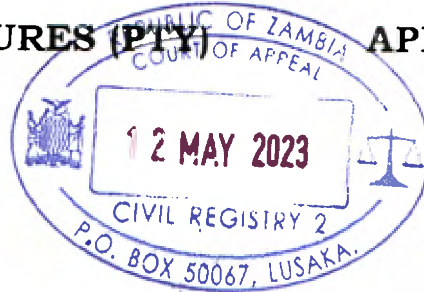
IN THE COURT OF APPEAL OF ZAMBIA **Appeal No. 143/2021**
HOLDEN AT LUSAKA
(*Civil Jurisdiction*)

BETWEEN:

SPAN AFRICA STEEL STRUCTURES (PTY) LIMITED **APPELLANT**



AND

KAY-TWO ZAMBIA LIMITED **RESPONDENTS**

Coram: Kondolo, Makungu, and Sharpe - Phiri J.J.A
On the 21st day of September, 2022 and on the 12th day of May, 2023

For the Appellant: Mr. M.K Mukonda & Mr. V. Brazel both of DHM & Company

For the Respondent: No Appearance

JUDGMENT

MAKUNGU, JA delivered the Judgment of the Court.

Cases referred to:

1. *Gaedonic Automotives Limited v. Citizens Economic Empowerment Commission (2014) Vol.3 ZR 1*
2. *Manharlai Harji Patel v. Surma Stationers Limited Shashikant Devraj Vaghela and Emmanuel Mwansan SCZ Judgment No.12 of 2009*
3. *Development Bank of Zambia and Mary Ncube (Receiver) v. Christopher Mwanza and 63 Others SCZ/8/103/08 (unreported)*
4. *Wang Ying v. Youjun Zhuang, Wang Qinghai, Kingphar Company Limited, Bumu General Trading FZE and Attorney General CCZ/0015/2020*
5. *Mutembo Nchito v. The Attorney General (2015/HP/358) (unreported)*
6. *Isaacs v. Robertson (1984) 3 ALL ER 140*

7. *Victor Zimba v. Elias Tembo. Lusaka City Council and The Commissioner of Lands CAZ Appeal No. 8 26 of 2016*
8. *Penelope Chishimba Chipasha Mambwe v. Millingtone Collins Mambwe SCZ Appeal No. 222/ 2015 (unreported)*
9. *Indo Zambia Bank Limited v. Muhanga (2009) Z.R 266*
10. *Henry Nsama and 1314 Others v. Zambia Telecommunications Company Limited (2014) Vol. 3 Z.R 85*
11. *George Chishimba v. Zambia Consolidated Copper Mines Limited (1999) Z.R 198*
12. *Chick Masters Limited and Another v. Investment Bank PLC Appeal SCZ Appeal No. 74 of 2014*
13. *Paul Judika v. The Attorney General and Another (2015) Z.R 339*
14. *Hytec Information Systems Limited v. Council of City of Coventry (1996) EWCA Civ 1099*
15. *Stanley Mwambazi v Morester Farms Limited (1977) Z.R. 108*
16. *Leopold Walford (Zambia) Limited v. Unifreight (1985) Z.R 203 (SC)*
17. *Access Bank (Zambia) Limited v. Group Five /Zcon Business Park Joint venture (suing as a firm) SCZ/8/52/2014*

Legislation Referred to:

1. *The Constitution of Zambia, Chapter 1 of the Laws of Zambia*
2. *The High Court Rules, Chapter 27 of the Laws of Zambia*
3. *The Companies Act, No. 10 of 2017*

Other Authorities Referred to:

1. *The Rules of the Supreme Court of England, 1965 (White Book) 1999 Edition.*
2. *Halsbury's Laws of England, 3rd Edition, Volume 37.*

1.0 INTRODUCTION

1.1 This appeal is against the ruling dated 18th November, 2019, passed by Dr. W.S Mwenda J, of the High Court Commercial

Division in Cause Number 2018/HPC/0297. The appellant's application to strike out the said action on the ground that it was an abuse of the process of court was dismissed. Nevertheless, the Court ordered that the respondent's action be stayed until the appellant's costs under the earlier Cause No. 2015/HP/616 are paid by the respondent. The respondent has cross appealed.

