IN THE COURT OF APPEAL OF ZAMBIA APPEAL No. 273/2022
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

ZAMBIA MEDICINES REGULATORY AUTHORITY APPELLANT

AND

HONEY BEE PHARMACY LIMITED RESPONDENT

CORAM: *Chashi, Makungu and Sichinga, JJA*
on 14 and 21 August, 2024

For the Appellant: *Mr. M. Lupiya, In-house legal counsel*

For the Respondent: *Non Appearance*

JUDGMENT

Sichinga JA, delivered the judgment of the Court.

Cases referred to:

1. *Bellamano v Ligure Lombarda Limited (1976) Z.R. 267*
2. *John Chisata v Attorney General (1992) S.J. 19*
3. *William David Carlisle Wise v E.F. Hervey Limited (1985) Z.R. 179*
4. *Anderson Kambela Mazoka and 2 Others v Levy Patrick Mwanawasa and 2 Others (2005) Z.R. 138*
5. *George Sikazwe and Others v Mulusew Tebeje and Another, SCZ/8/228/2002*
6. *Murray and Roberts Construction Limited and Another v Lusaka Premium Health Limited and Another, SCZ Appeal No. 141 of 2016*
7. *American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504*

Legislation referred to:

1. *The Supreme Court Rules (1965) 1999 Edition (White Book)*

Other works referred to:

1. *Black's Law Dictionary, Bryan A. Garner, 9th Edition, A. Thomson Reuters*
2. *Halsbury's Laws of England, Vol. 11 (2009), 5th Edition: Civil Procedure*

1.0 Introduction

1.1 This is an appeal by the Zambia Medicines Regulatory Authority (the defendant in the court below), against the whole ruling of the High Court under Cause No. 2021/HP/0083, delivered on 3 August 2022, by Lombe-Phiri J.

1.2 In the said ruling, the learned Judge declined to strike out the statement of claim and instead, determined that it would be more appropriate to join the other interested parties to avoid a multiplicity of actions.

2.0 Background

2.1 In the introductory part of this judgment, we shall refer to the parties by their designations in the High Court. The plaintiff, Honey Bee Pharmacy Limited (now respondent), commenced an action by way of writ of summons and statement of claim against the defendant, Zambia Medicines Regulatory Authority (now appellant), seeking the following reliefs:

i. An order to proscribe the defendant from revoking the Licence of the plaintiff;

ii. An order that the matter be referred to arbitration as per the provisions of the contract governing the relationship between the plaintiff and the procuring entity;

iii. An order of interim injunction to restrain the defendant by itself, its servants, agents or whomsoever, from revoking the plaintiff's Pharmaceutical Licence and publish any information on social media and other platforms calculated at injuring the reputation of the plaintiff;

iv. Any other reliefs the court would deem fit; and

v. Costs.

2.2 As gleaned from the statement of claim at page 18 of the record of appeal, the facts alleged by the plaintiff are that in November 2019, it won a tender for the supply of 22,500 Health Centre Kits with the Ministry of Health and a contract was executed to that end. That, it was a condition precedent under the contract that the goods were to be subjected to a testing and confirmation procedure, before the awarding of a certificate of acceptance as to the fitness of the goods supplied.

2.3 The plaintiff, further averred that pursuant to the contract, it delivered part of the consignment which was subjected to the condition precedent and duly issued a certificate of acceptance by the procuring entity.

2.4 The plaintiff alleged that in September 2020, the defendant started issuing threats, unverified and disparaging remarks to the plaintiff as having supplied defective products, despite the

earlier issued certificate of fitness. That, the actions of the defendant were unreasonable as they go against the provisions of the contract, coupled with the fact that the defendant was not party to said contract.

2.5 It is the plaintiff's further averment that it engaged the defendant on a number of occasions to settle issues, but all efforts proved futile, as the defendant continued issuing threats against the plaintiff's reputation. That, the defendant also threatened to revoke the plaintiff's licence in a malicious and arbitrary manner, without regard to the provisions of the contract, when other similarly circumstanced pharmaceutical companies only had their products recalled, without threats and negative publicity.

