I I

IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 92 OF 2020**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

ZCCM INVESTMENTS HOLDINGS PLC	**APPELLANT**
AND	
FIRST QUANTUM MINERALS	**1st RESPONDENT**
FQM FINANCE LIMITED	**2nd RESPONDENT**
PHILIP K. R. PASCALL	**3rd RESPONDENT**
ARTHUR MATHIAS PASCALL	**4th RESPONDENT**
CLIVE NEWAL	**5th RESPONDENT**
MARTIN R. ROWLEY	**6th RESPONDENT**
KANSANSHI MINING PLC	**7th RESPONDENT**

CORAM: Chashi, Lengalenga and Ngulube, JJA

ON: 14th October 2020 and 13th January 2021

For the Appellant:	*(1) B.C. Mutale, SC, with M. Mukuka (Ms.), Messrs Ellis and Company* *(2) Dr. J. Mulwila SC, with L. Chipeta (Ms.), Messrs Ituna Partners* *(3) L. Mbalashi - Deputy General Counsel - In - House*
For the 1st and 2nd Respondents:	*N/A*
For the 3rd, 4th, 5th and 6th Respondents:	*M. M. Mundashi, SC, with M. Chilufya, Messrs Mulenga Mundashi Legal Practitioner*
For the 7th Respondent:	*S. Chisenga, Messrs Corpus Legal Practitioners*

J U D G M E N T

CHASHI JA, delivered the Judgment of the Court

Cases referred to:

1. **Foss v Harbottle (1843) 2 Hare, 461**
2. **Shaw v Sloan (1982), NI 393, 394 CA**
3. **Birket v James (1977) 2 All ER, 801**
4. **Pople v Evans (1968) 2 All ER, 743**
5. **DSV Silo - und Verwaltungsgesellschaft mbH v Owners of the Sennar and 13 Other Ships - (1985) WLR, 490**
6. **ZCCM Investments Holdings v Kansanshi Holdings Plc and Another (2020) 1 All ER, 132**
7. **Bank of Zambia v Jonas Tembo and Others (2002) ZR, 103**
8. **Wallersteiner v Moir (No.2); Moir v Wallersteiner and Others (No. 2) - (1975)1 All ER, 849**
9. **Standard Chartered Bank Zambia Plc v Wisdom Chanda and Another - SCZ Judgment No. 18 of 2014**

10. **Siakokole and Others v The Attorney General - SCZ Appeal No. 9 of 2019**
11. **Mpongwe Farms Limited v Dar Farms and Transport Limited (2016) ZR, Vol 3,1**
12. **Finance Bank Zambia Limited v Noel Nkoma - SCZ Appeal No. 77 of 2015**
13. **Societe Nationale des Chemis De Pur Congo (SNCC) v Joseph Nonde Kakonde - SCZ Appeal No. 183 of 2008**
14. **Virgin Atlantic Airways Limited v Zodiac Seats UK Limited (2013) UKSC, 46**
15. **Arnold v National Westminster Bank Plc (1991) 2, AC 93**
16. **Hussein Safieddine v The Commissioner of Lands - SCZ Judgment No. 36 of 2017**
17. **BP Zambia Plc v Interland Motors Limited - SCZ Judgment No. 5 of 2001**
18. **Zinka v The Attorney General (1990 - 1992) ZR, 73**
19. **JK Rambai Patel v Mukesh Kumar Patel (1985) ZR, 220**
20. **YB & F Transport Limited v Supersonic Motors Limited - SCZ Judgment No. 160 of 2013**
21. **Griever Chola Sikasote v Southern Cross Motors Limited (2019) ZMCA, 2**

22. **Verrechia v Commissioner of Police for Metropolis (2002) EWCA Civ 608**
23. **Taher Ahmar Mohammed Kalil and Another v Libian African Investment Limited and 2 Others - CAZ Appeal No. 126 of 2019**
24. **Cotter v Kane - Judgment No. 136, Advance Opinion 63, Supreme Court of State of Nevada: 01/12/2020**
25. **Philip K. R. Pascall and 5 Others v ZCCM Investments Holdings Plc - CAZ Appeal No. 92 of 2018**

Legislation referred to:

1. **The Arbitration Act No. 19 of 2000**
2. **The Companies Act, No. 10 of 2017**

Rules referred to:

1. **The Supreme Court Practice (White Book) 1999**
2. **The High Court Act, Chapter 27 of the Laws of Zambia**

Other authorities referred to:

1. **Res Judicata by Spencer Bower and Handley, 5th Edition, Lexis Nexis**

2. **Joffe, QC et al - Minority Shareholders - Law, Practice and Procedure, 4th Edition**
3. **Black's Law Dictionary - Brian A Garner, Eighth Edition, Thomson West**
4. **Stakeholder Derivative Suits: Demand and Futility where the Board Fails to Stop Wrongdoers in Article 7 of the Marquette Law Review, Volume 78, Issue I Fall 1994**
5. **Toronto Butterworths, (2000) on the Doctrine of Res Judicata in Canada**
6. **Zambia Civil Procedure, Commentary and Cases, Volume 2, by Dr. Patrick Matibini, Lexis Nexis**

1.0 INTRODUCTION

1.1 This appeal emanates from the Ruling of Hon. Lady Justice Dr. W. S. Mwenda - High Court (Commercial Division).

In the said Ruling, the learned Judge upheld the preliminary issue which was raised by the 7th Respondent in the court below, that the Cause which was before her in Cause No. **2016/HPC/0515** was an abuse

of the court process on account of **multiplicity of actions** and **res judicata**.

2.0 BACKGROUND

2.1 On 26th October 2016, ZCCM Investments Holdings Plc (ZCCM) commenced arbitration proceedings against Kansanshi Holdings Limited (KHL) and Kansanshi Mining Plc (KMP) by way of Notice of Arbitration pursuant to Clause 27 of the Amended Shareholders Agreement (ASHA).

2.1.1 The Arbitration Tribunal (the Tribunal) of Three Arbitrators which was constituted under the UNCITRAL ARBITRATION RULES 2010, in its introduction, noted that, by the Notice of Arbitration, ZCCM gave notice that it wished to bring derivative claims on behalf of KMP against KHL.

2.1.2 Adopting the procedure that applies to the bringing of such a claim in the English Courts, ZCCM then applied to the Tribunal for permission to bring the claims. The Tribunal held an oral hearing on 10th to 12th January 2018 and delivered

its ruling on the permission application on 22nd February 2018.

2.1.3 In its twenty-two (22) paged ruling, the Tribunal after concluding that it had jurisdiction to hear the application considered the facts which were before it, in particular the relationship between the parties. It then considered the nature of the proposed claims and the evidence of the witnesses and documentary evidence.

2.1.4 According to the Tribunal, the relevant legal principle was to determine whether there was a *prima facie* case that:

(1) KMP is entitled to the relief being claimed; and

(2) The matter falls within one of the exceptions in **Foss v Harbottle**[1].

2.1.5 In its ruling, the Tribunal concluded that ZCCM had failed to make out a *prima facie* case either on falsity or as to loss which was fatal to the permission application.

That most of the claims were founded on allegations of deliberate dishonest which in the Tribunal's view failed to meet the threshold for a finding of dishonesty. That all causes of action were dependant upon proof of loss, as to which ZCCM had put in no evidence.

Because of the aforestated, the Tribunal was of the view that they did not need to deal with the further submissions by KHL as to why certain claims by ZCCM were bound to fail on other grounds, nor the argument by KHL on limitation.

2.1.6 The Tribunal therefore accordingly refused the application for permission to bring derivate claims and for indemnity as to costs.

The Tribunal ordered that the issue of costs will be dealt with separately.

2.2 DISENCHANTED

2.2.1 Disenchanted with the Ruling, ZCCM then made a raft of applications to the High Court of Justice Business and Property Courts of England and

Wales, Commercial Court (QBD). Justice Cockerill (Mrs.), then considered the background to the case, in particular the status of the parties and the relationship between them and the claims by ZCCM. The court then went on to consider the application which was before the Tribunal and made out that the Tribunal understood the application which was before it. The court then went on to consider the Ruling by the Tribunal.