2.0 BACKGROUND

2.1 In the court below, the respondent (as plaintiff) commenced an action on 12th May, 2015 against the appellant, in the Lusaka High Court Principal Registry by way of writ of summons and statement of claim under Cause Number 2015/HP/616. That action was dismissed on 17th January, 2018 due to the respondent's failure to comply with an earlier order for further and better particulars made by the Deputy Registrar (DR) on 13th October, 2015.

2.2 Another action was commenced by the respondent against the appellant by way of writ of summons and statement of claim in the Lusaka High Court Commercial Registry on 7th August, 2018 under Cause Number 2018/HPC/0297 on the same facts as or identical to the dismissed action.

2.3 Subsequently, on 8th October, 2018 the appellant applied formally for the following orders:

1. That pursuant to **Order 11, rule 1 (4) and Order 10, rule 16 of the High Court Rules, Chapter 27 of the Laws of Zambia**, the proceedings be set aside for irregularity and or for being a nullity on the ground that the writ of summons and statement of claim were issued for service out of jurisdiction and served out of the jurisdiction without prior leave of the Court.
2. Pursuant to Order 10, rule 18 and rule 1 (3) of the High Court Rules, service of the said writ of summons and statement of claim be set aside for the following reasons:-
    - (i) The appellant is not a citizen of Zambia, the required document which should have been served on it was the notice of writ of summons and statement of claim and not the originating process itself;
    - (ii) No valid request was made to the appellant to acknowledge receipt by signing on the original or other copy of the process or some other document tendered for the purpose; and/or

3. Pursuant to **Order 18, rule 19 (1) (d) of the Rules of the Supreme Court 1965 (1999 Edition), (RSC)** the said writ of summons and statement of claim be struck out on the ground that the new action is an abuse of the process of the Court. Further, that in the Ruling dated 17th January, 2018 in cause number 2015/HP/616, the DR held that the respondent had shown contumacious behaviour towards the Court. That the two cases are based on the same or similar facts. This resulted in the dismissal of the action.
4. An order that all further proceedings in the new action be stayed under the inherent jurisdiction of the Court or **Order 40, rule 8 of the High Court Rules**, and/or the said **Order 18, rule 19(1) (d) of the RSC** on the grounds that the respondent had not paid the appellant costs awarded in the above mentioned ruling dated 17th January, 2018 in the previous action. That Cause Number 2018/HPC/0297 is an abuse of the process of the Court for the reason given in paragraph 3 above; and
5. That the respondent should pay the appellant its costs of this action and of this application, to be taxed in default of agreement.

3.0 RULING OF THE COURT BELOW

3.1 On the several components of the application, the Court ruled as follows:

1. That leave was in fact granted to the plaintiff (now respondent) to issue for service, outside the jurisdiction, the writ and statement of claim, and to serve the process by substituted service.

2. That service was proper in that the writ and statement of claim were delivered to the appellant's premises in Pietermaritzburg on 13th August, 2018. Delivery was signed for by one N. Nosipho as per exhibit **"JJB3"** in the affidavit in opposition. Therefore, the writ and statement of claim and service thereof were not irregular.

3. As regards the defendant's (now appellant) claim that **Order 10 rule 18 of the High Court Rules** requires a notice of writ of summons and statement of claim and not the originating process itself to be served upon the foreign company, the lower Court was of the considered view that service of the originating process, instead of a notice of proceedings, was not irregular, as the originating process was served after obtaining leave of Court.

4. The Court opined that the provisions of **Order 10 rule 18 of the High Court Rules** are meant to cater for a situation where leave has not yet been granted to serve originating process outside jurisdiction; in order to notify the intended defendant of the proceedings commenced in Zambia. That the originating process is served after obtaining leave to serve process outside jurisdiction. And in any event, the appellant had provided no evidence that it had suffered any prejudice by being served with the originating process.

3.2 As regards the question raised by the appellant that **Order 10 rule 1 (3) of the High Court Rules** with respect to acknowledgement of service was not complied with, the Court determined that under the said rule, the person serving the originating process is allowed to request the person being served to acknowledge receipt by signing on the original or other copy of the process or on **"some other document tendered for the purpose."**

3.3 The Court ruled that there was a valid request for acknowledgment as the document provided by the courier was signed by the representative of the appellant, N. Nosipho. The Judge categorized the signed document as "some other

document tendered for the purpose of satisfying Order 10 rule 1 of the High Court Rules."

