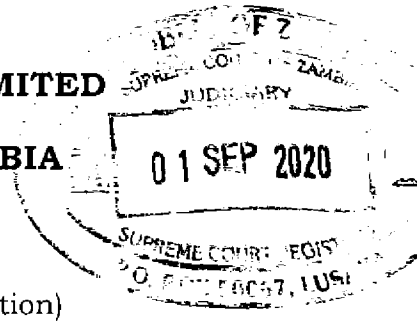
IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No. 186/2014
SCZ/8/236/2014

BETWEEN:



NWK AGRI SERVICES LIMITED — **1ST APPELLANT**

COTTON BOARD OF ZAMBIA — **2ND APPELLANT**

BOURNE CHOOKA — **3RD APPELLANT**
(As Executive Secretary of the
Zambia Cotton Ginners Association)

AND

GRAFFAX COTTON ZAMBIA LIMITED — **RESPONDENT**

CORAM: Wood, Kajimanga and Kabuka JJS on 9th August 2016 and 1st September 2020

For the 1st Appellant:	Ms T. Marietta, Messrs Sharpe & Howard Legal Practitioners
For the 2nd and 3rd Appellants:	Mr. M. Mwenye SC with Ms M. Bwalya, Messrs Mwenye & Mwitwa Advocates
For the Respondent:	Mr. S. Mulengeshi, Messrs AB & David (formerly Messrs Tembo, Mulengeshi & Chanda)

J U D G M E N T

Kajimanga, JS delivered the judgment of the court.

Cases referred to:

1. *Garret v Taylor (1620) 79 Eng. Rep. 485*

2. *Tarleton v McGawley (1793) Eng. Rep. 1127*
3. *Emerald Construction Limited v Lowthian [1966] 1 ALL ER 1013*
4. *Stocznia Gdanski SA v Latvian Shipping Co. (No. 3) [2002] 2 ALL ER (Comm) 768*
5. *John Mugala and Kenneth Kabenga v Attorney General (1988 – 1989) Z.R. 171*
6. *National Milling Company v A. Vashee (suing as Chairman of the Zambia National Farmers Union) (2000) Z.R. 98*
7. *Pyx Granile Co. Limited v Ministry of Housing and Local Government [1960] A.C. 260*
8. *Everett v Ribbands [1952] 1 ALL ER 823*
9. *Printing and Registering Co. v Sampson (1875) L. R. 19*
10. *Fender v Mildway [1937] 3 ALL ER 402*
11. *Isaac Tantameni C. Chali (Executor of the Will of the late Mwala Mwala) v Liseli Mwala (1995 - 1997) Z. R. 199*
12. *Attorney General v Aboubacar Tall and Zambia Airways Corporation Limited (1995 – 1997) Z.R. 54*
13. *Lumley v Gye (1853) 2 E & B 216*
14. *Allen v Flood [1898] AC 1*
15 *Quinn v Leathem [1901] AC 495*

Legislation referred to:

1. *Cotton Act No. 21 of 2005*
2. *Agricultural Credits Act No. 35 of 2010*

Introduction

[1] The court regrets the delay in delivering this judgment. This is an appeal against a ruling of the High Court (Nyambe, J), dismissing the entire case on the basis of preliminary issues raised pursuant to Order 14A of the Rules of the Supreme Court, 1999 Edition (RSC), and discharging the *ex parte* order of interim injunction.

[2] The appeal is principally concerned with the economic tort of

procuring or inducing breach of contract and the attendant liability. It also explores whether a party to the contract who has been induced into breaching it must also be joined to the proceedings.

Background

[3] The background facts are these. The first appellant (plaintiff in the court below) issued a writ of summons against the respondent (defendant in the court below) seeking the following relief:

[3.1] A declaration that the respondent had unlawfully and or knowingly induced breaches in the financing agreements between the first appellant and its agents or distributors and seed cotton farmers of Eastern, Central and Lusaka Provinces of the Republic of Zambia.

[3.2] An order of injunction restraining the respondent whether by its directors, officers, servants, agents or otherwise from committing a repetition of inducing or procuring breaches of similar agreements and, unlawfully interfering with the said agreements.

[3.3] Damages for intentional procurement by the respondent of the first appellant's farmers to breach their contracts.

[3.4] Additional costs and expenses.

[3.5] Legal costs.

[3.6] Any other equitable remedy.

[4] The first appellant then applied for and obtained an *ex parte* order of interim injunction restraining the respondent from:

> *"1. Directly or indirectly or howsoever INDUCING or PROCURING breaches of the seed production contracts between the plaintiff's agents and the farmers in the Eastern, Central and Lusaka Provinces pre financed by the plaintiff.*
> *2. Interfering directly or indirectly or howsoever with the agreements between the plaintiff and its agents and contracts between the plaintiff's agents and farmers.*
> *3. Directly or indirectly or howsoever purporting to buy the plaintiff's seed cotton pre financed by the plaintiff via the agents.*
> *4. Ginning the seed cotton allegedly bought from the plaintiff's pre financed farmers in the named areas..."*

[5] In the meantime and pending *inter partes* hearing, the respondent filed a notice of motion to raise the following preliminary issues pursuant to Order 14A, RSC:

> *"(i) Whether this action [is] rightly before this Honourable Court considering the failure by the Plaintiff to join to these proceedings, farmers who are alleged to have been induced into*

breaching their contracts by the defendant as alleged [and] are parties to the contracts.

(ii) Whether this action is rightly before this Honourable Court when the Plaintiff, while commencing this action before this Honourable [Court] has already lodged similar complaints before the Cotton Board of Zambia, some of which have been resolved while others are pending resolution."

