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

Appeal NO. 128 of 2021
CAZ/08/32/2021

BETWEEN:

KONKOLA COPPER MINES PLC	**1st APPELLANT**
VEDANTA RESOURCES HOLDINGS LIMITED	**2nd APPELLANT**
AND	
MILINGO LUNGU *(Sued in his capacity as Provisional Liquidator of Konkola Copper Mines Plc)*	**1st RESPONDENT**
REPHIDM MINING AND TECHNICAL SUPPLIES LIMITED	**2nd RESPONDENT**
MIMBULA MINERALS LIMITED	**3rd RESPONDENT**
MOXICO RESOURCES ZAMBIA	**4th RESPONDENT**

Coram: Sichinga, Ngulube and Banda-Bobo, JJA

On 24th March, 2022 and 3rd August, 2022

For the Appellants:	*Mr. M. Nchito, SC and Mrs. M. Chakoleka of Messrs Nchito and Nchito*
For the 1st Respondent:	*Mr. M. Chitambala of Messrs Lukona Chambers and Mr. N. Simwanza of Messrs Noel Simwanza and Company*
For the 2nd, 3rd, 4th Respondents:	*Mr. Z. Muya, Ms N. Chilamatobo, Mrs F. Kabwe and Ms. M. Muya, of Messrs Muya and Company*

JUDGMENT

Sichinga, JA delivered the Judgment of the Court.

Cases referred to:

1. *Daniels v Daniels [1978] Ch 406*
2. *Petroships Investment Pte Limited v Wealthplus Pte Limited and Others [2016] SGCA 17*
3. *Robert Mbonani Simeza (Sued as Receiver/Manager of Ital Terrazo Limited), Finance Bank (Z) Limited and Ital Terrazzo Limited (2018) ZR 105*
4. *Re Union Accident Insurance Co. Ltd [1972] 1 WLR 640.*
5. *Foss v Harbottle (1843) 2 Hare 461, 67 ER 189*
6. *ZCCM Investment Holdings Plc v First Quantum Minerals and 6 others CAZ Appeal No. 92 of 2020*
7. *Zambia Seed Company Limited v Chartered International (Pvt) Limited SCZ Judgment No. 20 of 1999*
8. *Edwards v Halliwell [1950] 2 All ER 1064*
9. *John Mukuma Kasanga and 2 Others v Development Bank of Zambia and 3 Others Appeals Nos. 59 of 2020 and 94 of 2019*
10. *Avalon Motors Limited (in receivership) v Bernard Leigh Gadsden, Motor City Limited (1998) SJ 26*

Legislation referred to:

1. *Mines and Minerals Development Act, No. 11 of 2015*
2. *The Corporate Insolvency Act No. 9 of 2017*
3. *The Companies Act No. 10 of 2017*
4. *Companies Act 2006, Chapter 46, United Kingdom*
5. *Rules of the Supreme Court 1999 Edition, White Book*

Other authorities referred to:

1. *The Merriam Webster Dictionary www.merriam-webster.com*
2. *Black's Law Dictionary, Bryan A. Garner, 6th Edition, Reuters*
3. *Company Law, Brenda Hannigan, 3rd Edition, Oxford University Press*

1.0 Introduction

1.1 This is an appeal by Konkola Copper Mines PLC and Vedanta Resources Holdings Limited (who were the plaintiffs in the court below) against a ruling of the High Court (B.C. Mbewe J) dated 19th January, 2021, dismissing the action before it for being incompetent.

2.0 Background

2.1 The brief background of this matter is that on 3rd July, 2019, the Court of Appeal delivered a Judgment emanating from a Ruling of the High Court dismissing the action before it for being statute barred and an abuse of the court process. The effect of our judgment was that we found merit in the appeal. We held that the appellant (Konkola Copper Mines PLC) was entitled to protect its proprietary rights by commencing the action before the High Court.

2.2 We took the view that it was asserting its proprietary rights which could not be dealt with under the dispute resolution mechanism under the *Mines Act*. We went on to state that the High Court had jurisdiction to deal with the matter which was premised on the tort of trespass as opposed to mining rights. We allowed the appeal and sent the matter back to the lower court before a different Judge.

2.3 Stemming from our Judgment, on 10th September, 2019, the parties executed a Consent Order which effectively determined the dispute between them.

