issues raised in the notice of motion, namely the question when the two causes of action arose. As the subject causes of action are based on contract, he found that section **2(1)(a) of the Limitation Act, 1939** applied in that any action relating to the two claims in dispute must be brought within a period of six years from the date on which the causes of action accrued. To determine the question when a cause of action arises, the court below considered **paragraphs 820 and 862 of Halsbury's Laws of England, 4th Edition. Vol. 28. (1979)** and the case of **William David Carlisle Wise v E. F. Harvey Limited** [1] and held that a cause of action accrues when there is a person who can sue and who can be sued, and when there are facts which are required to be proved in order for the plaintiff, or defendant in the case

of a counter-claim, to succeed in establishing the cause of action.

3.6 The learned Judge held that the cause of action relating to the suspension of production of the appellant's 500ml core brands arose in November 2008 while the one relating to the sparkling beverages arose in August 2012. The court below further held that the two claims are statute barred having accrued in November 2008 and August 2012 and accordingly struck them out from the Writ of Summons and Statement of Claim.

4.0 **GROUNDS OF APPEAL**

4.1 Dissatisfied with the ruling of the court below, the Appellant has appealed raising five grounds of appeal as follows:

1) ***The court below misdirected itself in law and in fact when it held that the cause of action relating to the suspension of production of the Plaintiff's 500ml core brands arose in November 2008 and 2012 in respect of the sparkling beverages therein;***
2) ***The court below misdirected itself in law and fact when it held that the Plaintiff could have properly commenced an action for damages within six years of the suspension of the core brands and sparkling beverages. The court lost sight of the affidavit evidence to the effect that the parties continued to trade under the various Bottlers Agreements and thus the suspension, in and of itself, could not give rise to an action. The court further misdirected itself in law and in fact when it held that at the***

time of the respective suspensions, factual situations existed which could have entitled the Plaintiff to seek remedy and further that any alleged breach of contract founded on the suspensions occurred at the respective points of suspension;

3) ***The court below misdirected itself when it held that the alleged negotiations and discussions could not and did not have the effect of extending or postponing the limitation periods. The negotiations and discussions inform the nature of the suspension and speak to whether or not there was a breach of contract giving rise to a cause of action;***
4) ***The court below further misdirected itself in law and in fact when it held that it would lead to absurd results if it held that the two causes of action did not arise at the points of suspension but only at termination; and***
5) ***The court below misdirected itself in law and in fact when it held that the notice of motion was properly before court. Order 14 A of the Rules of the Supreme Court could not properly be invoked to summarily deal with the question of damages of suspension as canvassed in the grounds (1) - (4) above.***

5.0 APPELLANT'S ARGUMENTS

5.1 The appellant filed heads of argument on 31st December, 2019 and began by first addressing ground five. The appellant contends that the form in which the respondents raised the motion in the court below was defective because no defence had been filed at that time notwithstanding the fact that a conditional memorandum of appearance was filed. That form goes to jurisdiction irrespective of how well a litigant argues his

case. The failure to file a defence, thus rendered the motion defective and therefore, improperly before the court. It was argued that the issue of the statute limitation as a defence being raised at any time is inconsequential. The form and manner in which the motion was brought before court was improper.

5.2 As authority for this argument, the case of **Kafumuyeke Mukelabai v Esther Nalwamba, The Commissioner of Lands and The Attorney General** [(2)] was cited where the Supreme Court stated that the giving of notice of intention to defend is a pre-requisite to making an application under order 14A, whether by summons, motions or orally at the hearing of the cause or matter or of an interlocutory application.

5.3 The appellant further argued that the holding of the lower court that one cannot set up an estoppel against a statute when the issue was not that there was an estoppel being set up, but rather that the application was improperly before court, was a misdirection. In the second instance, the appellant contended that even if the motion was to be deemed to have been properly before the court, **Order 14A of the RSC** cannot be used to deal with questions of damages and suspension as canvassed in the statement of claim in view of the affidavit evidence and the

unique nature of the matter that was before the court below. Reference was made to **Order 18/11/12** and **Order 33/3/1 of the RSC**, particularly the explanatory notes in relation to disposal of issues on points of law. Further the case of **Carm Investments Limited v Circolo Italian Di Lusaka** [3] was cited where misgivings at parties frequently raising preliminary objections was expressed by the Supreme Court because of the danger of straying into the substantive application.

