

IN THE SUPREME COURT OF ZAMBIA SCZ APPEAL NO. 178/2004
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

MIKE HAMUSONDE MWEEMBA
AND

APPELLANT

KAMFWA OBOTE KASONGO
ZAMBIA STATE INSURANCE
CORPORATION LIMITED

RESPONDENT

INTENDED JOINDER

Coram: Sakala, C.J., Mumba and Silomba JJS

On 16th May and 26th September, 2006

For the Appellant: Mr. P. W. Mwikisa of P. W. Mwikisa and Company.

For the Respondent: N/A.

For the Intended Joinder: Mr. A. Mbambara, Legal Counsel.

J U D G M E N T

Sakala, C.J., delivered the Judgment of the Court.

Cases Referred to:-

1. *Simbeye Enterprises Limited and Investrust Merchant Bank (Z) Limited Vs Ibrahim Yourself, SCZ Judgment No. 36 of 2000.*
2. *Attorney-General V Tall and Zambia Airways, Corporation Limited (1995) ZR 54.*
3. *Zulu Vs Avondale Housing Project Limited (1982) ZR 172.*



(P.370)

4. *Century Insurance Company Vs Northern Ireland Road Transport Board (1942) AC 509.*

5. *P. Sinonge and Anderson Security Systems V Pelekelo Leonard Sitali appeal no. 85 of 2004.*

6. *John Mungala and Kenneth Kabenga V. Attorney-General (1988/89) ZR 171.*

This is an appeal against the Ruling of the High Court dismissing the Appellant's application for Joinder of a party made pursuant to Order 14 Rule 5 of the High Court Rules, Cap. 27 of the Laws of Zambia.

For convenience, we shall refer to the Appellant as the Defendant and the Respondent as the Plaintiff, and the Intended Joinder as the Intended Joinder, which designations they were in the court below.

The undisputed facts leading to this appeal are that the Defendant was, at the material time, employed as Acting Managing Director of Zambia State Insurance Corporation Limited (ZSIC), the intended Joinder. During the period of his employment, the Defendant wrote and published or caused to be published a letter concerning the Plaintiff in his capacity as the Corporation Secretary of Zambia State Insurance Corporation Limited. Subsequent to the publication of the said letter, the Plaintiff commenced an action against the Defendant

by way of a Writ of Summons claiming damages for libel and mental distress, anguish and torture.

Before trial could commence, the Defendant took out a summons for Joinder of parties pursuant to order 14, Rule 5, of the High Court Rules, Cap 27 of the Laws of Zambia, for an order to join Zambia State Insurance Corporation Limited to proceedings as the 2nd Defendant. The summons was supported by an affidavit sworn by the Defendant. There was also an affidavit in opposition sworn on behalf of the Intended Joinder.

Paragraphs 5 and 6 of the affidavit in support read as follows:-

"5 THAT I have been sued by the Plaintiff for actions and decisions I took or made whilst in my capacity as Managing Director of Zambia State Insurance Corporation Limited and in the course of my duties as such.

6. THAT the said Zambia State Insurance Corporation Limited is likely to be affected by the outcome or result of these proceedings and yet have not been made party hereto."

Paragraphs 6, 7,8 and 9 of the affidavit in opposition read as follows:-

(P.372)

- "6. That the Defendant has been sued for falsehoods he maliciously published of and concerning the Plaintiff which falsehoods were immediately disowned by the intended 2nd Defendant on the same day the Defendant published the letter giving rise to this action. There is now produced and shown to me a true copy of the letter dated 2nd August, 2002 and marked "AM1" from the Permanent Secretary (FMA) who was the Chairperson of the Board of the intended 2nd Defendant at the material time.*
- 7. That the Defendant can not claim to have acted for and on behalf of the intended 2nd Defendant because he was merely acting as Managing Director for administrative convenience with no authority to undo a Board resolution appointing the Plaintiff as Company Secretary. There is now produced and shown to me a true copy of the letter dated 5th April, 2002 marked "AM2" appointing the Defendant to act for administrative convenience only.*
- 8. That in any case even if the Plaintiff was substantive Managing Director of the Zambia State Insurance Corporation, he could have had no authority to remove the Company Secretary without the resolution of the Board. There is now produced and shown to*

(P.373)

me a true copy of an extract from the Articles of Association of the Zambia State Insurance Corporation Limited marked "AM3" the relevant article being Article 17.

9. *That the intended 2nd Defendant having immediately disowned or disassociated itself from the letter giving rise to this action and the Defendant's willful disregard of the Articles of Association considered together clearly discharges the intended 2nd Defendant from any liability arising from the Defendant's letter giving rise to this action."*

After considering the affidavit evidence, the trial Judge found that the Defendant was informed that his actions did not have the blessings of the authorities and the Board of the Corporation; and that he was directed to rescind his decision and requested to place the matter before the Board; but he ignored the directive.

The court dismissed the application for Joinder as having no merit.