3.4 On the application to strike out the writ and statement of claim for being an abuse of the process of the Court, the trial Court considered the appellant's submissions, that the new case was identical to the old one and that when the old case was dismissed the respondent was found to have exhibited contumacious conduct towards the Court by refusing to comply with the order for further and better particulars. The Court also considered the appellant's argument that the order for further and better particulars was peremptory.

3.5 The lower Court went on to state that it had studied the writs and statements of claim in both suits and was satisfied that the causes of action were substantially the same. Further, that both actions arose from a contract between the same parties made on 1st September, 2013 for the erection of a steel structure at East Park Mall in Lusaka.

3.6 The lower Court further held that the order for further and better particulars was not peremptory as it did not prescribe the consequences for non-compliance. Reliance was placed on the

definition of a peremptory order in **Halsbury's Laws of England, 3rd Edition, and Volume 37, paragraph 184 at P.104:**

> ***"A peremptory order is an order whereby a person is required to do something within a fixed time or suffer the consequences."***

3.7 Following the preceding views, the Court held that the commencement of the new action did not constitute an abuse of Court process as the order which was breached in the first action was not peremptory, and therefore striking out the action was unwarranted.

3.8 The lower Court accepted the submission by the respondent (then plaintiff) that according to the case of **Gaedonic Automotive Limited v. Citizens Economic Empowerment Commission**[1] a fresh action can be instituted after the dismissal of a previous one where the matter has not been heard on the merits, so that the matter can be heard on the merits.

3.9 On the question of staying proceedings on the ground that the respondent had not yet paid the appellant's costs as ordered in the ruling of 17th January, 2018 delivered in the previous action, the lower court concurred with the respondent that the appellant

itself could have applied for leave to begin taxation proceedings pursuant to **Order 62 rule 29 (3) of the RSC** which provides:

> ***"Where a party entitled to costs fails to begin proceedings for taxation within the time limit specified in paragraph (1), any other party to the proceedings which gave rise to the taxation proceedings may with the leave of the taxing officer begin taxing proceedings."***

3.10 Further that the appellant was not disentitled to costs just because it did not take steps to enforce the order for costs, especially that the respondent itself could have applied for leave to begin the taxation proceedings and taxation can be filed late with leave of court. The case of **Manharlal Hirji Patel v. Surmu Stationers Limited Shashikant Devraj Vaghela and Emmanuel Mwansa**[2] was relied on in this regard.

3.11 In conclusion, the application to strike out the action for abuse of court process was dismissed. However, further proceedings by the respondent were stayed until the defendant's costs under the dismissed action are paid.

3.12 Costs were awarded to the respondent to be taxed in default of agreement.

4.0 GROUNDS OF APPEAL

4.1 The memorandum of appeal filed herein on 23rd March, 2021 contains the following six (6) grounds of appeal:

1. ***The learned trial Judge erred both in law and fact in holding that the commencement of the action in the High Court cause number 2018/HPC/0297 does not constitute an abuse of the process of the court.***

2. ***The learned trial Judge erred both in law and fact in holding that the order for further and better particulars dated 13th October, 2015 was not a peremptory order.***

3. ***The learned trial Judge erred both in law and fact when she held that leave was granted to the respondent to issue for service outside jurisdiction the writ of summons and statement of claim.***

4. ***The learned trial Judge erred both in law and fact when she held that leave was granted to the respondent to serve the writ of summons and statement of claim by substituted service in the form of courier.***

5. ***The learned trial Judge erred in law in holding that there was nothing irregular by the respondent serving the actual and original originating process on the appellant.***
6. ***The learned trial Judge misdirected herself in law and fact in awarding the costs of the application to the respondent.***

5.0 APPELLANT'S HEADS OF ARGUMENT

5.1 The appellant's learned counsel relied on the heads of argument dated 30th June, 2021. Starting with the second ground of appeal, which deals with the issue of the lower Court's finding that the order for further and better particulars dated 13th October, 2015 was not a peremptory order, counsel submitted that having regard to the definition of a peremptory order according to **Halsbury's Laws of England** which the lower Court quoted, the holding was unsound as the consequence of not complying with the said order was that the respondent's action was to be stayed until service on the appellant of further and better particulars.

