

IN THE COURT OF APPEAL OF ZAMBIA

Appeal No. 40 of 2023

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

EMMANUEL MWAMBA (Suing in his capacity as Director
and Shareholder of Rephidim Mining Supplies and Technical
Services Limited)

APPELLANT

AND

COSMAS TEMBO

1st RESPONDENT

FIDELIS CHANDA

2nd RESPONDENT

REPHIDIM MINING SUPPLIES AND

3rd RESPONDENT

TECHNICAL SERVICES LIMITED



CORAM: SIAVWAPA JP, CHISHIMBA & PATEL, JJA

On 22nd January & 15th March 2024

For the Appellants: Mr. A Shonga jnr. SC & Ms. S.C. Namusamba
Messrs. Shamwana & Company

For the Respondent: Mrs. N. Chila Matowe
Messrs. Muya & Company

JUDGMENT

Patel, JA, delivered the Judgment of the Court.

Cases Referred to:

1. Juldan Motors Limited and 2 Others v First National Bank and Another- SCZ Appeal No.51 of 2018;
2. Development Bank of Zambia (DBZ) and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceuticals Limited (1995/97) ZR, 187;
3. ZCCM Investments Holdings Plc v First Quantum Minerals, FQM Finance Limited, Philip K. R. Pascall, Arthur Mathias Pascall, Clive Newall, Martin R. Rowley and Kansanshi Mining Plc.- CAZ Appeal No. 92 of 2020
4. Foss v Harbottle (1843) 67 ER 189;
5. John Mukoma Kasanga and 2 others v Development Bank of Zambia, Siakamwi Chikuba and 2 others -CAZ Appeals No. 59 & 94 of 2019;
6. Hotelier Limited v Ody's Works Limited and Finsbury Investments Limited (2012) 1 ZR, 17.

Legislation referred to:

1. The Companies Act, No. 10 of 2017.
2. The Rules of the Supreme Court of England 1965, (White Book) (1999) Edition.
3. The Limitations Act of England 1939.
4. The Legal Practitioners Practice Rules, Statutory Instrument No.51 of 2002.
5. The Legal Practitioners Act, Chapter 30 of the Laws of Zambia

1.0 INTRODUCTION

1.1 This is an appeal against parts of the Ruling of **Mrs Justice K. E. Mwenda-Zimba**, delivered on 15th April 2021, emanating from the Commercial Division of the High Court at Lusaka, relating to two (2) motions, to raise preliminary issues, made by each party in the lower Court. The now Appellant was the Applicant, and the three Respondents, were Respondents in the Court below.

2.0 BACKGROUND

2.1 For the purposes of this section, we will address the Parties as they were in the Court below.

2.2 On 9th November 2020, the Applicant commenced an action by way of an Ex Parte Originating Summons, for leave to commence an action in the name of the company known as Rephidim Mining Supplies and Technical Services Limited, the 3rd Respondent, against the 1st and 2nd Respondents. The Applicant also caused to be filed Skeleton Arguments and an Affidavit in support of the *ex parte* summons sworn by one Emmanuel Mwamba, in his capacity as a shareholder and director of the 3rd Respondent company. (hereinafter referred to as *the Company*).

2.3 The lower court endorsed the Originating Process with a return date to hear the Parties *inter partes*.

2.4 The Applicant deposed that he, and one Ernest John Van Leeve, were the only two shareholders in the Company as at January 2011. He placed