[6] In the affidavit in support of *ex parte* summons for interim injunction, it was deposed that the first appellant had put in place a scheme for a number of years whereby it would pre finance cotton farmers in the Eastern, Central, Lusaka and other provinces in Zambia in exchange for them selling the crop to the first appellant after the harvest. Pursuant to the said scheme financing arrangements were signed between the first appellant and its agents acting as sole distributors for the appellant for allocation, distribution, recovery and collection of inputs which included planting seed, fertilizer and pesticides employed in the production of seed cotton. In return the agents were to be paid a commission determined on the basis of the value of seed cotton sold to the appellant by the farmers. The first appellant's agents in turn executed seed cotton production contracts with the farmers wherein the agents or distributors

agreed to supply to the farmers farming input and the farmers agreed to sell their produce to the appellant on the basis of the value of the tonnage of seed cotton produced, less the cost of the input. By virtue of the said financing agreement, the property in the seed cotton harvested by the farmers remained in the first appellant as the financer and facilitator of the production.

[7] The affidavit also disclosed that during the 2012/2013 farming season the first appellant engaged approximately 606 agents/distributors in Eastern Province and approximately 1,260 in Central and Lusaka Provinces who in turn supplied farming inputs to 62,905 farmers in Eastern and 101,069 farmers in Central and Lusaka Provinces respectively. The said farmers had cultivated and were harvesting the seed cotton which they were contracted to sell to the first appellant in line with the seed cotton production contracts. Sometime in June and July 2013 it came to the attention of the first appellant through its agents that the respondent's servants and agents had been buying and attempting to buy seed cotton from the first appellant's pre financed farmers with the full knowledge of

the agreements. Being a new entrant on the market, the respondent had financed very little seed cotton production in the areas to justify the quantities it was buying which the deponent believed belonged to the first appellant, to the first appellant's detriment and loss and the respondent was offering a higher price for the same.

[8] The deponent had been advised by the first appellant's employees that in Sinda, Katete, Petauke, Mumbwa and Lusaka a number of its pre financed farmers had been induced by the respondent's agents to breach the seed production contracts by deliberately selling the seed cotton to the respondent instead of the first appellant. The first appellant's distributors had made written reports on the challenges they were facing with their farmers in the named areas who were side-selling their cotton produce to the respondent's agents despite the latter having pre financed a few or none of them at the beginning of the farming season.

[9] The deponent further deposed that farmers who had side-sold the cotton to the respondent only on the consideration of the higher price had in turn made statements that they obtained

loans from the first appellant but sold the produce to the respondent. Without regard to the financing and production contracts between the first appellant, its agents and the farmers, the respondent had continued to induce and buy seed cotton from the farmers thereby causing the first appellant great loss and damage. As a consequence, the first appellant had suffered and continued to suffer loss and benefits of the said agreements, income it would have otherwise realised and had been greatly injured and continued to be injured in its business. If the respondent was not restrained from inducing the farmers and buying the first appellant's seed cotton, the first appellant would suffer irreparable injury that could not be atoned for by an award of damages.

[10] In the respondent's combined affidavit in opposition to affidavit in support of *ex parte* summons for interim injunction and in support of the notice to raise a preliminary issue, it was deposed that the first appellant had not produced before court a single contract for the farmers in issue for the court to substantiate its claims. The property in the seed cotton harvested by the farmers who had been financed by the first appellant was

limited to the value of the loan obtained by the farmers in form of inputs and the rest was only an undertaking that they would sell to the financier but the farmer must also be happy about the price he was selling at. Despite being a new entrant, the respondent had equally significantly registered and or contracted a huge number of farmers under its wings in Central and Eastern Provinces. The first appellant had not availed the court with any documentary evidence to support its claim such as invoices or contracts indicating that the farmers in issue were financed by the first appellant or any proof of payment by the respondent to the farmers.

[11] Furthermore, it was extremely dangerous for the first appellant to base its belief that the extra quantities of seed cotton, as alleged, belonged to it without indicating the basis of such belief or providing evidence to that effect. The first appellant was making assumptions that only farmers who had been contracted by it were the ones who cultivated cotton when there were also many other independent farmers who were not contracted to any ginners. Despite being a new entrant, the respondent purchased much of its seed cotton from its

contracted farmers and some from independent farmers at a very competitive price, a factor that drew a lot of such farmers to sell to the respondent and not other ginners that were clearly exploiting the farmers by offering very low prices to the extent that some farmers in the Eastern Province burnt their crop in protest against such clear exploitation.

[12] The deponent also stated that all the purported testimonies of the alleged employees of the first appellant were hearsay as the appellant had not produced any evidence that the purported farmers were contracted to it. Furthermore, the authors of the said testimonies had not produced any documentary proof that it was the respondent that purchased from the first appellant's farmers. Even the purported report from the Police should have been accompanied by either a copy of a docket or an entry in the occurrence book since it was reported to the Police supposedly as a criminal offence. If it was not reported as such, it was surprising how the State Police were getting involved in such matters.

[13] It was deposed that the respondent did not cause the first appellant to suffer the alleged loss and damage. Even assuming

what the first appellant stated were true facts, which they were not, it ought to have at least indicated how many kilogrammes of seed cotton had allegedly been bought by the respondent, names of the farmers alleged to have sold to the respondent and most importantly, the value of the seed cotton because once that was ascertained, then the alleged loss could properly be quantified. The first appellant was not interested in disclosing to the court below the actual figures of seed cotton allegedly bought by the respondent because it wanted to create the impression that the alleged loss suffered, if any, was unquantifiable which was not true. In any case, the marketing season was almost coming to a close, therefore, there was nothing the first appellant would suffer as many of the players in the industry including the first appellant were currently not actively buying any seed cotton as it was the period when buying scales down since much of the crop had been mopped up. Furthermore, there was no irreparable injury that the first appellant would suffer as the same could easily be atoned for in damages once the seed cotton allegedly bought by the respondent was ascertainable, if any, because a specific value

could be attached to it. In the premises the *ex parte* order of interim injunction granted ought to be discharged because if it was not, the respondent would unjustly be stopped from ginning even the seed cotton collected from its own farmers at great expense.

