IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(*Civil Jurisdiction*)

2008/HP/1012

BETWEEN:

WELUZANI BANDA AND OTHERS **PLAINTIFFS**

AND

FINANCE BANK ZAMBIA LIMITED **DEFENDANT**

Before Mrs. Justice A. M. Banda-Bobo on the 06th day of May, 2016

FOR THE PLAINTIFFS: **Mr. M. Lisimba of Mambwe, Siwila Lisimba Advocates**

FOR THE DEFENDANT: **Mr. J. P. Sangwa, SC of Simeza Sangwa & Associates**

R U L I N G

Cases referred to:

1. Simbeye Enterprises Limited vs. Invest Trust Merchant Bank (z) Limited (2002) ZR 159
2. Attorney-General vs. Abubakar Tall and Zambia Airways Limited (1975) App 77 of 1994
3. London Ngoma and Others vs UBZ (App 91 of 1997)
4. Dean Mung'omba and Others vs. Peter Machungwa and Others App No. 3 of 2003
5. Mweemba vs. Kasongo and ZSCI (2006) ZR 101.

Legislation and other authorities used:

- High Court Rules
- Rules of the Supreme Court 1999 White Book
- Order 14 rule 6 of the Rules of the Supreme Court

- Murphy on Evidence 5th Edition (1995) Universal Law Publishing

This is a Ruling on an application for joinder that was filed on 15th March, 2016, which application was brought pursuant to Order 14 Rule 5 of the High Court Rules; Cap 27 of the Laws of Zambia. There are 426 applicants in total.

Acting on behalf of his colleagues, Mr. Simataa, deposed to the affidavit in support of the application. He deposed that he and the other applicants had been employees of the defendant, and like Mr. Banda, the plaintiff in the main matter had not been paid their pension dues upon separation from the defendant. Being similarly circumstanced, they desired to be joined to the main matter so they could also be paid their pension. He deposed that all the 426 of them had sufficient interest to be joined to these proceedings.

I set the matter down for hearing inter-partes.

On 29th March, 2016, the defendant through counsel applied to set the application for joinder aside, pursuant to **Order 2 rule 2 of the Rules of the Supreme Court 1999 White Book**. The gist of the motion was that the application did not comply with the provisions of **Order 14 rule 5 of the High Court Rules**, and **Order 14 rule 6 of the Rules of the Supreme Court, 1999 White Book.**

Further or alternatively, an order of dismissal of the application on the ground that the said application constitutes an abuse of court process. Counsel asked that costs of this application be paid by Mr. Simataa Simataa to the defendant.

When the matter came up for hearing, learned counsel for the defendant, Mr. Sangwa, SC submitted that the application for joinder was irregularly before Court as it was made under **Order 14 Rule 5 of the Rules of the High Court**. He contended that the application did not come within the ambit of the said Rule. After reading the rule, counsel indicated that the operative words in the Rule were **"at or before the hearing of a suit".** He argued that this application has come rather late as at this point in time, the parties had closed their cases, made written and oral submissions and the matter had since been reserved for judgment to 31st May, 2016.

That being the case, State Counsel reasoned, the application is not tenable as there is no suit yet to be heard to which the 426 applicants can be joined. He went further to argue that **Rule 5** itself, even if the question of lateness was, for arguments' sake to be ignored, the 426 listed individuals have not shown how they are entitled to claim or share an interest in the subject matter of the suit. They have, so counsel contended, not demonstrated their interest in the matter; save to say that the deponent in the affidavit in support said that he and 425 others are similarly circumstanced like Mr. Banda, the plaintiff in the main matter; in that they were never paid their pension dues. Counsel said other than that there is nothing else.

He wondered what **"similarly circumstanced"** meant, and went on to state that the applicants had not shown that they all had been employees of the defendant. That they had not shown when

they were employed, how long they worked or if they have stopped working and why they stopped. Counsel contended that such information was necessary to determine whether these applicants should or should not be joined. Learned State Counsel went on to wonder as to whether the 425 applicants are alive or dead.