2.2.2 The court concluded that the ruling by the Tribunal did not decide an issue of substance relating to the claim. It was not a final decision on any of the claims. It was a decision on a procedural issue (a derivative claim being itself a procedural device, and this being leave to bring that form of claim). That the bottom line was that the arbitration was not over and the Tribunal was not *functus*. That before that can happen there will have to be an award on the merits.

According to the Judge, it was possible that the claim could be pursued by KMP although as matters stand (with KHL being *de factos* in control of KMP) that was obviously unlikely.

2.2.3 It was on that basis, that the court refused to set aside the ruling pursuant to Section 68 (2) as it was not an award.

2.2.4 The raft of applications before the court were all refused by the court.

The Tribunal then on 9th July 2019 concluded arbitration by dealing with the issue of costs and made its Final Award.

The Award was consequently registered in Zambia pursuant to Section 18 of **The Arbitration Act**[1].

2.3 CAUSE NO. 2016/HPC/0515

2.3.1 Simultaneously, at the time of issuing the notice of arbitration on 26th October 2016, ZCCM also commenced a derivative action against six defendants on behalf of KMP. A perusal of the claims, shows that they were the same claims

which were before the Tribunal, except for the parties, the six defendants.

2.4 PRELIMINARY ISSUE

2.4.1 KMP, the 7th Defendant, after registering the arbitration award, then made an application in the court below pursuant to Order 14A and Order 18/19 (1) (d) **RSC** for an Order to dismiss/dispose of the action for being an abuse of the court process, multiplicity of actions and *res judicata.*

2.4.2 After considering the application, the affidavit evidence and the arguments, the court below formulated the question requiring resolution as "Whether or not the institution of the action, whilst almost simultaneously commencing arbitration proceedings in London, amounts to an abuse of the court process by reason of multiplicity of actions and *res judicata.*

2.4.3 In resolving the issue, the learned Judge reviewed what transpired in the arbitration proceedings in London and the claim which was before her.

The learned Judge was of the view that the arbitration in London and the claim before her arose from the same facts and issues, save for the exclusion of KHL from the action before her and the inclusion of the 1st to 6th Defendants.

That, that however, notwithstanding the parties cannot be regarded as separate and distinct due to the fact that the 1st to 6th Defendants are privies of the 7th Defendant in view of the relationship that exists between each of the Defendants and the 7th Defendant on whose behalf the Plaintiff had brought the derivative action.

2.4.4 According to the Court, the claims endorsed on the writ and particularized in the statement of claim relating to conspiracy, deceit, dishonest assistance and breaches of the Management Services Agreement, amongst others are materially the same as in the arbitration.

2.4.5 Relying on the definition of *res judicata* by Black's Law Dictionary, on the essential elements of the same, as well as the definition of Judgment, the learned Judge was of the view that, to proceed to trial on the merits, the court would be called upon to consider essentially the same issues that have already been considered and ruled upon by the Tribunal, a development that has the potential of bringing about conflicting decisions between the Tribunal and the court below.

On the privies, further reliance was placed on Section 20 (1) of **The Arbitration Act**[1] which states that, an award is final and binding on the parties and on any person claiming through or under them.

At the end of the day, the application for an Order to dismiss/ dispose of the action for being an abuse of court process, multiplicity of actions and *res judicata* was said to have succeeded. As a result, the entire cause was dismissed with costs.

2.5 THE APPEAL

2.5.1 Dissatisfied with the Ruling, the Appellant has appealed to this Court, advancing thirteen (13) grounds of appeal couched as follows:

2.5.2 The learned Judge erred in law and fact in holding that the claims in the proceedings herein are materially the same as in the London Arbitration between the Appellant and KHL.

2.5.3 The learned Judge erred in law and fact in holding that the London Arbitral Award determined all the issues in the action brought by the Appellant.

2.5.4 The learned Judge erred in law in holding that any *res judicata* or issue estoppel arose between the Appellant and the 7th Respondent as a result of the London Arbitral Award.

2.5.5 The learned Judge erred in holding that any *res judicata* or issue estoppel arose out of all of the London Arbitral Award in respect of the claims

which the Appellant sought permission to bring on behalf of the 7th Respondent against KHL.

2.5.6 The learned Judge erred in law in holding that the London Arbitral Tribunal had determined the merits of the claims which the Appellant sought permission on behalf of the 7th Respondent against KHL.

2.5.7 The learned Judge misdirected herself in law by failing to appreciate:

(i) the nominal role of the defendant in a derivative action; and

(ii) that there was no "lis or issue" between the Appellant and the 7th defendant in the London Arbitration Proceedings capable of giving rise to a *res judicata* or issue estoppel.

2.5.8 The learned Judge misdirected herself when she held that a nominal defendant in a derivative action had a right to apply for the dismissal of the action.

2.5.9 The learned Judge erred in law when she held that, relief number (xxiii) for indemnity of costs on the writ of summons entitled the 7th Respondent to apply for a dismissal of the action.

2.5.10 The learned Judge erred in holding that the 1st to 6th Respondents are privies of the 7th Respondent for the purpose of enabling them to rely upon any *res judicata* or issue estoppel open to the 7th Respondent (Which *res judicata* or issue estoppel is denied).

2.5.11 The learned Judge erred in law in holding that the relationship between the 1st to 6th Respondents and the 7th Respondent is capable of being relevant to establishing a *res judicata* or issue estoppel in the proceedings

2.5.12 The court below erred in law in its failure to deliver its Ruling on the Appellant's application of 26th May 2017 which would have determined the status of the Respondents in the action.

2.5.13 The learned Judge erred in law in her failure to hear the Appellant's application of 2nd September 2019 to stay the proceedings pending delivery on the application of 26th May 2017.

2.5.14 The court below erred in law in dismissing the action that the Court of Appeal in its Judgment dated 11th January 2019 had determined was highly contentious and ought to have been resolved on its merits and in the interests of justice.

2.6 ARGUMENTS IN SUPPORT OF THE APPEAL

2.6.1 Mr. Mutale, State Counsel, led the Appellant's submissions. He indicated to the Court that he will rely on the Appellant's heads of argument filed into Court on 5th June 2020.

2.6.2 Grounds 1, 2, 4, 5 and 13 were argued together. According to State Counsel, the five grounds attack the finding by the learned Judge to the effect that, the claims raised by the Appellant had been decided by

the Tribunal, thereby establishing *res judicata* and issue estoppel.

2.6.3 It was submitted that, there can be no question of *res judicata* unless the earlier decision was final, on the merits, determined the issue raised in the later litigation and the parties are the same or their privies, or the earlier decision was in *rem.* It was contended that each of the prerequisites aforestated must be established for there to be *res judicata.* Our attention was drawn to the learned authors of **Res Judicata**[1] at paragraph 1.02, where the English Court of Appeal cited the case of **Shaw v Sloan**[2], where Lowry, CJ stated as follows:

> *"the entire corpus of authority on issue estoppel is based on the theory that, it is not an abuse of process to relitigate a point where any of the ... requirements of the doctrine is missing"*

2.6.4 According to State Counsel, all the prerequisites are missing as there was no decision on the merit, no determination of a question raised in the later

litigation and the parties are not the same or their privies and the earlier decision was not in *rem*. On the issue of there being no decision on the merit, State Counsel relied on the case of **Birket v James**[3] and the case of **Pople v Evans**[4], where it was held that *"the estoppel by res judicata was intended to be limited to the decision of issues on their merits as for example, when Orders were made on trial or on admission or by way of compromise."*

2.6.5 Reliance was also placed on the case of **DSV Silo - und Verwaltungsgesellschaft mbH v Owners of the Sennar and 13 Other Ships**[5] where the House of Lords held that a decision on procedure alone is not a decision on the merits. Reference was once again made to the learned authors of **Res Judicata**[1] at paragraph 5.32 where it was observed that:

> *"The dismissal of an interlocutory application on procedural grounds or the merits is not final and does not bar a further application... such Orders do not decide any question finally."*

At paragraph 16.05 on refusal of permission to bring judicial review proceedings, they concluded as follows:

> *"There is no issue estoppel from the refusal of leave because that decision is interlocutory."*

2.6.6 State Counsel drew our attention to the ruling of the Tribunal and the Judgment of the High Court of England in **ZCCM Investments Holdings v Kansanshi Holdings Plc and Another**[6] where the court held as follows:

(1) The Tribunal's ruling was procedural in form and substance;

(2) There was no final decision on the merits of the derivative claim;

(3) The 7th Respondent is not precluded from bringing a fresh action in respect of the claims asserted; and

(4) The 7th Respondent will only be precluded from bringing a claim in respect of the claims

asserted if there is a determination on the merits.