- reliance on an exhibit marked '**EM1**' being a copy of the shareholding reflected at the Patents and Companies Registration Agency (PACRA).
- 2.5 It was the Applicant's contention that he had grievances in the manner the affairs of the company were being conducted and after the demise of the other shareholder in the 3rd Respondent Company.
- 2.6 The Applicant catalogued his complaints in his affidavit and deposed that by or about June 2011, the 1st and 2nd Respondents, who were directors in the company, had allotted shares to themselves. He placed reliance on several exhibits, collectively marked "**EM 2 to EM13**" in a bid to prove that he did not receive any satisfactory response to his queries.
- 2.7 The Applicant has further deposed that on or about 16th October 2020, his Advocates, Messrs Shamwana & Co, sent a letter of demand to the 1st and 2nd Respondent setting out the Applicant's demand. A copy of which letter was exhibited and marked '**EM 10 and 11**'.
- 2.8 The Applicant prayed in the circumstances, for an order of leave, in the name of the company, to pursue his claims against the 1st and 2nd Respondents.
- 2.9 On 1st December 2020, Messrs Muya and Company, filed its Notice of Appointment as Advocates for the company, which it referred to as the 3rd Defendant and also caused to be filed a Notice to be heard pursuant to **section 331 (6) of the Companies Act**¹.
- 2.10 On 14th December 2020, both the 1st and 2nd Respondent, though referring to themselves as 1st and 2nd Defendant, also filed a notice to be heard on what they termed, as the Plaintiff's application.

- 2.11 On 17th December 2020, Messrs Muya & Company filed their notice of appointment for the 1st and 2nd Respondents in the matter and caused to be filed an Affidavit in Opposition to the ex-parte Originating Summons which is deposed by the 2nd Respondent, **Fidelis Chanda**, in his capacity as shareholder and director of the Respondent Company. Counsel also filed its list of authorities and skeleton arguments.
- 2.12 He deposed to facts challenging the claims made by the Applicant, and referred to an action, pending at the High Court at Ndola, under **Cause Number 2020/HN/100** touching on the shares in the company and which were owned by the late Ernest John Van Leeve. He referred to exhibits marked '**FC2**' being a copy of the ex parte Order of Interim Injunction restraining the administrator of the estate of the late Ernest John Van Leeve and '**FC7**' being copies of the originating process and supporting affidavits in the said cause.
- 2.13 It was the deponent's contention that the Applicant was being used in these proceedings, to further the claims of the administrator, **Jean Bwale Sinyokosa**, having been restrained by the order of injunction.
- 2.14 It was his contention that the Applicant had not been involved in the company, only owned 1 share and that nothing had been shown to prove that the 3rd Respondent, the company would suffer any injustice.
- 2.15 On 20th January 2021, the Applicant filed its notice of intention to raise preliminary issues pursuant to **Order 33 rule 3 of the Rules of the Supreme Court**² on two points of law, namely, whether the Respondents' Advocates can act for the Respondents and whether the 2nd Respondent has *locus standi* to swear the affidavit in this action.

- 2.16 This application was supported by Skeleton Arguments of even date. (Hereinafter referred to as the Applicant's preliminary application.)
- 2.17 Not surprisingly, and in what was to become a tit for tat exchange, between Counsel, the Applicant's preliminary application was met with the Respondents' Notice of intention dated 28th January 2021, to raise preliminary issue pursuant to **Order 33 rule 3 of the Rules of the Supreme Court**² raising four (4) preliminary issues for the determination of the Court. This was supported by an Affidavit sworn by the 2nd Respondent, with exhibits showing the relationship of the Applicant's Advocates in other instructions, it was pursuing against the 3rd Respondent company, on behalf of one **Jean Bwale Sinyokosa**, in her capacity as administrator of the estate and who had allotted the shares to herself after the death of Ernest John Van Leeve. (Hereinafter referred to as the Respondents' preliminary application.)
- 2.18 On 23rd February 2021, the Applicant filed an affidavit and skeleton arguments in opposition to the Respondents application.
- 2.19 The affidavit was sworn by one **Suwilanji Namusamba**, an advocate practicing in the Firm of Shamwana and Company. She confirmed that the Applicant's advocates had acted for Jean Bwale Sinyokosa, in a matter where the 3rd Respondent had been sued under cause number 2018/HK/514. That said action was discontinued on 22nd May 2020.
- 2.20 It was argued that the procedure involved in a derivative action is two-fold. That firstly, an interested party applies for leave of Court and subsequently, once leave is granted, the interested party may proceed with the actual derivative action, both in the name of and on behalf of the company. It was

deposed that there was no mention that the Appellant's advocates also purport to act on behalf of the 3rd Respondent Company and that no conflict of interest would arise if Messrs Shamwana and Company were to act for the 3rd Respondent, although the Firm had not been retained as such.