Counsel went on to argue that at law, one cannot be joined to proceedings at the instance of another person as a plaintiff unless consent to that effect has been given. To buttress, I was referred to the case of **Simbeye Enterprises Limited vs. Invest Trust Merchant Bank (z) Limited**[1] on the issue of consent; where the Court said that a person who seeks to be joined has to give consent.

He argued that the deponent, Mr. Simataa had not laid before Court, any evidence that he had authority of the other 425 to apply on their behalf to join these proceedings. Counsel went on to state that in arriving at their pronouncement, the Supreme Court relied on **Order 15 rule 6 sub rule 4 of the Rules of the Supreme Court 1999 Edition**.

Learned State Counsel submitted that in view of the above, the application was improperly before Court and ought to be dismissed with costs, which costs are to be borne by the deponent, Mr. Simataa Simataa. Learned counsel went on to rationalise the need for consent, namely that if the individuals failed in their application for joinder, they could be condemned in costs. He reckoned that it would not be justiciable if such a

person is condemned in costs without proof that he had agreed to be joined to the proceedings.

He reiterated, in conclusion, the three grounds, namely that there is no suit yet to be heard by this Court as the main matter is just awaiting judgment, secondly that there is lack of evidence of their interest in the suit, and thirdly lack of consent to be joined to this application, on which he asked the Court to dismiss the application.

In responding, Mr. Lisimba, learned Counsel for the applicants said the application to dismiss ought to fail. He predicated his argument on the case of **Attorney-General vs. Abubakar Tall and Zambia Airways Limited**[2], where the Court held that in a proper case, the court can join a party to the proceedings even after the parties have closed their case, but before delivery of judgment by invoking **Order 14 rule 5 of the High Court Rules**. He also cited the case of **London Ngoma and Others vs. UBZ**[3], where the Supreme Court held that the appellant had interest in the matter and ought to have been notified of the proceedings and could be joined even after the close of the case. The gravamen of his argument was that it was not too late for the 426 applicants to be joined to these proceedings as judgment had not been passed yet.

On the question of interest, I was referred to the case of **Dean Mung'omba and Others vs. Peter Machungwa and Others**[4] (App No. 3 of 2003), for the proposition that only a party with sufficient interest can apply to be joined.

Counsel referred to paragraph 6 of the deponents affidavit in which he stated that besides himself, there were 425 others, who after they left the defendant's employment were all not paid. Counsel went on to submit that the main matter before Court sought for a declaration that a pension existed during the period up to 1999. He found himself submitting that all that these people needed to state is that they were never paid. Counsel claimed that there can be no other sufficient evidence of non-payment. He contended that if the applicant claims he was never paid his pension upon separation with the defendant, that is sufficient interest. Curiously, counsel argued that it is up to the defendant to prove that such payment was made if at all.

On the need for proof of when each applicant joined the defendant or left, he argued that that may only be necessary at the time of assessment once the court declares that a pension existed. He was of the view that there was at this point no need to individualise the evidence.

On lack of consent, while conceding the need for it, counsel argued that while the others may be at liberty to show consent themselves, at least in the case of the deponent, Mr. Simataa Simataa, there had been sufficient consent to be joined, and the Court should join him. He prayed that the motion to dismiss the application for joinder be dismissed as it was misconceived and was incompetent.

In reply, learned State counsel stated that the lack of consent for the 425 was fatal and their application ought to fail on that ground.

On the issue of Mr. Simataa Simataa, it was argued that that too should fail, this being predicated on the grounds that Mr. Simataa Simataa had been aware of these proceedings as could be evidenced by the fact that he was plaintiff's witness (PW3) in the matter three years and so could not move the Court as and when he liked. Having thus testified, counsel said he had not proffered a reason for not having made the application for joinder then.