2.6.7 It was the Appellant's submission that, the final award by the Tribunal merely dismissed the Appellant's application and made no determination on the liability of KHL as it could not make any determination on liability as the substantive claim was not before it. As what was before the Tribunal was only an application for permission to commence a derivative claim against KHL. That in rendering the final award, the Tribunal confined itself to the issue of costs. It made no further ruling or award; nor did it disturb or depart from the High Court Judgment.

It was the Appellant's submission that no question of *res judicata*, multiplicity of actions or abuse of court could possibly arise on the basis of the ruling of the Tribunal or the final award.

2.6.8 It was further submitted that there can be no question of **res judicata** in the absence of an earlier decision on the merits between the same parties.

Reliance in that respect was placed on the case of **Bank of Zambia v Jonas Tembo and Others**[7] where the Supreme Court had this to say:

> *"(1) In order that a defence of res judicata may succeed, it is necessary to show that the cause of action was the same, but also that the plaintiff had an opportunity of recovering but for his own fault might have recovered in the first action that which he seeks to recover in the second.*
>
> *(ii) A plea of res judicata must show either an actual merger or that the same point had been actually decided between the same parties."*

According to State Counsel, the claims and or causes of action being pursued in the High Court and before the Tribunal are quite distinct, albeit that they arise out of the same events.

2.7.1 Grounds 3, 6, 7, 8, 9 and 10 were argued together. According to the Appellant, these grounds relate to the findings of the court below to the effect that the action before it was a duplication of the London arbitration proceedings; that the 1st - 6th Respondents are privies of the 7th Respondent for purposes of establishing *res judicata*, the Appellant's claim in respect of indemnity of costs created a *lis* as between the Appellant and the 7th Respondent was entitled to apply for the dismissal of an action brought for its benefit.

2.7.2 It was submitted that the findings by the court below were erroneous as there was no finding on the merits as the parties, the issues and the claims were different.

Further that, there is no *lis*, issue or cause of action as between the Appellant and the 7th Respondent either in the arbitral proceedings or in the proceedings in the court below.

2.7.3 According to State Counsel, the claim for costs is not made on the basis of any alleged cause of action, but is merely a procedural matter in derivative actions. Our attention was drawn to the learned authors of **Minority Shareholders - Law, Practice and Procedure**[2] in respect to derivative claims 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."*

2.7.4 State Counsel further submitted that, the learned authors of **Minority Shareholders**[2] at paragraph 3.11 noted that a number of exceptions to the rule in **Foss v Harbottle**[1] have evolved to include;

where what has been done amounts to equitable fraud and the wrong doers are themselves in control of the company.

It was contended that the 1st - 6th Respondents had committed a fraud on the Appellant, the minority shareholder.

2.7.5 The Appellant further submitted that, contrary to the finding of the court below, it makes no difference that the Appellant shareholder seeks an indemnity for costs from the company. A claim for indemnity for costs does not constitute a *lis* between the minority shareholder bringing the action, and the company; nor does it confer the status of the company's privy on the alleged wrong doers.

The Appellant relied on the decision of the Court of Appeal of England in **Wallersteiner v Moir (No.2)**; **Moir v Wallersteiner and Others (No. 2)**[8], where Denning, MR as he then was, stated that:

"It was open to the court in a minority shareholders action to order that the company should indemnify the plaintiff against the costs incurred in an action.

Where the wrongdoers themselves controlled the company, a minority shareholder's action brought to obtain redress, whether brought in the plaintiffs own name or on behalf of himself and the other minority shareholders, and even though brought without the company's authority, was in substance a representative action on behalf of the company to obtain redress for the wrong done to the company. Accordingly, provided that, it was reasonable and prudent in the company's interest for the plaintiff to bring the action and it was brought by him in good faith, it was a proper exercise of judicial discretion or in accordance with the principles of equity, that the court should Order the company to pay the plaintiffs costs down to Judgment whether the action succeeds or not..."

2.7.6 State Counsel submitted that, Section 331 of **The Companies Act**[2] which was brought to the attention of the learned Judge in the court below has settled the law on derivative actions. Section 331 (1) provides as follows:

> *"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 or 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 purposes of continuing, defending or discontinuing the proceedings on behalf of the company as subsidiary as the case may be."*

2.7.7 It was State Counsel's contention that, the learned Judge opted not to express her view on Section 331.

It was submitted that, as an entitled person, the Appellant's right to commence a derivative action on behalf of the 7th Respondent is unassailable.

2.7.8 It was further submitted that, there is no privity of interest between the 7th Respondent and the 1st - 6th Respondents in the action in the court below. According to the Appellant, the learned Judge by relying on section 20 (1) of **The Arbitration Act**[3] relied upon the control exercised by the 1st to 6th Respondents over the 7th Respondent as the basics for contending that they were its privies. According to State Counsel, that finding was misconceived as there is no privity of interest between the 7th Respondent and the 1st to 6th Respondents. That based on the aforestated, it cannot reasonably be argued that the 1st to 6th Respondents were privies of the 7th Respondent for purposes of establishing *res*

judicata, that the Appellant's claim for indemnity for costs created a *lis* between the Appellant and the 7th respondent or that the 7th Respondent was entitled to bring the application to dismiss the action, which had been brought for its benefit.

2.8.1 Grounds 11 and 12 were argued together as they are concerned with the decision by the learned Judge to hear and determiner the 7th Respondents application to dismiss the action despite:

(1) Not having delivered a ruling on the Appellant's application to strike out the 7th Respondents defence;

(2) Not having heard and determined the Appellants application for stay of the 7th Respondent's application pending the ruling.

2.8.2 It was submitted that the application against the 7th Respondent to strike the defence was made on 26th May 2017, was heard, but the ruling was never delivered. That however, the court went ahead to hear the application by the 7th Respondent to

dismiss the action despite an application by the Appellant to stay the 7th Respondents application pending delivery of the aforestated ruling.

2.8.3 It is the Appellant's contention that the principles of fairness were not observed as the Appellant did not receive fair treatment. That justice was neither done nor seen to be done.

2.8.4 Reliance in that respect was placed on the cases of **Standard Chartered Bank Zambia Plc v Wisdom Chanda and Another**[9] and the case of **Siakokole and Others v The Attorney General**[10]. It was the Appellants contention that the court below ought to have determined the Appellants application of 26th May 2017 before hearing the 7th Respondents application and dismissing the action.

2.8.5 State Counsel in view of the aforestated arguments urged us to overturn the ruling of the court below and allow the matter to proceed.

3.0 THE 3rd, 4th, 5th and 6th RESPONDENTS ARGUMENTS IN OPPOSING THE APPEAL

3.1 In response to the 1st, 2nd, 4th, 5th and 13th grounds of appeal, State Counsel Mundashi acknowledged that, these set of grounds were attacking the ruling of the court below on its findings pertaining to *res judicata*, multiplicity of actions and abuse of court process when the learned Judge dismissed the action against all the Respondents. Our attention on the issue of *res judicata* was drawn to the case of **Mpongwe Farms Limited v Dar farms and Transport Limited**[11] where the Supreme Court followed the definition of *res judicata* as defined at page 1336 of **Black's Law Dictionary**[3] and held as follows:

> *"(latin - a- thing adjudicated)*
>
> 1. *An issue that has been definitively settled by judicial decision.*
> 2. *An affirmative defence barring the same parties from litigating a second law suit on the same claim or any other claim arising from the same transaction or series of transaction and that could have been – but was not – raised in the first suit."*

3.1.2 According to State Counsel, his understanding of the Mpongwe case is that *res judicata* puts to rest and entombs in eternity every judiciable issue and question actually adjudicated upon or which should have been raised in the initial suit so as not to be pursued further by the same parties or their privies. The Supreme Court in the Mpongwe case went on to elucidate that for a party to successfully rely on the defence of *res judicata* that party must satisfy the following conditions:

(1) that the parties or their privies are same in both previous and present proceedings;

(2) That the claim or issue in dispute in both actions is the same;

(3) That the res (or subject matter of litigation) in the two cases are the same;

(4) That the decision relied upon to support the plea of estoppel is valid, subsisting and final; and

(5) That the court that gave the previous decision relied upon to sustain the plea, is a court of competent jurisdiction.