2.4 On 28th November, 2019, Konkola Copper Mines PLC and Vedanta Resources Holdings Limited as 1st and 2nd plaintiffs respectively, commenced an action by writ and statement of claim seeking to set aside the Consent Order of 10th September, 2019 made between Milingo Lungu, the 1st defendant (in his capacity as provisional liquidator of Konkola Copper Mines PLC) in the name of the 1st plaintiff and the 2nd to 4th defendants (who are the respondents to this appeal.

2.5 In the writ, the plaintiffs sought the following claims:

i. An Order setting aside the Consent Order dated 10th September, 2019 under Appeal No. 74 of 2018;

ii. An Order that the matter be determined in accordance with the directions of the Court of Appeal in the Judgment dated 3rd July, 2019;

iii. An Injunction restraining the 1st defendant whether by himself or his agents from taking any action to effect or perfect the sale of Lot 694/M to the 2nd or 4th defendants;

iv. An Injunction restraining the 2nd to 4th Defendants whether by themselves or their agents from:

1. Enforcing the Consent Order in Appeal No. 74 of 2018 until final determination of the matter;
2. Entering and remaining on Lot 694/M Chingola, Zambia;

v. Any other relief as the court may deem fit; and

vi. Costs

3.0 The decision of the court below

3.1 Upon considering the application for an Order to set aside the Consent Order dated 10th September, 2019, the learned trial Judge, in his Ruling and in the main, held that the plaintiffs had not properly brought the action in the name of the 1st plaintiff, in its changed capacity (in liquidation). He held that directors and/or members of a company can seek redress against a liquidator in their own names within the process of the liquidation proceedings.

3.2 The learned Judge found that the 1st plaintiff's legal counsel, acting on instructions of the 1st defendant (as provisional liquidator) was charged with the authority to commence, conduct, continue or discontinue an action by or against the 1st plaintiff. However, the discontinuance was only in respect of Konkola Copper Mines Plc and not Vedanta Resources Holdings Limited, which has a right to bring an action in its own name.

3.3 The lower court set aside the notice of discontinuance of the whole action and restricted it to the discontinuance of the action by the 1st plaintiff only. He held that the 2nd plaintiff should have taken its case to the liquidation proceedings which were before Banda-Bobo J (as she then was). The learned Judge was of the view that the 2nd plaintiff's action was based on a wrong interpretation of ***section 74 (2) (e) of the Corporate Insolvency Act[2],*** therefore, it was misconceived.

3.4 The lower court held that the action before it was incompetent and dismissed it in its entirety. The 2nd plaintiff was condemned in costs.

4.0 Grounds of appeal

4.1 The plaintiffs, being dissatisfied with the ruling of the court below, lodged an appeal before this Court based on four grounds of appeal as follows:

1. ***The Court below erred in law and in fact when it held that the 1st appellant's In-House counsel had authority to discontinue a matter filed in the name of the 1st appellant by directors of the 1st appellant exercising their residual powers;***
2. ***The Court below erred in law and fact by holding at R37 that the correct forum for the 2nd appellant to take its action challenging the Consent Order was the liquidation proceedings before Hon. Lady Justice Banda-Bobo, when it is settled law that a Consent Order can only be set aside by commencing a fresh action;***
3. ***The court below erred in fact and in law when it dismissed the entire action before it, without hearing the parties on the dismissal; and***
4. ***The Court below erred in law and fact when it held that the only ground advanced for challenging the Consent Order was a misguided application of section 74 (2) (e) of the Corporate Insolvency Act, when the appellants had advanced other grounds including the illegality of a single Judge of the Court of Appeal changing a decision of the full court of the Court of Appeal.***

5.0 Grounds of cross-appeal

5.1 The 2nd to 4th respondents being dissatisfied with a portion of the Ruling, cross-appealed on the following sole ground:

1. ***That the court below erred in law and in fact when it held that it did not agree with the defendants' submission that the plaintiffs should have brought a derivative action and should have obtained prior leave of the court to do so.***

6.0 Submissions by counsel

6.1 In support of the appeal, the appellants filed heads of argument on 19th June, 2021, and heads of argument in reply to the respondents' submissions on 29th July, 2021.

6.2 The 1st respondent relied on heads of argument filed into court on 5th August, 2021. The 2nd to 4th Respondents filed heads of argument on 14th July, 2021.