[14] The affidavit also disclosed that without admitting liability the problems of side-buying and selling among farmers and ginners were not unique or isolated from the alleged instances subject of the claim before court. There was already a mechanism in the industry provided by the Cotton Board of Zambia for resolving such problems without resorting to litigation. It was therefore premature and a breach of the standing procedures on conflict resolution as per the practice in the industry for the appellant to commence these proceedings. In addition, matters raised herein had also been raised by the first appellant to the Cotton Board of Zambia for resolution and it was therefore disappointing that the first appellant was also seeking relief from the court over the same issues.

[15] It was also deposed that the first appellant had bought and or collected seed cotton from the respondent's farmers and this

had been brought to the first appellant which acknowledged and promised to verify with its officials which it did as per the e-mail exchanges. The first appellant's commencement of this action has ill motives of merely preventing the respondent from ginning its own seed cotton in that the order of injunction had not specified which of the seed cotton was alleged to have been bought from the first appellant's farmers, if any, thereby inhibiting the respondent from ginning even other seed cotton that may not be subject of these proceedings. The order of injunction was oppressive and meant only to deny the respondent the opportunity of ginning the seed cotton which would be required as part of the input to the farmers in the coming season which had already started in that the first appellant and other players in the industry had since commenced giving seed to the farmers. If the injunction was maintained, the respondent would be stopped from doing so.

[16] It was also deposed that the sole reason why the respondent was before court was because it had offered farmers what they deserved to get by the higher prices that many players had failed to offer and consequently, many farmers were getting attracted

to the respondent's rates and shunning the other ginners. Further, that prior to the respondent setting up, the Competition and Consumer Protection Commission (CCPC) investigated a suspected cartel in the cotton sector and found cartelistic behaviour among the players and it cautioned against the practice.

[17] The affidavit further disclosed that even in the 2012/2013 farming season almost all the players set their seed cotton prices at the rate of ZMW1,600.00 per kg and this is what caused problems for the farmers as they felt that they were getting a raw deal from ginners to the extent that some of them threatened to have their crop burnt. The respondent, on the other hand, offered what it felt was reasonable for the farmer at ZMW2,700.00 per kg and this was the reason why other players did not like it because the respondent refused to follow the heartless cartelistic behaviour which invariably has caused the downfall of the cotton industry from production levels of about 269,000 tonnes in the 2010/2011 farming season to about 139,000 tonnes in the 2012/2013 farming season. In addition, the said CCPC directed that the bodies representing cotton

ginners would not be allowed to negotiate prices on behalf of its members primarily to avoid price fixing which ends up disadvantaging the farmer but allowed that individual ginners could negotiate prices directly with the farmers on their own which was exactly what the respondent had done in this case and for which it was now being punished.

[18] The deponent also deposed that the first appellant had not joined to these proceedings, the individual farmers who allegedly sold the cotton seed to the respondent because they were primarily the ones in breach of their contracts. The first appellant brought an action against the respondent which is not a party to the contracts breached by the farmers. If the order of injunction is confirmed it would cause untold misery not only to the respondent but most importantly, to the farmers who would have no alternative but to sell their cotton seed at unreasonable prices. Furthermore, the respondent had already procured chemicals to the value of US$800,000 for treating the seed cotton in readiness for the new farming season commencing at the beginning of September 2013. The effect of the said order renders an undue advantage to the first appellant

in that it would be ginning the seed cotton while the respondent would be inhibited. The order of injunction ought to be discharged because the appellant's action was not only unlikely to succeed at trial but that the injury, if any, could easily be atoned for in damages.

[19] The first appellant's affidavit in opposition to notice of motion to raise preliminary issue, to the extent relevant to this matter, disclosed that the respondent's application was misconceived, unnecessary and an abuse of court process in itself and an afterthought. Further, it lacked merit and should be dismissed with costs.

Consideration of the matter by the High Court and decision

[20] Both applications (for interim injunction and notice of motion to raise a preliminary issue) subsequently came up for hearing on the same day. Starting with the preliminary issues, the trial Judge found on the first preliminary issue, that the farmers alleged to have sold their crop to the respondent should have been named and included as parties to these proceedings because their presence or absence defined the core of this case and that it was fatal for the first appellant not to do so. On the

second preliminary issue, the trial judge found that it was an abuse of process by the first appellant to take out an action before the lower court when there was already an internally established avenue and procedure to be followed and the first appellant had actually lodged similar complaints before the Cotton Board of Zambia, some of which had been resolved while others were pending. The trial judge summed up her findings in the following words:

> *"This matter is clearly improperly before this court because the subject matter involving the same parties is already before the Cotton Board of Zambia or can be referred to the Cotton Board of Zambia for determination in accordance with procedures established there. It only serves to contribute to inundating the court with unnecessary litigation."*

Based on the foregoing the trial judge upheld the preliminary issues and dismissed the entire action with costs.

[21] As regards the application for an interim injunction, the trial judge found that there was no serious issue to be tried which could not be addressed by the procedures established by the industry. In her view, the fact that the first appellant had not clearly stated the interest that it sought to protect, by disclosing quantifiable amounts of seed cotton it had allegedly lost, made

this case a candidate of not being a good arguable case. She also found that the first appellant's claim was not likely to succeed at trial in the main cause; and that if properly quantified, the damage the first appellant would suffer, if any, could be atoned for in damages. She consequently discharged the *ex parte* order of injunction and awarded damages on the undertaking to the respondent.