3.1.3 It was submitted that, the three elements laid out in **Black's Law Dictionary**[3] were met and the court below cautiously examined the merits of the 7th Respondents application that led to its decision. According to State Counsel, the Appellant in trying to salvage its case that is without merit, has argued that there was no final decision at the time the 7th Respondent moved the lower court for an Order to dismiss the Appellants action on the grounds of abuse of court process. That these are misleading arguments.

3.1.4 It was further submitted that as rightly observed and pointed out by the 7th Respondent in its submission, and the court below in its Ruling, in the proceedings before the Tribunal, the Appellants sought to bring a derivative claim. As required by the law, the Appellant sought permission from the

Tribunal to proceed with the derivative action. The Tribunal assessed evidence before it proceeded to make its decision, on merit of the evidence before it.

According to State Counsel, it is apparent that the Appellant's evidence was given due consideration and as such, it is therefore misleading for the Appellant to argue that there was no decision on the merits at the time of the decision in the court below.

3.1.5 State Counsel further submitted that the issue as to whether there was sufficient evidence to warrant leave being granted for a derivative action to proceed was conclusively determined by the Tribunal after consideration of the material before it. That the Award was registered in the Zambian High Court and is now a recognised and enforceable Judgment.

It was submitted that, the factual matrix before the Tribunal and the court below was the same. That the court below thoroughly examined the claims that were before the Tribunal and before it. That

the lower court rightfully rejected the Appellant's attempt to relitigate issues that had already been put before the Tribunal and whose award was registered in Zambia.

3.2.1 In arguing grounds 3, 6, 7, 8, 9 and 10, State Counsel submitted that the decision of the court below cannot be faulted. It was submitted that, the Appellant had a claim against the 7th Respondent, which made it a party to the action in the court below as per reliefs 21 and 23 in the statement of claim at page 127 of the record of appeal. That by its own admission, the record shows that the Appellant has confirmed that the proceedings in the court below and the Tribunal were both derivative actions. That this underscores the fact that since the two actions were substantially the same and upon registration of the Award in Zambia, the action in the court below became *res judicata* and an abuse of the court process because the Award had the force of a Zambian Judgment.

Further that the parties before the Tribunal and the court below were all privies.

3.3.1 In arguing grounds 11 and 12, it was submitted that the court below cannot be faulted for having to proceed to hear the application to dismiss the action. Our attention was drawn to the learned authors of Black's Law Dictionary at page 1199 where "nominal defendant" is defined as:

> *"A person who is joined as defendant in an action not because he is immediately liable in damages or because any specific relief is demanded as against him, but because his connection with the subject matter is such that the plaintiff's action would be defective under the technical rules of practice, if he were not joined."*

3.3.2 According to State Counsel, the Appellant expressly sought reliefs against the 7th Respondent as per paragraphs 21 and 23 of the statement of claim. That it follows therefore that the 7th Respondent was an active party to the proceedings in the lower court with

sufficient *locus standi* to defend the matter before the lower court, including making an application leading to the lower court's decision. It was State Counsel's view that based on the aforestated definition of a "nominal defendant", the 7th Respondent is not a nominal defendant as alleged by the Appellant.

3.3.3 It was further submitted that, in any event, the Appellant has not advanced any authority which states that a nominal defendant is not a party to an action and that it is precluded from making any application. Our attention was drawn to the learned authors of **Stakeholder Derivative Suits**: **Demand and Futility where the Board Fails to Stop Wrongdoers**[4] in which Thomas P. Kinney observes in making reference to Corporate Law (Textbook Treatise Series) by Robert Charles Clark that:

> *"a derivative action is considered a single suit, but the corporation is seen as a nominal defendant that can make objections to the action."*

3.3.4 It was also submitted that, if the Appellant was aggrieved by the decisions of the court below, to hear the 7th Respondents application first, the Appellant should have appealed against the directive.

3.3.5 It was State Counsel's contention that, the rest of the authorities cited by the Appellant have been relied on out of context and do not aid any of their arguments. That the **Standard Chartered Bank Zambia Plc**[9] case, can be distinguished from the present case. That the court below judicially exercised its discretion to hear the application whose outcome could affect all the applications that were filed before it.

4.0 7th RESPONDENTS ARGUMENTS IN OPPOSING THE APPEAL

4.1.1 Learned Counsel for the 7th Respondent, Mr. Chisenga in response to the 1st, 2nd, 4th, 5th and 13th grounds of appeal submitted that, the court below

was on firm ground and did not err when it held that the Appellant's claim were *res judicata* and an abuse of court process. Counsel cited the case of **Finance Bank Zambia Limited v Noel Nkoma**[12], where the Supreme Court stated as follows:

> *"Res judicata means a matter that has been adjudicated upon. It is a matter that has been heard and determined between the same parties. The principles of res judicata states that once a matter has been heard between the same parties by a court of competent jurisdiction, the same matter should not be reopened.*
>
> *Multiplicity of actions refers to commencement of more than one action on the same facts or transaction."*

4.1.2 That therefore, the courts have no place whatsoever, save in special or exceptional circumstances, to determine issues that have already been decided on. It was submitted that the duty to demonstrate the existence of some special

or exceptional circumstances to enable the court to decide on issues that have already been determine by a court of competent jurisdiction lies on the party alleging that the same were not properly determined. That the issues before the court were already determined by the Tribunal and as a result cannot be determined for the second time in the High Court following the registration of the award, which has the force of a Judgment.

4.1.3 Counsel further submitted that a perusal of the Appellant's argument do not reveal any special and exceptional circumstances that would warrant the court to determine the issues that have already been decided upon by the Tribunal of competent jurisdiction and dismissed for want of merit. That in any event, the institution of the High Court proceedings at the same time as the arbitral proceedings demonstrated the Appellant's forum shopping. Counsel cited a number of cases on the issue of *res judicata*, which included the case of **Societe Nationale des Chemis De Pur Congo**

(**SNCC**) **v Joseph Nonde Kakonde**[13] where it was held that it is in the public interest that courts should not be clogged by re determination of the same disputes and; the private interest that it is unjust for a man to be vexed twice with litigation on the same subject matter.

4.1.4 Counsel further submitted that the principles of cause of action estoppel were recently summarized by Lord Sumption, JC in the UK Supreme Court in **Virgin Atlantic Airways Limited v Zodiac Seats UK Limited**[14] who had regard for the earlier House of Lords decision in **Arnold v National Westminster Bank Plc**[15] as follows:

> *"(1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action.*
>
> *(2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-*

existence of a cause of action which were not decided because they were not raised in the earlier proceedings. If they could with reasonable diligence and should in all circumstances have been raised."

4.1.5 It was Counsel's submission that cause of action estoppel prevents re-litigation of a cause of action where the cause of action has been determined in earlier arbitral or judicial proceedings. It also operates to prevent subsequent litigation of potential causes of action which could with reasonable diligence have been raised in the earlier proceedings and should, in all circumstances have been raised.

4.1.6 On the subject of issue estoppel, Counsel submitted that, it precludes a party challenging an earlier judicial or arbitral decision on a specific issue if that issue was an essential ingredient of an earlier cause of action which was arbitrated or litigated.