5.2 On the first ground of appeal, regarding the trial Judge's decision that the commencement of cause no. 2018/HPC/0297

does not constitute an abuse of the process of court, Counsel contended firstly; that the said order for further and better particulars was a peremptory one. Secondly, that the learned trial Judge erred in confining abuse of court process to breach of the peremptory order when on the facts of this case, the conduct of the respondent clearly amounts to an abuse of the court process. In this vein, we were referred to a number of authorities on what amounts to abuse of process of the court, including **Development Bank of Zambia and Mary Ncube (Receiver) v. Christopher Mwanza and 63 Others**[3] and **Wang Ying v. Youjun Zhuang, Wang Qinghai, Kingphar Company Limited, Bumu General Trading FZE and The Attorney General.**[4]

5.3 The cases of **Mutembo Nchito v. The Attorney General**[5] and **Isaacs v. Robertson**[6] were cited on the principle that once an order is pronounced, whether perceived to be wrong or not, a litigant is obliged to obey, and failing to do so may have unpleasant consequences. That the administration of justice and the courts would be brought into disrepute if litigants without justification were allowed to flout orders of the court.

5.4 Counsel further submitted that, in the ruling dated 17th January, 2018 the lower Court found that the respondent had exhibited contumacious conduct towards the Court. This finding remains valid as it has not been challenged. In support of his submission that the second action should be dismissed, counsel referred us to the case of **Victor Zimba v. Elias Tembo, Lusaka City Council and The Commissioner of Lands**[7] where we held that:

> ***"It is only in instances where a plaintiff's action has been dismissed for disobedience to a peremptory order providing for dismissal on failure to comply with that order that a defendant would successfully apply for dismissal of the second action commenced during the occurrence of the limitation period. This is because failure to obey peremptory orders amounts to intentional and contumelious conduct, warranting dismissal of the second action for abuse of process."***

5.5 It was contended that the DR's finding in the ruling dated 17th January, 2018, that the respondent had exhibited

contumacious conduct towards the Court, is sufficient to justify the dismissal of the second action.

5.6 According to counsel, the learned trial Judge failed to distinguish the facts of the present case from the case of **Gaedonic Automotives Limited v. Citizens Economic Empowerment Commission.**[1] Counsel stated that the Gaedonic case did not involve a plaintiff who willfully disobeyed a court order so as to amount to an abuse of the process of the court.

5.7 The submissions on the third and fourth grounds of appeal were as follows: the in terms of **Article 120 of the Constitution of Zambia** and **section 9 of the High Court Act**, the High Court is a Court of record. That if prior leave was granted to the respondent to issue for service out of jurisdiction the writ of summons and statement of claim, the order granting leave should have been on the file at the time that the appellant made a search on 4th September, 2018. However, what was on the record as at 18th September, 2018 was an unsigned order date-stamped 23rd July, 2018.

5.8 Counsel went on to state that the transcript of proceedings at pages 322 – 340 of the record of appeal does not show on what

date the court below sat to hear and determine the summons for leave to issue court process for service out of jurisdiction. The summons has no return date. The said order was not dated, and this can be interpreted in two ways: firstly, that if the order existed, it might have been granted before the writ of summons and statement of claim were issued. Secondly, that the order was granted after the issuance and service of the said process. Thus, under the *contra proferentem* rule, the respondent will have to suffer the consequences of the omission of the provision for the date in the order. Counsel relied on the cases of **Penelope Chishimba Chipasha Mambwe v. Millingtone Collins Mambwe**[8] and **Indo Zambia Bank Limited v. Muhanga**[9] to the effect that where a document is capable of two interpretations, the *contra proferentem* rule requires that the ambiguity should be resolved against the party that drew up the document.

5.9 In light of the foregoing, counsel submitted that the order ought to be construed in favour of the appellant and against the respondent, being the party that drafted it.

5.10 That an order permitting a party to serve originating process out of jurisdiction should specifically state so and should state the

jurisdiction in respect of which service of the originating process is to be effected. That the failure by the trial Judge to appreciate this resulted in a serious misdirection.