The grounds of appeal to this court

[22] Dissatisfied with the ruling of the lower court, the first appellant appealed to this court advancing five grounds in its memorandum of appeal filed on 3rd October 2014. On 12th July 2015, a single judge of this court granted an order joining the second and third appellants to these proceedings. Subsequently on 16th July 2016 and by consent of the parties, he also granted an order amending the memorandum of appeal.

[23] The first ground in the amended memorandum of appeal is that

the learned judge in the court below erred both in law and fact when she failed to recognize that the economic tort of procuring a breach of contract does not require those induced into

breaching the contracts to be joined as parties to the proceedings. The second ground is that the learned judge in the court below erred in law and fact when she found that it was fatal for the first appellant to fail to join farmers who were alleged to have been induced into breaching their contracts by the respondent and dismissed the entire action for non-joinder of parties. The third ground is that the learned judge in the court below erred in law and fact when she held that the first appellant abused court process by commencing the action before the High Court while it had already lodged similar complaints before the Cotton Board of Zambia. The fourth ground is that the learned trial judge erred in law and fact by treating the preliminary issue raised as one which was appropriate for summary determination. The fifth ground is that the learned trial judge erred in law and fact when she relied on Order 14A, RSC, to dismiss the first appellant's action. The sixth ground is that the learned judge in the court below erred in law and fact when she held contrary to the provisions of the Agricultural Credits Act No. 35 of 2010, that cotton farmers who had entered into pre finance contracts were free to sell their

cotton crop to any buyers, other than the companies which had provided them with inputs and with whom they had entered into the pre financed contracts. The seventh and last ground is that the learned judge in the court below erred in law and fact when she decided to issue a roving order affecting all players in the cotton industry, notwithstanding the fact that the matter in the court below was only between the first appellant and the respondent and other companies and players in the cotton industry were not parties to the proceedings before the court and were therefore not given a chance to be heard.

[24] All the parties filed written heads of argument which were briefly augmented by oral submissions at the hearing. In support of ground one, Ms. Marietta submitted in the first appellant's heads of argument, that inducement to breach a contract is one of the principal torts contained in economic torts and it occurs when a party intentionally damages a plaintiff's contractual relationship with third parties by disrupting the ability of third parties to perform their contractual obligations thereby preventing the plaintiff from receiving the performance promised as well as from establishing or maintaining business

relationships with the said third parties or others. Reliance was placed on the case of *Garret v Taylor*[1] in which the defendant drove customers away from the plaintiff's quarry by threatening them with mayhem and also to *"vex [them] with suits"*.

[25] We were also referred to the case of *Tarleton v McGawley*[2] where the defendant shot from its ship... off the coast of Africa upon natives while contriving and maliciously intending to hinder and deter the natives from trading with the plaintiff's rival ship... The action caused the natives (plaintiff's prospective customers) to flee the scene, depriving the plaintiff of their potential business. The King's Bench Court held the conduct actionable.

[26] The case of *Emerald Construction Limited v Lowthian*[3] was also cited where the court stated that:

> *"There are three essential elements in the tort of [unlawful] procurement of a breach of contract; the act, the intent and the resulting damage. In a quia timet action such as this it is sufficient to prove the act and the resulting damage..."*

[27] Reliance was also placed on the case of *Stocznia Gdanski SA v*

Latvian Shipping Co. 23 (No. 3)[4] where the court held as follows:

> *"The tort is an economic tort designed to place limits on the self-interested rough and tumble of the business world. Its philosophical basis appears to be that contracts should be kept rather than broken. Whereas, here, A (Latco) procures B's (Latreefer's) breach of his contract with C (the yard), adopting it as his own because he is interested to do so, seeking a benefit for himself or a fortiori a detriment for C, and does so deliberately, knowing and intending the breach to take place, then A puts himself in the way of incurring a liability, even though not himself a party to the contract, unless (i) he does not directly procure the breach, and (ii) he uses no (relevant) unlawful means, or (iii) he can claim some justification. The significance of (i) is that where A directly procures a breach of contract he makes himself as it were directly privy to the breach. The significance of (ii) is that in the absence of making himself privy to the breach, he cannot be faulted as long as he acts as he is entitled to act, but if (deliberately, knowing and intending the breach to take place) he commits an unlawful act of sufficient causative relevance, then he renders himself liable ... The significance of (iii), an area which has not been clearly worked out in the cases, appears to be that there may be moral or perhaps economic factors which may mitigate even to the point of justifying conduct otherwise incurring a prima facie liability."*

[28] The learned counsel submitted that it is clear from the above authorities that a person who knowingly procures a breach of contract, or knowingly interferes with the due performance of a contract, is liable in damages to the innocent party. The tort in itself does not necessarily require that those induced into

breaching the contract should be made parties to the action. The procurer of the breach is personally liable in his own capacity.

[29] In arguing ground two, the first appellant's counsel submitted that the position is that failure to join a party to an action does not defeat the action as was observed by this court in *John Mugala and Kenneth Kabenga v The Attorney General*[5] and repeated in *National Milling Company v A. Vashee (suing as Chairman of the Zambia National Farmers Union)*[6] where it was held that there is no defeasance of the suits for misjoinder or non-joinder.

[30] Reliance was also placed on Order 14, rule 5(3) of the High Court Rules, Chapter 27 of the Laws of Zambia which states that:

> *"No suit shall be defeated by reason of non-joinder or misjoinder of parties."*

[31] It was submitted that the first appellant did not make a claim against the farmers with whom it had entered into contracts but the respondent, for procuring the breach of such contracts by the farmers. Therefore, the court below misdirected itself when

it failed to acknowledge, appreciate and apply the law regarding the principles of procuring a breach of contract. The learned counsel argued that if the trial judge felt that the farmers ought to have been made parties to the proceedings, failure to join them to the said proceedings was not fatal but a defect which could have been cured by the making of an order that they be joined to the proceedings, a position which is supported by the law cited above.

