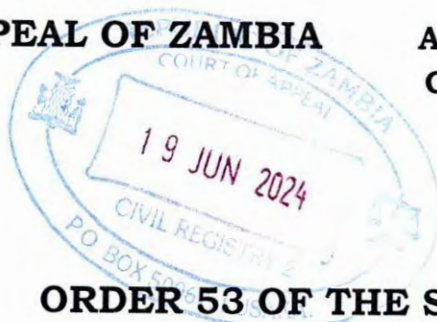


IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL NO. 177/2023
CAZ/8/188/202



BETWEEN:

IN THE MATTER OF : ORDER 53 OF THE SUPREME COURT
PRACTICE OF ENGLAND (1999)
EDITION

IN THE MATTER OF : AN APPLICATION FOR JUDICIAL
REVIEW

BETWEEN

AFRICAN BANKING CORPORATION ZAMBIA APPELLANT
LIMITED T/A ATLAS MARA

AND

THE INSPECTOR GENERAL OF POLICE
THE ATTORNEY GENERAL
RAJAN LEKHRAJ MAHTANI

1ST RESPONDENT
2ND RESPONDENT
INTERESTED PARTY

Coram : Chashi, Makungu and Sharpe - Phiri, JJA
On the 30th day of April, 2024 and 19th June, 2024

For the Appellant : Mrs. M. Mutuna of Mweshi Banda & Associates Legal Practitioners

For the 1st & 2nd Respondents: Mr. N. Mwiya Principal State Advocate

For the Interested Party: Mr. P. Chomba from Mulenga Mundashi Legal Practitioners with Mrs. B Nachinga of J.M Advocates

JUDGMENT

MAKUNGU JA, delivered Judgment of the Court

Cases referred to:

- R (Elmes) v. Essex County Council and Secretary of State for Communities and Local Government¹ (2018) EWHC 2055*
- Re Northern Ireland Human Rights Commission (2002) UKHL 25*

3. *The Minister of Home Affairs and the Attorney General v. Lee Habasonde suing on behalf of Southern African Centre for the Constructive Resolution of Disputes* (SCZ Judgment No. 23 of 2007).
4. *R v. Liverpool City Council ex-parte Muldoon* (1996) 1 WLR 1103
5. *Dean Namulya Mung'omba, Bwalya Kanyata Ng'andu and Anti – Corruption Commission v. Peter Machungwa and 2 Others* (SCZ Judgment No. 3 of 2003)

Other Authorities referred to:

1. *Rules of the Supreme Court of England* (1999) Edition, White Book
2. *Halsburys Laws of England*, 4th Edition
3. *De Smith's Judicial Review*, 8th ed: 4th supplement, Lord Harry Woolf 2021, Sweet and Maxwell Ltd, UK
4. *Application for Judicial Review Law and Practice of Crown Office*, 2nd ed. Grahame Aldous and John Alder 1993 Butterworths, London
5. *Judicial Review Law and Practice of the Crown Office*, 2nd ed. Butterworths London, Dublin, Edinburgh 1993

1.0 INTRODUCTION

- 1.1 This appeal is against the Ruling dated 30th May 2023, made by High Court Judge M.M. Bah-Matandala granting an order to join the interested party to the proceedings for judicial review commenced by the appellant. She ordered costs in the cause and granted leave to appeal.

2.0 BACKGROUND

- 2.1 The genesis of this matter is the failure by the appellant, who is the applicant in the Judicial Review proceedings in the Court

below to remit funds that were paid to it, to the “interested party” and other parties whom the interested party represents.

2.2 The interested party lodged a criminal complaint against the appellant and its employees for illegally appropriating funds that were supposed to be paid to him and other sellers of Finance Bank Zambia Limited from the proceeds of receivership of Lamasat International Limited.