5.11 Counsel further submitted that according to **section 305 (e) and (f) of the Companies Act, 2017,** service on a company should be effected at the registered office or principal place of business of the foreign company in the country of its incorporation; or by personal service on a director or secretary of the foreign company in the country of its incorporation.

5.12 Counsel pointed out that the affidavit of service appearing at pages 96-102 of the record of appeal does not state whether the writ of summons and statement of claim were served at the registered office or principal place of business of the appellant in the country of its incorporation or a director or secretary of the foreign company in the country of its incorporation. That even assuming that leave was granted to serve the said process outside the jurisdiction by courier, it was not open to the respondent to serve contrary to the provisions of the Companies Act.

5.13 In support of the fifth ground of appeal, which attacks the lower Court's finding that it was not irregular for the respondent to

serve the originating process upon the appellant, counsel for the appellant relied on **Order 10 rule 18 of the High Court Rules**, which provides as follows:

> ***"Where a writ of summons, originating summons or originating notice of motion is issued for service out of the jurisdiction upon a person not being a citizen of Zambia, notice thereof and not the originating process itself shall be served upon such a person."***

5.14 Based on the above provision, counsel submitted that contrary to the holding by the learned trial Judge, the document that was supposed to be served on the appellant was the notice of the originating process and not the actual process.

5.15 In support of the sixth ground of appeal, concerning the issue of costs, counsel cited the cases of **Henry Nsama and 1314 Others v. Zambia Telecommunications Company Limited**[10] and **George Chishimba v. Zambia Consolidated Copper Mines**[11] to the effect that costs follow the event and a successful party ought not to be deprived of his costs unless he is guilty of improper conduct in the prosecution of the claim. He contended that costs ought to have been awarded to the appellant since

the application for stay of proceedings pending the payment of costs in the court below was allowed. Further that, the court ought to have considered the respondent's refusal to comply with the order of the court below, the neglect or refusal by the respondent to pay costs incurred by the appellant in the earlier action and dragging the appellant to Court again on the same cause of action, as factors warranting the exercise of its discretion to award costs in favour of the appellant.

6.0 RESPONDENT'S HEADS OF ARGUMENT

6.1 The respondent relied on the heads of argument dated 11th August, 2021. In opposing the first ground of appeal, counsel for the respondent cited the case of **Chick Master Limited and Another v. Investrust Bank PLC**[12] in support of the submission that abuse of court process can only occur if subsequent proceedings are commenced to make a claim that has already been settled by a court.

6.2 In light of the preceding authority, counsel argued that, in *casu*, the commencement of a new action under Cause Number 2018/HPC/0297 after cause no. 2015/HP/616 was dismissed at the interlocutory stage and therefore, cannot be said to be an abuse of the process of the Court.

6.3 On ground 2, counsel relied on **order 42 rule 2 (1) and order 42 rule 2 subrule 3** of the **RSC** on peremptory or unless orders. He also made reference to **Halsbury's Laws of England, 3rd Edition, Volume 37 paragraph 184 at page 104** where a peremptory order is defined as follows:

> ***"A peremptory order is an order whereby a person is required to do something within a fixed time, or suffer the consequences."***

6.4 He stated that in *casu,* the order in question only stated that the plaintiff should within 14 days after service of the order, serve the defendants with further and better particulars and that the action be stayed until service of the same. So the dismissal of the case was unwarranted.

6.5 We were referred to the case of **Victor Zimba v. Elias Tembo and 2 Others,**[7] also cited by the appellants. It was accordingly submitted that the appellant could only apply to dismiss a subsequent action commenced by the respondent during the period of limitation in which an action ought to be brought, if a peremptory order was not complied with by the respondent. That since the order which was breached by the respondent

herein was not a peremptory one, the respondent was entitled to bring a fresh action based on the same facts.

6.6 We were also referred to the case of **Gaedonic Automotves Limited v. Citizens Economic Empowerment Commission,**[1] in furtherance of the argument that the commencement of the fresh action did not constitute an abuse of the process of court and an order to strike out the action was therefore unwarranted.