Reliance was placed on the **Virgin Atlantic** case where Lord Sumption summarised the principles as follows:

> *"(3) Except in Special circumstances where thus would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all circumstances have been raised."*

4.1.7 In respect to the argument where the Appellant has alleged that there was no issue between the Appellant and the 7th Respondent in the Tribunal, which was capable of giving rise to *res judicata* of the matter herein, Counsel submitted that the learned author, **Toronto Butterworths**[5] at pages 72-73 has listed factors that are to be considered to determine if a legal entity is privity for purposes

of *res judicata.* The author has stated that, if an entity has knowledge of the previous proceedings, the entity has a clear interest in the proceedings` and it has the ability to intervene as a participant but chooses to stand-by, that entity has been affected by the issue determined in the previous proceedings.

4.1.8 Counsel further submitted that the principle of *res judicata* is to support the good determination of justice in the interest of both the public and the litigants to the matter by preventing abusive and duplicate litigation.

4.1.9 As regards the assertion that there was no decision on the merits, Counsel submitted that the Appellant's argument is misleading. That as per the law, for the Appellant to bring a derivative action, it was required to apply for leave to proceed with the derivative action.

The Appellant had at that stage to demonstrate to the Tribunal that it had sufficient evidence to proceed with the said derivative action. The

Tribunal received evidence, which it then assessed in its ruling on the merits, that there was not sufficient evidence for the Appellants to proceed with the derivative action. That the Tribunal substantially assessed the evidence and arrived at a decision on the merits.

4.1.10 Counsel further submitted that, the learned Judge in the court below was on firm ground when she held that the Tribunal had already determined the Appellants claims on their merits.

4.1.11 On the issue of different parties, claims and reliefs, Counsel submitted that it is misleading that the claims in the court below and the Tribunal were distinct as alleged by the Appellant.

Counsel cited the case of **Hussein Safieddine v The Commissioner of Lands**[16] and submitted that the principles of *res judicata* applies in relation to same parties or their privies. It was submitted that all the parties in the court below and the Tribunal were all privies. That therefore, the learned Judge was on firm ground.

4.1.12 On the issue of claims, our attention was drawn to pages 74-75 of the record of appeal (the record) and submitted that the court below listed the Appellants endorsement on the writ of summons and also the Appellant's claims in the notice of arbitration and reached the conclusion that the claims were substantially the same. That therefore, the argument by the Appellant that the reliefs were necessarily different is devoid of any merit.

4.1.13 On the issue of abuse of court process, it was submitted that the Appellant commenced arbitration and litigation proceedings, and this was an abuse of process contrary to Zambian law. That it is an abuse of court process for parties to relitigate the same subject matter from one action to another, particularly where the issues have become *res judicata*. That in the case of **BP Zambia Plc v Interland Motors Limited**[17], the Supreme Court guided that:

"For our part, we are satisfied that as a general rule, it will be regarded as abuse of process if the same

parties relitigate the same subject matter from one action to another or from Judge to Judge.

This will be so especially when the issues have become res judicata or when they are issues which should have been resolved once and for all by the first."

4.1.14 It was submitted that the policy underlying the rule is that parties ought not to commence a multiplicity of procedures, proceedings or actions over the same subject matter. According to Counsel, the Appellant in the court below should not have been permitted to bring a multiplicity of proceedings. That the court below was on firm ground by not entertaining the Appellants attempt to relitigate issues that have been put before the Tribunal in the arbitration whose final award was registered in Zambia.

4.2.1 In arguing grounds 3, 6, 7, 8, 9 and 10, Counsel submitted that, the Appellant had a claim against the 7th Respondent which made it a party to the action in the court below as per reliefs 21 and 23 in the statement of claim appearing at page 127 of the record.

That it is clear from those reliefs that the 7th Respondent was not merely enjoined as a nominal defendant to the action. According to Counsel, what is clear is that the action in the court below was never brought in good faith as the Appellant commenced parallel proceedings and failed to show sufficient evidence in the Tribunal that there was any basis of a derivative action. That by its own admission, the Appellant has confirmed that the proceedings in the court below and the Tribunal were all derivative actions. It was submitted that this underscores the fact that since the two actions were substantially the same and upon registration in the High Court, the Zambian action became *res judicata* and an abuse of the court process because the award had the force of a Zambian Judgment. It was further submitted that in any event, there was no order in the High Court for leave to proceed in a derivative action.

4.2.2 As regards grounds 11 and 12, Counsel submitted that the court below cannot be faulted having proceeded to hear the application to dismiss the action for being an

abuse of the court process, *res judicata* and a multiplicity of actions. That the Appellant has not advanced any authority which states that a nominal defendant is not a party to an action and that it is not precluded from making any application. It was Counsel's submission that the Appellant has not advanced any authority which states that a nominal defendant is not a party to an action and that it is precluded from making any application. It was further submitted that, the order in which the court below proceeded promoted judicial economy. That as the Court confirmed, whether the 7th Respondent was characterized as only a nominal defendant, has no bearing on whether or not it could bring the application. According to Counsel, the bottom line is that the 7th Respondent was a party to the action, nominal or not and is entitled as a party to the proceedings to bring the application pursuant to Order 14A RSC.

4.2.3 It was further submitted that there was no injustice occasioned to the Appellant in the court below. That if at all the Appellant was aggrieved with by the directions of

the court to hear the 7th Respondent's application first, should have appealed against the directive. That the court judicially exercised its discretion to hear the application whose outcome could affect all the applications that were filed by the court below. According to Counsel, the Appellants' arguments are misconceived and are an afterthought.

4.2.4 We were urged to uphold the decision of the lower court and dismiss the entire appeal with costs.

5.0 APPELLANT'S ARGUMENTS IN REPLY TO THE 3rd, 4th, 5th and 6th RESPONDENTS HEADS OF ARGUMENTS

5.1.1 The Appellant in response to paragraph 1.2 of the arguments in opposition to the 3rd - 6th Respondents argument that:

> *"It is apt to state from the outset that our submissions should be read together with the 7th Respondents heads of argument filed before this court on 17th July 2020 ... which we fully endorse. We submit that the 7th Respondents submissions have adequately canvassed each and every ground*

that has been submitted against the lower court's decision"

The Appellant submitted that based on the aforementioned position taken by the 3rd - 6th Respondents, the Appellants heads of argument in reply of 27th July 2020 are repeated in relation to the said Respondent's arguments.

5.1.2 It was further submitted that, the arguments in response to grounds 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 introduce nothing new.

5.2.1 In reply to grounds 11 and 12, that based on the preceding authoritative definition of a nominal defendant, the 7th defendant is not a nominal defendant as alleged by the defendant, it was submitted that the submissions should be disregarded entirely for being contradicting. It was further argued that the Respondent's argument that the 7th Respondent's application to dismiss action was "the application whose outcome could affect all the applications that were filed before it"; it was submitted

that the position is untenable as the Appellants application to strike out the 7th Respondents defence would have determined the said Respondents *locus standi* to take any steps in objection to the matter.

5.2.2 In conclusion, it was submitted that the arguments of the 3rd - 6th Respondents do not engage with the Appellants submission and lack merit and therefore the appeal should be allowed.

6.0 APPELLANT'S ARGUMENTS IN REPLY TO THE 7th RESPONDENT

6.1.1 In reply to the 7th Respondent on grounds 1, 2, 4 and 5, it was submitted that the 7th Respondent's arguments fail to address the submissions by the Appellant.

6.1.2 In reply to ground 3, 6, 7, 8, 9 and 10, it was submitted that, the finding by the learned Judge in the court below that the 1st - 6th Respondents are the 7th Respondents privies and thereby affected by the ruling of the Tribunal was incorrect. That it is not in dispute that none of the 1st - 6th Respondents was a party to the amended and restated shareholders agreement between

KHL, the Appellant and 7th Respondent. That it follows that they could not rely on the arbitration clause and thus had no ability to intervene as participants. It also follows that the arbitration clause did not provide a means of adding any of them for the purpose of pursuing tortuous claims against them.

6.1.3 It was also Counsel's submission that the Appellant could not make allegations against the 1st - 6th Respondents and prosecute a claim against them, in their absence.

