IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 112 OF 2018**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

RAE ZAMBIA LIMITED **APPELLANT**

AND

THE ATTORNEY GENERAL **1st RESPONDENT**

TULLOW ZAMBIA BV **2nd RESPONDENT**

CORAM: Chashi, Lengalenga and Siavwapa, JJA

ON: 16th October, 2nd and 28th November 2018

For the Appellant: *E. S. Silwamba, SC with M. Undi (Ms.), Messrs Eric Silwamba, Jalasi and Linyama Legal Practitioners*

For the 1st Respondent: *D. M. Shamabobo (Mrs.), Senior State Advocate*

For the 2nd Respondent: *S. Chisenga and J. Kawana, Messrs Corpus Legal Practitioners*

J U D G M E N T

CHASHI, JA delivered the Judgment of the Court.

Cases referred to:

1. ***Abel Mulenga and Others v Chikumbi and Others (2006) ZR, 33***
2. ***Mike Hamusonde Mweemba v Kamfwa Obote Kasongo, Zambia State Insurance Corporation Limited (Intended Joinder) (2006) ZR, 101***
3. ***The Attorney General v Aboubacar Tall and Zambia Airways Corporation Limited - SCZ (1995) – Selected Judgment***

Legislation referred to:

1. ***The Petroleum (Exploration and Production) Act No. 10 of 2008***
2. ***The High Court Act, Chapter 27 of the Laws of Zambia***
3. ***The Supreme Court Practice (white Book) 1999***
4. ***The Industrial and Labour Relations Act, Chapter 269 of The Laws of Zambia***

This appeal is against the ruling of the High Court under Cause No. **2013/HPA/007** in which the learned Judge dismissed the Appellant's application for joinder of Tullow Zambia BV, the 2nd Respondent as a party to the proceedings.

The brief background to this matter is that, on 20th March 2013, the Minister of Mines, Energy and Water Development (the Minister) decided to cancel with immediate effect the Petroleum Exploration Licence (PEL 007), (the Licence) which had been issued to the Appellant in respect to Block 31.

The Appellant pursuant to Section 97 (1) of ***The Petroleum (Exploration and Production) Act***[1] (the Act) appealed to the High Court alleging illegality, breach of natural justice, breach of legitimate expectation, procedural impropriety and irrationality.

Whilst the appeal was pending, Block 31 was re-advertised by the Minister and a licence was issued to the 2nd Respondent.

This prompted the Appellants on 10th July 2017 to make an application for an Order for joinder of the 2nd Respondent to the proceedings, pursuant to Order 14/5 (1) of ***The High Court Rules (HCR)***[2] and Order 15/4 of ***The Rules of The Supreme Court (RSC)***[3] on the following premise:

(1) That despite the Order of the court for a stay of the Minister's decision and prohibition from advertising Block 31 and inviting bids, the same has been allocated to the 2nd Respondent, whilst the determination by the court as to whether the Appellant still has proprietary interest is still awaiting determination of the court.

(2) That during the Appellants formal application, the 1st Respondent had stated its preference for the Appellant to partner with another entity in line with normal industry practice of sharing exploration risk.
That the 2nd Respondent expressed interest as 50% partner which culminated into an option and shareholders agreement. The agreement was presented to the 1st Respondent and was duly signed

by the Appellant and initialed by the 1st Respondent. The involvement of the 2nd Respondent was to have the effect of accelerating the exploration program of up to US$35,000,000.00.

In addition to the agreement, the Appellant presented a certificate of evidence of transfer of 50% of the Licence to the 2nd Respondent.

In Opposing the application, the 2nd Respondent asserted that, what the Appellant was challenging was a particular act of Government and as such had no interest in the proceedings before the court, which were purely administrative in nature and in addition that they could not competently respond to any of the grounds contained in the appeal.

The 2nd Respondent denied any knowledge of the option and share agreement, as it was not dated and signed and was therefore inconclusive. The 2nd Respondent further argued that the proceedings in the court below cannot affect them in any way as the licence does not vest any proprietary rights in the Block on which it was issued, as all the proprietary rights vest in the State and the licence merely gives the holder the rights to carry out the exploration activities.