- 2.21 As it relates to the issue of whether the Applicant has *locus standi*, it was deposed that it was necessary that the Applicant, being the only other shareholder at the time, should have been involved. It was further deposed that the present case does not amount to multiplicity, as the shares in issue in the Applicant's case, are substantially different from the shares in contention under cause number 2019/HN/100 (*the Ndola Action*). It was deposed that the late Ernest John Van Leeve, held 1,999 shares in 2011, when there were only two shareholders.
- 2.22 On 11th March 2021, the 1st Respondent swore an affidavit in reply, to the Applicant's affidavit in opposition to the Respondent's application. He deposed that in paragraph 10 of the affidavit in opposition by the Applicant, the deponent, who is also counsel for the Applicant, had given a different position to the facts averred by the Applicant in his affidavit in support of the Originating Summons. He stated that it is not true that the late Ernest John Van Leeve's shareholding remained at 1,999 shares at the time of allotment of shares to the 1st and 2nd Respondents. He referred to his exhibit marked "**EM3**", the shareholding of the late Ernest John Van Leeve, had increased to 2,749 shares, following the restructure of the shareholding in the 3rd Respondent Company.

- 2.23 It was further deposed that the Applicant had not been involved in the affairs and administration of the 3rd Respondent since its incorporation and that the Applicant was merely placed to satisfy the minimum requirement of 2 shareholders at incorporation.
- 2.24 It was deposed that it was only after the passing of the late Ernest John Van Leeve, that the Applicant was seeking to take advantage of his absence. It was further deposed that the Affidavit in opposition to the Respondent's motion to raise preliminary issues, consisted of contentious facts in respect of shares in issue and paragraph 10 was cited as an example.
- 2.25 On 22nd March 2021, the Applicant filed skeleton arguments in reply, submitting that what has been raised against the Respondent's advocates is a professional issue, and that if the Court agrees with the position that the Respondents' advocates cannot represent the Respondents, then such a determination has a bearing on the papers filed by the said advocates as they ought not to have brought themselves before this Court in the manner they have done. It was also their submission that at the stage of leave, it is clear that the inquiry of the Court is directed towards the company, adding that only the company may appear and be heard.

3. **DECISION OF THE COURT BELOW**

- 3.1 The learned trial Judge considered the composite applications and heard the arguments for and against the Appellant's application. The learned judge considered the two motions, the parties' affidavits, oral and written arguments and the authorities cited.

- 3.2 The learned judge started by considering the Applicant's preliminary application on a point of law on disqualification of the Respondent's advocates and then moved to the Respondent's preliminary application on a point of law, on the disqualification of the Applicant's advocates before considering the rest of the points of law raised by the parties.
- 3.3 She took the view that firstly, a clear conflict is presented and stated that the advocates are likely to breach confidences or use the information received for the benefit of one client to the disadvantage of the other(s). She therefore agreed that the Respondent's advocates are precluded from acting for any of the Respondents.
- 3.4 The learned judge noted that the Applicants advocates are in a no better situation. She analysed the issue that it was not in contention that the Applicant's advocates had acted for one Jean Bwale Sinyokosa, in a matter where she had sued the 3rd Respondent Company under **Cause No. 2018/HK/514**. The lower court noted that this matter was discontinued on 22nd May 2020. However, the learned judge emphasized that the **Legal Practitioners Act** ⁶ does not forbid counsel from acting only when a matter is active. It forbids acting where there appears some conflict or breach of confidence or significant risk of it between two clients or the giving of undue advantage to the new client may occur.
- 3.5 The learned judge took the view that counsel for the Appellant is equally precluded from acting for the Applicant and placed reliance on the case of **Juldan Motors v First National Bank** ¹. The learned judge found it difficult to appreciate how, after acting against the 3rd Respondent, counsel for the Applicant seeks leave in the interest of the 3rd Respondent.