2.6 The plaintiff alleged that the actions of the defendant were calculated at victimising the plaintiff and its good will. That, the defendant had falsely and unjustly caused harm to the plaintiff's reputation and commercial wellbeing, and continue to do so by circulating libelous articles on the internet and print media.

2.7 The plaintiff had also alleged that even the results the defendant was relying on were obtained from a laboratory that is not accredited with the World Health Organisation, contrary to the provisions of the contract.

2.8 The plaintiff has denied the defendant's allegations or supplying defective goods to the procuring entity.

2.9 On 12 February 2021, the defendant entered appearance and defence, essentially denying the plaintiff's entitlement to its claims.

2.10 In its defence, the defendant averred that the samples of medicines and allied substances supplied by the plaintiff were analysed according to recognized international standards and were found to be out of specification to set criteria.

2.11 The defendant had further averred that it was not party to the contract the plaintiff was referring to and acted within its statutory mandate in all the actions it took in verifying the quality of medical products supplied by the plaintiff.

2.12 The defendant also stated that the plaintiff was never granted a licence by the defendant, but only granted a licence to Honeybee Pharmacy, a sole trader under *the Registration of Business Names Act, 2011* and the said entity was struck off and deregistered on 1 April 2020, at the Patents and Companies Registration Agency (PACRA).

2.13 The defendant averred that the laboratory that conducted the testing on the medical products supplied by the plaintiff is a certified laboratory.

2.14 A day after filing the originating process, the plaintiff made an application for an order of interim injunction.

2.15 On 1 March 2021, the defendant made an application, via a summons, to strike out the writ of summons and statement of claim pursuant to ***Order 18, rule 19 (1)(a)*** and ***(d) of the Rules***

of the Supreme Court (the White Book)[1]. In the affidavit in support of the application, the deponent deposed that the defendant had been advised by its advocates that the writ and statement of claim disclosed no reasonable cause of action against the defendant, and that the action was an abuse of the court process.

2.16 On 11 March 2021, the defendant filed its affidavit in opposition to the application to strike out the writ and pleadings. In the said affidavit, the deponent deposed that the defendant failed to disclose any deficiency in the originating process.

2.17 The plaintiff's application for an order of interim injunction was heard, and the ruling in respect thereof delivered on 29 April 2021. In said ruling, the learned Judge found that the claims in the writ of summons and statement of claim did not, *prima facie*, show any serious question to be tried, and thus, declined to grant the interim injunction.

2.18 At that moment, the defendant's application to strike originating process and pleadings was still pending, but was eventually heard, resulting in the ruling now herein assailed.

3.0 The decision of the High Court

3.1 Lady Justice Lombe-Phiri, in addressing the application to strike out, highlighted that ***Order 18, rule 19 of the White Book*** provides for the court's jurisdiction to either strike out

any pleadings or endorsement on a writ or in any pleading for the following reasons:

i. *Failure to disclose a reasonable cause of action or defence;*
ii. *For being scandalous, frivolous or vexatious;*
iii. *Prejudice, embarrassment or delaying the fair trial of the action; or*
vi. *Abuse of process of court.*

3.2 Further, that the rule also provides that a court may order the action to be stayed or dismissed or judgment to be entered.

3.3 The court also highlighted the cases of ***Bellamano v Ligure Lombarda Limited***[1] and ***John Chisata v Attorney General***[2], establishing the point that an application under ***Order 18, rule 19 of the White Book*** is not one to set aside for irregularity, but to dismiss for abuse of process of court. Further, that the discretion to strike out should only be exercised in the clearest of cases, with the best course being allowing the whole matter to go to trial and to leave the trial judge to decide what claims are sustainable.

