

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



Appeal No. 244/2022

BETWEEN:

ROBERT MBONANI SIMEZA (Sued as **APPELLANT**
Receiver/Manager of Zambezi Portland Cement
Limited (In Receivership)

AND

ANTONIO VENTRIGLIA **1ST RESPONDENT**
MANUEL VENTRIGLIA **2ND RESPONDENT**
ZAMBEZI PORTLAND CEMENT LIMITED **3RD RESPONDENT**

CORAM : Siavwapa JP, Chishimba, and Patel JJA

On 26th March and 12th April, 2024

For the Appellant : Mr. M. Nkunika and A. Sakala of Messrs.
Simeza Sangwa & Associates

For the Respondents: Mr. A. Siwila of Messrs. Mambwe Siwila
& Lisimba, Mr. Sianoondo of Messrs.
Malambo & Co. Mr. K. Khanda of Messrs.
Central Chambers

J U D G M E N T

CHISHIMBA JA, delivered the judgment of the Court.

CASES REFERRED TO:

- 1) Avalon Motors Limited (In receivership) v Bernard Leigh Gadsden & Motor City Limited (1998) ZR 41
- 2) The Attorney General v Aboubacar Tall & Zambia Airways Corporation (1993-1994) Z.R. 54



- 3) Anderson Kambela Mazoka & Others v Levy Patrick Mwanawasa & Others (2005) ZR 138
- 4) Magnum (Z) Limited v Basit Quadri (Receiver/Managers) & Grindlays Bank International (Z) Limited (1981) ZR 141
- 5) Fred M'membe & Post Newspaper Limited (In Liquidation) v Abel Mbozi & Others SCZ Appeal No. 7 of 2021
- 6) Murray & Roberts Construction Limited & Another v Lusaka Premium Health Clinic Limited & Another SCZ Appeal No. 141 of 2016
- 7) Atlantic Bakery Limited v ZESCO Limited Selected Judgment No. 61 of 2018
- 8) Konkola Copper Mines PLC v Milingo Lungu Appeal Number 70/2023
- 9) Jonathan Van Blerk v Attorney General SCZ/03/2020

LEGISLATION CITED:

- 1) The High Court Rules Chapter 27 of the Laws of Zambia.
- 2) The Rules of the Supreme Court of England, 1999 Edition.
- 3) The Companies Act Chapter 388 of the Laws of Zambia (repealed)

1.0 INTRODUCTION

- 1.1 This appeal arises from the ruling of Mrs. Justice M. M. Bah-Matandala dated 28th February, 2022 in respect of an application for misjoinder. In that ruling, the Learned Judge held that it is in the interest of justice that the appellant remains a party to the proceedings for purposes of him providing a report on the role he played as the receiver because the respondents seek to challenge his participation regarding the consent order being challenged. That he is likely to be affected by the results of litigation. The court below dismissed the application for misjoinder.

2.0 BACKGROUND

- 2.1 The respondents commenced an action at the Ndola District Registry under Cause No. 2008/HN/268 which was moved to the Principal Registry under Cause No. 2013/HP/0021. The defendants in that action were Eastern and Southern African Trade and Development Bank (1st defendant) and the appellant (2nd defendant). They sought to set aside the Consent Order entered into between the 3rd respondent, the appellant and 1st defendant on the basis of mistake and misrepresentation, as well as damages. The 1st and 2nd respondent averred that they were out of jurisdiction from around 2012 to 2015. They were not privy to the management of the affairs of the 3rd respondent.
- 2.2 Upon their return to Zambia in 2015, the 1st and 2nd respondents conducted a search to ascertain the stage of proceedings. A notice of intention to proceed was filed on 11th September, 2018. In December 2018, it came to the attention of the 1st and 2nd respondent that a consent order had been executed between the 3rd respondent, and the appellant and 1st defendant.
- 2.3 By the said consent order dated 16th April, 2014, the 3rd respondent agreed to pay the 1st defendant US\$1,000,000.00

in full and final settlement of the loan amounts obtained. In turn, the 1st defendant agreed to discharge the held securities. Further, that upon satisfaction of the terms of the consent order, the action would stand discontinued and settled as between the 3rd respondent of the one part, and the appellant and 1st defendant of the other part. The consent order was executed by the advocates of the above parties.