32] In support of ground three, it was the learned counsel's submission that Article 94 of the Constitution of Zambia, Chapter 1 of the Laws of Zambia established the High Court and conferred on it unlimited and original jurisdiction to hear and determine any matter except matters which are exclusively reserved for the Industrial Relations Court. She contended that the first appellant made its first application before the High Court. It is difficult, counsel contended, to ascertain how this could be termed as an abuse of court process when the Constitution specifically gives the High Court original and unlimited jurisdiction to hear any matter. Counsel argued that while it is not in dispute that the first appellant initially sought

the intervention of the Cotton Board of Zambia, a body constituted pursuant to the Cotton Act No. 21 of 2005, there was nothing contained in the said Act expressly ousting the jurisdiction of the court in the resolution of the dispute. According to counsel an ousting of the jurisdiction of the court must be explicit as was held in the case of *Pyx Granile Co Limited v Ministry of Housing and Local Government*[7] where Lord Simond stated that:

> *"It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's Courts for the determination of his rights is not to be excluded except by clear words."*

[33] Grounds four and five were argued together. The learned counsel submitted that the rule relating to preliminary issues was set by Romer, L. J. in the case of *Everett v Ribbands*[8] at page 827 as follows:

> *"Where there is a point of law, if decided in one way, is going to be decisive of the litigation, advantage ought to be taken of the facilities afforded by the rules of court to have it disposed of at the close of the pleadings or very shortly afterwards."*

[34] It was submitted that orders of this kind are normally made if the point of law will be decisive in the litigation or will result in a substantial saving of costs. The trial judge had an option to

discharge the injunction and hear the main matter on its merits but opted not to do so, contrary to decided cases and law. It was also contended that instead of relying on Order14A, RSC, the court below should have proceeded to hear the entire case and determine the same on its merits. For the foregoing reasons, counsel urged us to allow this appeal with costs.

[35] In arguing grounds six and seven in the written heads of argument, counsel for the second and third appellants, Mr. Mwenye SC, started by referring us to the following passage at page R15 of the lower court's ruling:

> *"... at another level, I find the actions by the plaintiff and any other players in the industry to force these farmers to sell their cotton at a fixed rate, unacceptable notwithstanding the fact that they were pre financed by the provision of inputs. This case has demonstrated that it is possible to sell the cotton at a price higher than the one fixed by the plaintiff, demonstrating further the fact that the cotton can attract a higher price. This is a free market economy and the farmers should be free to sell their produce at the highest price offer. This must be the case even where farmers have been provided with inputs prior to the planting season. The only recourse the provider of inputs can have is to recover the agreed price from the farmers... the current pricing regime in the industry is anti-competition and exploitative as it ties the farmers to sell at a lower price than what may be on offer; and must be frowned upon by the courts."*

[36] State Counsel submitted that this part of the trial judge's ruling effectively annulled all the pre finance contracts entered into by players in the market and jeopardized the agricultural charges that had been registered under the Agricultural Credits Act No. 35 of 2010. The effect of the ruling was to invalidate, any and all, pre finance contracts in the agricultural sector which sought to fix a purchase price of crops, such as cotton, in consideration for the provision of finance through the supply of agricultural inputs and other support.

[37] According to State Counsel, the decision of the trial judge flew in the teeth of the provisions of the Agricultural Credits Act, whose letter and spirit, recognizes pre finance contracts as long as they comply with the prescription of the Act and particularly section 19(1) which enacts that:

> *"A contract for the advancement to a farmer in inputs or other items required for cultivation shall state –*
>
> *(a) The value of the inputs or other items at the time the inputs or items are advanced to the farmer;*
> *(b) The interest rate to be charged, expressed at an annual percentage rate; and*
> *(c) Any charges, fees or penalties that the farmer will be required to pay if the farmer does not pay or deliver the produce at the price*

agreed on, as stipulated in the contract, unless subsection 1 of section fourteen applies."

[38] It was therefore contended that there was nothing before the trial judge to suggest that there were any public policy considerations to warrant the decision that she made. The facts as deposed to by the third appellant in his affidavit in support of joinder exhibited in the supplementary record of appeal, and specifically at paragraphs 9 and 10, reveal that the pre financing of cotton crop is an integral part of the industry, which could very well be brought to destruction by a blanket nullification of the effectiveness of pre finance contracts. This position is echoed by Mr. Dafulin Kaonga, the second appellant's Board Secretary in his affidavit in support of joinder exhibited in the supplementary record of appeal and specifically at paragraph 6 where he deposed to the following:

"That the relevant portion of the ruling of the court goes far beyond the parties to the action and has the capacity to impact the investment levels in the production of cotton and therefore the state of the cotton industry."

[39] Even if the trial judge did not specifically say so in the ruling, State Counsel argued, in declaring that farmers could sell their cotton crop to any buyers other than their financiers and

thereby declaring all the pre finance contracts in the cotton industry void, she attempted to do so on the basis of public policy. The trial judge was wrong in holding as she did because her decision went against the well-founded principle of public policy that men of full age and competent understanding shall have utmost liberty in contracting, especially in this case, where the pre finance contracts which were effectively annulled by her, are recognized by statute. In support of this principle, reliance was placed on the case of *Printing and Registering Co. v Sampson*[9] (cited with approval in the case of *Fender v Mildway*[10]).

[40] It was the further submission of State Counsel that before the trial judge made the decision that she did, she should have satisfied herself, on clear evidence, that the harm to the general public, not just the farmers, was substantially incontestable and that this was a clear case in which she could make an order that would affect the whole cotton industry. A perusal of the record, he continued, reveals that this matter did not proceed to trial and the roving order which had industry-wide repercussions, was made without any evidence on the nature of

the harm to the public that the pre finance contracts were allegedly causing.