2.3 Due to the events that ensued, on 13th August 2022, the appellant trading as Atlas Mara Zambia, applied for leave to commence judicial review proceedings against the 1st respondent as the Principal Commander of the Zambia Police Service pursuant to **Section 3 (1) of the Zambia Police Act, Chapter 107 of the Laws of Zambia**, and the 2nd respondent in his capacity as the legal representative of the Government of the Republic of Zambia pursuant to **Section 12 of the State Proceedings Act, Chapter 71 of the Laws of Zambia**. The application was against the following actions and decisions:

1.1 The decision of the 1st respondent acting through the Zambia Police Service, Anti-Fraud Department at Force Headquarters (Anti – Fraud Department) to apply for and

obtain warrants to inspect bankers books under section 8 (1) of the Evidence (Bankers Books), Chapter 44 of the Laws of Zambia dated 30th June, 2022 (the warrant) with respect to purported investigations against Lamasat International Limited's account number 3015089516020 held at the applicant's and the applicant's recoveries cash advance account number 9315922387014 respectively as the suspects in respect of an alleged complaint that they committed the offence of theft by agent contrary to **section 280 of the Penal Code, Chapter 87 of the Laws of Zambia;** and

- 1.2 The decision of the 1st respondent acting through the Anti-Fraud Department to issue notices under ZP Form 87 to the applicant's employees namely Zella Mwale, Helen Lunda and Lewis Kanda (the notices) pursuant to the warrants in the absence of naming the applicant as a suspect thereby depriving it (the applicant) of its right to natural justice and prejudicing its right against self-incrimination; and
- 1.3 The decision of the 1st respondent acting through the Anti-Fraud Department to indirectly investigate the applicant through the guise of inter alia notices issued pursuant to the

warrants without issuing warn and caution statements placing the applicant on notice that any statements made by its employees can and will be used against the applicant should the investigations culminate in criminal proceedings; and

1.4 The decision of the 1st respondent acting through the Anti-Fraud Department to issue the notices pursuant to the warrants without furnishing the applicant with any evidence of a complaint lodged by Dr. Rajan Mahtani (the Complainant) or by not disclosing the particulars of the alleged complaint lodged against the applicant to support the allegation of theft by agent; and

1.5 The decision of the 1st respondent acting through the Anti-Fraud Department to commence criminal investigations against the applicant in a matter that is civil in nature which has the effect of or the perception of assisting the complainant intimidate the applicant and oppress or coerce it into giving in to the complainant's civil demands made by letter from the complainant dated 8th June 2022.

2.4 The reliefs sought are inter alia:

1. *An order for certiorari: to remove into the High Court for purposes of quashing the decision of the 1st respondent to commence criminal investigations that have been actuated by ulterior motive rather than a desire to punish on behalf of the public crime committed.*
2. *A declaration that the decision by the 1st respondent to apply for the search warrants and commence criminal investigations through the issuance of Notice against the Applicant's employees is illegal, ultra vires the Zambia Police Act and Wednesbury unreasonable.*

2.5 On 11th November 2022, under CAZ/8/444/2022 this Court granted leave to the appellant to commence judicial review proceedings. Subsequently, the appellant did commence judicial review proceedings.

2.6 On 16th December, 2022, the interested party applied to be joined to the proceedings for the purpose of being heard in opposition to the application for judicial review.

2.7 The application was made pursuant to **Order 53 Rule 9(1)** as read with **Practice Note 53/14/76 of the Rules of the Supreme Court 1999 Edition (White Book) Volume 1. (RSC)**

3.0 AFFIDAVIT IN SUPPORT OF THE APPLICATION FOR JOINDER

3.1 The affidavit in support of the application for joinder was sworn by the interested party, Rajan Lekhraj Mahtani. He deposed that he was the one who lodged a criminal complaint against the applicant and its employees, for illegally appropriating funds that were supposed to be paid to him and other sellers of Finance Bank Zambia Limited from the proceeds of the receivership of Lamasat International Limited.

3.2 That the applicant mentioned him, especially in the documentation filed in support of the application for judicial review, and as such, any decision of the High Court will inevitably affect him and his rights as the complainant in the criminal matter. That the documents before Court demonstrate clearly that he has sufficient interest to be joined to the proceedings so that he is heard and a just decision is reached.

4.0 AFFIDAVIT IN OPPOSITION TO THE APPLICATION FOR JOINDER

4.1 The appellant filed an affidavit in opposition sworn by Zelia Agness Mwale the Recovery and Collection Manager of the appellant bank. She deposed that she has been advised by the appellant's/applicant's Counsel of record and verily believes it to be true that the intended party does not have sufficient interest to be joined to the proceedings.

5.0 1ST AND 2ND RESPONDENT'S POSITIONS

5.1 The 1st and 2nd respondents did not file any documents in opposition to the application for joinder. They did not even appear before the lower court on the hearing of the application.