5.4 The appellant contends that the issues raised in the motion were not suitable for determination under order 14A as can be seen from the affidavit in opposition, in that they were of mixed fact and law. Had the court below paid attention to these issues, it would have dismissed the application.

5.5 Grounds one, two and three were argued together. The contention being that the suspension of the core brands and the sparkling brands which eventually culminated into various undertakings, did not give rise to a situation upon which the appellant can or, rather could establish a right or entitlement to a judgment in its favour against the respondents. The appellant took the view that the suspension of its brands by the appellant had not disclosed a cause of action upon which it

could attach liability to the respondent, or upon which it could establish a right or entitlement to a judgment in its favour. The case of **William David Carlisle Wise** (supra) on the definition of cause of action was cited.

5.6 That had the learned Judge taken into account the affidavit evidence before him, he would have appreciated the unique relationship and the ongoing discussions that culminated into various commitments. It was submitted that had the appellant taken action against the respondents at the point of suspension, it would not have established a right or an entitlement to a judgment in its favour against the respondent, as the parties had quickly engaged in discussions and undertakings, some of which had been performed.

5.7 Therefore, it was submitted that the cause of action arose at the point of termination of the contracts as the alleged negotiations had the effect of postponing the breaches that occurred as a result of the suspension. As persuasive authority, the Canadian case of **Zeppa v. Woodridge Heating and Air Conditioning Limited** [(4)] was called in aid which suggests that in order for the limitation clock to be postponed, the plaintiff must show actual and continued reliance on the defendant's superior knowledge

and abilities while the defendant is seeking to remedy the plaintiff's loss; especially where the defendant undertakes efforts to ameliorate the plaintiff's loss.

5.8 With respect to ground four, the appellant contends that the court below fell into the error of speculation and completely lost sight of the affidavit evidence which showed that the parties were engaged in negotiations, in holding that it would lead to absurd results if it held that the two causes of action did not arise at the points of suspension but only at termination. This view is informed by the fact that it is not in every case in which a suspension occurs that an affected party should sue.

5.9 By analogy, the appellant submitted that if that was the case, then it would follow that in employment cases, employees would sue their employers upon their being suspended pending investigations irrespective of the investigations, and that should they not sue, and the suspension lasts for a period beyond the limitation period and they are dismissed unfairly, then that employee cannot sue for damages as a result of that suspension.

5.10 In this regard, it was submitted that the rationale behind limitation period is that defendants should not be faced with

stale claims brought many years after relevant events as per the holding in the case of **Donovan v Gwetoys Limited** [5]. In *casu*, the parties were engaged in discussions as late as September 2017. Therefore, the court below erred by striking out the claims.

5.11 The appellant prayed that the appeal should be allowed and ruling of the court below set aside in its entirety.

6.0 **RESPONDENTS ARGUMENTS**

6.1 The respondent filed heads of arguments attached to the notice of non-appearance dated 16th April, 2021. We shall begin by referring first to the arguments in response to ground five on the issue of whether the notice of motion was properly before the court. It was submitted that the notice of motion was properly before the court and that, in the alternative, the matter ought to be decided on the merits and not procedural technicalities.

6.2 The respondents being alive to the Supreme Court decision in **African Banking Corporation Zambia v Mubende Country Lodge Limited** [6] on what constitutes a notice of intention to defend, conceded that they fell short of the procedure provided under **Order 14A of the RSC** by failing to file a memorandum

of appearance and defence. They contend that despite this failure, a litigant should not lose his right or remedy due to a lapse in procedure. **Article 118(2)(e) of the Constitution of Zambia (Amendment) Act No. 2 of 2016**, was cited on the administration of justice without undue regard to procedural technicalities.