3.4 The court, thus decided that the writ and statement of claim showed that there were certain claims that were under contention and it could not be said that the said claims were either frivolous or vexatious. Further, the court stated that the main grievance of the defendant was that it was not the correct party to have been sued as it was not party to the contract in dispute. The Judge noted, however, that there was the first claim in the writ of summons, seeking the court's restraint of

the defendant from revoking the plaintiff's licence. The learned Judge found that it would be incorrect to state that there was nothing in the matter that requires the response of the defendant.

3.5 Consequently, the Judge held that the case was not suitable for striking out of the pleadings, and instead, guided that it would be more appropriate to join the other two interested parties to avoid a multiplicity of actions. With this, the learned Judge dismissed the defendant's application to set aside the writ and statement of claim, with costs to the plaintiff.

4.0 The appeal

4.1 Dissatisfied with the High Court's ruling, the appellant (previously defendant) appealed to this Court, advancing two grounds as follows:

1. ***The lower court erred in law and fact by declining to strike out the statement of claim for failure to disclose a reasonable cause of action against the appellant; and***
2. ***The lower court erred in law by volunteering a ruling for joinder of parties.***

5.0 Appellants' arguments

5.1 At the hearing, Mr. Lupiya, learned counsel for the appellant, relied entirely on the appellant's heads of argument filed on 21 November 2022. In support of ground one, it was submitted on behalf of the appellant, that the writ of summons and statement

of claim, exhibited at pages 16 to 20 of the record of appeal do not disclose a reasonable cause of action against the appellant. Mr. Lupiya, in citing *Order 18, rule 19 of the White Book*, contended that the provision clothes the High Court with the requisite jurisdiction to strike out pleadings and dismiss an action for failure to disclose a reasonable cause of action.

5.2 Further, citing ***Practice Note 18/19/10 of the White Book*** and the case of ***William David Carlisle Wise v E.F. Hervey Limited***[3], it was submitted that a reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered; and that a cause of action is disclosed only when a factual situation is alleged, which contains facts upon which a party can attach liability to the other or upon which he can establish a right or entitlement to a judgment in his favour against the other. That, *in casu*, the factual allegations by the respondent are aimed at enforcing the contract for supply and delivery of 22,500 Health Center Kits, to which the appellant is not privy. Further, that the respondent although seeking to challenge the appellant's mandate, does not state the appellant's wrongdoing, and therefore, the respondent has not set out any factual issues worth proving at trial against the appellant.

5.3 It was, thus, submitted that this is a proper case for the Court to strike out the pleadings and dismiss the matter. To buttress this submission, Mr. Lupiya further referred us to pages R10 to R12 of the ruling of the lower court on the order for interim

injunction. It was advanced that it was delivered before the court's determination of the application to strike out writ and pleadings. The ruling is exhibited at pages 155 to 166 of the record of appeal.

5.4 It was counsel's contention that said ruling effectively settled that the statement of claim did not disclose any reasonable cause of action when the Judge opined that the pleadings do not disclose any serious question to be tried.

5.5 Citing the cases of ***William David Carlisle Wise***, *supra*, and ***Anderson Kambela Mazoka and 2 Others v Levy Patrick Mwanawasa and 2 Others***[4], Mr. Lupiya highlighted the purpose of pleadings and submitted that a scrutiny of the writ and statement of claim shows that they do not, in any way, put the appellant on notice regarding any breach of its mandate as was indicated in the lower court's ruling on injunction.

5.6 With this, counsel urged us to uphold the first ground of appeal and allow that the pleadings be struck out and the matter be dismissed.

5.7 Regarding ground two of the appeal, it was submitted on behalf of the appellant, that the application that was being considered by the lower court, and exhibited at pages 95 to 104 of the record of appeal, was striking out of the originating process. That, neither the appellant nor the respondent applied for joinder of parties to this matter and therefore, the court below should have restricted itself to the application before it.