6.0 RULING OF THE LOWER COURT

6.1 Upon hearing the application for joinder in the absence of the 1st and 2nd respondents, the lower court interpreted **Order 53 (9) (1) RSC** which provide as follows:

“On the hearing of any motion or summons under Rule 5 that any person who deserves to be heard in opposition to the summons or notices and appears to the Court to be a proper person to be heard, shall

be heard, notwithstanding that he has not been served with the notice of motion or summons.”

6.2 Her interpretation was that the Court is clothed with jurisdiction to join a party to judicial review proceedings when it appears to the Court that that is a proper person to be heard.

6.3 The learned Judge proceeded to determine that “*the interested party had demonstrated, on the evidence on record and the arguments by both parties, that he is a proper party to give full and frank facts, to help the court with its investigations into the motion for judicial review.*”

6.4 On this basis, the application for joinder was granted as prayed. It was further ordered that costs be in the cause and the parties be at liberty to appeal.

7.0 GROUNDS OF APPEAL

7.1 The appellant has raised six (6) grounds of appeal couched as follows:

1. *The Judge in the court below erred in law and fact when she made an unbalanced assessment of the evidence before her in paragraph 6 of the Ruling that the interested party would*

give further, full, and frank information as party interested to give information thereby abrogating the principles of judgment writing.

- 2. The Judge in the court below erred at law when she rendered a decision that was not thorough, exhaustive, and clear on all issues raised before her by failing to address how the interested party as a private person could explain the administrative decisions and steps taken by the 1st respondent, as a public body.*
- 3. The Judge in the Court below erred in law when she joined the interested party for the purpose of being heard in opposition to the application for judicial review in disregard of the principles in judicial review which only permit her to give an interested party audience to be heard.*
- 4. The Judge in the court below misdirected herself when she held that the interested party is a proper person to be heard to give full and frank facts to help the court with its investigation in the judicial review proceedings brought by the appellant against the 1st respondent arising from the latter's decision to commence investigations against Lamasat International Limited's Bank account number*

3015089516020 and the appellant 's Recoveries Cash Advance Account number 9315922387014, respectively held at the appellant 's Bank, as suspects, without having regard to the principles that govern the right of an interested party to be heard in judicial review proceedings.

5. The Judge erred in law and fact when she joined the interested party who is a private individual to the proceedings in complete disregard for the object and purpose of judicial review proceedings thereby wrongly exercising her discretion.
6. The Judge erred in law and fact when she held that joining the interested party to the proceedings would not derail the essence of the Judicial review into ordinary civil proceedings without due regard to the fact that judicial review is not meant to enforce private rights.

8.0 APPELLANT 'S HEADS OF ARGUMENT

8.1 In the appellant's heads of argument filed on 12th June 2023, the six grounds of appeal are argued together because they are inter-related.

8.2 The appellant started by discussing the purpose and nature of judicial review. In this regard, reference was made to

Halsbury's Laws of England 4th Edition, reissue on page 91 paragraph 60 where it is written inter alia that:

“Judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself.

It is thus different from an ordinary appeal. The purpose of the remedy is to ensure that the individual is given fair treatment by the authority to which he has been subjected.

..... The duty of the court is to confine itself to the question of legality. Its concern is with whether a decision – making authority exceeded its powers, committed an error of law, committed a breach of the rules of natural justice, reached a decision which no reasonable tribunal could have reached or abused its powers.”

8.3 We were also referred to paragraph 4 of the explanatory notes in **Order 53/14/25 of the RSC** that:

“Judicial review will not lie against a person or anybody carrying out private law and not public law functions...”

8.4 In light of the foregoing, counsel submitted that the interested party, as a private individual, does not exercise any public functions and cannot explain the decisions and steps taken by the 1st respondent, which is a public body. This is because the evidence within his reach would attempt to explain the merits of the 1st respondent’s decision, which is against the nature of judicial review.

8.5 Counsel acknowledged that the law provides for the joinder of parties to judicial review proceedings. Reference was made to the definition of “interested persons” under paragraph 2 – 072 of **De Smith Judicial Review, 8th edition** where the learned author stated as follows:

“Persons other than the claimant and defendant may participate in a claim for judicial review. One important category is “interested parties”, upon whom the claimant is obliged to serve the claim form, an interested party “means any person (other than

the claimant and defendant) who is directly affected by the outcome of the claim.” Being inevitably or necessarily affected by the outcome of judicial review is insufficient to make a person affected, he must also be affected without the intervention of an intermediary agency.”