6.3 We were referred to the definition of procedural law and substantive law by **Black's Law Dictionary, 10th Edition**, pages 1398 and 1658. With the former referring to rules that prescribe the steps for having a right or duty judicially enforced as opposed to the law that defines the specific rights or duties themselves.

6.4 The learned author of **John Salmond, Jurisprudence by Glanville L. Williams. 10th Edition, (1947)**, was drawn to our attention on the distinction between procedural and substantive law as follows:

> ***"So far as the administration of justice is concerned with the application of the remedies to violated rights, we may say that substantive law defines the remedy and the right, while the law of procedure defines the modes and conditions of the application of the one to the other."***

6.5 It was therefore submitted that since procedural law encompasses the steps a litigant has to satisfy in order to obtain remedies or reliefs sought, a litigant cannot lose out on the remedy s/he is entitled to for having followed the wrong steps as the claims ought to be decided on merit. The case of **Henry Kapoko v The People** [7] was cited where the Supreme Court stated that Article 118(2) was not intended to do away with existing principles, laws and procedures, even where the same may constitute technicalities. It was intended to avoid a situation where a manifest injustice would be done by paying unjustifiable regard to a technicality.

6.6 Reference was also made to the case of **Harkness v Bell Asbestors & Engineering Limited** [8] on omissions in respect of practice and procedure being regarded as an irregularity which is rectifiable as long as it is without prejudice.

6.7 The respondent's position on the purposes of **Article 118(2)(e) of the Constitution** being to enable substantive justice to be attained by deciding matters on merits; allowing the appeal would result in manifest injustice, the respondents having a justifiable case on the merits.

6.8 In the alternative, as held by the court below, that the issue of limitation period is a point of law, and that they were entitled to bring the notice of motion notwithstanding the fact that they only entered appearance and defence after the motion was filed. As authority, the case of **City Express Services Limited v Southern Cross motors Limited** [9] was cited in which the court stated that the issue of statute of limitation can be raised and considered at any stage of the proceedings even when not pleaded but ***"may not be raised at the end of the trial as a second defence by a person losing a case on the merits."***

6.9 In response to grounds one to four as to when the cause of action arose, it was submitted that the court below was on firm ground by holding as follows:

> ***"... that suspension of production of core brands and sparkling beverages arose in 2008 and 2012 respectively; that an action could have been commenced within six years of suspension; that the discussions and negotiations did not have the effect of extending and postponing the limitation periods and that it would lead to absurd results if it held that***

the two causes of action did not arise at the points of suspension but only at termination."

6.10 The respondents made reference to the definition of the term *'cause of action'* in the cases of **William David Carlisle Wise** [1], **Cook v Gill** [10] and **Mwanza v Harrington & Others** [11] namely that it accrues where all the facts exists of which entitles one person to obtain from the court a remedy against another person.

6.11 It was submitted that the cause of action arose upon the suspension of production of the core brands in 2008 and the sparkling beverages in 2012. Therefore, the appellant ought to have commenced an action within six years after the suspension. Further, that discussions and negotiations cannot be properly aligned under the instances provided in Part II of **The Limitation Act, 1939**. The case of **Birkett v James** [12] was cited on the purpose of the statutory provisions imposing periods of limitations.

6.12 It was contended that this matter falls within the parameters of authorities cited and that the court below was on firm ground when it upheld the preliminary issues raised by the holding that the claims arising from the suspension of production of the

products mentioned are statute barred. It was prayed that the appeal be dismissed with costs.

7.0 **DECISION OF THE COURT**

7.1 We have considered the appeal, the arguments advanced by the learned State Counsel and the respondents, as well as the authorities cited.

7.2 The facts preceding the appeal are as follows; the parties had entered into Standard International Bottler's Agreements (SIBA) in 1995. The terms being that the appellant was to prepare, distribute and sell products under certain brands including manufacturing of schweppes brands. The core brands in 500 ml approved bottles and other sparkling beverages.