6.3 In support of the cross-appeal, the 2nd to 4th respondents relied on their heads of argument filed on 5th October, 2021.

6.4 In response to the cross-appeal the appellants relied on their heads of argument filed on 27th January, 2022.

6.5 The cross-appeal, to the extent that it assails the lower court for failing to hold that this was a derivative action and that the appellants should have obtained prior leave of the court to commence the action, raises a jurisdictional issue for the

Court. We will therefore, address the cross-appeal first for reasons which will become clear.

7.0 Respondents' submissions on the cross-appeal

7.1 Under the sole ground of the cross-appeal, our attention was drawn to ***Section 331 of the Companies Act[3]:*** which provides as follows:

> ***"1) Except as provided in this section, a director or an entitled person shall not bring or intervene in any proceedings in the name of, or on behalf of, a company or its subsidiary.***
>
> ***2) The court may, on the application of a director or an entitled person, grant leave to-***
>
> ***(a) Bring proceedings in the name and on behalf of the company or any subsidiary..."***

7.2 It was submitted that the appellants' position in paragraph 5 of the statement of claim at pages 56 to 63 of the record is that the directors commenced the action in the court below in the name of the 1st appellant to challenge the actions of the provisional liquidator. Counsel submitted that the cited provision prohibits, in mandatory terms, the director or an entitled person from instituting proceedings in the name of or on behalf of the company without obtaining leave of the lower court. It was submitted that the directors' failure to have sought prior leave of the court rendered the action

incompetently before the lower court. Therefore, the lower court had no jurisdiction to hear and was bound by the provisions of ***section 331 of the Companies Act*** *supra* to obtain prior leave of the court before instituting the proceedings in the lower court.

7.3 It was submitted that the 1st appellant is a company, a corporate legal entity capable of suing and being sued in its own name. That notwithstanding its undergoing provisional liquidation, its status as a company remained the same. Reliance was placed on ***sections 2, and 3 of the Corporate Insolvency Act*** *supra* and ***section 2 and 16 of the Companies Act*** *supra* on the meaning of a company.

7.4 It was submitted that ***section 331 of the Companies Act*** *supra* referred to 'derivative actions,' but that the term was not defined in the *Act.* Reliance was placed on the definition in ***the Merriam Webster Dictionary***[1] which defines a 'derivative action' as follows:

> ***"Lawsuit brought by a corporation shareholder against the directors, management and/or other shareholders of the corporation, for a failure by management. In effect, the suing shareholder claims to be acting on behalf of the corporation, because the directors and management are failing to exercise their authority for the benefit of the company and all its shareholders."***

7.5 The case of ***Daniels v Daniels***[1] was cited for the court's holding that a derivative action pertains to actions of abuse of power whereby the directors or majority, who are in control of the company, secure a benefit at its expense.

7.6 It was submitted that this was a derivative action and the appellants were supposed to have moved the lower court in accordance with the provisions of ***section 331 of the Companies Act.*** Counsel contended that the lower court erred in law and fact when it held that it did not agree with the defendants' submission that the plaintiffs should have brought a derivative action and should have obtained prior leave of the court to do so.

7.7 We were urged to uphold the cross-appeal with costs to the 2nd, 3rd and 4th respondents.

8.0 The appellants' submissions on the cross-appeal

8.1 In response the cross-appeal, it was submitted that the court below was on firm ground when it held that ***section 331 of the Companies Act*** *supra* does not confer a right to commence a derivative action in liquidations. Reliance was placed on the definition of 'derivative actions' in ***Black's Law Dictionary***[2] which states at page 443 as:

> ***"...a suit by a shareholder to enforce a corporate cause of action. An action is derivative action when the action is based upon a primary right of the corporation, but is asserted on its behalf by the shareholder because of the***

corporation's failure, deliberate or otherwise, to act upon the primary right."