- 2.4 The 1st and 2nd respondents, shareholders of the 3rd respondent, averred that the consent order was procured by mistake and/or misrepresentation because as parties to the action, they were not consulted and are not parties to the said order. Hence the suit in the court below to have the consent order set aside.

3.0 APPLICATION IN THE COURT BELOW FOR MISJOINDER

- 3.1 The appellant filed summons for an order for misjoinder pursuant to **Order 14 rule 5(2) of the High Court Rules Chapter 27 of the Laws of Zambia (the HCR)**, to strike his name out as 2nd defendant.
- 3.2 According to the supporting affidavit, by deed of appointment dated 14th April, 2008, the 1st defendant (Bank) appointed the appellant as Receiver and Manager of the 3rd respondent. During his tenure, the 1st and 2nd respondents commenced

an action in their capacities as shareholders of the 3rd respondent which action culminated into a consent order.

3.3 On 21st April, 2010, his appointment as Receiver and Manager of the 3rd respondent was terminated by the 1st defendant who at the same time appointed Mr. Alfred Jack Lungu in the place of the appellant. The appellant was thus no longer receiver of the company. That he was joined to the action which culminated into a consent order in his capacity as Receiver and Manager and not in his personal capacity.

3.4 His legal capacity to defend actions on behalf of the 3rd respondent having been divested, it was in the interests of justice that he be removed as a party to the proceedings as he has no interest in the subject matter of the consent order. Further that he does not wish to be dragged into matters which least affect him as an individual and subject him to unnecessary costs.

3.5 Antonio Ventriglia, the 1st respondent opposed the misjoinder. Though he had sight of the deed of discharge, the appellant, by his advocates Messrs. Simeza Sangwa and Associates, originated and executed the consent order from their chambers, citing the appellant as the 2nd defendant

therein, in his capacity as Receiver of Zambezi Portland Cement Limited.

3.6 That the appellant's legal capacity cannot be said to have been divested as it particularly relates to the consent order that he entered into on behalf of the 3rd respondent at the material time. And as such, the appellant ought to be maintained on the proceedings to answer substantially on issues thereto.

3.7 The 1st respondent's position being that even though the appellant claims to have no interest in the substance of this matter, maintaining him in the action is absolutely necessary as any further order of the court may affect him in his capacity as former Receiver of the 3rd respondent.

4.0 DECISION OF THE COURT BELOW

4.1 The Learned Judge considered the application and was of the view that the main questions for determination are whether the appellant has an interest in the matter and whether it is in the interest of justice that he be joined as a party to the proceedings.

4.2 The Learned Judge considered the cases of **Avalon Motors Limited (In receivership) v Bernard Leigh Gadsden & Motor City Limited** ⁽¹⁾ and **The Attorney General v**

Aboubacar Tall & Zambia Airways Corporation ⁽²⁾ on the considerations a court must take into account in determining whether or not to join a party to the proceedings.

- 4.3 She opined that it is in the interest of justice that the appellant remains a party to the proceedings for purposes of him providing a report on the role he played as the Receiver because what the respondents are seeking to challenge centers around his participation as a Receiver regarding the consent order being challenged. On this basis, the court below dismissed the application for an order for misjoinder.

5.0 GROUND OF APPEAL

- 5.1 Dissatisfied with the ruling of the court below, the appellant appealed advancing two grounds as follows:

- 1) *The lower court erred in law and fact when it when it held that the appellant does have an interest in this matter notwithstanding termination of his appointment as Receiver and Manager; and*
- 2) *The lower court erred in law and fact by declining to strike out the appellant from the proceedings for purposes of the appellant providing a report on the role he played as Receiver and Manager.*

6.0 APPELLANT'S HEADS OF ARGUMENT

- 6.1 The appellant filed heads of argument dated 21st October, 2022. In ground one, the appellant contends that he has no interest in this matter, his appointment as Receiver and

Manager of the 3rd respondent having been terminated by the 1st defendant. Citing **Order 14 rule 5(1) of the HCR**, the appellant contends that for him to be made a party to the suit, the respondents must demonstrate that the appellant is either entitled to or claim some share or interest in the subject matter of the suit, or is likely to be affected by the result of the action.