6.7 He further argued that this case is distinguishable from the case of **Development Bank Zambia and Mary Ncube (Receiver) v. Christopher Mwanza and 63 Others**[2] relied on by the appellants in that, in that case, judgment was entered against the appellant for failure to appear and for disobedience of a peremptory order that stated that the matter would be struck out with liberty to restore within 14 days, failure to which it would stand dismissed. In this case, however, the order for further and better particulars was not a peremptory one.

6.8 Counsel further relied on **Article 118 (2) of the Constitution of Zambia** to the effect that justice should be administered without undue regard to procedural technicalities.

6.9 On this basis it was contended that the respondent should not be denied the right to be heard and its matter determined on the merits because of a procedural default. Moreover, the appellant was already awarded costs as compensation for the said default, which costs the appellant has not been interested in taxing.

6.10 The third and fourth grounds of appeal were argued together as follows: that prior leave to issue for service outside jurisdiction the writ of summons and statement of claim was obtained in accordance with **Order 10 rule 16 of the High Court Rules** and the court ruled that the said writ be served by substituted service in accordance with **Order 10 rule 17** of the same rules. That, the said order was granted on 3rd August, 2018 and there is no evidence on record to contradict this. Counsel further submitted that the arguments by the appellant, on the omission of the date on the order having two possible interpretations, and the respondent being the party that prepared the order having to suffer the consequences under the *contra proferentem* rule, were not raised in the court below and should not be considered at this stage of the proceedings.

6.11 That, in any case, the search form though date stamped does not contain a date on which the actual search was conducted. This could mean that either the search was done before the order was granted or after the order was granted. That the ambiguity in the interpretation of this document, should be held against the appellant.

6.12 As regards service of process, it was submitted that **Section 304 (1) of the Companies Act** provides that service on a foreign company can be effected by leaving a document at an address of the foreign company. Firstly, there was no evidence from the appellant that the office where the documents were served was not the registered office or principal place of business as per the requirement of the Companies Act.

6.13 Secondly, personal service as provided under the Companies Act was not achievable, and that is the reason why the respondent applied to have the process served by way of courier.

6.14 The argument against ground 5 was that the respondent served the process pursuant to **order 10 rule 15 of the High Court Rules.** Therefore, the argument by the appellant that the respondent should have served the notice of proceedings as

opposed to the actual originating process in line with **Order 10 rule 18** of the same rules is flawed.

6.15 Counsel contended that the court below was on firm ground when it held that there was nothing irregular by the respondent serving the originating process on the appellant.

6.16 In opposing ground 6, counsel cited **Order 40 rule 6 of the High Court Rules and order 62 rule 5(2) of RSC** on costs. It was submitted that the appellant was not successful in its application to set aside the proceedings and was therefore not entitled to costs. That the appellant cannot claim costs on the basis of the respondent's alleged conduct in a different case. Improper conduct can only disentitle the respondent from costs which spring from the same matter in which costs are awarded and not from a separate matter.

7.0 OUR ANALYSIS AND DECISION

7.1 We have carefully considered the record of appeal and the submissions made by the parties through their legal counsel. The six grounds of appeal will be tackled together as they are connected. The questions arising from the grounds of appeal are in our view, as follows:

1. Whether the order for further and better particulars was a peremptory one;
2. Whether the second action was an abuse of court process;
3. Whether leave to issue process for service out of jurisdiction was granted to the respondent;
4. Whether the service by the respondent of the originating process on the appellant was irregular; and
5. Whether the costs order was properly made by the lower Court.

7.2 Starting with the issue of whether the Order for further and better particulars was peremptory, the lower Court rightly referred to **Halsbury's Laws of England, 3rd Edition, Volume 37 paragraph 184 at page 104** on the definition of a peremptory order (see paragraph 3.7 hereof).

7.3 In the case of **Paul Judika v. The Attorney General and Another,**[13] a peremptory order was described as:

> ***"An order that prescribes unpleasant consequences unless a particular act is done in an order that requires a person to do an act within the meaning of RSC, order 42, rule 2.***

Rule 2 (1) requires that (subject to important exceptions mentioned in paragraph 7 below) such an order must make clear to the party against whom it is made the precise period within which the act is to be done, failure to which the unpleasant consequences are to follow and is usually called an unless order.