5.8 Mr. Lupiya submitted that it was a serious misdirection on the part of the lower court to order joinder of parties without an application being made by either one of the parties herein. That, the court below erred by volunteering a ruling for joinder of parties without an application being made before it. To lend support to this position, counsel relied on the case of ***George Sikazwe and Others v Mulusew Tebeje and Another***[5].

5.9 It was further submitted, on behalf of the appellant, that if the statement of claim has disclosed no cause of action, it cannot be cured by joinder of parties. Furthermore, that where a court seeks to deal with an issue not raised by the parties, the court should call for the parties to address it before rendering a ruling. Counsel, to this end, called in aid the case of ***Murray and Roberts Construction Limited and Another v Lusaka Premium Health Limited and Another***[6]. Mr. Lupiya, thus, submitted that the lower court's holding violated a cardinal principle of civil litigation.

5.10 With this, the appellant urged us to uphold the second ground of appeal.

6.0 Respondent's arguments

6.1 The respondent neither filed its heads of argument in response to the appeal nor attended the hearing.

7.0 The decision of the Court on appeal

7.1 We have attentively considered this appeal, read the ruling appealed against and analysed the appellant's heads of argument on record.

7.2 The essence of this appeal is two-fold:

i. *Whether the court below should have struck out the originating process and pleadings, under* ***Order 18, rule 19 of the White Book****; and*

ii. *Whether the court below made an order for joinder of parties without a formal application before it, and if so, whether it had the authority to make such order.*

7.3 In support of ground one, the appellant has argued that the originating process before the lower court reveals no reasonable cause of action and that this was confirmed by the order of the court in its ruling on the application for an order of interim injunction. That, by the court finding no serious question to be tried, when it addressed the application for injunction, it fundamentally determined that the statement of claim did not disclose any reasonable cause of action. This line of argument advanced by Mr. Lupiya, in our view, seems to suggest that the notion of *'a serious question to be tried'* as considered in the interim/interlocutory injunction applications and the notion of *'a reasonable cause of action'* as usually understood in respect of an entire/the main action are one and the same. This could not be farther from the truth and this will become clear shortly.

7.4 On the subject of injunctions, the learned authors of ***Halsbury's Laws of England, Vol, 11, 5th Edition***, state as follows, in paragraph 385, regarding the ***'serious question to be tried'***:

> ***"On an application for an interim injunction the court must be satisfied that there is a serious question to be tried. The material available to the court at the hearing of the application must disclose that the claimant has real prospects for succeeding in his claim for a permanent injunction at the trial...***
>
> ***...Where the application is to restrain the exercise of an alleged right, the claimant should show that there are substantial grounds for doubting the existence of the right. It requires a very strong case indeed to induce the court to interfere with an admitted right upon an alleged equity.***
>
> ***The claimant must also be able to show that an injunction until the hearing is necessary to protect him against irreparable injury; mere inconvenience is not enough."***

7.5 In the explanatory footnotes, the learned authors, citing the case of ***American Cyanamid Co v Ethicon Ltd***[7], clarify that a finding by the court that there is a serious question to be tried, simply entails that the court must be satisfied that the claim is not frivolous or vexatious. In other words, the material available to the court at the hearing of the injunction application must disclose that there are real prospects of success in the claim for the permanent injunction at the trial. Not necessarily the

success of the substance of the entire action. It entails, simply, that the evidence must set out the facts on which the applicant relies for the claim being made against the respondent, including all material facts of which the court should be made aware, particularly as regards that injunction application. In other words, the claimant must demonstrate during an application for interim/interlocutory injunction that there are substantial grounds to interfere with the exercise of the defendant's alleged right at that stage and possibly permanently, at the trial.