Counsel went on to argue that **Order 14 rule 5** does not give a party blanket authority to join, but that certain conditions had to be met. He said one of the conditions was that one must show interest in the subject matter of the suit. While counsel agreed that in the circumstances of this case, one had to show that he was not paid his pension benefits, he was of the view that showing something and claiming something are two different things. He opined that what was before Court were not sufficient; as the applicants had not provided proof that they were actually engaged by the defendant, that their services were terminated for whatever reason, how long they worked, how much they were paid and how much pension money was omitted from their severance package. Counsel went on to say that even a simple thing like a payslip or a man number to indicate that these 426 people were engaged by the defendant could have

sufficed, but unfortunately there is nothing. They had thus failed to demonstrate their interest.

Counsel decried the attempt to shift the burden of proof to the defendant, and contended that he who alleges must prove; hence having alleged that they are former employees, they must prove to assert their interest.

On the **Abubakar Tall case** (supra), counsel said the same had to be read with care. He contended that the Supreme Court did not lay down a proposition of general application, as it said **"In a proper case, a court can join a party to the proceedings."** He was of the view that what is proper has to be determined on a case by case basis; and that in that matter, the decision was based on the facts peculiar to that case. He went on to state that in casu, the applicant has not demonstrated why it would be proper to join them; especially that this matter has subsisted on the active cause list since 2008; and they want to be joined 8 years later. Regarding the deponent, counsel repeated his earlier argument that he had three years ago appeared as plaintiff's witness, and he was aware of the matter.

Regarding the **Dean Mung'omba** case and other cases cited by the applicant's counsel, it was contended that the same had been misapplied. Counsel said the **Dean Mung'omba** case involved an application for judicial review, and the argument there was whether the provisions of **Order 14 rule 5 of the High Court Act** were appropriate in those circumstances and the court said no;

and that is how the application to join Dr. Kalumba to the proceedings was refused.

Counsel went on to state further, that even then, the application for judicial review had not been heard. Counsel reiterated his earlier assertion that the application was improperly before court and should be refused against all the 426; as they had not demonstrated whey they ought to be joined as well as their interest in the matter, and lack of consent to be joined by the 425 applicants, which fact applicant's counsel conceded. Counsel reiterated that the application be dismissed with costs to be borne by the deponent of the affidavit in support, Mr. Simataa Simataa.

I have carefully considered the application and submissions by counsel for the parties in this matter. It is not in dispute that on 3rd October, 2008, one Weluzani Banda took out suit against the defendant, Finance Bank Zambia Limited for among other reliefs, a declaratory order that the non-contributory pension scheme existed from 1993; and a declaratory order that the plaintiff is entitled to benefit from the non-contributory pension scheme.

It is also not in dispute that on 10th November, 2009, there were issued summons, with an affidavit in support for non-joinder of 162 persons, sworn by the said Weluzani Banda, as persons with an interest in the matter or who would be likely to be affected by the outcome of the suit. He prayed for their joinder to the action. The order was granted on 12th November, 2009. Thereafter, the matter proceeded to trial with both parties calling witnesses in

support of their case. The deponent herein was a witness in this case, as PW3 and testified before court on 5th June, 2013. It is not in dispute that upon conclusion of this matter, the court invited the parties to file their written submissions and allowed them to revert to court to make oral arguments to augment their case. Thereafter, the court reserved the matter for judgment.

Counsel for the defendant has opposed the application for joinder on three limbs, namely that the matter having reached this stage, there is no longer a matter still pending to be heard, as per **Order 14 rule 5** under which the application has been brought, lack of proof of interest by the applicants in the suit, and finally, that there has not been put before court any consent by the 425 applicants to be joined to the suit.

Again it is not in dispute that **Order 14 rule 5 of the Rules of the High Court** provides for joining of a party to proceedings, if the court considers that they may be entitled to a claim or interest in the subject matter. See **Mweemba vs. Kasongo and ZSCI**[5] (2006) ZR 101.