8.6 Further reference was made to the case of **R (Elmes) v. Essex County Council and Secretary of State for Communities and Local Government.**¹ In this persuasive precedent, an interested party is defined as *“a party that would be directly and adversely affected by a successful judicial review claim.”*

8.7 Counsel submitted that the lower court’s decision to allow the joinder of an interested party was erroneous because the interested party did not show what evidence or information he would bring before the High Court concerning the procedure adopted by the 1st respondent in its decision to investigate the appellant without due notice. There was no evidence that the interested party would be adversely affected by the investigations into his complaint being carried out unlawfully.

The decisions of the 1st respondent were stated in the notice containing a statement in support of the application for leave to apply for judicial review (the notice). Considering the merits of the 1st respondent's decisions arising from the alleged facts leading to the interested party's complaint has nothing to do with the ambit of judicial review. Therefore, the interested party's intervention in the proceedings will have the negative effect of detaching the proceedings from the consideration of the decision-making process that the 1st respondent engaged in.

8.8 We were referred to the case of **Re Northern Ireland Human Rights Commission**² where it was stated as follows:

"The practice of allowing third persons to intervene in proceedings brought by and against other persons which do not directly involve the persons seeking to intervene has become more common in recent years but it is still a relatively rare event. The intervention is always subject to the control of the court and whether the third person is allowed by the court to intervene is usually dependent upon the court's judgment as to whether the intervention will assist the court itself to

perform the role upon which it is engaged. The court has always to balance the benefits which are to be derived from the intervention as against the inconvenience, delay, and expense which an intervention by a third person can cause the existing parties." [our emphasis]

8.9 Counsel proceeded to submit that the lower court abrogated the principles of judgment writing enunciated in the case of **The Minister of Home Affairs and The Attorney General v. Lee Habasonde suing on behalf of Southern African Centre for the Constructive Resolution of Disputes.**³ That the Court below failed to consider the law or the principles that explain who is a proper person to be heard and why. That the Judge did not explain why she believed that the interested party was a proper party to give frank facts to help the court with its investigations into the motion.

8.10 Additionally, in **R v. Liverpool City Council ex-parte Muldoon,**⁴ it was stated that in approaching the issue of who is a proper person to be joined, the English Court's approach has been to ensure that only those who will be directly affected by

the decision under review should be joined. In that case which is highly persuasive, since we follow **Order 53 of the RSC** being affected financially did not clothe a party with sufficient interest.

8.11 Reference was also made to the Zambian case of **Dean Namulya Mung'omba Bwalya Kanyata Ng'andu and Anti – Corruption Commission v. Peter Machingwa and 2 Others.**⁵

8.12 Finally, counsel prayed for the reversal of the joinder with costs to the appellant both in this court and the court below.

9.0 INTERESTED PARTY'S HEADS OF ARGUMENT IN OPPOSITION TO THE APPEAL

9.1 The interested party filed heads of argument in opposition on 12th July 2023, wherein counsel contended that the respondent misapprehended the purpose for which the interested party was joined to the substantive hearing of the judicial review. Contrary to the appellant's assertions, the interested party joined the proceedings to give full and frank disclosure of the facts that triggered the exercise of the power that is the basis of the judicial review. The interested party has not been joined to explain or justify the decisions reached by the 1st respondent.

That is the preserve of the 1st respondent. He has only been joined to explain the facts from his personal knowledge since he was the one who complained to the police, which resulted in the commencement of the investigations. He will be directly affected by the outcome of the judicial review proceedings.

9.2 Counsel further pointed out that the appellant's intention is to stop the investigations that were commenced by the 1st respondent. On the other hand, the interested party wants to ensure that his complaint is fully attended to and that the 1st respondent investigates the complaint. If there is any merit in their findings, the first respondent will proceed to prosecute the appellant through the legal channels. Therefore, it is in the interest of justice that the interested party is allowed to present the evidence leading to his lodgment of the complaint with the Zambia Police.

9.3 Counsel further submitted that the appellant cannot on one hand specifically mention the interested party's name in trying to prove its case, but on the other hand stop the interested party from being heard on the allegations. Justice demands that a

party against whom certain allegations have been made, be heard on such allegations.