To comply with rule 2 (1) such orders either (a) specify the time after service of the order within which the act is to be done or (b) specify some other time for this purpose.

Accordingly, an unless order should be worded either: (a) unless within fourteen days of service of this order (the defendant serves his list of documents the defence be struck out and judgment entered for the plaintiff with costs (or as may be).”

7.4 In our view, the above definitions are very clear. The order for further and better particulars dated 13th October, 2015 appearing at page 213 of the record only stated that further proceedings in the action be stayed until service of further and

better particulars. It did not set out what would happen in case of a breach of the same order. Therefore, the lower Court was correct to hold that the order for further and better particulars was not peremptory.

7.5 Considering the question of whether the second action was an abuse of the process of court, we note that the fresh action is similar to the previous one in that the claims are based on the same contract for the construction of steel structures at East Park Mall, Lusaka, between the same parties.

7.6 The case of **Hytec Information Systems Limited v. Council of City of Coventry**[14] prescribes a wider test for failure to comply with one or a number of orders through negligence, incompetence or sheer indolence. It was held that this could qualify for the exercise of discretion to dismiss an action. That it all depends on the individual circumstances and the exercise and degree of fault found by the court after hearing representations to the contrary by the party whose pleading is sought to be struck out.

7.7 In light of the above precedent, though it is merely of persuasive value, we take the view that the appellant's counsel rightly submitted that it was necessary for the Judge to consider all the

relevant circumstances of the case, including the unchallenged order by the DR in which the respondent was found to have exhibited contumacious conduct towards the court.

7.8 The respondent in its affidavit in opposition to summons to strike out the second action, filed on 6th November, 2018 at page 208 of the record at paragraphs 6 and 7, blamed the default on the company's previous advocates M.K. Achiume Associates. This excuse is untenable.

7.9 Though we have found blameworthy conduct on the part of the respondent, we are constrained from preventing the respondent to proceed with the second action. This is because the respondent had the right to institute a fresh action as the first action was not heard on its merits; see the cases of **Gaedonic Automotive Limited v. Citizens Economic Empowerment Commission**[1] and **Chick Master Limited and Another v. Investrust Bank PLC**[12] *supra*. Further, it is in the interests of justice that triable issues should be allowed to proceed to trial. We are fortified, in so holding, by the Supreme Court's guidance in **Stanley Mwambazi v. Morester Farms Limited**[15] that:

"It is the practice in dealing with bona fide interlocutory applications for courts to allow triable

issues to come to trial despite the default of the parties; where a party is in default he may be ordered to pay costs, but it is not in the interests of justice to deny him the right to have his case heard."

7.10 We therefore hold that the second action cannot be said to be an abuse of court process notwithstanding the default of the respondent in the first action. Since the Court order that was breached in the first action was not peremptory and limitation of action did not arise, we accept the respondent's counsel's submission that the respondent was entitled to commence a fresh action based on the same facts. Our decision in the case of **Victor Zimba v. Elias Tembo and Others**[7] *supra,* fortifies this holding.

7.11 As regards the 5th question on costs, in view of the position we have taken, it follows that the award of costs to the respondent is reversed as the lower Court did not exercise its discretion judiciously in light of the unpaid costs of the previous action. We instead award costs to the appellant.

7.12 We therefore order the parties to negotiate the costs payable under the previous action (cause number 2015 /HP/ 616)

within 7 days from the date hereof. If they fail to agree, the costs shall be taxed. Consequently, the stay of proceedings is hereby set aside.

7.13 As regards, the question of whether leave to issue process for service out of jurisdiction was granted, **Order 10 rule 16 of the High Court Rules** requires that leave of court to issue for service out of jurisdiction a writ of summons and statement of claim, be obtained before the same can be served out of the jurisdiction. Further, in the case of **Leopold Walford (Zambia) Limited v. Unifreight,**[16] the Supreme Court guided that there is need for leave of court before a writ of summons can be issued for service outside the jurisdiction.

7.14 In the present case, we take note that the respondent applied for leave to serve the writ of summons and statement of claim out of jurisdiction on 23rd July, 2018. This application was granted by the lower Court as evidenced by the Order for Service out of Jurisdiction appearing at page 80 of the Record of Appeal.