8.2 Counsel contended that the action was not a derivative action, and therefore the respondents' argument was misplaced. Reliance was placed on the case of ***Petroships Investment Pte Limited v Wealthplus Pte Limited and Others***[2], which case was cited by the learned Judge. In that case the Singaporean Court of Appeal held that:

> ***"Section 216A had no application to a company in liquidation, whether the company was in voluntary (shareholders or creditors) or court ordered liquidation as it provides for a situation when the company is still a going concern.***

8.3 It was submitted that equally *in casu* a derivative action was not available to the 1st appellant. Counsel argued that the action by the appellants is not a derivative claim so as to require leave to be sought under ***section 331 of the Companies Act.***

8.4 It was submitted that reference to *'directors of the company'* in the wording of ***section 331 of the Companies Act*** indicates that statutory derivative actions are only meant for companies that are still going concerns. That such reference presupposes that there would be directors in active management, in the first place, who could authorise proceedings on behalf of the company. It was submitted that where a company is in liquidation, its board of directors does not have the power to

authorise such proceedings on behalf of the company. That it would be the liquidator to authorise.

8.5 It was submitted that where the liquidator is a wrong doer, the directors have residual powers to commence an action in the name of the company to challenge the actions of a delinquent liquidator. On the issue of residual powers reliance was placed on the case of ***Robert Mbonani Simeza (Sued as Receiver/Manager of Ital Terrazo Limited), Finance Bank (Z) Limited and Ital Terrazzo Limited***[3] where the Supreme Court held as follows:

> ***In Avalon Motors, the question was, when the directors and shareholders of the company under receivership can be allowed to maintain an action in the name of the company. This Court upheld the decision in Magnum (Zambia) Ltd v Quadri (receiver/manager) and Another. It then held that directors and shareholders of a company under receivership, as well as anybody who is properly interested and who has beneficial interest to protect, can sue a wrongdoing receiver or former receiver, in their own names and in their own right..."***

8.6 The Supreme Court went on to state that:

> ***"On the facts of this matter, we do not accept the argument by Mr. Mundashi and Ms Kasonde that the Directors should have first asked the Receiver to institute an action in the name of the company; and only institute one themselves if he refused to do so. The reason is simple: what this action challenges are the Deed of Appointment of the 1st defendant, as Receiver and the Mortgage Debenture Deed, under which he was appointed. It would not have been reasonable for the Directors of the***

plaintiff, to ask the Receiver to institute an action in the name of the company to challenge his own appointment."

8.7 It was submitted that even with the enactment of the ***Companies Act, 2017***, the cases referred to above were still good law as they provide for instances where the liquidator is a wrongdoer, which is not provided for under ***section 331 of the Companies Act, 2017.***

8.8 It was contended that the position was the same in England as demonstrated by the case of ***Re Union Accident Insurance Co. Ltd***[4].

8.9 It was submitted that in the instant case, having established that the action challenging an illegal Consent Order entered into by the Provisional Liquidator was correctly commenced and is not a derivative action, it follows that ***section 331 of the Companies Act*** does not apply.

8.10 It was submitted that the case of ***Foss v Harbottle***[5] established that the proper plaintiff in respect of a wrong done to a company is *prima facie,* the company. That however, it was acknowledged by the court that save for every urgent and exceptional circumstance, this rule was not to be departed from because of the fundamental principle of company law that a company has separate legal personality.

8.11 It was submitted that the exceptional circumstances under which the 'proper plaintiff' rule could be departed from include the following:

i. Where the alleged act is ultra vires and illegal;

ii. Where the alleged act could only have been validly done or sanctioned, in violation of a requirement in the articles by some members of the special majority;

iii. Where the alleged acts cause invasion of the claimant's personal and individual rights in his capacity as a member of the company; and

iv. Where a fraud on the minority has been committed by the majority who themselves control the company.

8.12 Counsel submitted that the exceptions exist to protect minority rights. That in the instant case the action before the lower court is not by a minority shareholder.

8.13 We were referred to ***Company Law***[3] in which the learned author states at page 423 paragraph 18 – 17 in reference to ***section 261*** of the English ***Companies Act 2006***[4] as follows:

> ***"While the section refers to 'a member' for, as the court noted in Cinematic Finance Ltd v Ryder, only in very exceptional circumstances (which the court thought difficult to envisage) would it be appropriate to permit a shareholder in control of a company to bring a derivative claim. A controlling shareholder has other options open to him or her, such as appointing a new board of directors and then the claim can be brought by the company in the usual way so respecting the rule in Foss v Harbottle that a claim vested in the company should be pursued by the company."***

8.14 It was submitted that in the instant case, the action challenging the illegal Consent Order in the High Court was not an action by minority shareholders against the majority. That

the action was against a wrongdoing provisional liquidator by the directors of the 1st appellant exercising their special residual powers to protect the interests of the company which are circumstances that can be distinguished from a derivative action. Counsel contended that *in casu* it is the company that sued. It was argued that even if the action was commenced by the 2nd appellant on behalf of the 1st appellant (which it was not), it could not be regarded as a derivative action because the 2nd appellant is a majority shareholder.