[41] State Counsel finally submitted that the roving order issued by the trial judge has affected non-parties to the action in the court below that were never accorded a chance to be heard before the decision was handed down. We were urged to adopt the attitude we adopted in *Isaac Tentameni Chali (Executor of the Will of the late Mwala Mwala) v Liseli Mwala*[11] where we stated that the learned judge was legally precluded from considering the interests of non-parties. This principle, he argued, applies with more force in this case, where an order was issued to the detriment of non-parties without a hearing. We were urged to set aside the lower court's ruling with costs.

[42] In response to grounds one and two the learned counsel for the respondent, Mr. Mulengeshi, submitted in the respondent's heads of argument that for the first appellant to prove its allegations against the respondent that the latter caused farmers with whom the first appellant had pre finance contracts to breach their contracts with the first appellant, it would have to proffer evidence that there were pre finance contracts in

existence. This would have entailed joining the parties with whom the purported contracts were entered into as parties to the proceedings so as to show that there were contracts in existence; that these contracts were breached; and that such breach was at the inducement of the respondent. The prudent thinking would have been for the first appellant to commence this action against the farmers it alleged to have entered into pre finance contracts with so that a claim for breach of contract by the said farmers is determined by the court. Furthermore, citing the farmers as parties to the action would have allowed them to confirm or rebut the allegation of the existence of pre finance contracts, the basis of the first appellant's action in the court below. The case of *Attorney General v Aboubacar Tall and Zambia Airways Corporation Limited*[12] was cited as authority on joinder of parties to an action.

[43] The failure by the first appellant to join the farmers with whom it alleges the existence of pre finance contracts, counsel contended, was fatal as it would have resulted in a grave injustice of having the matter decided by the court below on the premise of assertions by the first appellant which could not be

to if liability was consequently to be imputed on the respondent. If there was no liability for breach of contract by the farmers, it was contended, then the respondent cannot be said to have procured breach of contract. We were accordingly urged to dismiss the first and second grounds of appeal.

[47] In response to ground three, counsel contended that section 3(1)(a) of the Cotton Act confers the Cotton Board of Zambia with the power to regulate the production, ginning and manufacturing of seed cotton. In the exercise of its mandate under the said section, the Cotton Board of Zambia adjudicates and settles disputes arising amongst its members. Although it was conceded that the Cotton Act does not specifically provide for the procedure of how complaints and disputes are addressed, through usage and custom, the Cotton Board of Zambia with input from its members and stakeholders has devised methods and means by which such grievances are addressed. These methods have been widely accepted by its members, including the first appellant. The procedure developed by the Cotton Board of Zambia for the resolution of grievances is an internally established forum for resolution of

disputes arising under the provisions of the Cotton Act, including the issues raised by the first appellant in its writ of summons and statement of claim.

[48] It was submitted that the Cotton Board of Zambia has in the past completely settled disputes such as the one before this court, including cases for the first appellant. It is therefore the appropriate forum before which the first appellant should have taken its grievance instead of the High Court, even though the High Court has jurisdiction simpliciter conferred on it by the Constitution of Zambia. The first appellant's commencement of an action before the High Court when the same or similar complaint is yet to be determined by the Cotton Board of Zambia amounts to forum shopping, which conduct has been frowned upon in legal practice. The lower court was therefore on firm ground when it dismissed the first appellant's action for abuse of court process. We were implored to dismiss this ground of appeal.

[49] In response to grounds four and five, it was submitted that the preliminary issues raised in the court below affected the core of the whole matter, determination of which would possibly result

in the court deciding the matter without it proceeding to trial. Our attention was drawn to the case of *Allen v Gulf Oil Refining Limited*[14] where the court stated as follows:

> *"The preliminary point procedure can in certain classes of case be invoked to achieve the desirable aim of economy and simplicity. The... cases desirable as being suitable for trial as a preliminary issue include:*
>
> *(a) Where a single issue of law can be isolated from the other issues in a case, and its decision may be finally determinative of the case as a whole;*
>
> *(b) Where the facts are agreed and the sole issue is one of law."*

[50] Order 14A, rule 1(1), RSC, was also relied on which provides in part that:

> *"The court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that –*
>
> *(b) Such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein."*

[51] As has been stated in the respondent's arguments relating to grounds one and two, counsel submitted, the first appellant's

omission to join the farmers who are alleged to have been induced into breaching their contracts by the respondent was irregular and fatal. The lower court was therefore, on firm ground and within the provisions of the law when it dismissed the action at the stage of adjudicating the preliminary issue. According to counsel grounds four and five are unfounded in law and should therefore be wholly dismissed.

[52] The respondent's response to grounds six and seven was that these grounds are predicated on the opinion expressed by the court in passing, after it had addressed the questions raised before it in the preliminary issues and that the opinion of the court has no legal binding effect on which the appellants can base their appeal. Counsel contended that the statements of the lower court expressed in relation to the conduct by the first appellant and other players in the industry and farmers who entered into pre financing contracts were mere observations made by the court by the way, while deciding the actual issues before it. The said opinions and observations made by the court below, counsel argued, do not form part of the final judgment as they are beyond the ambit of the authoritative and operative

part of the ruling. According to counsel, there was no contravention of the Agricultural Credits Act as alleged in these grounds of appeal.

[53] It was finally submitted that no roving order was made or issued by the lower court which affected all players in the cotton industry. The orders granted by the lower court in its ruling related only to the issues between the first appellant and the respondent. We were accordingly urged to dismiss grounds six and seven as well and the entire appeal.