- 6.2 The appellant submits that whether or not he is likely to be affected by the result of the litigation herein, is not a matter for speculation or conjecture, but is a matter that ought to be determined by examining the pleadings before the court. The said pleadings at page 65 of the record of appeal show that there is no claim against the appellant. The pleadings do not disclose any reasonable cause of action against the appellant to warrant joinder to the action.
- 6.3 That the only issue raised in the pleadings which falls for determination before the lower court is whether the consent order was procured by mistake and/or misrepresentation and whether the respondents are entitled to damages and interest.
- 6.4 The appellant questioned how he will be affected by the results of the action *vis-à-vis*, the setting aside of the consent

order which awards no benefits to the appellant. That the setting aside of the consent order can have no bearing whatsoever on the appellant as his involvement with the consent order was in his capacity as the Receiver and Manager of the 3rd respondent, a position he no longer holds having been removed as Receiver on 21st April, 2010 and replaced by one Alfred Jack Lungu. Further, that the 3rd respondent is no longer under receivership as the PTA Bank lifted the receivership and handed back the company to the directors.

6.5 As such, the appellant cannot be affected by the results of an action when no relief is sought against him. The case of **Anderson Kambela Mazoka & Others v Levy Patrick Mwanawasa & Others** ⁽³⁾ was cited on the function of pleadings to show that the statement of claim as pleaded, does not support the lower court's finding that the appellant will be affected by the results of this suit to warrant joinder to this action.

6.6 The appellant also contends that **section 113(1) of the repealed Companies Act Chapter 388 of the Laws of Zambia**, which applied then, made a receiver of a company an agent and officer of the company in receivership.

Therefore, the appellant was an agent of the 3rd respondent. As further authority, the case of **Magnum (Z) Limited v Basit Quadri (Receiver/Managers) & Grindlays Bank International (Z) Limited** ⁽⁴⁾ was cited where the Supreme Court held that a company in receivership has no *locus standi* independent of its receiver and is bound by whatever contract or agreement the receiver enters into for and on behalf of the company. That the receivership having come to an end, the 3rd respondent is now answerable for all the actions of the Receiver. In this regard, the appellant argues that the action brought by the respondents ought to be between the 3rd respondent and the PTA Bank (1st defendant).

- 6.7 In ground two, the appellant takes issue with the decision of the court below not to strike out him from the proceedings on the basis of the appellant providing a report on the role he played as Receiver and Manager. In arriving at the decision, the court below relied on the case of **Fred M'membe & Post Newspaper Limited (In Liquidation) v Abel Mbozi & Others** ⁽⁵⁾. In that case, the Court ordered joinder of the liquidator even after he had concluded the liquidation for purposes of receiving all the necessary reports from the liquidator and for considering his personal liability.

6.8 It was submitted that there are no similarities between the **Fred M'membe** case and the case herein. That it was totally unnecessary to refer to the cited case and is a misapplication of the Supreme Court decision. The lower court misdirected itself in maintaining the appellant as a party to the proceedings for merely providing a report which in itself, is speculative as the pleadings make no such specific relief.

6.9 The case of **Murray & Roberts Construction Limited & Another v Lusaka Premium Health Clinic Limited & Another** ⁽⁶⁾ was called in aid for the principle that the inherent jurisdiction of a trial judge must be exercised with caution and judiciously. The case of **Atlantic Bakery Limited v ZESCO Limited** ⁽⁷⁾ was referred to on the principle that courts ought not to decide issues, not pleaded.

6.10 We were urged to set aside the ruling of the court below and strike out the appellant from the proceedings.

7.0 ARGUMENTS BY THE RESPONDENT

7.1 The respondents filed heads of argument dated 25th November, 2022. In ground one, they submit that the court below did not err when it held that the appellant has an interest in the litigation notwithstanding the termination of his appointment as Receiver and Manager.