- 3.6 The learned judge found that both sets of counsel in this matter, were conflicted and ordered that their firms are disqualified and should remove themselves from the record as acting for their respective clients.
- 3.7 The learned judge proceeded to determine the remaining issues on merit. The lower court considered the Appellant's contention that the 2nd Respondent ought not to have sworn an affidavit on behalf of the Respondents. The court took note that the 2nd Respondent was cited as a party in the application and added that there is no provision of the law that states that only the company can be heard on an application for leave.
- 3.8 The court referred to **Order 15 rule 12A the Rules of Supreme Court** ², which provides that all parties cited in an action, are entitled to be heard. The learned judge did not see how after being cited as a party by the Applicant, the 2nd Respondent should not be heard on the application. The learned judge explained that in any case, the 2nd Respondent is a director in the 3rd Respondent Company, therefore entitled to depose to the affidavit on behalf of the company.
- 3.9 The lower court considered the affidavit in opposition to the originating summons which the Applicant sought to expunge, and did not agree with the Applicant, that the issues relating to **cause number 2020/HN/100** are extraneous. The lower court was of the considered view that *paragraphs 7, 8 and 14* do not contain extraneous matters.
- 3.10 The lower court ordered *paragraphs 4, 13, and 15 to 18* be expunged from the record, as they contained legal arguments, made conclusions and were not factual.

- 3.11 The lower court moved to the next issue, being the Respondent's contention that this matter amounts to multiplicity of actions and an abuse of the court process as there is an active matter in Ndola under **Cause No. 2020/HN/100**. The learned judge took judicial notice of the proceedings in Ndola. She emphasized the need to avoid multiplicity of actions and relied on the case of **Development Bank of Zambia (DBZ) and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceuticals Limited**².
- 3.12 The learned judge moved to the next issue being the argument that the present action is statute barred. The learned judge noted that it was not in dispute that the act of the transfer of shares, sought to be impugned, was alleged to have been made in 2009 and registered at PACRA in 2011. The court also noted that the Appellant has stated that the fact of the share transfer was only discovered in March 2019.
- 3.13 The lower court considered the Appellant's argument that there being concealment of the alleged fraud, time only began to run when it was discovered in 2019.
- 3.14 The learned judge noted that the proviso under **Section 26 of the Limitations Act**³ requires reliance on **section 26** be made where the circumstances are such that even with reasonable diligence, an applicant would not have discovered the fraud or concealment. The learned judge took the view that the applicant did not show that even if he employed reasonable diligence, he could not have discovered the fraud.

3.15 The lower court took the view that from the evidence on record, the applicant failed to show that even if he applied reasonable diligence, he could not have discovered the alleged concealment by fraud earlier than 2019. It was the court's view that the period between the registration and discovery of 9 years is too long an interval, such that with reasonable diligence the Applicant, being a shareholder, would have discovered it. The lower court found the Applicants claim to be statute barred and ultimately dismissed the Applicant's application for leave.

4. THE APPEAL

4.1 Being dissatisfied with the Ruling of the lower Court, the Appellant filed a Notice of Appeal and Memorandum of Appeal on 29th April 2021 advancing three (3) grounds of appeal:

1. *The Court erred in law and fact when it found that the Applicant's Advocates had a conflict of interest in acting for the Applicant and ordered that the said Advocates remove themselves from the record as acting for the Applicant;*
2. *The Court erred in law and fact in finding that the 1st and 2nd Respondents had a right to be heard at the hearing of the application for leave to commence a derivative action;*
3. *The Court erred in law and fact when it held that the Applicant's claim was statute barred.*

4.2 On 30th April 2021, the Applicant filed an application for an order to stay execution of the Ruling of 15th April 2021 (the subject of this appeal), as it ordered Messrs. Shamwana and Company to remove themselves from the

record as acting for the Applicant, pending the hearing and determination of the Applicant's Appeal before this court.