9.4 Counsel further submitted that the appellant's argument that an interested party is not joined to explain the factual matrix of the case called for judicial review but to explain the legality or validity of the impugned decision is erroneous and should accordingly be dismissed. He referred to **Order 53(9) (1) of the RSC** and submitted that the provisions empower the High Court to hear any person who desires to be heard in opposition to the motion or summons if it appears to the High Court that such a person is a proper person to be heard.

9.5 It was further submitted that the joining of the interested party was to enable the High Court to have a full and clear set of facts. The High Court after hearing the parties also noted that the interested party was likely to be affected by the outcome of the judicial review proceedings.

9.6 Reference was made to the case of **Dean Namulya Mung'omba Bwalya Kanyata Ng'andu and Anti - Corruption Commission**

v. **Peter Machingwa and 2 Others**⁵ where it was held inter alia as follows:

“In the present case, it is worth noting that the appellant s joined in the proceedings after showing sufficient interest in the matter, the sufficient interest being that they originated the complaints that led to the appointment of the tribunal whose findings and recommendations are subject of the judicial review.”

9.7 Counsel contended that in light of the above holding, the interested party has sufficient interest in the judicial review proceedings as the party that lodged the complaint to Zambia police, which prompted the 1st respondent to exercise the powers that are subject of the judicial review.

9.8 In response, to the appellant 's submission concerning what evidence or information the interested party will bring before the High Court about the procedure adopted by the 1st respondent in its decision to investigate the appellant , counsel contended that this submission has no legal basis because in determining whether or not to join a party, the High Court can be influenced or persuaded by various factors, including whether such an

interested party is likely to bring cogent evidence that will assist the Court in fairly and judiciously determining the matter.

9.9 Responding to the appellant's contention that the High Court ruling goes against the principles of judgment writing, counsel submitted that the High Court's ruling showed the facts, the law, and the reasoning of the Court. He went on to reproduce certain portions of the ruling verbatim to demonstrate that the Court relied on **Order 53 (9) (1) of the RSC** and applied it to the facts of this case.

9.10 In rebutting the appellant's argument that the lower court did not balance the interest of joining the interested party against the delay that this would cause to the proceedings, counsel submitted that this argument is mere speculation as the High Court had weighed the competing interests. The High Court had determined that the benefit that the interested party would bring to the proceedings in assisting the Court in arriving at its decision outweighed the delay, if any, that the joining of the interested party to the proceedings would bring. We were urged to dismiss the appeal with costs to the interested party.

10.0 ANALYSIS AND DETERMINATION

10.1 We have considered the record of appeal and the arguments by the appellant and the interested party. The six grounds of appeal are intertwined, hence we shall tackle them together.

10.2 We shall begin by considering whether the Ruling was properly written following the guidelines given in the **Lee Habasonda** case supra that:

“Every judgment must reveal a review of the evidence, where applicable, a summary of the arguments and submissions if made, findings of fact, the reasoning of the court on the facts and the application of the law and authorities, to the facts, and finally, the conclusion.”

10.3 The appellant complains that the lower court did not consider principles that explain who a proper person to be joined to judicial review proceedings is. The Judge merely stated that she believed that the interested party would give full and frank facts to help the court with its investigations into the motion for judicial review.

10.4 Having looked at the Ruling, we are satisfied that it complies with the guidelines laid down in the **Lee Habasonda** case. Under paragraphs 6.2 to 6.5 the lower court considered its jurisdiction pursuant to Order **53(9) (1) of the RSC** and stated that, the interested party had demonstrated on the evidence on record and the arguments by both parties, that he is a proper party to be joined to the proceedings. Further, in paragraph 6.6 the Court stated that allowing the joinder would not derail the essence of judicial review into an ordinary civil proceeding since the interested party is only coming in to give further, full and frank information as a party interested to give information.

10.5 Although the lower Court did not state that the interested party will be affected by the outcome of the judicial review, we are of the firm view that for a party to be interested, it means that, that person will be affected by the outcome of the proceedings.