As regards the 1st Respondent, they mainly opposed the application on the ground that the 2nd Respondent did not have sufficient interest in the matter, to be joined to the proceedings.

After considering the affidavit evidence and the parties' respective arguments, the learned Judge opined that, the granting of the Order for joinder of a party is discretional and in exercising that discretion, the court is guided by the interest of justice.

The learned Judge then formulated the following questions in determining the application:

(1) That is it absolutely necessary that the 2nd Respondent should be joined in order for there to be proper determination of all the issues in the matter.

(2) Will the Appellant's cause suffer or be defeated if the 2nd Respondent is not joined?

(3) Would it be in the interest of justice to add the 2nd Respondent to the matter.

The learned Judge then went on to state that, for a party to be joined, it must either have an interest in the subject matter, or must likely to be affected by the result of the proceedings. The case of **Abel Mulenga and Others v Chikumbi and Others**[1] was in that respect cited.

The learned Judge then agreed with the 2nd Respondent that, if they were joined, they were not going to make any meaningful contribution as they could not speak to the decision taken by the Minister as they were not the issuing authority. That therefore, joining them will not be absolutely necessary for there to be proper determination of all the issues in the matter.

The learned Judge then, at page R20, line 12 of the ruling, had this to say:

> *"Furthermore, it is true that the outcome of the matter is likely to affect the intended 2nd Respondent.*
>
> *The question to be answered however, is whether it is in the interest of justice for the intended respondent to be joined to the proceedings and wait for the outcome of this matter to affect it while incurring legal costs? The answer is in the negative. The law is very clear that joinder may be granted even after judgment has been delivered... therefore, at the time when the decision of this court affects the intended 2nd Respondent, the Appellant can apply for them to be joined to the matter."*

Disenchanted with the ruling, the Appellant appealed to this Court advancing three grounds of appeal, namely:

(1) That the court below erred in law and fact when it found as a fact that the 2nd Respondent had no interest or *locus standi* whatsoever in the proceedings before the court.

(2) That the learned Judge erred in law and fact when she found as a fact that the 2nd Respondent would be affected by the outcome of the proceedings but however proceeded to refuse to join the 2nd Respondent on the ground that it would not be in the interest of justice.

(3) That the learned Judge erred in law and fact when she applied the wrong test for the joinder of a party.

At the hearing of the appeal, State Counsel Silwamba relied on the Appellants heads of argument. The grounds of appeal were argued *seriatim*.

In arguing the first ground, our attention was drawn to the provisions of Order 14/5 (1) ***HCR***[2] as read with Order 15/4 (1) **RSC**[3] and submitted that the 2nd Respondent possesses sufficient interest to be joined to the proceedings in the court below as was depicted in the Appellant's affidavit in support of the application for joinder.

According to State Counsel, the very act of the 2nd Respondent submitting submissions to defend its "exploration rights" constitute grounds in itself that the 2nd Respondent has an interest to defend its rights and should therefore be joined to the proceedings. It was State Counsel's submission that, the dispute at the heart of the matter relates to an exploration licence that the Appellant states was illegally reissued to the 2nd Respondent. State Counsel referred us to the provisions of Section 14 (1) of the Act and submitted that, in the event that the Appellant succeeds in its claim, that would directly affect the licence held by the 2nd Respondent.

It was further submitted that, the only option available to ensure that the interest of justice are efficiently pursued is to have all necessary parties

with an interest that could be affected, in this case, be joined to the proceedings.

As regards the second ground, it was submitted that, this is a fit and proper matter for joining the 2nd respondent. Whilst the learned Judge held that it would not be in the interest of justice to join the 2nd Respondent, State Counsel argued that the 2nd Respondent are likely to be affected by the decision of the court. That, this constitutes sufficient interest to justify the inclusion of the 2nd Respondent as a party.