7.6 A *'cause of action'*, on the other hand, has been defined and espoused as follows, by ***Black's Law Dictionary***[1]:

> ***"Cause of action is a group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in the court from another person.***
>
> ***What is a cause of action? Jurists have found it difficult to give a proper definition. It may be defined generally to be a situation or state of facts that entitles a party to maintain an action in a judicial tribunal. This state of facts may be- (a) a primary right of the plaintiff actually violated by the defendant; or (b) the threatened violation of such right, which violation the plaintiff is entitled to restrain or prevent, as in case of actions or suits for injunction; or (c) it may be that there are doubts as to some of the duty or right, or the right beclouded by some apparent adverse right or claim, which the plaintiff is entitled to have cleared up, that he safely perform his duty, or enjoy his property."***

7.7 The phrase *'cause of action'* has been explained, under *Practice Note 15/1/2 of the White Book*, as follows:

> ***"The words "cause of action" comprise every fact (though not every piece of evidence) which it would be necessary for the plaintiff to prove, if traversed, to support his right to the judgment of the Court. If the plaintiff alleges the facts which, if not traversed, would prima facie entitle him to recover, then he makes out a cause of action. The phrase comprises every fact which is material to be proved to enable the plaintiff to succeed... The words have been defined as meaning "simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person"... In Ireland, these words have been held to mean the subject-matter of grievance founding the action, not merely the technical cause of action..."***

7.8 The learned authors of ***Halsbury's Laws of England***, also define a *'cause of action'* and further, a *'reasonable cause of action'*, in paragraph 21, as follows:

> ***"'Cause of action' has been defined as meaning simply the facts the existence of which entitles one person to obtain from the court a remedy against another person. The phrase has been held from the earliest time to include every fact which is necessary to be proved to entitle the claimant to succeed, and every fact which the defendant would have a right to dispute. 'Cause of action' has also been taken to mean that particular act on the part of the defendant which gives the claimant his cause of complaint, or the subject matter or grievance founding the claim, not merely the technical cause of action...***

A reasonable cause of action means a cause of action with some chance of success, when only the allegations in the statement of case are considered."

7.9 *Practice Note 18/19/10 of the White Book*, further, defines and describes *'a reasonable cause of action'* as follows:

"A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered... So long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out nor is the fact that the Statute of Frauds 1677 (which was merely a provision as to evidence) might be a bar to the claim. In such a case application may be made under O.33, r.3, for the trial of a preliminary issue. A court can hear a striking out application which contained non-compliance with the rules of pleading and which was not based on the merits or on the facts of the case."

7.10 From the definitions and explanations above, it appears that a *cause of action* seems to accord a broader application than a mere *'serious question to be tried'* in an injunction application. A cause of action, in our view, is the very basis on which a party summons another party to court. Put differently, one party is saying to another, *"there are these circumstances that transpired between you and I. You wronged me in the given circumstances and I suffered loss/damage. You need to remedy the wrong you*

committed/you need to compensate me for the loss/damage I suffered at your instance."

7.11 Whereas the *'serious question to be tried'*, in an application for interim/interlocutory injunction, pertains only to the justification of that the particular application which is basically a subset of the many aspects in an entire matter before the court. It is no wonder interim injunctions are granted *'pending determination of the main matter'* or are granted *ex parte* and then later discharged in certain instances when found unjustifiable, without necessarily determining the whole matter. Unless the only claim in a matter is a permanent injunction.

7.12 On account of this, the *'serious question to be tried'* is within the confines of and specifically focused on the application for interim injunction before the court and is not to be confused with a *'cause of action'*, which relates to the entire action before the court, of which the application for interim/interlocutory injunction will merely be a subset.

7.13 In fact, still on the strength of the ***American Cyanamid case***, the learned authors of ***Halsbury's Laws of England***, further and categorically, clarify that it is no part of the court's function, at this stage of the litigation (being the point at which an application for interim/interlocutory injunction is heard), to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend, nor to decide difficult questions of law which call for detailed argument and

mature consideration. This, in our view, clearly distinguishes the notion of a *'serious question to be tried'* from that of a *'reasonable cause of action'*.