10.6 Having carefully considered the nature and purpose of judicial review as elucidated in **Halsbury's Laws of England 4th edition**, re-issue, page 91 paragraph 6, quoted in paragraph 8.2 hereof, **Order 53/14/73 of the RSC** and the case of **R (Elmes) and Secretary of State Communities and Local**

Government¹ together with the cases of **Re Northern Ireland Human Rights Commission and the Dean Mungomba**,⁵ our views are as follows:

The interested party is the one who lodged a criminal complaint against the appellant and its employees for misappropriating monies that were supposed to be paid to him and other sellers of Finance Bank Zambia Limited from the proceeds of receivership of Lamasat International Limited. This shows that he has sufficient interest in the matter. Although he is not involved in the administrative actions of the 1st respondent, he would be directly affected by successful judicial review proceedings in that the investigations into the matter by the 1st respondent would be halted. That would obviously prejudice him. We hold that the interested party will be able to give the Court background information which will assist it in reaching a fair decision, for example, whether the 1st respondent's decisions were Wednesbury unreasonable or illegal.

10.7 In the **Dean Mungomba**⁵ case, the 2nd, 3rd and 4th appellants had applied to the High Court during judicial review proceedings to be joined as interested parties as they were the

ones who initiated complaints to the Honourable Chief Justice who appointed a Tribunal under the **Parliamentary and Ministerial Code of Conduct, Act No 35 of 1994**. Their application for joinder was granted and they were joined as 2nd, 3rd and 4th respondents respectively.

10.8 In the same case, the respondents subsequently proceeded to apply for joinder of Dr. Katele Kalumba to the proceedings pursuant to **Order 14 and 18** of the **High Court Rules, Chapter 87 of the Laws of Zambia**. The High Court refused the application on the ground that Orders 14 and 18 of the High Court Rules do not apply to judicial review proceedings but Order 53 of the RSC.

10.9 The appellants appealed to the Supreme Court against the High Court decision. The Supreme Court held inter alia that persons who are not originators of the process may apply pursuant to Order 53 rule 9 (1) for leave to be joined so that they are heard on the motion or summons. The applicant must himself show sufficient interest in the matter to which the application relates.

10.10 There was a cross appeal challenging the joinder of the 2nd, 3rd and 4th appellants. At page 6 of the judgment, the Court considered the following question “How does one get a hearing without becoming a party to the proceedings?” The Court stated that:

“The nomenclature of “respondent,” “third party,” or ‘interested party’ is immaterial but once one has shown sufficient interest in the proceedings, the Court can hear the party under whatever name he is clothed in. We are satisfied that as the appellants initiated the complaints under the Parliamentary and Ministerial Code of Conduct Act, they were interested parties. On the face of it, we cannot fault the learned trial Judge on allowing the appellants to be heard, as we said under whatever ‘name’.”

10.11 As a result, both the appeal and cross appeal were dismissed. It was ordered that the case be sent back to the High Court to continue the judicial review proceedings.

10.12 The appellant has submitted at length on the purpose and nature of judicial review. The appellant has taken a hypothetical view that should the interested party be heard, the lower court will allow him to justify his complaint which will lead the court to review the merits of the decisions in respect of which the application for judicial review is made instead of the decision making process. We cannot make that assumption. The question is whether the interested party can be heard in the judicial review proceedings.

10.13 In resolving this question, we have to interpret **Order 53 Rule 9 (1)** under which the application for joinder was made. This order and rule appear under the sub heading **“Hearing of application for judicial review (O.53 r. 9).”** It provides as follows:

“9. (1) on the hearing of any motion or summons under rule 5, any person who desires to be heard in opposition to the motion or summons, and appears to the Court to be a proper person to be heard shall be heard, notwithstanding that he has not been served with notice of motion or summons.”

10.14 Our view is that **Order 53 Rule 9 (1)** does not provide for joinder of a third party or interested party to judicial review proceedings. It merely empowers the court during judicial review proceedings to hear any person who desires to be heard in opposition to the motion or summons made under **Order 53 rule 5**. This entails that that person has to communicate to the court his desire to be heard in opposition by filing an application together with an affidavit in support, for an order to be heard. Upon hearing the application, the court may grant the application if it considers him to be a proper person to be heard, regardless of whether he has been served with notice of motion or summons for judicial review.

10.15 The facts of the **R. v. Liverpool City Council ex parte Muldoon**⁴ case were briefly that the respondents Elizabeth Kelly and Lee Muldoon each sought judicial review of the refusal or failure of Liverpool City Council to determine their respective claims in housing benefit under the Social Security Act, 1986 and Regulations made there under. The point at issue in each case was whether, within the meaning of Regulation 95 (7) of the Housing Benefit (General Regulations, 1987, the rent officer

had been denied entry to the applicant's dwelling in circumstances where there had been no deliberate denial of entry by the applicant.