- 7.2 It was argued that the consent order was executed on 16th April, 2014, about four years after the appellant had been discharged of his duties as Receiver and Manager. In these circumstances, the appellant ought to remain a party to the proceedings as he is likely to be affected by the outcome of the case.
- 7.3 It was submitted that the appellant has some explaining to do in his conduct of executing a consent order as Receiver and Manager four years after his appointment had been terminated. Reliance was placed on the case of **Fred M'membe & Post Newspaper Limited (In Liquidation) v Abel Mbozi & Others** ⁽⁵⁾ to show that although the appellant seemingly fell off the picture in this matter, it is necessary to maintain him as a party to the action. That there is a likely possible personal liability having executed the consent order after he had been discharged as Receiver of the 3rd respondent.
- 7.4 Therefore, there is a very valid reason for the appellant to be maintained as a party to these proceedings as there seems to be some wrong doing on the part of the appellant which he ought to explain in view of the fact that receivers and liquidators occupy a fiduciary relationship and are liable for

their wrongdoing. For this position of law, we were referred to the case of **Avalon Motors Limited (In receivership) v Bernard Leigh Gadsden & Motor City Limited** ⁽¹⁾.

- 7.5 In ground two, the respondents contend that the appellant ought to remain a party to these proceedings because he is likely to be affected by the outcome of this litigation. This is for the purposes of him providing a report on the role he played as receiver because what the respondents seek to challenge centers around the participation of the appellant as Receiver regarding the consent order being challenged.
- 7.6 It was reiterated that the appellant executed the consent order as Receiver and Manager of the 3rd respondent on 16th April, 2014 at a time his appointment as Receiver and Manager had come to an end. This means that the appellant was masquerading as Receiver and Manager, which calls for an explanation.
- 7.7 The case of **The Attorney General v Aboubacar Tall & Zambia Airways Corporation** ⁽²⁾ was relied upon to show that although the appellant argues that he has neither interest in the subject matter of the cause nor does he claim some share in it, he is likely to be affected by the outcome of the same hence the need to maintain him as a party to the case.

7.8 In response to the contention that the court below decided on an issue not pleaded when it held that the appellant should be maintained so as to allow him to render a report, it was submitted that this comment was made by the court in passing when considering the application for misjoinder. We were urged to dismiss the appeal with costs.

8.0 ARGUMENTS IN REPLY

8.1 The appellant filed heads of argument in reply which are essentially a repetition of his earlier submissions. That the pleadings reveal no specific claims against him in his personal capacity which he ought to defend No damages, personally, or in his capacity as Receiver and Manager of the 3rd Respondent, are claimed. In addition, that the setting aside of the consent order would have no bearing on appellant.

9.0 HEARING

9.1 At the hearing, the appellant contended that the Messrs. Simeza Sangwa executed the consent order because there was no change of advocates on record.

9.2 In response Mr. Sianondo submitted that the consent order was signed four years after the appellant's discharge as Receiver and Manager and he is a party to the document.

Reference was made to our decision in the case of **Konkola Copper Mines PLC Milingo, Lungu Simwanza & Company** ⁽⁸⁾ in respect of a former liquidator being sued.

9.3 In reply the appellant cited the case of **Jonathan Van Blerk & Others v Attorney General** ⁽⁹⁾ in which the Supreme Court stated that an action to set aside only allows one relief, i.e. the setting aside of the consent order.

9.4 The appellant reiterated that the setting aside of this consent order will not result in liability on the part of the appellant.

10.0 ANALYSIS AND DECISION OF THE COURT

10.1 We have considered the appeal, the authorities cited and the arguments advanced by the Learned Counsel for the parties. It is not in dispute that the appellant was appointed by then Eastern and Southern African Trade and Development Bank (the PTA Bank) as Receiver and Manager of the 3rd respondent by a deed of appointment dated 24th April, 2008.

10.2 By a Deed of Discharge dated 21st April, 2010, PTA Bank discharged the appellant as Receiver and Manager of the 3rd respondent. We refer to page 87 to 90 of the record of appeal. On 22nd April, 2010, the appellant proceeded to file Companies Form 41 i.e. 'Notice of Ceasing to Act As Receiver and Manager' appearing at page 91 of the record of appeal.