7.14 The application to strike out writ and pleadings, the subject of the assailed ruling herein, was made pursuant to ***Order 18, rule 19 of the White Book*** which provides as follows:

> ***"(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –***
>
> ***(a) it discloses no reasonable cause of action or defence, as the case may be; or***
> ***(b) it is scandalous, frivolous or vexatious; or***
> ***(c) it may prejudice, embarrass or delay the fair trial of the action; or***
> ***(d) it is otherwise an abuse of the process of the Court; and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.***
>
> ***(2) No evidence shall be admissible on an application under paragraph (1)(a).***
>
> ***(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading."***

7.15 The appellant maintains that the lower court ought to have struck out the writ and statement of claim. The appellant's

contention on appeal is that the factual allegations by the respondent are aimed at enforcing the contract for supply and delivery of 22,500 Health Center Kits, to which the appellant is not privy. Further, that the respondent although seeking to challenge the appellant's mandate, does not state the appellant's wrongdoing, and therefore, the respondent has not set out any factual issues worth proving at trial against the appellant. However, the lower court's holding was as follows, as observed at pages 14 and 15 of the record of appeal:

> ***"A perusal of the Writ of Summons and Statement of Claim shows that there are certain claims that are under contention. It cannot be said the claims are either frivolous or vexatious. The main grievance of the Defendant is that they are not the correct party to have been sued as they are not party to the contract in dispute. However, there is the first claim in the Writ of Summons that seeks the court restrain the Defendant from revoking the licence belonging to the Plaintiff. In that regard, it would be incorrect to state that there is nothing in the matter that requires the response of the Defendant.***
>
> ***In view of the foregoing, I find that this is not a suitable case for striking out of a Statement of Claim. Instead, it would be more appropriate to join the other interested parties to avoid a multiplicity of actions.***
>
> ***In that regard, the application by the defendant to set aside the statement of claim is dismissed."***

7.16 It is the appellant's argument that the statement of claim does not disclose any cause of action. This argument, on appeal, and to a great extent, has been anchored on the lower court's earlier finding in the injunction application, that there was no serious question to be tried.

7.17 We have comprehensively discussed the difference between a *'serious question to be tried'* and a *'cause of action'*, above, and for those reasons, we must reject the appellant's argument essentially equating the two concepts. Clearly, counsel for the appellant gravely misconceived these concepts.

7.18 The foregoing notwithstanding, we are of the view that the writ and statement of claim do not disclose a cause of action against the appellant. The Judge in the lower court found, first, that the claims in the writ and statement of claim were neither frivolous nor vexatious. Secondly, it would be incorrect to state that there is nothing in the matter that required the response of the appellant.

7.19 We have perused the statement of claim and cannot censure the lower court for finding as it did. We note, especially, that there are allegations in the statement of claim, of the appellant issuing the respondent threats to revoke its licence and which allegations are leading up to the first claim, for an order proscribing the appellant from revoking the respondent's licence. These allegations, are not the kind that can be determined summarily as envisaged under ***Order 18, rule 19***

of the White Book. The exercise of powers by the court, under this rule has been clarified as follows in Practice Note 18/19/6:

> ***"It is only in plain and obvious cases that recourse should be had to the summary process under this rule. It cannot be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. If there is a point of law which requires serious discussion, an objection should be taken on the pleadings, and the point set down for argument under O.33, r.3."***

7.20 The level of contention raised by the respondent in its pleadings and even the nature of responses given by the appellant in its defence, in our view, are far from being termed *'plain and obvious'* for purposes of invoking the procedure under *Order 18 of the White Book*. The contentions raised require serious discussion and the *Practice Note 18/19/6* guides that in such instances, the best course would be for the parties to proceed under ***Order 33, rule 3 of the White Book***, which allows the court to try issues or questions of fact or law arising in a cause/matter, before, at or after the trial of a cause or matter.

7.21 We further note, from the perusal of said ***Order 33, rule 3*** that it should be read together with ***Order 14A of the White Book***, on disposal of cases on a point of law.