Consideration of the appeal by this court and decision

[54] We shall consider the first and second grounds of appeal together as they are interrelated. The first ground assails the trial judge for failing to recognize that the economic tort of procuring a breach of contract does not require those induced into breaching the contracts to be joined as parties to the proceedings. The argument being that a person who knowingly procures a breach of contract, or knowingly interferes with a performance of a contract, is personally liable in damages to the innocent party in his own capacity. Ground two faults the trial judge for finding that it was fatal for the appellant to fail to join

farmers who were alleged to have been induced into breaching their contracts by the respondent and dismissing the entire action for non-joinder of parties. The first appellant contends that if the trial judge felt that the farmers ought to have been made parties to the proceedings, failure to join them was not fatal but a defect which was curable by making an order that they be joined to the proceedings.

[55] The respondent's response to the two grounds is that for the first appellant to prove its allegations against the respondent, it would have to adduce evidence that there were pre finance contracts in existence. This would have required joining the farmers with whom the purported contracts were entered into as parties to these proceedings in order to show that there were contracts in existence which were breached as a result of the respondent's inducement. According to the respondent, the failure by the first appellant to join those farmers was fatal because it would have resulted in serious injustice of having the matter decided by the court below on the basis of assertions by the first appellant which could not be gainsaid or confirmed by

the persons with whom the first appellant alleged the existence of pre finance contracts.

[56] The principles governing the economic tort of procuring or inducing a breach of contract are well settled as revealed in the authorities cited by counsel for the first appellant and the respondent. In sum, this tort occurs when some one, with the intention of damaging a plaintiff's contractual relationship with another person disrupts the ability of such person to perform his/her obligation under the contract and in the process, a plaintiff is either prevented from deriving benefits from the contract or maintaining a business relationship with the other party.

[57] In its pleadings the first appellant seeks among others, a declaration that the respondent had induced breaches in its financing agreements with its agents or distributors and seed cotton farmers in Eastern, Central and Lusaka provinces. It was on this basis that the first appellant sought an injunction to restrain the respondent from engaging itself in the alleged unlawful conduct. The thrust of the respondent's preliminary issues was that the failure by the first appellant to join the

cotton farmers with whom it had executed pre finance contracts to these proceedings was fatal. As we have demonstrated below, however, the case of *Lumley v Gye*[13] relied on by the respondent does not make it mandatory for the induced party to be jointly sued with the inducer.

[58] Liability for inducing breach of contract was established by the seminal case of *Lumley v Gye*[13] cited by the respondent's counsel. The court's decision was predicated on the general principle that a person who procures another to commit a wrong incurs liability as an accessory. At page 232 of the judgment, Erle J stated that:

> *"It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property, whether real or personal, or to personal security: he who procures the wrong is a joint wrongdoer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of."* [Emphasis added]

[59] In a subsequent case, *Allen v Flood*[11], Lord Watson put it this way at page 107:

> *"He who willfully induces another to do an unlawful act which, but for his persuasion, would or might never have been committed, is rightly held responsible for the wrong he has procured."*

[60] The words of Lord Macnaghten in the case of *Quinn v Leathem*[15] are also useful. He said this at page 509:

> *"There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case according to the law laid down in Lumley v Gye*[10]*, the inducer may be held liable if he can be shewn to have procured his object by the use of illegal means directed against that third party."* [Emphasis added]

[61] Contrary to the respondent's contention, the first appellant cannot be faulted for not suing the farmers alleged to have been induced by the respondent to breach their pre finance contracts with the first appellant. As the authorities we have discussed in the preceding paragraphs demonstrate, the first appellant's omission to sue the farmers could not be said to be fatal as the law does not make it mandatory for the induced party to be jointly sued with the inducer.

[62] Furthermore, Order 14, rule 5(3) of the High Court enacts as

follows:

> *"No suit shall be defeated by reason of non-joinder or misjoinder of parties."*

[63] In the end, we have no hesitation in concluding that the trial judge completely misapprehended the law relating to inducing or procuring breach of contract. The first and second grounds of appeal must therefore succeed.

[64] The grievance in ground three is that it was wrong for the trial judge to hold that the first appellant abused court process by commencing these proceedings in the High Court when it had already lodged similar complaints before the Cotton Board of Zambia. It is contended that the Constitution of Zambia confers unlimited jurisdiction on the High Court to hear and determine any matter except matters exclusively reserved for the Industrial Relations Court. Further, that although the first appellant initially sought the intervention of the Cotton Board of Zambia, there is no provision in the Cotton Act expressly ousting the jurisdiction of the court in the resolution of the dispute between the first appellant and the respondent. On its part, the respondent's position is that in the exercise of its

mandate under the Cotton Act, the Cotton Board of Zambia adjudicates and settles disputes arising among its members. It is therefore the appropriate forum before which the first appellant should have taken its grievance instead of the High Court, notwithstanding the jurisdiction conferred on it by the Constitution. The commencement of this action before the High Court by the first appellant when the same or similar complaint was yet to be determined by the Cotton Board of Zambia amounted to forum shopping. The trial judge was therefore on firm ground when she dismissed the first appellant's action for abuse of court process.

[65] In considering this ground we think it appropriate to start by examining the relevant provisions of the Cotton Act. The preamble to the Act states as follows:

> *"An Act to establish the Cotton Board and define its functions and powers; to regulate the cotton industry as it relates to the production and ginning of seed cotton; to control the production and marketing of cotton; to repeal and replace the Cotton Act, 1914; and to provide for matters connected with or incidental to the foregoing."*

Section 18 of the Act establishes an Appeals Committee. Its

functions are set out in section 19(1) as follows:

> *"The functions of the Committee shall, on behalf of the Board, be to hear and determine appeals from aggrieved cotton growers, ginners and promoters on matters relating to cotton."*

[66] A perusal of the entire piece of legislation reveals that section 19(1) of the Act is the only provision that deals with the hearing and determination of appeals from aggrieved cotton growers, ginners and promotors. It is quite plain from this section that it does not expressly oust the jurisdiction of the court to determine disputes relating to the cotton industry. This also means that a party cannot be prevented from seeking redress in the High Court over a matter pending determination before the Appeals Committee of the Cotton Board. Therefore, the contention by the respondent that this amounts to an abuse of court process is legally flawed. We accept the first appellant's argument that in the absence of an express statutory provision ousting the jurisdiction of the court, the High Court's unlimited jurisdiction as conferred by the Constitution cannot be fettered. There is therefore merit in ground three.