5. **APPELLANT'S ARGUMENTS IN SUPPORT OF THE APPEAL**

5.1 We have duly considered and appreciated the Appellant's Heads of Argument filed on 13th February 2023 which we will not recast here, save for emphasis as necessary.

6. **RESPONDENT'S HEAD OF ARGUMENTS**

6.1 We have equally considered the Respondent's '*List of Authorities and Heads of Arguments in Opposition to the Appeal*' filed on 17th March 2023, and which should simply have been entitled, *Respondent's Heads of Argument*, which will also not be recast, save for emphasis as necessary.

Needless to say, we are grateful for the written and *viva voce* submissions of Counsel.

7. **THE HEARING**

7.1 At the hearing, SC Shonga placed reliance on the Record of Appeal and the Heads of Argument filed on 13th February 2023. To augment their submissions in ground 1, SC submitted on the issue of conflict with specific reference to **pages 46/47** of the Record of Appeal. He maintained the distinction in the applicable procedure as provided by **Order 15²** Rules of The Supreme Court and **section 331¹** of the Companies Act. He further canvassed the difference in the issue of conflict in *casu* as compared to the cases cited by the lower Court. State Counsel also submitted that they had

no instructions to act for the 3rd Respondent, and that they only held instructions for the Applicant in the lower Court.

7.2 In opposing the appeal, Counsel placed reliance on their Heads of Argument to support the finding of the lower Court that Messrs Shamwana & Co, in their application for leave, was already pursuing the interest of the 3rd Respondent.

8.0 **DECISION OF THIS COURT**

8.1 We have carefully considered the grounds of appeal reproduced in *paragraph 4* above, the impugned Ruling, and the arguments and submissions of the Parties. For ease of reference, we shall adopt the approach used by the Appellant and refer to the Appellant (who was the Applicant in the court below) as the Appellant, when referring to the proceedings in the instant case and in the court below.

8.2 In addressing our minds to *ground 1*, we note the Appellant's submission that the learned trial judge erred in assuming that the Firm of Messrs. Shamwana and Company were already pursuing the interests of the 3rd Respondent company. It is the Appellant's argument, that in ruling this way, the trial Judge held that the process of commencing a derivative action is one continuous process. The process is reflected in the Zambian law in **section 331 (2) of the Companies Act No. 10 of 2017**¹ (hereinafter called "the Companies Act"). That provision requires that before the commencement of a derivative action, leave to commence the said action must be sought from the Court first.

- 8.3 It is the Appellant's submission, that a reading of the above-mentioned authority is clear that the process of a derivative action is a two-stage approach, with the first stage being that the "director or entitled person," seeks leave of court to bring proceedings. It is their submission that the second stage is that the "director or entitled person" brings proceedings before the court in the name and on behalf of the company, only after leave is granted.
- 8.4 It is the Appellant's argument that during the first stage, leave is granted not to the company but to the "director or entitled person" and it is his interest to acquire such leave that is served. It was their argument that the interest of the company is served in the second stage, where, if leave is granted, the ensuing proceedings would be brought in the name of, and on behalf of the company. It was their submission that the learned trial judge, erred in her Ruling, when she formed the view that Messrs. Shamwana and Company were, during the application for leave to commence a derivative action, serving the interests of the company.
- 8.5 The 1st and 2nd Respondents have argued that the lower court was on firm ground in its finding that Messrs Shamwana and Company was conflicted and placed reliance on **Section 331 of the Companies Act** ¹.
- 8.6 It is their submission that what the Applicant's advocates were pursuing by making an application for leave to commence a derivative action, is the 3rd Respondent's interest as a company and not that of the Applicant as a shareholder. It is their argument that the information given to the advocates which they filed into court pertain to the 3rd Respondent for the court below to determine as to whether or not it is in the interest of the

company to commence derivative proceedings. It was submitted that in this cause, Messrs Shamwana and Company were purporting to champion the interest of the 3rd Respondent, whereas, in Cause No. **2018/HK/514**, they acted against the said 3rd Respondent and hold the view that the Judge below was on firm ground when she held that Messrs Shamwana and Company were conflicted and for their removal from the court's record as Counsel for the Applicant.