10.16 By notice of motion dated 1st March, 1994 the appellant Secretary of State for Social applied to the court for an order to be joined as a respondent to both applications for judicial review as being a person directly affected within Order 53 rule 5 (3). On 10th March 1994, Hidden J. dismissed the application and on 16th March 1995, the Court of Appeal, (Russell, Hobhouse and Morritt L.JJ) dismissed the Secretary of States appeal. He then appealed to the House of Lords who also dismissed the application.

10.17 In that case, the appellant's claim to be affected rested upon the nature of subsidy scheme for housing benefit set up under **section 135 of the Social Security Administration Act 1992** and relevant regulations. The appellant was also said to be interested as being the author of and responsible for, the relevant subordinate legislation.

10.18 The case of **R. v. Liverpool City Council ex-parte Muldoon**⁴ concerned an application for joinder to judicial review proceedings pursuant to **Order 53 rule 5(3) RSC** which provides inter alia:

“The notice of motion or summons must be served on all persons directly affected...”

10.19 The application for joinder was refused because the applicant was found to have no direct interest in the matter and that he would not be directly affected by successful judicial review proceedings. In the same case **Order 53 rule 9 (1)** was expounded and the court stated that *“the applicant might under **Order 53 (9) (1)** be regarded as a proper person to be heard in opposition to the motion for judicial review but he would still have no right of appeal. The applicant must show sufficient interest in the matter.”*

10.20 The facts of the **Liverpool City Council**⁴ case are very different from the facts of the case at hand. The facts of this case are similar to the facts of the **Mungomba**⁵ case in that the persons joined as 2nd, 3rd and 4th respondents were found to have an

interest in the matter because they were the ones who initiated complaints to the Honourable Chief Justice which led to the appointment of a tribunal under the **Parliamentary and Ministerial Code of Conduct, Act No. 35 of 1994**. Similarly, in this case, the interested party is the one who lodged a complaint to the Zambia Police against the appellant and its agents: That led to the institution of investigations by the 1st respondent and eventually the judicial review proceedings.

10.21 In the present case, we cannot fault the lower court for finding that the interested party is a proper person to be heard because as we stated herein before he would be adversely affected if judicial review proceedings succeed. The lower court's view that the interested party will give full and frank facts cannot be condemned as it is inconsequential. We find no reason to overturn the finding that the interested party is a proper person to be heard as he has shown his desire to be heard and sufficient interest in the matter through the affidavit in support of his application for joinder.

10.22 Order 53/14/76 which was also the basis of the application of the interested party's application, provides as follows:


“Opposition to application for judicial review (rule 9 (1)) *On the hearing of any motion or summons as the case may be for judicial review, if it appears to the court that “a proper person” desires to be heard in opposition and that he is such a proper person, that person will be heard notwithstanding that he has not been served the notice of motion or summons (r. 9 (1)). Thus, justices may show cause by affidavit though they may also show cause either by counsel or in person (R. v. Field (1895) 11 T.L.R. 240).*

10.23 In light of the foregoing, we take the view that emphasis in the said **Order 53 (9) (1)** and **Order 53/14/76** is placed on the “hearing of a proper person in opposition” and nothing is said about joinder of that person. Therefore following the guidelines under **Order 53/14/76**, we allow the interested party to be heard as a proper person in opposition to the application for judicial review. We direct that he files an affidavit in opposition in the lower court.

11.0 CONCLUSION

- 11.1 In closing, we find merit in the 3rd and 5th grounds of appeal as it was irregular to join the interested party to the judicial review proceedings pursuant to **Order 53 rule 9 (1) RSC** and **Order 53/14/76** because they do not provide for joinder but for hearing of a proper person.
- 11.2 Nevertheless, the interested party/proper person shall be heard by the lower court. The rest of the grounds of appeal are bereft of merit and hereby dismissed. The lower court's ruling dated 30th May 2023, is upheld to the limited extent stated herein.
- 11.3 We further order that costs shall abide the outcome of the judicial review proceedings.


.....
J. CHASHI
COURT OF APPEAL JUDGE


.....
C.K. MAKUNGU
COURT OF APPEAL JUDGE


.....
N.A. SHARPE - PHIRI
COURT OF APPEAL JUDGE