8.15 We were asked to consider the facts in the case of ***ZCCM Investment Holdings Plc v First Quantum Minerals and 6 others***[6] in which we discussed the principles in the case of ***Foss v Harbottle***. That we stated in the ***ZCCM-IH case*** that a party seeking to commence a derivative action must follow the procedure laid out in ***Order15/12A of the Rules of the Supreme Court (White Book)***[5].

8.16 It was submitted that the ***ZCCM-IH case*** was a straight forward derivative action, in which the minority shareholder (ZCCM-IH) in Kansanshi Mining Plc was seeking to commence a derivative action against the majority shareholder, Kansanshi Holdings Limited. That ZCCM-IH had followed the laid down procedure by making an application for leave to commence the action as provided in ***Order 15/12A of the White Book***, That ZCCM-IH was unsuccessful because the action was deemed to be an abuse of the court process for being *res judicata* and a multiplicity of actions since a similar action had been

commenced by ZCCM-IH in the United Kingdom by way of arbitration. It was submitted that where the exceptions in ***Foss v Harbottle*** are not met, the action cannot be classified as a derivative one. That ZCCM-IH had initially applied to commence a derivative action in the Tribunal proceedings but its application was dismissed. That the Tribunal, as well as Justice Cockeril on appeal in England held that ZCCM-IH had failed to make out a prima facie case on falsity or as to loss which was fatal to the application. The following was stated in that case:

> ***"The Tribunal found that most of the claims by the Appellant were founded on allegations of deliberate dishonesty which in the Tribunal's view failed to meet the threshold. Also that all causes of action were dependent upon proof of loss to which the Appellant had put no evidence."***

8.17 It was submitted that since the instant case did not fall within the ***Foss v Harbottle*** exceptions, the argument that the action commenced in the court below was a derivative one is misplaced.

8.18 It was submitted that the ***ZCCM-IH case*** should be distinguished from the instant one for the following reasons:

i. In the *ZCCM-IH case,* the plaintiff had specifically set out to commence a derivative action, unlike in the instant case where the appellant's action was one specifically commenced to challenge an illegal Consent Order for a company in liquidation. That the challenge was in line

with the principles laid down by the Supreme Court in the case of ***Zambia Seed Company Limited v Chartered International (Pvt) Limited SCZ[7]*** where the Supreme Court held as follows:

> ***"... By law the only way to challenge a judgment by consent would be to start an action specifically to challenge that consent judgment."***

ii. In the ***ZCCM-IH case,*** it was the minority shareholder

who was seeking to sue a majority shareholder on behalf of the company, whereas in the instant case, the Consent Order action was commenced by directors of the company (and hence the company itself) and majority shareholders against a delinquent provisional liquidator. That derivative actions do not extent to the activities of errant liquidators. It was submitted that the rules applicable to errant liquidators, provisional or otherwise, are different and were followed by the appellants.

8.19 Counsel submitted that the two cases were not in tandem with the instant case.

8.20 We were urged to dismiss the cross appeal for lack of merit.

9.0 Our decision on the cross appeal

9.1 We have considered this cross-appeal, read the ruling appealed against and analyzed the heads of argument and the respective response thereto. We are grateful to counsel for the same. The

question that confronts us on the cross-appeal is simply *whether or not leave is required by a shareholder before commencing an action?*

9.2 Mr. Nchito, State Counsel, on behalf of the appellants, has laboured to submit that references to *'directors of the company'* in the wording of ***section 331 of the Companies Act*** *supra* indicate that statutory derivative actions are only meant for companies that are still going concerns. That where a liquidator is a wrong doer, the directors have residual powers to commence an action in the name of the company to challenge the action of a delinquent liquidator.