8.7 Having considered the submissions above, we note the Applicant's argument which is hinged on the two-stage procedure outlined in **Section 331 (2) of the Companies Act¹** on derivative actions. It is their argument that the learned judge was wrong to have viewed that Messrs. Shamwana and Company, advocates for the appellant, during the application for leave to commence an action, was serving the interest of the company. Their assertion is that, in the first stage, the leave stage, essentially serves the Appellant and not the company.

8.8 In our considered opinion, the question that the appeal seeks to interrogate turns on the understanding of the following issues:

what is a derivative claim?

Further, what is the procedure in bringing that claim?

It is trite, that in our Jurisdiction and based on **section 331 of the Companies Act¹**, for the Appellant to bring a derivative action, it was required to apply for leave to proceed with the derivative action. It was incumbent on the Appellant to show to the court below that it is possessed

of sufficient evidence to warrant and consequently proceed with the derivative claim.

- 8.9 The proper claimant principle was laid down in the celebrated case of **Foss v Harbottle**³. The rule being that, if a wrong is done to the Company, the proper person to sue the wrongdoer is the company itself. It is now the position that a shareholder may bring a claim by way of derivative action seeking relief on behalf of a company for a wrong done to a company. Essentially, a derivative claim is one where the right of action is derived from the company and is exercised on behalf of the company. It therefore falls within the exception to the proper claimant principle.
- 8.10 As we interrogate the issues in this appeal, we place reliance on our earlier Judgment, rendered in the case of **ZCCM Investments Holdings Plc v First Quantum Minerals, FQM Finance Limited, Philip K. R. Pascall, Arthur Mathias Pascall, Clive Newall, Martin R. Rowley and Kansanshi Mining Plc**⁴ which Judgment, we believe is instructive, and in which we had occasion to closely examine the requirements and procedure in bringing a derivative action. In that case, **ZCCM IH**, gave notice (*albeit under Arbitral proceedings and adopting the procedure that applied in the English Courts*), of its intention to bring derivative claims on behalf of KMP (Kansanshi Mining Plc) against KHL (Kansanshi Holding Limited). The Arbitral Tribunal proceeded to consider whether there was a *prima facie* case that KMP was entitled to the relief being claimed and whether the matter falls within one of the exceptions in **Foss v Harbottle**³.

We noted that the Tribunal concluded that ZCCM IH had failed to make out a *prima facie* case whether on falsity or as to loss which was fatal to the permission application.

8.11 We set this out as a background, alive to the fact that **The Companies Act**¹ has set out the procedure to be invoked, and also recognizing the two-staged approach as canvassed by State Counsel Shonga.

We have taken the liberty of quoting **section 331**¹ by way of emphasis:

331. (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) *Subject to subsection (4), 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; or*

(b) *intervene in proceedings to which the company or any related company is a party for the purpose of continuing, defending, or discontinuing the proceedings on behalf of the company or subsidiary, as the case may be.*

(3) *Despite the generality of subsection (2), the Court shall, in determining whether to grant leave in accordance with that subsection, have regard to the—*

(a) *likelihood of the proceedings succeeding;*

(b) *costs of the proceedings in relation to the relief likely to be obtained;*

(c) *action already taken, if any, by the company or its subsidiary to obtain relief; or*

(d) *interests of the company or its subsidiary in the proceedings being commenced, continued, defended, or discontinued, as the case may be.*