7.3 In 2007, the 1st respondent was alleged to have breached the manufacturing agreement by appointing Zambia Bottlers Limited to produce the core brands and stopped purchasing from the appellant. In 2012, the 2nd respondent suspended the appellant from producing sparkling beverages. In the year 2014, the appellant was served with non-performance and breach notice letters from the respondents who applied to CCPC for a release from Clause 5 of the 2001 MOU. Various

correspondence were exchanged culminating in the termination of contracts in 2018.

7.4 As a result of the above disputes, the appellant sued the respondents seeking a declaration that the termination letters are defective, null and void and restoration of the parties' status quo. Of relevance to the appeal are the claims for damages caused by the abrupt suspension of the core brands and for investments made and idle plant capacity for the core brands, the subject of abrupt suspension.

7.5 It is not in dispute that the respondents, at the time of filing the Notice of Motion dated 29th April, 2019 did not file a defence. What was entered was a conditional appearance. The record shows that when the matter was before Judge B. G. Shonga, a scheduling conference was held and directions issued. A defence was filed on 11th of June, 2019. The matter was subsequently transferred to Justice E. Pengele. At a scheduling conference, the respondents informed the court of their intention to proceed with the hearing of the preliminary issues of 29th April 2019. The preliminary issue was subsequently considered by the court below and upheld.

8.0 **ISSUES FOR DETERMINATION**

8.1 The issues for determination, in our view, are as follows:

(1) Whether the Notice of Motion pursuant to order 14A of the Rules of the Supreme Court was properly before the court below? And if so;

(2) When the actual causes of action arose in respect of the claims subject of the alleged Statute of Limitation Act.

8.2 **Order 14A RSC** provides that:

(1) The court may upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that –

(a) Such question is suitable for determination without a full trial of the action; and

(b) Such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

(2) Upon such determination, the court may dismiss the cause or matter or make such order or judgment as it thinks just.

8.3 Pertinent to the appeal, is **Order 14A/2/3 of the RSC** which provides the requirements a party must meet before invoking **Order 14A** and it is couched as follows:

Requirements of Order 14A

The requirements for employing the procedure under this Order are the following:

(c) the defendant must have given notice of intention to defend;

(d) the question of law or construction is suitable for determination without a full trial of the action (para. 1 (i)(a));

(e) such determination will be final as to the entire cause or matter or any claim or issue therein (para. 1 (i)(h)); and

(f) ***the parties had an opportunity of being heard on the question of law or have consented to an order or judgment being made on such determination (para. 1 (3)).***

8.4 The explanatory note under **Order 14A/2/4** states that:

> ***"The wording of para. 1 (3) makes it clear that the determination of any question of law or construction under this Order can only be made if the defendant has given notice of intention to defend. It precludes the Court from determining any such question unless the parties, i.e. both the plaintiff and the defendant, have had any opportunity of being heard on the question or have consented to an order or judgment being made on such determination."***

Therefore, it is clear that the filing of a notice to defend is a prerequisite to the filing of a notice of motion under Order **14A of the RSC.**

8.5 In this case, the respondents filed the notice of motion on 29th April, 2019 and a conditional memorandum of appearance. They only filed their defence to the statement of claim on 11th June, 2019. It is not in dispute that they had not yet entered a

defence at the time they had filed the notice of motion. This fact was conceded to by the respondents in their heads of argument.

8.6 In **Kafumuyeke Mukelabai v. Esther Nalwamba & Others** [2], the Supreme Court held that:

> ***"3. The giving of notice of intention to defend is a prerequisite to making an application under Order 14A, whether by summons, motions or orally at the hearing of the cause or matter or of an interlocutory application."***

The Court went further and held that:

> ***"5. No appearance was entered or defence filed on behalf of the 2nd and 3rd Defendant up to the time the preliminary issue was being raised. As a result, in terms of the requirement for the party to qualify to raise an issue of law for the determination by the court under Order 14A, the 2nd and 3rd Defendants were precluded from making any application of the nature they did."***

8.7 In the latter case of **African Banking Corporation Zambia Limited v Mubende Country Lodge Limited** [6], the Supreme Court dealt with the issue of the requirements for making an application to dispose of a case on a point of law under **Order 14A of the RSC, 1999 Edition**. In particular, whether a conditional memorandum of appearance amounts to a notice of intention to defend. In the cited case, a conditional appearance was filed together with a notice of motion for an order to

determine a point of law and dismiss the matter pursuant to **Orders 14A and 33 of the RSC**, arising from an action instituted by an interpleader for damages for wrongful execution.