At the same time, PTA Bank appointed Alfred J. Lungu as Receiver of the 3rd respondent on 21st April, 2010.

10.3 Sometime in 2008, prior to the appellant being discharged as Receiver and Manager, the respondents commenced an action against the PTA Bank and the appellant under Cause No. 2008/HN/268 which was later moved to the Principle Registry under Cause No. 2013/HP/0021. This action culminated in a consent order dated 16th April, 2014 executed between the 3rd respondent company, the appellant and the PTA Bank. The 1st and 2nd respondents were not party to this agreement and did not execute the consent order.

10.4 Though the appellant had long ceased acting as Receiver and Manager of the 3rd respondent, the consent order at pages 109 to 112 of the record of appeal, shows that he was sued *"In his capacity as Receiver of Zambezi Portland Cement Limited (In Receivership)"* and that his advocates, Messrs. Simeza, Sangwa & Associates, executed the said consent order on his behalf, being the 2nd defendant.

10.5 The main issue raised in ground one of the appeal for determination is as follows:

- (i) Whether the appellant is likely to be affected by the outcome of the proceedings.

10.6 The appellant contends that he does not have an interest in the matter, his appointment as Receiver and Manager having been terminated. It was also argued that there is no claim in the pleadings against the appellant to warrant his being maintained as a party and as such, he is not likely to be affected by the outcome of the proceedings. He further argued that there being no specific claim for an account, no account can be sought in this action.

10.7 On the other hand, the respondents argued that the appellant ought to be maintained in the proceedings as he executed the consent order in his capacity as Receiver and Manager of the 3rd respondent knowing that his appointment as such had been terminated four years earlier. That he ought to be maintained in the action so that he may explain how he executed the consent.

10.8 With respect to misjoinder, **Order 14 rule 5 of the HCR** provides that:

(1) If it shall appear to the Court or a Judge, at or before the hearing of a suit, that all the 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 a Judge may adjourn the hearing of the 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. In such case, the Court shall issue a notice to such persons, which shall be served in the manner provided by the rules for the service of a writ of summons, or in such other manner as the Court or a Judge thinks fit to direct; and, on proof of the due service of such notice, the person so served, whether he shall have appeared or not, shall be bound by all proceedings in the cause:

(2) The Court or a Judge may, at any stage of the proceedings, and on such terms as appear to the Court or a Judge to be just, order that the name or names of any party or parties, whether as plaintiffs or as defendants, improperly joined, be struck out.

10.9 In the case of **The Attorney General v Aboubacar Tall & Zambia Airways Corporation** ⁽²⁾, the Supreme Court considered the provisions of **Order 14 rule 5 of the HCR** and guided as follows:

“... We take note however that the application of the provisions of our order 14 is limited to "all the persons who may be entitled, or claim some share or interest in the subject matter of the suit, or who may be likely to be affected by the results" and who have not been parties are the only ones the court may order to be made parties. ...”

10.10 We have perused the pleadings on record, i.e. the writ and statement of claim. The 1st and 2nd respondents,

shareholders in the 3rd respondent averred that they took out an action under cause 2013/HP/0021 against PTA bank and the appellant who was appointed Receiver of the 3rd respondent. Upon returning to Zambia in 2015, they discovered that a consent order was executed by PTA bank and the appellant as Receiver of Zambezi Portland Cement Limited (in Receivership) hereinafter referred to as ZPC. The said order settled the matter and discontinued the action. They averred that the order was procured by mistake and or misrepresentation. And that the 1st and 2nd respondent were never consulted nor were they parties to the said consent order. In addition that they still have claims under cause 2013/HP/0021. Hence, the fresh action to set aside the Consent Order so that the issues can proceed to trial. We will not go into the particulars of alleged mistake or misrepresentation, save to state that the respondents also sought damages arising from the entry of the Consent Order.

10.11 The issue is whether the appellant is likely to be affected by the result of the action, to warrant him being a party to the proceedings. The appellant contends that he will not be affected by the results of the setting aside of the consent order entered into between ZPC and the bank. The said

order having been signed in his capacity as Receiver and Manager of the ZPC. That the said ZPC is no longer in receivership. In addition, that there are no specific claims made against him in his personal capacity to defend.