State Counsel then drew our attention to a plethora of authorities on joinder of parties, notable ones being the cases of **Abel Mulenga and Others**[1], **Mike Hamusonde Mweemba v Kamfwa Obote Kasongo, Zambia State Insurance Corporation Limited (Intended Joinder)**[2] **and The Attorney General v Aboubacar Tall and Zambia Airways Corporation Limited**[3] and submitted that, pursuant to the aforestated authorities, the learned Judge erred in dismissing the application for joinder when there was sufficient evidence to show that the 2nd Respondent possessed sufficient interest that may potentially be affected by the decision of the court.

That in addition, one of the purposes of joinder as was stated in the **Aboubacar Tall**[3] case, is to ensure that the matters in the cause may effectually and completely determined and adjudicated upon to put an end to any further litigation.

In arguing the third ground, State Counsel submitted that, whilst the learned Judge acknowledged that the 2nd Respondent possessed an interest capable of being affected by the court's decision, failed to take into consideration that the Appellant had established that the 2nd Respondent possessed sufficient interest to justify joining them to the case.

State Counsel submitted that, the learned Judge erred in failing to consider that sufficient interest of the 2nd Respondent existed.

It was his view that, in Order to serve the interests of justice, the appeal should be upheld.

Mrs. Shamabobo, Counsel for the 1st Respondent equally relied on the 1st Respondents heads of argument and argued the first and second grounds of appeal together followed by the third ground

According to Counsel, the law as provided for under Order 14/5(1) **HCR**[2] entails that, for a party to be joined to the proceedings, the party must:

(1) Either have an interest in the subject matter of the action, or

(2) Must be likely to be affected by the result of proceeding's

Counsel submitted that, the option and shareholders agreement appear to have been made between the Appellant and the 1st Respondent and that negates the interest the Appellant claims is held by the 2nd Respondent.

It was Counsel's submission that the Licence is unlikely to be affected by the outcome of the appeal because the only practical Order that can be made in the event that the Appellant is successful is an Order for damages. That this is because the 2nd Respondent has already commenced exploration activities and an Order which will have the effect of reinstating the Appellant's Licence would be impractical in view of the fact that what is being challenged is a decision of the State and not a decision of the 2nd Respondent.

Counsel relied on the case of **Abel Mulenga and Others**[1] in which it was stated that:

> *"The mere fact that the applicants may have been affected by the decision of the court below does not clothe them with sufficient interest or locus standi entitling them to be joined to the dispute."*

It was on the strength of that case submitted that, the 2nd Respondent does not have sufficient interest to be joined to the proceedings merely because it is likely to be affected by the decision of the court.

In response to the third ground of appeal, it was contended that, the learned Judge took into consideration the interest of the 2nd Respondent

and found that it was not sufficient to clothe it with enough *locus standi* to be joined to the proceedings and that it was therefore not in the interest of justice for it to be joined.

According to Counsel, while the court was aware that the 2nd Respondent was likely to be affected by the decision, it was also alive to the fact that in the interest of justice, that alone was not sufficient for it to be joined. That as such the right test was employed by the court.

Counsel for the 2nd Respondent Mr. Chisenga, also relied on the heads of argument, which he augmented with brief oral submissions.

In response to the first ground, Counsel submitted that the learned Judge was on firm ground in exercising her discretionary jurisdiction in the manner that she did, in accordance with the provisions of Order 14/5 (1) **HCR**[2] as read with Order 15/4(1) **RSC**[3]. That, the rules vest discretionary jurisdiction on the High Court to order joinder of a person who may be affected by the outcome of proceedings before the court.

Counsel argued that the import of the rules is that, the High Court is required to consider the circumstances of every case. According to Counsel, it is clear from the record that, the act of cancellation was a ministerial act and failure to show any involvement by the 2nd Respondent negates any possibility of a joinder to the proceedings against the cancellation of the licence.