7.22 Reverting to the issue of whether or not there is a cause of action disclosed in the respondent's statement of claim, our view is that the respondent's allegations and claim against the

appellant are well-captured by the definition of a *'cause of action'* as discussed above. Do we think that this *'cause of action'* has some chance of success when only the allegations in the pleading are considered, so as to qualify it as a *'reasonable cause of action'*? Our answer is in the affirmative.

7.23 In view of the foregoing, we find no merit in the first ground of appeal.

7.24 On the second ground of appeal, the appellant has argued that the lower court misdirected itself by ordering a joinder of parties in an application to strike out the writ and pleadings, when neither the appellant nor the respondent had applied for joinder of parties. That, the lower court should have restricted itself to the application before it, being one to strike out originating process and not volunteer joining parties to the application because it was not one for joinder.

7.25 An order has been defined by ***Black's Law Dictionary***, as follows:

> ***"1. A command, direction or instruction. 2. A written direction or command delivered by a court or judge. The word generally embraces final decrees as well as interlocutory directions or commands- Also termed court order; judicial order.***
>
> ***An order is the mandate or determination of the court upon some subsidiary or collateral matter arising in an action, not disposing of the merits, but adjudicating a preliminary point or directing some step in the proceedings."***

7.26 ***Black's Law Dictionary***, further, explains that the words *'ordered', 'adjudged'* and *'decreed'* are the traditional words used to present the court's decision. That, the usual style of a decree is *'It is ordered that...', 'It is adjudged that...'* or *'It is decreed that...'*

7.27 What we gather from the foregoing is that an order of court should be a specific and unequivocal command or direction to a party to do or to refrain from doing something; or a specific and unequivocal command or direction on a step to be taken in proceedings. When we look at the words of the lower court in the assailed ruling, that are supposedly the order of the court, we are inclined to opine that they do not amount to an order for joinder of parties. The relevant words are as follows:

> *"**In view of the foregoing, I find that this is not a suitable case for striking out of a Statement of Claim. Instead, it would be more appropriate to join the other interested parties to avoid a multiplicity of actions.**"* (Emphasis ours)

7.28 The underlined words, in our view, are more or less, guidance or suggestion provided by the court, rather than a direction or command that parties should be joined to the cause. If by the said words, the lower court intended for them to constitute an order of joinder, it would have specifically stated that it was making the order and would have clearly identified which parties it was ordering the joinder of. For example, in the same ruling, after the court found that the case was not suitable for striking out of the statement of claim, it proceeded to expressly

dismiss the subject application, and that is what constituted the order. Similarly, for the alleged joinder, the court should have expressly stated that it was making an order for joinder and whom it was joining. However, nothing of this sort can be inferred from the words that the court had used.

7.29 By suggesting that the words of the court were an order for joinder, the appellant is simply saying that from the point of the ruling, the parties were at liberty to proceed to file amended pleadings with abstract interested parties joined therein. This is stretching what the court said. All that the lower court suggested was that, in the given circumstances, an appropriate action to be taken in the proceedings would be a joinder. Nothing more, nothing less.

7.30 In the premises, we reject the appellant's argument that the court below ordered a joinder of parties, or that it did so without either party first lodging an application for joinder of parties.

7.32 The appellant's second ground of appeal, however, fails because the words used by the lower court, to which the status of an order has been ascribed by the appellant, do not satisfy the characteristics of a court order.

8.0 Conclusion

8.1 Having found no merit in both grounds of appeal, the whole of the appellant's appeal is accordingly dismissed.

8.2 Since the respondent did not participate in the appeal by filing its heads of argument or attending to the hearing, we order each party to bear its own costs.

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J. Chashi

COURT OF APPEAL JUDGE

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C.K. Makungu

COURT OF APPEAL JUDGE

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D.L.Y. Sichinga, SC

COURT OF APPEAL JUDGE