10.12 It is trite that a Receiver\Manager although appointed by the Debenture holder is an agent of the company and not the Debenture Holder. In casu, the appellant was an agent of ZPC and not the PTA bank. We refer to the case of **Magnum (z) Limited** (supra) where it was held that;

A receiver who is an agent of the company under receivership is there to secure the interest of the debenture holder."

10.13 It is further trite that once a company ceases to be in receivership, it is the company that assumes the *locus standi* to sue or be sued. Further the said company is responsible for obligations under any contracts entered into by the receiver i.e. such as the consent order.

10.14 We are therefore of the view that the appellant is not likely to be affected by the result of the action to set aside the consent order in issue. We are fortified by the provisions of **Section 113 (1) of the Companies Act 388** which states that a receiver appointed under a power contained in any instrument subject to section 114, shall be deemed to be an

agent and officer of the company and *“not an agent of the persons by or on behalf of whom he is appointed...”*

10.15 Further, as held in the **Maganum (Z) Limited** ⁽⁴⁾ case, the company under the above circumstances is answerable for the receiver's acts, contracts and default. If a company is answerable for the receiver's acts and contracts entered into, the question then is how will the appellant who was an agent of the company likely to be affected by the outcome of the suit? The answer simply is that he is not likely to be affected by the outcome of the suit to set aside the consent order on the basis contended. The company ZPC becomes answerable for the Receiver's actions.

10.16 We therefore, hold that the lower court erred in law and fact by holding that the appellant is likely to be affected by the outcome of the suit and maintaining him as a party to the proceedings.

10.17 In ground two, the appellant assails the refusal by the court to strike him from the proceedings on the basis that the appellant would have to provide a report on the role he played as Receiver and Manager. The court relied heavily on the case of **Fred M'membe & Post Newspapers and Others** ⁽⁵⁾ where the former liquidator was joined to the

proceedings for the purposes of receiving all necessary reports from the liquidator and considering his personal liability.

10.18 The relied upon authority is distinguishable. The said appeal, amongst others, questioned the appointment of the provisional liquidator and his activities as liquidator. The said liquidator having been confirmed by way of a consent judgment. The case arose from a Petition to Wind Up, where the interested parties were not afforded the opportunity to be heard. Equally the cited case of **Konkokola Copper Mines v Milingo Lungu and Lungu Simwaza & Co** ⁽⁸⁾ is in applicable we dealt with the issues whether the claims by the appellant against the respondents therein could be determined in the winding up proceedings as opposed to commencing a fresh action. Though we did address the position that there are remedies available to a Company in receivership/Liquidation where wrong doing is imputed upon the receiver/Liquidator.

10.19 In *casu*, the appellant, having been discharged as Receiver/Manager, who entered into a consent Order applied to be struck out from the suit seeking to set aside the consent order. We held the view that lower court erred

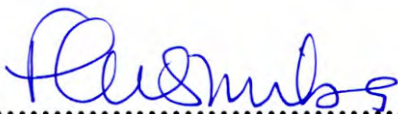
by refusing to misjoin the appellant on the basis of the need to provide a report on the role he played as Receiver regarding the Consent Order being challenged. The suit was for setting aside the Consent Order. The appellant cannot be joined to the suit for the purpose that he must explain in what capacity he executed the consent. Application for misjoinder is determined on the issue of whether the appellant is likely to be affected by the outcome of the suit.

11.0 CONCLUSION

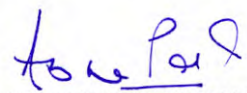
11.1 Having held that the appellant is not likely to be affected by the result of the action to set aside the consent order, we accordingly set aside the decision of the court below, and substitute it with an order that the appellant be removed as a party from the proceedings. The main matter for setting aside the consent order shall proceed to trial before the same Judge. Costs to the appellant to be taxed in default of agreement.



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M. J. Siavwapa
JUDGE PRESIDENT



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F. M. Chishimba
COURT OF APPEAL JUDGE



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A. N. Patel S.C
COURT OF APPEAL JUDGE