Counsel contended that, the 2nd Respondent has no locus in the process of cancellation of the licence which is subject of the appeal in the High Court and therefore, cannot be joined to that appeal, as the 2nd Respondent cannot speak to the Minister's action of cancelling the licence. That the Appellant has taken issue with a specific decision of the Government and has called upon the High Court to make a determination of the legality of that decision.

It was further submitted that, as rightly observed by the learned Judge, the 2nd Respondent would have no meaningful contribution to make in the proceedings and would merely be incurring unnecessary costs.

According to Counsel, since the Government is a party to the proceedings, the 2nd Respondents exploration rights are well defended because it is only the Government as the issuing authority that can justify the decision to award the 2nd Respondent's its exploration rights.

Counsel further submitted that the 2nd Respondents knowledge that the Appellant held a Licence does not clothe the 2nd Respondent with interest in the proceedings, in light of the established facts that the Appellant's Licence was cancelled and Government put up a public tender for petroleum exploration in Block 31.

That there was nothing precluding the 2nd Respondent or other persons from submitting bids.

Counsel argued that, the Appellant's reliance on Section 14 (1) of the Act is flawed because the Appellant's Licence was cancelled and the 2nd Respondent was issued with a new licence following due process.

In response to the second ground, Counsel submitted that, the mere fact that a person may be affected by the decision of the court does not in itself entail that the person must be joined to the proceedings. The court must consider all the facts and the interest of justice. Counsel in that respect relied on the **Abel Mulenga and Others**[1] and the **Aboubacar Tall**[3] cases and reiterated that the 2nd Respondent has no interest in the proceedings and although it is possible that it may be affected by the decision of the court, it is not in the interest of justice to join the 2nd Respondent because they can neither defend nor justify the decision of the State.

As regards the third ground, Counsel submitted that the learned Judge used the correct test, as she applied Order 14/5 (1) **HCR**[2] and Order 15 **RSC**[3] as well as the **Abel Mulenga and Others**[1] case.

That as provided for in Order 14/5 (1) **HCR**[2], the issue for determination in a joinder application are whether there is sufficient interest in the subject matter of the action and whether the person who is not a party to that action is likely to be affected by the outcome of the action. Counsel

submitted that, since the learned Judge considered the aforestated elements, the test applied by the learned Judge cannot be faulted.

In concluding, Counsel urged us to dismiss the appeal with costs.

We have considered the party's respective arguments and the ruling being impugned. We shall address all the three grounds of appeal together as they are entwined. The issue they raise is whether the learned Judge in the court below in exercising her discretion in the application of joinder of the 2nd Respondent, applied the correct test.

As earlier alluded to, the application for joinder was brought by the Appellant in the court below pursuant to Order 14/5 (1) **HCR[2]** as read with Order 15/4(1) **RSC[3]**.

Order 14/5 (1) **HCR[2]** provides as follows:

> *"If it shall appear to the court or a Judge, at or before the hearing of a suit, that all persons who may be entitled to or claim some share or interest in, the subject matter of the suit, or who may be likely to be affected by the result, have not been made parties, the court or Judge may adjourn the hearing of suit to a future day, to be fixed by the court or a Judge, and direct that such persons shall be made either plaintiffs or defendants in the suit, as the case may be..."*

Order 15/4 **RSC[3]** states as follows:

> *"4-(1) subject to rule 5 (1) two or more persons may be joined together in one action as plaintiffs or as defendants with the leave of the court or where –*
>
> *(a) If separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions and*
>
> *(b) All rights to relief claimed in the action (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions."*

The threshold under Order 14/5 (1) **HCR[2]** is that, for a party to be joined to the proceedings it must either;

(1) be a person who may be entitled to, or claim some share or interest in the subject matter of the suit or

(2) who may likely to be affected by the result or outcome of the suit.

The import of the aforestated is that, for an application for joinder to be granted, one does not necessarily have to satisfy both requirements, but either of the two, would suffice.