According to the Appellant, that would be an affront to the basic requirements of natural justice espoused in **Zinka v The Attorney General**[18]. It was the Appellant's argument that in any event, any such adverse finding would not have been binding.

6.1.4 It was State Counsel's further argument that there was no *lis*, issue or cause of action as between the Appellant and the 7th Respondent either in the arbitration proceedings or in the proceedings herein.

6.1.5 It was also submitted that, the 7th Respondent has failed to counter the Appellant's submissions in paragraph 4.20 to 4.26 to the effect that, mere commercial interest in the outcome of a dispute and the corporate relationship between parent and subsidiary cannot be sufficient to establish privity of interest.

7.0 THE 3rd, 4th, 5th and 6th RESPONDENT'S CROSS APPEAL

7.1.1 The aforestated Respondents filed a Notice of Cross appeal containing one ground couched as follows:

> *"That the learned Judge in the court below erred in law when she awarded legal costs only to the 7th Respondent without giving any reasons as to why she did not grant costs to the 3rd, 4th, 5th and 6th Respondents respectively."*

7.1.2 In arguing the ground, State Counsel relied on the case of **JK Rambai Patel v Mukesh Kumar Patel**[19] where the Supreme Court stated as follows:

> *"We agree... that the costs are in the discretion of the court, but there are certain guidelines which we must follow in exercising that discretion. A successful*

party will not normally be deprived of his costs unless there is something in the nature of the claim or in the conduct of the party which makes it improper for him to be granted costs."

Furthermore, the case of **YB & F Transport Limited v Supersonic Motors Limited**[20] and **Griever Chola Sikasote v Southern Cross Motors Limited**[21] were cited. In the latter case, it was stated that:

"The discretion to deprive a successful party of his costs must be exercised judicially, on grounds which are inexplicable or evident and which disclose something blameworthy in the conduct of the case"

7.1.3 It was submitted that in the **YB & F Transport** case, the Supreme Court identified the issue as being "who won the case?" It was submitted that, in the case *sub judice*, it is all the Respondents, not only just the 7th Respondent. According to State Counsel, the court below did not confine its dismissal of action only as to the 7th Respondent. That on the contrary the lower court correctly dismissed the action in its entirety,

including as it pertained to the individual Respondents. According to State Counsel, the dismissal of the action necessarily had the effect of making all Respondents victorious, thereby entitling them to an award of costs, absent a proper exercise of discretion to the contrary supported by facts.

7.1.4 Our attention was drawn to the case of **Verrechia v Commissioner of Police for Metropolis**[22] where the English Court of Appeal held that:

> *"Where the reason for an order for costs is not obvious, the Judge should explain why he or she has made the order. The explanation can usually be brief".*

Further that, the learned author of **Zambia Civil Procedure, Commentary and Cases**[6] at page 1696 makes reference to the **Verrechia** case and stipulates that "where the reason for an order for costs is not obvious, the Judge should explain why he has made the order".

7.1.5 State Counsel submitted that, the record will show that while the application leading to the dismissal of the action was made by the 7th Respondent, the substantive proceedings before the court were against the 1st to 6th Respondents. The 7th Respondent was represented at all the court attendances dealing with interlocutory applications and even in the appeal to the Court of Appeal.

7.1.6 That from the aforestated, the Respondents incurred costs and that at the determination of the 7th Respondents application leading to the dismissal, an order for costs was warranted and if the court took the view that such costs were not obvious, it should have proceeded to provide adequate explanation as to what informed her decision with respect to only awarding costs to the 7th Respondent.

7.1.7 Reference was again made to the learned author, Dr. Matibini at page 1697, under the heading "General Principles Relating to Costs Order" that "a party who unnecessarily causes costs must bear those costs."

According to State Counsel, this is a proper case for this Court to interfere with the decision of the court below with regard to the decision in respect to costs and the cross appeal be upheld.

8.0 APPELLANT'S ARGUMENTS IN OPPOSING THE 3rd, 4th, 5th and 6th RESPONDENTS CROSS APPEAL

8.1.1 It was submitted that the question posed by the cross appeal will only be relevant if the appeal succeeds; the order as to costs will automatically be set aside. According to State Counsel, the reason behind the Order for costs by the court below is obvious to anyone who has had sight of the whole record. That the record shows that the 3rd - 6th Respondents filed no arguments, neither orally or in writing on the 7th Respondent's application to dismiss the action. That they were passive throughout the proceedings relating to the 7th Respondents application.

8.1.2 Our attention was drawn to Order XL rule 6 of the High Court Rules which states as follows:

"The cost of every suit or matter and of each particular proceeding therein shall be in the discretion of the court or a Judge; and the court or a Judge shall have full power to award and apportion costs, in any manner it or he may deem just, and in the absence of any express direction of the court or a Judge, costs shall abide the event of the suit or proceeding:

Provided that, the court shall not order the successful party in a suit to pay to the unsuccessful party the costs of the whole suit; although the court may order the successful party, notwithstanding his success in the suit, to pay the costs of any particular proceeding therein."

8.1.3 According to State Counsel, the 3rd - 6th Respondents have not filed the relevant proceedings to demonstrate that orders for costs, if any were made, or whether any were made at all. That it therefore follows that this Court has been denied an opportunity to assess the

soundness of the decision of the court below on the question of costs.

9.0 CONSIDERATION AND DECISION OF THE COURT

9.1 We have considered the parties respective arguments and the Ruling being impugned. We shall address grounds 1, 2, 3, 4 and 5 together as they are entwined. The said set of grounds of appeal raise two issues which are related. The first being what exactly was decided by the Tribunal in its ruling, which was upheld by the High Court of Justice Business and Property Courts of England and Wales. The second being whether in view of the aforestated ruling, the learned Judge in the court below can be faulted for dismissing the cause of action before her for being an abuse of court process on account of multiplicity of actions and *res judicata*.

9.2 It is not in dispute that the claims before the Tribunal and those in the court below were derivative claims. The proper claimant principle was laid down in the case of **Foss v Harbottle**[1]. The rule being that, if a wrong is done to the company, the proper person to sue the

wrongdoer is the company itself. The disadvantage of the rule is that it could allow the majority to plunder the company, leaving the minority without a remedy. Exceptions to the rule have therefore been developed as enunciated in the **Foss** case.

9.3 A shareholder may now bring a claim by way of a derivative action seeking relief on behalf of a company for a wrong done to a company. A derivative claim is one where the right of action is derived from the company and is exercised on behalf of the company.

It is therefore an exception to the proper claimant principle.

9.4 As earlier alluded to, the Tribunal in its proceedings adopted the procedure that applies to bringing of derivative claims.

As a result, the Appellant had to apply to the Tribunal for leave or permission to bring the claims. It should from the onset be noted that this same procedure is applicable in our jurisdiction in respect to derivative claims.

9.5 We note that, the Appellant in their arguments made reference to Section 331 of **The Companies Act[2]** and endeavored to cast fault on the learned Judge for failure to express her views on the same. The arbitral proceedings and the proceedings in the court below, having been commenced in 2016, Section 331 of **The Companies Act[2]** which came into effect in 2017, in our view was not applicable, as it was not in force at the material time. Therefore, the learned Judge cannot be faulted for not expressing her views on the same.

9.6 The applicable provisions of the law, which was adopted by the Tribunal, which was also applicable to the court below and which the court was under a mandate to adopt, is Order 15/12A **RSC**. The relevant parts of the rule provide as follows:

> *"Derivative actions (0.15, r12A) 12A. (1) This rule applies to every action begun by writ by one or more shareholders of the company where the cause of action is vested in the company and relief is*

accordingly sought on its behalf (referred to in this rules as a derivative action.")

(2) Where a defendant in a derivative action has given a notice of intention to defend, the plaintiff must apply to the court for leave to continue the action.

(3) The application must be supported by an affidavit verifying the facts on which the claim and the entitlement to sue on behalf of the company are based.