In dealing with the matter, I will start with the last two points before moving on to deal with the issue of when a joinder can be effected under **Order 14 Rule 5 of the High Court Rules**. The underlying principle for joinder of parties is to ensure that there is avoidance of multiplicity of legal proceedings arising from **Similar circumstances. Section 13 of the High Court Act, Cap 27** buttresses this position as it vests the court with power

to ensure that all contentious issues between the parties are brought to finality, thus avoiding a multiplicity of actions.

Counsel for the defendant asked what is meant by being similarly circumstanced, in response to what was deposed that because Mr. Banda, the plaintiff in the main matter who sued on behalf of 162 others was not paid, the applicants herein who said they were also not paid by the defendant were similarly circumstanced. Defendant's counsel questioned the basis of this similar circumstances contending that the applicants had not laid before Court any evidence to show that they were all former employees of the defendant, perhaps by way of appointment letters or man numbers, perhaps even a payslip, the date of employment, the circumstances for parting company with the defendant, or indeed when they left the defendant. Curiously, Mr. Lisimba in his response stated that since this case sought a declaration that there existed a pension fund, all these persons needed to do was state that they were never paid, and that there can be no other sufficient evidence of non-payment, and that once a person denied being paid his dues, it is up to the defendany to prove that such payment was made if at all.

I said rather "curiously" because, and as counsel for the defendant rightly said, Mr. Lisimba would like to turn the principle of the burden of proof on its head such that now the defendant bears the burden of proof. Clearly this goes against the laid down legal tenets. **Murphy on Evidence, 5th Edition (1995) Universal Law Publishing at page 89** dealt with this when it was said that:

the legal burden of proof as to any fact in issue in a civil case lies upon the party who affirmatively assets that fact in issue, and to whose claim or defence proof of the fact in issue is essential.

It was incumbent upon them to prove that they were not paid, and this they could do by proffering proof to that effect. I believe the issues raised as to when these people joined the defendant, how long they worked and under what circumstances they left are cardinal in helping the Court to determine whether they have an interest in the matter and deserve to be joined or not. It is the basis upon which the Court will determine whether they have sufficient interest in the subject matter or not. To accept applicant's counsel's argument, merely on the applicant's say so without anything further to show interest would be like inviting the whole world to be joined to a matter, which in my view is not tenable. Further, I do not believe that it is tenable to join them and only ask them to prove when each and everyone of them joined or left the bank at the time of assessment. One wonders what would happen if it was at that point discovered that infact some were not entitled to be joined. That is why it is critical to determine interest in the subject matter before joinder. To do otherwise would be akin to allowing a fishing expedition. I deem therefore that the 425 applicants have not shown sufficient interest by way of evidence that they are similarly circumstanced as the 163 plaintiffs herein. It is not sufficient for them to just state that they were not paid.

Order 15 rule 6 sub rule 4 of the Rules of the Supreme Court, 1999 Edition, White Book is clear on the need for consent. It states:

"4. No person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised"

The Supreme Court, in the cited case of **Simbeye (supra)**, and as already stated, pronounced itself on the need for consent and the rationale for it. Mr. Lisimba, while conceding that there was indeed no such consent by the 425 applicants, said that if the Court was of the view that each one of them should individually give consent, they may be at liberty to apply to show consent themselves. It is not denied that Mr. Simataa Simataa swore an affidavit on their behalf stating that they all were persons with interest in the matter. The law clearly says he ought to have obtained consent from these people, but he did not. To now ask, that the Court should allow them the liberty to apply for joinder themselves, would be to allow them a second bite at the cherry. I decline to proceed in that manner.

Counsel was of the view that at least with regard to Mr. Simataa Simataa, he had shown sufficient consent as he had sworn the affidavit in support himself. Counsel for the defendant opposed this and said it was an abuse of Court process, as the applicant could not move the Court as and when he liked. In the case of **London Ngoma** (supra), the court allowed joinder of the applicants on the basis that there was a consent judgment of which they were **not parties and were not aware of a hearing.**

In casu, and as I have already pointed out at page R9 of this Ruling, after the plaintiff commenced this matter, there was an application for joinder which brought the number of plaintiffs to 163 altogether. Further, the deponent herein, Mr. Simataa Simataa appeared as PW3 three years ago. He therefore had ample time in which to join this matter to assert his interest as he was aware of it. No reason has been proffered for his not having taken any step to be joined to this matter. Consequently, in as much as it is appreciated that by swearing the application he had shown consent, I believe that having been aware of this matter, his case is distinguishable from the **London Ngoma** case. I am disinclined to consider joining him to these proceedings on that ground.