- (4) *The Court may grant leave, in accordance with subsection (2), if satisfied that—*
- (a) *the company or its subsidiary does not intend to bring, diligently continue or defend, or discontinue the proceedings, as the case may be; or*
 - (b) *it is in the interests of the company or subsidiary that the conduct of the proceedings should not be left to the directors or to the determination of the members as a whole.*
- (5) *A notice of the application, made in accordance with subsection (2), shall be served on the company or subsidiary.*
- (6) *A company or its subsidiary—*
- (a) *may appear and be heard; and*
 - (b) *shall inform the Court, whether or not it intends to bring, continue, defend, or discontinue the proceedings, as the case may be.*

8.12 In our earlier Judgment referred to in the **ZCCM IH⁴** case, we stated as follows:

*“The need to obtain leave is thus added to the standing requirements of **Foss v Harbottle case** and is a way of controlling unnecessary costs being incurred in the ensuing proceedings and also reducing the possibilities for “gold digging” claims against the company. This gives the court control over derivative actions.*

The court at leave stage, will consider whether the shareholder’s application for permission and the evidence filed in support show that the shareholder has a prima facie case. The shareholder cannot take any steps in the action until the court determines this question. If the court determines that no prima facie case exists, then it will dismiss the shareholder’s application and the action cannot proceed.”

8.13 The Learned Authors of **Minority Shareholders - Law, Practice and Procedure**² in respect to derivative claims state that:

"In such circumstances, a shareholder was able at common law to bring a claim on behalf of and for the benefit of the company in respect of which a wrong had been done to the company. The claim was called a derivative claim as the shareholder's right to claim is derived from a right of the company to claim in respect of a wrong done to it ... the company was joined to the proceedings as nominal defendant so that relief could be ordered in its favour."

8.14 It has been canvassed that a number of exceptions to the rule in **Foss v Harbottle**³ have evolved to include where what has been done amounts to equitable fraud and the wrong doers are themselves in control of the company. In *casu*, we note, and the Appellant has catalogued in his supporting affidavit, a series of transgressions, which he alleges were oppressive to him as a minority shareholder, being the basis on which he seeks leave to bring a derivative action. However, as noted previously, the reliefs claimed are missing from the Originating Process. **Page 66** of the Record of Appeal shows the front face of the Originating Summons. There are no reliefs outlined.

8.15 We have also noted the Appellant's argument, that as an entitled person, the Appellant's right to commence a derivative action is unassailable, and that the lower court erred in allowing the 1st and 2nd Respondents to challenge the application, being an application for leave. It was also canvassed that **section 331 (6) of the Companies Act**¹ is instructive that the company, and only the company, may appear and be heard and that only

the company is entitled to be given notice of application for leave, by virtue of **section 331 (5) of the Companies Act¹**.

- 8.16 It was further argued that the 1st and 2nd Respondents, who are neither the company nor a subsidiary of it, were allowed to be heard by the learned trial judge in error as this was not the opportunity for the 1st & 2nd Respondents to put forward a defence to matters to be brought in the main derivative action, but to represent and put forward the position of the company.
- 8.17 It is therefore trite and the correct position, that the court may, on the application of a director, or an entitled person, only sue on behalf of the Company under a derivative action as provided under **section 331 of the Companies Act¹**. Derivative actions are an exception to the general rule as stated in **Foss v Harbottle³**, that the proper Plaintiff in an action for a wrong alleged to have been committed against a company is the company itself. We are suitably guided by another judgment, rendered in the case of **John Mukoma Kasanga and 2 others v Development Bank of Zambia, Siakamwi Chikuba and 2 others⁵** in which case, we had occasion to reflect on the nature of derivative actions and the need for leave, in line with the decision in **Foss v Harbottle³** case.
- 8.18 For what we are about to state hereunder, we are of the considered view that Counsel, by raising preliminary issues in the manner he did, caused the lower Court to delve into issues, which are, and should have been the preserve of the main action, ***if leave had been granted***. Suffice it to say, that the lower Court, found itself embroiled in a web of mud-slinging between Counsel, as it grappled to deal with contentious issues, on

affidavit evidence and which issues are best suited to be tried in the derivative action.