8.8 The Supreme Court stated that one of the requirements under **Order 14A/1-2/2** is the giving of the notice of intention to defend. As to whether the filing of a conditional memorandum of appearance amounts to a notice of intention to defend, the court stated that it did not. Instead, what constitutes a notice of intention to defend is the filing of the memorandum of appearance accompanied by a defence. Under **Order II Rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia**, filing of the above is mandatory. That filing of ***"a conditional memorandum of appearance without a defence is only applicable in circumstances where a defendant wishes to contest the validity of proceedings with a view to setting aside the writ."***

8.9 The respondents in contesting the appeal, further argued that despite the procedural breach of failure to file a defence before raising the preliminary issues pursuant to Order 14A, a litigant should not lose his right due to the lapse in procedure. They

relied heavily on **Article 118(2)(e) of the Constitution of Zambia**. We are of the view that the respondents cannot seek solace in **Article 118(2)(e) of the Constitution of Zambia**.

8.10 The Supreme Court has had occasion to deal with the provision of Article 118(2)(e) in the case of **Access Bank (Zambia) Limited v Group Five/ZCON Business Park Joint Venture (Suing as a firm)** [13] by holding that Article 118(2)(e) was never meant to oust the obligations of litigants to comply with procedural rules as they seek justice from the court. In the **Mubende Case**, the appellant sought solace in **Article 118(2)(e) of the Constitution of Zambia** by arguing that the dismissal of the appellant's application was based on procedural irregularity which was curable. The Supreme Court found the argument devoid of merit and stated that ***"Article 118(2)(e) of the Constitution was not enacted to shield litigants from complying with procedural rules which are intended to provide an orderly administration of justice."***

8.11 Reverting back to the issue of whether or not the notice of motion pursuant to **Order 14A of the RSC** was properly before the lower court, we hold that the motion was improperly before the court below, on the basis that it was invoked contrary to the

requirements for employing the procedure under Order 14A/2/3, namely that the defendant (respondents) must have given a notice of intention to defend at the time of raising the motion. The fact that a defence was filed months later before the application was heard does not cure the defect. The fact remains that at the time of filing the motion pursuant to **Order 14A of the RSC**, there was no notice of intention to defend (defence).

8.12 There was merely lodged a conditional memorandum of appearance applicable to applications such as setting aside the writ. The notice of motion pursuant to Order 14A of Rules of the Supreme Court was irregularly and improperly before the court below.

8.13 We hold that the lower court erred in law and in fact by holding that the respondents were entitled to bring the Notice of Motion notwithstanding the fact that, after filing their Notice of Motion, they proceeded to enter appearance and filed a defence.

8.14 Having held that the Notice of Motion pursuant to **Order 14A of the RSC**, was improperly before the court below, an issue that goes to jurisdiction, we do not see the need to proceed to determine the other grounds of appeal as they are *otiose*.

8.15 We accordingly set aside the ruling by the lower court striking out the two claims in the statement of claim on the basis of being statute barred.

8.16 This does not by all means deprive the respondents of raising the defence of statute of limitation as the same can be raised in the defence and be considered by the court.

8.17 For the foregoing reasons, we uphold the appeal and set aside the ruling of the court subject of appeal. Costs are awarded to the appellant to be taxed in default of agreement.

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J. Chashi

COURT OF APPEAL JUDGE

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F. M Chishimba

COURT OF APPEAL JUDGE

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D. L. Y. Sichinga

COURT OF APPEAL JUDGE