As can be seen, the provisions under Order 15/4(1) **RSC[3]** are not to the same effect as Order 14/5 (1) **HCR[2]**. Order 15/4 (1) **RSC[3]** brings to the fore other additional circumstances when one can be joined as a party which mainly deals with issues of avoiding multiplicity of actions.

It is for that reason that we shall restrict ourselves with the provisions under Order 14/5 (1) **HCR[2]**. We are fortified in doing so in view of the fact that the respective parties to this appeal evidently restricted their arguments to the provisions of Order 14/5 (1) **HCR[2]**.

As far as Order 14/5 (1) **HCR[2]** is concerned, our view is that the cancellation of the Appellant's Licence and the granting of a licence to the 2nd Respondent, relates to the same subject matter, being Block 31.

We opine that, this gives the 2nd Respondent sufficient interest in the matter.

The learned Judge in the court below, having found that the 2nd Respondent were likely to be affected by the outcome of the proceedings, which in our view was the correct finding, should not *volte face* have stated that the Appellant should wait until the Judgment of the court and then see if it is affected. That was an evident contradiction of its earlier finding. In any case, the issue is not whether a person will be affected, but whether he is likely to be affected.

We note from the ruling of the court below, that the learned Judge seems to have been swayed more by the questions she formulated, which in our view were not the right questions. The learned Judge should have

restricted herself to the requisites as provided for under Order 14/5 (1) **HCR**[2] and should have exercised her discretion in favour of the Appellant. There are a lot of issues which have been raised by the Respondents in their arguments as to why they are of the view that the 2nd Respondent will not be affected by the outcome of the proceedings. We are of the view that, that is the more reason they need to be party to the proceedings, in order to make representations and assist the court below in arriving at a decision which will not adversely affect them.

We further note that the Respondents heavily relied on the case of **Abel Mulenga and Others**[1] in the court below and in their arguments before this Court, and it is on the basis of the holding in that case as earlier alluded, the learned Judge based her decision. That case in our view is very much distinguishable from this case on many fronts.

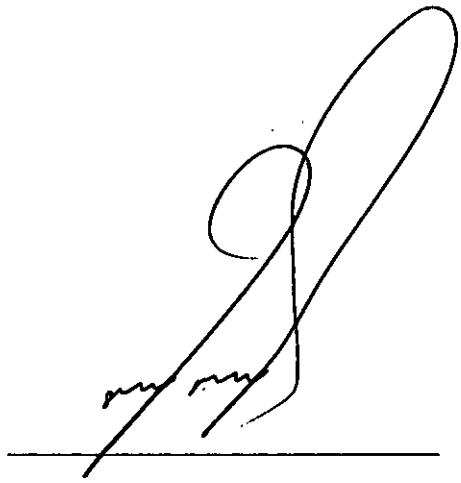
Firstly, that case was in the Industrial Relations Court and was dealing with Rule 32 of ***The Industrial and Labour Relations Act***[4], which is distinct from Order 14/5 (1) **HCR**[2] in both form and content.

Secondly, the court below found that the appellants had no interest in the subject matter as the appellants did not have any dispute with the 2nd respondent relating to payment of their terminal benefits. Furthermore, the court had no jurisdiction in the matter the Appellants were propagating as it related to the right to purchase houses.

In *casu*, as earlier stated, the 2nd Respondent has sufficient interest in the matter and is likely to be affected by the outcome of the appeal in the court below.

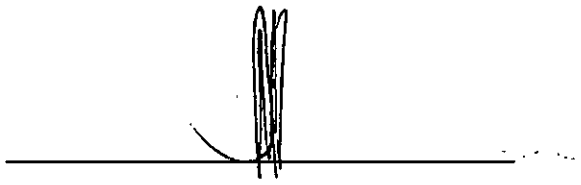
In the view that we have taken, the appeal has merit and it is allowed and we accordingly order joinder of the 2nd Respondent.

Each party to bear its own costs.



J. CHASHI
COURT OF APPEAL JUDGE

F. M. LENGALENGA
COURT OF APPEAL JUDGE



M. J. SIAVWAPA
COURT OF APPEAL JUDGE