7.15 The same order further granted the respondent leave to serve the originating process by way of substituted service.

7.16 We take it that the Order for leave to serve process out of jurisdiction was signed on 23rd July, 2018 according to the date-

stamp as no other date appears therein and it appears to be an ex-parte order.

7.17 The writ and statement of claim were delivered to the appellant's premises in Pietermaritzburg on 13th August, 2018 and signed for by N. Nosipho, the Receptionist of the appellant.

7.18 We therefore find that the respondent compiled with the requirement to obtain leave under **Order 10 rule 16 of the High Court Rules** and served process pursuant to **Order 10 Rule 18** of the same rules. We uphold the lower Court's findings and holdings that the service of process was proper under the circumstances.

7.19 Coming to the question of whether it was irregular for the respondent to serve the originating process on the appellant instead of a notice of commencement of the proceedings, we agree with counsel for the appellant that, the provisions of **Order 10 rule 18 of the High Court Rules** require that where a writ of summons and statement of claim are being served out of jurisdiction, the notice thereof and not the originating process must be served.

7.20 In *casu,* we note that the appellant was served with the originating process instead of a notice of commencement of

proceedings. The lower court opined that there was nothing irregular about that since the originating process was served on the appellant by the respondent with leave of Court. That the provisions of **Order 10 Rule 18 of the High Court Rules,** envisage a situation where leave has not yet been granted to serve originating process out of jurisdiction.

7.21 In our view, the service of the originating process instead of the notice thereof was contrary to **Order 10 rule 18 of the High Court Rules**. However, we agree with the lower Court that the appellant was not prejudiced in any way because the whole purpose of **Order 10 rule 18 of the High Court Rules** is for the intended defendant who resides out of this jurisdiction to be notified about the court proceedings. We are fortified by the case of **Access Bank (Zambia) Limited v. Group Five/Zcon Business Park Joint Venture (suing as a firm)** [17] where the Supreme Court guided that matters should as much as possible be determined on their merits rather than be disposed of on technical or procedural points.

7.22 Under the circumstances, it is in the interest of justice that this matter be allowed to be heard and determined on its own merits.

8.0 CROSS APPEAL

8.1 The respondent has raised two grounds of cross appeal as follows:

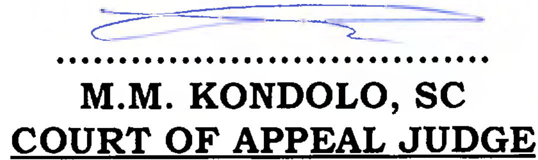
1. ***The lower Court misdirected itself in law and fact when it stayed proceedings until costs of the appellant under cause number 2015/HP/616 are paid, in circumstances where the appellant no longer had a clear right to the said costs, and***
2. ***The lower Court erred in law and in fact when it stayed proceedings commenced by the respondent on conditions dependent on the appellant without compelling the appellant to take positive steps within a defined time frame.***

9.0 OUR VIEWS ON CROSS APPEAL

9.1 Since we have upheld the lower Court's ruling to condemn the respondent in costs for the first action, there is no need to summarize the parties' submissions on the cross appeal. The cross appeal succeeds as a stay of proceedings would merely delay the proceedings in the lower Court. We have already set aside the stay of proceeding (see paragraph 7.12). Therefore, this is more of an apparent win than a real one.

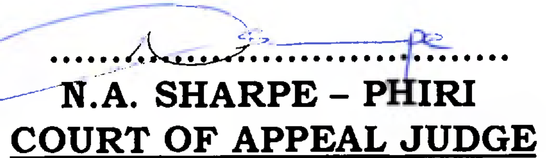
10.0 CONCLUSION

10.1 In summary, the second action 2018/HPC/0297 did not amount to an abuse of the court process and the appeal succeeds only on the sixth ground of appeal. Costs in the Court below are awarded to the appellant. Accordingly, each party shall bear its own costs of the appeal and cross appeal.



M.M. KONDOLO, SC
COURT OF APPEAL JUDGE

C.K. MAKUNGU
COURT OF APPEAL JUDGE



N.A. SHARPE – PHIRI
COURT OF APPEAL JUDGE