[67] Grounds four and five were argued together. We will also consider them together. Ground four attacks the trial judge's treatment of the preliminary issues raised as ones which were appropriate for summary determination. In ground five the trial judge is assailed for relying on Order 14A, RSC, to dismiss the first appellant's action. The first appellant's argument on these two grounds is that orders of this kind are normally made if the point of law will be decisive in the litigation or will result in a substantial saving of costs. That the trial judge had an option to discharge the injunction and hear the main matter on its merits but opted not to do so. According to the respondent however, the preliminary issues raised affected the core of the whole matter whose determination would possibly result in the court deciding the matter without it proceeding to trial. That the lower court was on firm ground when it dismissed the action at the stage of adjudicating the preliminary issues because the first appellant's omission to join the farmers alleged to have been induced into breaching their contracts by the respondent was irregular and fatal.

[68] The second preliminary issue was whether this action was rightly before this court when the first appellant commenced this action before the court below when it had already lodged similar complaints before the Cotton Board of Zambia, some of which had been resolved while others were pending resolution. In our determination of ground three, we held that in the absence of an express statutory provision in the Cotton Act ousting the High Court's jurisdiction, there was no impropriety in the commencement of this action by the first appellant in the court below notwithstanding that similar disputes had been lodged with and were pending determination by the Appeals Committee of the Cotton Board.

[69] In our view, the purpose of Order 14A, RSC is quite clear. It confers power on the court to determine a question of law or construction of a document at any stage of the proceedings without a full trial of the action, which determination will finally result in the resolution of the entire matter or any claim or issue in that cause and substantially save on costs. The question therefore is whether the two preliminary issues raised by the respondent in the court below were questions suitable for

determination under Order 14A, RSC. The first preliminary issue was whether this action was rightly before the lower court considering the failure by the first appellant to join to these proceedings, farmers alleged to have been induced by the respondent into breaching their contracts with the first appellant.

[70] In our consideration of grounds one and two, we held that the economic tort of inducing breach of contract does not make it mandatory for the induced party to also be a party to the action because the inducer is personally liable in his/her own capacity. We also made reference to Order 14, rule 5(3) of the High Court rules which states that an action cannot be defeated on the basis of non-joinder or mis-joinder of parties.

[71] Given the foregoing discourse, we take the view that the two preliminary issues were unsuitable for determination under Order 14A, RSC. As aptly argued by the first appellant, the trial judge had an option to discharge the interim injunction and hear the main matter on its merits. We can only assume that what the trial judge endeavoured to do was to fast track the disposal of this case by dismissing it at preliminary stage with

a view to reducing her backlog as no circumstances existed to warrant such dismissal. Our assumption is informed by the trial judge's findings we have quoted in paragraph 20 of this judgment that this matter was improperly before the court and *"it only serves to contribute to inundating the court with unnecessary litigation"*. We strongly deprecate such practice by trial judges. Without doubt, this is not a case fit for final determination under Order 14A, RSC. Accordingly, we find merit in grounds four and five.

[72] Grounds six and seven were argued together. Similarly, we shall also consider them together. The second and third appellants' grievance in ground six is that the holding by the trial judge that cotton farmers who had entered into pre finance contracts were free to sell their cotton crop to buyers other than the companies which provided them with inputs and with whom they had entered into pre finance contracts was contrary to the provisions of the Agricultural Credits Act. Ground seven attacks the decision of the trial judge to issue a roving order affecting all players in the cotton industry when the matter in the court below was only between the first appellant and the

respondent while other players were not parties, and were therefore not given a chance to be heard. The argument by the respondent is that there was no contravention of the Agricultural Credits Act as the opinions expressed by the trial judge do not form part of the final judgment and were made while she was deciding the actual issues before her. In response to questions from the court at the hearing of this appeal, counsel for the respondent conceded that he did not agree with part of judgment of the lower court being impugned by the second and third appellants in grounds six and seven.

[73] We note that the last two grounds were triggered by the trial judge's pronouncement we have reproduced at paragraph 35 of this judgment. According to that pronouncement, courts were being urged to deprecate pre finance contracts which are permitted by law and to be specific, section 19(1) of the Agricultural Credits Act. While the said pronouncement may not be categorized as *ratio decidendi* in strict legal sense, it has the potential not only to send a wrong signal to the players in the cotton industry but also to destabilize it by encouraging farmers who freely execute pre finance contracts to breach them

its normal course before another judge. We award costs to the appellants which shall be taxed in default of agreement.

A. M. WOOD
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE

J. K. KABUKA
SUPREME COURT JUDGE

willy nilly on account of a higher price offered by a third party. If we may add, some players in the cotton industry would be tempted to implement the misplaced pronouncements of the trial judge to the detriment of other players. As aptly submitted by Mr. Mwenye SC, the roving order issued by the trial judge is capable of affecting non-parties to the action in the lower court that had no opportunity to be heard prior to handing down her decision. Therefore, State Counsel's prayer that the ruling of the trial judge should be set aside is not far-fetched. We are satisfied that grounds six and seven must also succeed.

Conclusion

[74] All the grounds of appeal having succeeded we have come to the ineluctable conclusion that this appeal must be allowed. Consequently, the ruling of the trial judge is wholly set aside. For the avoidance of doubt, our decision does not relate to the lower court's discharge of the *ex parte* order of interim injunction which was not appealed against. We take judicial notice that the trial judge who rendered the ruling has since retired. We therefore remit this matter to the High Court to take