9.3 The 2nd to 4th respondents' position is that since the property which is the subject the dispute relates to surface rights over 694/M and its remaining extent which is the property of the 1st appellant, the 1st appellant's directors were required to seek the lower court's leave before commencing the action. They argued that the appellants had not complied with ***section 331 of the Companies Act*** *supra.*

9.4 The starting point for our consideration is the rule enunciated in the case of ***Foss v Harbottle*** *supra.* A clear statement of the rule was stated in the case of ***Edwards v Halliwell***[8] where Jenkins LJ stated that:

> ***"The rule in Foss v Harbottle... comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association***

of persons is prima facie the company or associations of person itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and all its members by a simple majority of the members, no individual member of the company or association is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company is in favour of what has been done, then cadit question. No wrong has been done to the company or association and there is nothing in respect of which anyone can sue."

9.5 In the case ***ZCCM Investments Holdings v First Quantum Minerals and 6 others*** *supra,* we stated that the disadvantage of the rule is that it could allow the majority to plunder the company, leaving the minority without a remedy. We noted that exceptions to the rule have therefore been developed as pronounced in the ***Foss v Harbottle*** *supra.* We therefore, went on to state that a shareholder may bring a claim by way of a derivative action seeking relief on behalf of a company for a wrong done to it. A derivative claim is one where the right of action is derived from the company and is exercised on behalf of the company.

9.6 In the instant case, we are confronted with a company in liquidation at the control of a Provisional Liquidator, who is the alleged wrong doer, and who allegedly sanctioned a questionable consent order in which his own conduct was being impugned. The appellants seek to set aside the said consent

order. At stake too are the company's surface rights over 694/M and its remaining extent which have been allegedly sold in an obscure transaction contrary to the law.

9.7 In the case of ***John Mukuma Kasanga and 2 Others v Development Bank of Zambia and 3 Others***[9] we dealt with a company in receivership. The alleged wrong doer was also in control of the company and not willing to bring an action where his decision to sell the company's most important real estate asset was alleged to be in bad faith and contrary to the law. We held as follows:

> ***"On the principles in Foss v Harbottle, the derivative principle applies equally to this case in that the receiver and manager, who has control of the company is the alleged wrong doer against the company. It would therefore, be unreasonable to think that the receiver and manager, in the circumstances would take action against himself for the benefit of the company."***

9.8 We stated in *obiter dicta* that such a circumstance should have been provided for under the ***Corporate Insolvency Act No. 9 of 2017.*** Therefore, the only avenue available in such circumstances is ***section 331 of the Companies Act*** *supra* and case law.

9.9 In the ***Avalon Motors Limited (in receivership) v Bernard Leigh Gadsden, Motor City Limited***[10], cited by the appellants' counsel, there were allegations to the effect that the receivership

was being conducted in a delinquent fashion to the serious disadvantage of the company, the shareholders and all concerned. As a result a new receiver was appointed. Meanwhile, an action was commenced against the former receiver, who was the first respondent and also against the second respondent who sold the company's properties and assets allegedly at a grossly undervalued or give-away price. An action was commenced in the company's name and a preliminary objection was taken by the defendants that the director and shareholder was not entitled to sue in the name of the company; only the new receiver could do so. The objection was sustained; the action was dismissed leading to this appeal. On appeal, the Supreme Court held *inter alia* that receivers as well as liquidators occupy a fiduciary relationship and are liable for their wrongdoing. The same principle was followed in the ***Robert Mbonani Simeza case.***

9.10 Of note in the above cases is that they were not derivative actions in which a similar provision to the now ***section 331 of the Companies Act*** *supra* was considered. They are therefore distinguished from the instant case which merits a consideration of the law as it stands today.

9.11 In our view, on a proper construction of ***section 331 of the Companies Act*** *supra,* it is evident, that a director or an entitled person shall not bring or intervene in any proceedings in the name of, or on behalf of, a company or its subsidiary,

without the leave of the court. We accept the 2nd to 4th respondents' submission to the effect that the appellants ought to have sought leave to bring the action on behalf of the company.

9.12 We find merit in the cross-appeal and we allow it.

10.0 Conclusion

10.1 Since leave to commence the action was not sought before the lower court, it renders the appeal before us a nullity. We dismiss it with costs to the 2nd to 4th respondents

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D.L.Y. Sichinga, SC
COURT OF APPEAL JUDGE

.....
P.C.M. Ngulube
COURT OF APPEAL JUDGE

.....
A.M. Banda-Bobo
COURT OF APPEAL JUDGE