8.19 Based on the authorities above, we are of the considered opinion that the lower court in allowing the 1st & 2nd Respondents to file their affidavit in opposition, and for placing reliance on contested affidavit evidence, fell into grave error, in attempting, at this early stage of seeking leave, to settle issues of conflict, and by its finding on the action being statute barred. As we have noted above, in the **ZCCM IH⁴** case, it was incumbent upon the lower Court to simply see if the Appellant had indeed made out a case to warrant the grant of leave, whether on falsity or as to loss, to bring a derivative claim. Regrettably, we are unable to do so, as the Originating process before us, appears incomplete.

8.20 By this finding above, we have, we believe, dealt with the substantive ground of appeal, leaving us to interrogate the issue of conflict, which took center-stage in the lower Court. We would be failing in our duty as an Appellate Court, if we did not speak about the glaring issue of professional conflict, that appears to have plagued this matter and is deep rooted.

8.21 We refer Counsel to the provisions of **Rule 3 (2) (c) and (e), Rules 33 and 34 of the Legal Practitioners' Practice Rules, 2002⁴**. These Rules provide as follows: **Rule 3⁴**

"(2) A practitioner shall not do anything in the course of practice or permit another person to do anything on the practitioner's behalf, which compromises or impairs or is likely to compromise or impair any of the following:

(c) the practitioner's duty to act in the best interest of the client;

(e) the practitioner's professional standard of work..."

Rule 33 (1) (f) and (g) ⁴ which provides:

"(1) A practitioner shall not accept any brief if to do so would cause the practitioner to be professionally embarrassed under the following circumstances:

(f) there is or appears to be some conflict or significant risk of some conflict either between the interest of the practitioner, or of any partner or other associate of the practitioner and some other person or between the interest of any one or more of their clients; or

(g) the matter is one in which there is a risk of a breach of confidences entrusted to the practitioner, or to any partner or other associate, by another client or where the knowledge which the practitioner possesses of the affairs of another client would give an undue advantage to the new client.

8.22 We also refer to **Rule 32(4) (e)** of the said **Legal Practitioners' Practice Rules, 2002**⁴ which provides that:

(4) A practitioner shall not-

(e) disclose, unless, lawfully ordered to do so by the Court or as required by statute what has been communicated to the practitioner in the capacity as practitioner even if the practitioner has ceased to be the client's practitioner, and this duty extends to the partners associates or assistants of a practitioner.

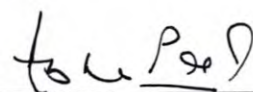
- 8.23 We did hear State Counsel Shonga, confirm at the hearing, that the Firm of Messrs Shamwana & Co. were not retained for the 3rd Respondent and had no intention of acting for the Company. We remind Counsel, that the legal profession is a noble one, and we urge them to conduct themselves in a manner befitting of belonging to the noble profession. Counsels' respective attention has already been drawn to the cases of **Juldan Motors Limited and 2 others v First National Bank Zambia Limited**¹ and the case of **Hotelier Limited v Ody's Works Limited and Finsbury Investments Limited**⁶ in as far as these cases speak to conflict.
- 8.24 The net effect of our determination is that we find favour in the appeal. The Ruling of the lower Court is set aside as it was a misdirection to proceed in this manner. We remit the matter back for re-hearing of the application for leave, before a different Judge of the Commercial division, to make its finding on whether the Appellant has discharged the burden incumbent upon him, on a proper consideration of the law and principles as required.
- 8.25 Costs here shall abide by the outcome of the costs in the lower Court.



M. J. SIAVWAPA
JUDGE PRESIDENT



F.M. CHISHIMBA
COURT OF APPEAL JUDGE



A.N. PATEL S.C.
COURT OF APPEAL JUDGE