(4) *Unless the court otherwise, orders, the application must be issued within 21 days after the relevant date and must be served, together with the affidavit in support and any exhibits to the affidavit not less than 10 clear days before the return day on all the defendants who have given notice of intention to defend; any defendant so served may show cause against the application or otherwise."*

9.7 Order 15/12A/2 **RSC** on effect of the rule goes on to state as follows:

> *"This rule gives effect to the practice of bringing such actions which formerly caused difficulties; resolution of these must now be sought immediately after notice of intention to defend. Although leave is not required to start a derivative action, the new rule requires leave to be obtained to continue the action before service of a defence becomes due. The method of obtaining such leave is specified in the rule.*
>
> *The purpose of such actions to permit a member of the company to sue on behalf of a company for a wrong done to the company where there has been a fraud on a minority of shareholders extends beyond fraud at common law and includes an abuse or misuse of power by the majority, whether acting as directors or shareholders..."*

9.8 The need to obtain leave or permission is thus added to the standing requirements of **Foss v Harbottle**[1] 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.

9.9 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.

9.10 It is evident from the ruling of the Tribunal that appears at page 287 of the record, that the application which was before the Tribunal was a permission application. The Tribunal at that stage had to consider whether the Appellant's application for permission and the evidence before it in support of the application showed that the Appellant had a *prima facie* case.

9.11 As earlier alluded to, the Tribunal ruled that the Appellant had failed to make out a *prima facie* case, either on falsity or as to loss which was fatal to the permission application. The Tribunal found that most of the claims by the Appellant were founded on allegations of deliberate dishonesty which in the Tribunal's view failed to meet the threshold. Also, that all causes of action were dependent upon proof of loss as to which the Appellant had put in no evidence.

9.12 The ruling by the Tribunal was sustained by the High Court of England and Wales when it refused to set aside the ruling of the Tribunal. The said Judgment appears at page 209 of the record.

9.13 What seems to have brought confusion in the minds of the parties were the conclusions made by Justice Cockerill (Mrs) in the Judgment. The learned Judge concluded that the ruling by the Tribunal did not decide an issue of substance relating to the claim; it was not a final decision on any of the claims or reliefs which were being sought in the action.

That the decision was on a procedural issue (a derivative claim itself being a procedural device, and this being leave to bring that form of claim). According to the learned Judge, the bottom line was that the arbitration was not over and the Tribunal was not *functus*. That before that, there will have to be an award on merits. Further according to the Judge, it was possible that the claims could be pursued by the company KMP, although as matters stand, with KHL being *de factos* in control of KMP, that was obviously unlikely.

9.14 It is evident from the aforestated ruling of the Tribunal and the Judgment of the High Court in England and Wales that the issue of permission or leave to continue with a derivative action by the Appellant was conclusively dealt with and resolved.

Resolved in the sense that permission by the Appellant to bring a derivative action was refused as the claims did not fall within any of the exceptions in **Foss v Harbottle**[1].

9.15 What remains for us to resolve at this stage is what effect the ruling by the Tribunal and the Judgment by the High Court in England and Wales has on the matter which was in the court below, taking into consideration the law in our jurisdiction.

It is not in dispute that the ruling by the Tribunal was registered in the High Court in Zambia pursuant to Section 18 of **The Arbitration Act**[1] and therefore, the award upon registration had the force of a Zambian Judgment. For removal of doubt, the Tribunal dealt with the procedural application, the issue being a permission application for bringing a derivative action and made a final and binding decision on the issue that a derivative action could not be brought by the Appellant on behalf of KMP.

As earlier alluded to, the High Court in England and Wales in its Judgment sustained the ruling by refusing to set it aside.

9.16 Having registered the ruling, under the final award, the ruling is binding on the court below in respect to the

issue of the refusal of leave or permission to continue with a derivative action.

In her Ruling which appears at page R55, line 18, the learned Judge correctly made the following finding:

> *"Therefore, the plaintiff's action for permission to commence a derivative action on behalf of the 7th Defendant having been dismissed by the arbitral tribunal and final award registered in the High Court in Zambia, the derivative action on behalf of the 7th defendant before this court cannot be sustained for being an abuse of the court process, multiplicity of actions and res judicata."*

9.17 In our recent case of **Taher Ahmar Mohammed Kalil and Another v Libian African Investment Limited and 2 Others**[23] we had the opportunity to interrogate what attains at common law in the recognition of foreign Judgments. In the said Judgment, we noted that under common law, the underlying conditions for recognition of a foreign Judgment, is that, the Judgment must have been given by a court of competent jurisdiction and must

be a final and conclusive Judgment. It is in that respect that in addition to the award being registered, we also take recognition of the Judgment of the High Court in England and Wales, which Judgment is subsisting and was handed out by a court of competent jurisdiction.

9.18 On the second issue, on this set of grounds of appeal, we note that the parties are not at variance on their understanding of the principles of *res judicata*. The authorities cited by the parties were all summarised in one breath in the case of **Mpongwe Farms Limited**[11]. Where the Supreme Court at page J27 had this to say:

> *"Our understanding of this authoritative definition is that res judicata puts to rest and entombs in eternal quiescence every justifiable issue and question actually adjudicated upon or which should have been raised in the initial suit. And the law is fairly settled and defined beyond peradventure in a plethora of cases decided by this Court, that for a party relying on the defence of res judicata to succeed, he must satisfy the following five conditions, namely: (i) that*

the parties or their privies are the same in both the previous and present proceedings; (ii) that the claim or issue in dispute in both actions is the same; (ii) that the res (the subject matter of the litigation)in the two cases are the same; (iv) that the decision relied upon to support the plea of estoppel is valid, subsisting and final; (v) that the court that gave the previous decision relied upon to sustain the plea, is a court of competent jurisdiction."

9.19 We have no doubt in our minds that in arriving at its decision, the court below took into consideration the aforestated conditions as the circumstances of the case which was before it was that it met the threshold. Although we will specifically address the issue of privies when we consider grounds 9 and 10 of the grounds of appeal, it is evident that the five conditions set out in the **Mpongwe Farms** case were met when what attained in the arbitral proceeding and the court below are compared. We are satisfied that issue estoppel was accordingly applied and we see no basis on which to fault the court below.

9.20 Grounds 6 and 7 questions the role of a nominal defendant in a derivative action. Indeed, we take note that in a derivative action, the company, in this case, the 7th defendant in the court below was a nominal defendant. The role of a nominal defendant was recently resolved by the Supreme Court of Nevada in the case of **Cotter v Kane**[24] where they concluded as follows:

> *"We conclude that a corporation, as a nominal defendant, is precluded from challenging the merits of a derivative action, but may challenge a shareholder plaintiff's standing in such action. Additionally, we adopt the factors set forth by the ninth circuit Court of Appeals in* ***Larson v Dumke****, 900 F2d 1363, 1367 (9th cir 1990) for determining whether a shareholder plaintiff in a derivative action fairly and adequately represents the interests of shareholders ...because Cotter Jr. lacks standing as an adequate representative of shareholders."*

9.21 In the **Cotter** case, the Supreme Court of Nevada considered whether the corporation as a nominal

defendant, can oppose the underlying action or present arguments. It concluded that, in line with the majority of jurisdictions, a nominal corporate defendant cannot oppose a derivative action on merits. The court went on to state that, nevertheless, while a corporation cannot oppose the merits of a derivative action, it may still challenge a shareholder plaintiff's ability to bring the underlying derivative action. The Court observed that California permits a corporation to assert certain defences, such as the shareholder plaintiff's; lack of standing Patrick, 84 Cal. Rprt, rd. at 652 (Stating that while a nominal defendant corporation generally may not defend a derivative action filed on its behalf, it may assert defences contesting the plaintiff's right or decision to bring the action such as asserting the shareholder plaintiff's lack of understanding ...) The court determined that the California precedent was persuasive and concluded that a corporation should be able to defend itself from an erroneously brought derivative action. If a corporation may have to later indemnify directors who defend against the derivative action, the corporation

should have the ability to stop an unlawfully brought action before excessive costs and lawyer's fees are incurred.