Defendant's counsel has said this application does not come within the ambit of **Order 14 rule 5** pursuant to which it was made. The gravamen of his assertion is that having gone through trial, parties closing their cases, submissions with the matter awaiting judgment; there was no suit to be heard to which these individuals can still be joined.

Order 14 rule 5 of the Rules of the High Court reads thus in parts relevant to the case:-

> **If it shall appear to the Court or a Judge, at or before the hearing of the suit that all persons who may be entitled to, or claim some share or interest in the subject matter ... or who may be affected by the result ... and direct that such persons shall be made either plaintiffs or defendants**

In **Attorney General vs. Tall** (supra) the Supreme Court held that:-

> **"... in a proper case, a court can join a party to the proceedings when both the plaintiff and the defendant have closed their cases and before judgment has been delivered by invoking Order 14 rule 5"** (underline by Court for emphasis only)

Under paragraph 9 on page 56, of that judgment, the court opined thus:

> **In our view, a true construction of the words " at or before the hearing of a suit" as contained in our Order 14 Cap 50 mean or must be interpreted to mean before delivering of a judgment in a suit. This appears to us to be the only reasonable interpretation of that phrase in the Order because the delivery of a judgment is a hearing and a process of a suit.** (underline by Court for emphasis only)

Two issues can be distilled from the above, namely, the Court's inherent jurisdiction to order joinder, and or but that jurisdiction ends at the point where judgment has been rendered. Of course that's not to lose sight of the parties statutory rights post judgment, but for purposes of joinder, it is patent from the explanation in the cited case that joinder can be done at any stage before judgment is rendered. However, in the case of **London Ngoma,** joinder was allowed post judgment on the grounds that:

> **"there was a consent judgment of which they were not parties and they were not aware of a hearing"**

As guided by the cited authorities, I believe that in casu, judgment having not been delivered, the parties have a right to be joined to these proceedings as long as they showed sufficient interest in the subject matter of the suit. However, I must hasten to add, that such joinder can only be done in what was termed **"a proper case"** in the **Attorney-General vs. Tau** case (supra).

The question I have to determine is whether this is a proper case in which I can order joinder. The answer is in the negative, firstly, the parties have not laid before Court the basis of their interest. There is no proof that they have ever been employees of the defendant at any one time or that they were terminated, and which manner of termination.

Secondly, and as stated by counsel for the defendant, the 425 applicants did not adhere to **Order 15 rule 6 sub rule 4 of the Rules of the Supreme Court, 1999 Edition** as they did not give consent to the deponent for joinder.

Thirdly, the deponent, Mr. Simataa Simataa, having been aware of these proceedings three years ago cannot now apply to join these proceedings. He slept on his rights. The case of **London Ngoma** cannot aid his case, as he was aware of these proceedings.

Based on the above and despite the fact that joinder can be done before judgment is rendered in a case, I do not deem

that this is a proper case in which I can order joinder. The application is therefore dismissed for irregularity.

In the **Simbeye case**, the Supreme Court stated the grounds for ensuring that there is consent of anyone who wished to be joined to the proceedings, namely the question of costs. In this case, and having found that the deponent did not lay before Court proof of consent by the other 425 to be joined to these proceedings, Mr. Simataa Simataa will bear the costs of this application, which costs are for defendant.

Leave to appeal is granted.

Delivered at Lusaka this .....6th..... day of .....May..... 2016.

Hon. Mrs. Justice A. M. Banda-Bobo
High Court Judge