9.22 We find the **Cotter** case highly persuasive and determine that it is adopted in our jurisdiction. The application by the 7th defendant did not go to the merit of the derivative action. It was based on issue estoppel in respect of the procedural requirement of leave or permission to continue with the action, which is premised on whether or not the plaintiff in bringing an action could show that it had a *prima facie* case. In the face of the **Cotter** case, a nominal defendant can challenge an action on the limitation of action and can also assert equitable defences such as coming to equity without clean hands, laches and statutory limitations.

In the view we have taken, the 7th Respondent as a nominal defendant in the court below had the right to apply for the dismissal of the action.

9.23 Ground 8 attacks the holding by the learned Judge that relief number 23 for indemnity of costs on the writ of

summons entitled the 7th Respondent to apply for a dismissal of action. Although we have under grounds 7 and 8 of the grounds of appeal dealt with the right of a nominal defendant, we note that under Order 15/12A/2 and 15/12A/3 **RSC** the shareholder plaintiff has the right to make an application for an order against the company for an indemnity as to costs before discovery and it is incumbent on the plaintiff applying for such an interim order for costs to show it is genuinely needed. The practice of seeking an indemnity for costs according to Order 15/12A/3 from the assets of the company endures and is now permitted to be made together with the application for leave to continue the action and the application must be heard *inter partes*.

9.24 In **Wellesteiner**[8], the Court of Appeal in England recognised that in appropriate cases, the shareholder plaintiff should be indemnified by the company against the costs of bringing an action on the company's behalf on such terms as the court thinks appropriate. This is part of court control on costs and has nothing to do with the company's right as a nominal defendant.

We however note that, the application was made before the Tribunal and was accordingly dismissed together with the application for leave permission.

9.25 Grounds 9 and 10 essentially questions the learned Judges finding that the 1st to 6th Respondents who were not parties to the arbitral proceedings were privies of the 7th Respondent and as such issue estoppel applies to them. In the Judgment of 11th January 2019 in the case of **Philip K. R. Pascall and 5 Others v ZCCM Investments Holdings Plc**[25], we interrogated the relationship of the now 1st to 6th Respondents and concluded that the entwined shareholding and directorship structures showed how the 1st to 6th Respondents had control of KHL and through KHL had control of the 7th Respondent.

9.26 The learned Judge in the court below equally had the opportunity to examine the status of the defendants and their relationship. In doing so, the learned Judge took into consideration the Appellant's own pleadings and in

particular the statement of claim, paragraph 59 – 61 and this is what she found on page R 48 in her Ruling:

> *"I am of the view as correctly submitted by the 7th defendant, the arbitration in London and the action herein arise from the same facts and issues, save for the exclusion of KHL from the present action and the inclusion of the 1st - 6th defendants. However, the exclusion of KHL from the present action and the inclusion of the 1st - 6th notwithstanding, the parties cannot be regarded as separate and distinct due to the fact that the 1st to 6th defendants are privies of the 7th defendant. The plaintiff itself has outlined in detail in its statement of claim the relationship that exists between each of the 1st - 6th defendants and the 7th defendant on whose behalf the plaintiff has brought the derivative action."*

9.27 The learned Judge further noted that, the plaintiff averred in the statement of claim that the defendants are either members of the 1st defendant's corparate group (FQM Group) or directors and shareholders of the

companies within the FQM Group who between them control and have at all the material times controlled KHL and the 7th defendant. Based on the pleadings before her, the learned Judge concluded that on the third element of *res judicata,* namely, the involvement of the same parties, or parties in privity with the original parties, it had been established that the 1st - 6th defendants are privies of the 7th defendant and therefore that requirement has been met.

9.28. Having placed the findings to a large extent on the Appellant's own pleadings, we find no basis on which to fault the learned Judge.

9.29 Grounds 11 and 12 attacks the order in which the learned Judge dealt with the applications which were before her. The grievance by the Appellant is that, there were other applications which were filed by the Appellant and should have been heard first, such as the Appellant's application to strike out the 7th defendant's defence. That the Appellant was unfairly treated by the court not

staying the 7th Respondent's application pending delivery of the ruling on the Appellant's application.

9.30 The record shows that, the Applicant commenced proceedings in the court below on 28th October 2016. The Respondent gave their notice of intention to defend in January 2017. The Appellant did not apply for leave to continue the derivative action until 31st March 2017 when they applied for extension of time within which to make the application. On 7th April 2017, the 7th Respondent took out an application to dismiss the action on account of failure to obtain leave which application was opposed. From the submission on status conference at page 269 of the record, it is evident that the aforestated applications were not heard. What then followed was an application to strike out the 7th defendant's defence, which according to the Appellant was heard but the ruling was never delivered.

9.31 Under Order 15/12 A **RSC**, the Order or sequence to be followed by the parties in derivative claims is outlined. After service of the derivative action, the defendants must

give their notice of intention to defend. Thereafter, within 21 days of the relevant date, the plaintiff must apply to the court for leave to continue the action. As earlier alluded to and concluded, no further action can be taken in the cause until the issue of leave was determined. Therefore, the application by the plaintiff to strike out the 7th defendant's defence was misplaced and should not have been accepted, before determination of the application for leave to continue the action.

9.32 Having earlier concluded that issue estoppel applied to the proceedings in the court below, the ruling of the Tribunal and the Judgment of the High Court in England and Wales, overtook the pending application for extension of time for leave to continue the derivative action in the court below. The argument therefore, by the Appellant that the learned Judge must first have heard the Appellant's application is misplaced.

9.33 Ground 13 in our view has no leg to stand on. The court below did not make any reference to the Judgment of the Court of Appeal of 11th January 2019. We are therefore

at pains in understanding how it has found itself as a ground of appeal. In any case, even though the Court of Appeal upheld the ruling of the learned Judge in the court below and held that the matter was highly contentious and ought to be heard on its merits, in the interest of justice, the action being a derivative action, its continuity and proceeding to trial was subject to leave to continue being granted. In view of the court below having effected issue estoppel on account of refusal for leave to continue the action, the Appellant cannot rely on the holding of the Court of Appeal.

10.0 CROSS APPEAL

10.1 The cross appeal by the 3rd, 4th, 5th and 6th Respondents attack the learned Judges awarding of legal costs to the 7th Respondent only and not the other Respondents and the Court's failure to advance any reason as to why costs were not granted to the other Respondents.

10.2 In dismissing the cause of action and granting the costs, this is what the learned Judge said at page R 56 – 57 of the Ruling.

"In view of the aforesaid, the 7th Defendant's application for an Order to dismiss/dispose of action for being an abuse of Court process, multiplicity of action and res judicata has succeeded. The action is accordingly dismissed with costs to the 7th defendant. The said costs shall be agreed or taxed in default".

Our understanding of the aforestated caption is that, the costs which were awarded were in respect to the cause of action which was dismissed and were therefore not limited to the success of the 7th Respondent's application.

10.3 A perusal of the record shows that all the seven (7) Respondents in this cause, gave their notice of intention to defend. It further shows that, they participated at almost all the hearings if not all. It is therefore evident that they all in one way or the other incurred costs which they ought to recover. As argued by State Counsel Mundashi, no reason was given by the learned Judge in

excluding the other Respondents in the award of costs. If indeed, it was the intention of the learned Judge to exclude the other Respondents, the learned Judge should have advanced her reasoning for doing so. In the absence of the reasoning and the circumstances of the case, the learned Judge ought to have granted costs to all the Respondents. In the view that we have taken, the cross appeal succeeds and we set aside the learned Judge's award of costs to the 7th Respondent only and order that costs of the cause be awarded to the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Respondents.

11.0 CONCLUSION

11.1 All the grounds of appeal with the exception of grounds 8 having failed, the appeal herein is according dismissed. As regards the cross appeal, it succeeds and is accordingly upheld.

11.2 Costs in this Court and in the court below are awarded to the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Respondents to be paid

forthwith. The said costs shall be agreed by the parties or taxed in default of agreement.

J. CHASHI
COURT OF APPEAL JUDGE

F. M. LENGALENGA
COURT OF APPEAL JUDGE

P. C. M. NGULUBE
COURT OF APPEAL JUDGE