The Defendant has appealed to this court against the whole ruling. The appeal is based on three grounds. These are:

- "1. That the learned Judge erred in law by refusing the Defendant's application for leave to join the Defendant's former employers to the proceedings on the ground that the Defendant's actions were not approved by the Defendants former employers which issue properly falls to be determined on the merits in the normal course of trial;*
- 2. That the learned Judge misdirected himself in law and fact when he found that the Defendant was advised by the authorities not to dismiss the Plaintiff against the evidence before him which issue also falls to be determined in the normal course of trial; and*
- 3. That the learned Judge misdirected himself in law and fact by failing to find that the Defendant's former employers are persons who will be affected by the out come of the action and persons against whom the Defendant was likely to further commence proceedings with the same questions and issues being tried and invoke Section 13, High Court Act, Cap, 27 of the laws of Zambia and Order XIV (14) rule 5 of the High Court Rules.*

On behalf of the parties, Counsel filed written heads of argument supported by brief oral submissions, based on the three grounds of appeal.

The gist of the arguments and submissions on ground one is that Order 14 grants powers to the court to add or substitute parties to an action in order that the decisions arrived at in an action may be final. It was argued that issues and facts arising in this cause cannot be determined without Zambia State Insurance Corporation Limited (ZSIC) being joined as 2nd Defendant; and that the subject matter of this action arose while both the Plaintiff and the Defendant were employees of (ZSIC) and while both were acting in the course of their employment. In support of these arguments, counsel cited the cases of *Simbeye Enterprises Limited and Investrust Merchant Bank (Z) Limited Vs Ibrahim Yourself*¹; *Attorney-General V Tall and Zambia Airways, Corporation Limited*², and *Zulu Vs Avondale Housing Project Limited*³ where the court said: -

"I would express the hope that trial Courts will always bear in mind that it is their duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality. A decision which because of uncertainty or want of finality, leaves a door open for further

(P.376)

litigation on the same issues between the same parties can and should be avoided."

Order 15 of the Rules of the Supreme Court, 1985 Edition, was also cited in support of the arguments on ground one.

Counsel prayed that Zambia State Insurance Corporation Limited be joined as the 2nd Defendant to the action.

The summary of the arguments on ground two is that the Defendant was a servant in the employment of Zambia State Insurance Corporation Limited and Zambia State Insurance Corporation Limited was and is supposed to be vicariously liable for the Defendant's actions. It was submitted that the Defendant was acting in the course of his employment when he communicated to the Minister of Finance and National Development his decision to terminate the Plaintiff's contract of employment and that the Defendant was under a legal and moral duty to inform the Minister, who had a like duty and interest to receive the letter and be aware of its contents. The case of *Century Insurance Company Vs Northern Ireland Road Transport Board*⁴, where an employer was held liable for the negligence of its employee in the discharge of his duties was cited in support of the submissions on ground two. It was further submitted that the course of employment means that and should mean that all acts done within the scope of a

(P.377)

servant's employment; including the ones that he is directly authorized to do as well as those which the servant considers prudent to do should effectively make the Master liable in tort.

The gist of the submissions on ground three is that there are issues in the action which issues would properly be determined at the trial between the Defendant and Zambia State Insurance Corporation Limited which need to be settled and which cannot be resolved if Zambia State Insurance Corporation Limited is not made a party to this action.

At this juncture, we must mention that the Plaintiff or his counsel did not appear at the hearing of the appeal and did not file heads of argument.

At the hearing of the appeal, counsel for the Intended Joinder made oral submissions and subsequently filed written heads of argument to which counsel for the Defendant also responded.

In his oral submissions in response to the arguments and submissions on the three grounds of appeal, counsel for Zambia State Insurance Corporation Limited pointed out that the cases cited on behalf of the Defendant did not apply to this case; that although the Defendant was employed by Zambia State Insurance Corporation Limited, he was not employed to defame others; that the Defendant knew his operations which did not

(P.378)

include defaming others; that he was given sufficient time to retract his defamatory letter when the Board disassociated itself; and that in the pleadings, the Plaintiff made no reference to Zambia State Insurance Corporation Limited.

In the written heads of argument, counsel for the Intended Joinder responded to ground one that the trial Judge was on firm ground when he refused the application to join Zambia State Insurance Corporation limited because the Defendant's actions did not have the approval of his former employers.

The response to ground two was that the principle of vicarious liability did not apply to this case as the Defendant committed the tort knowing too well that he did not have the authorization by the employer to do so. In support of this argument, counsel cited the case of *P. Sinonge and Anderson Security Systems V Pelekelo Leonard Sitali*⁵ where this court stated :-

"Clearly, no reasonable person can entertain the idea that a servant has authority from his Master to steal people's property. If we ruled that any security firm whose guard steals any person's property other than the property it contracted to guard is liable, then we are sure, it will be very dangerous to run a security firm."

(P.379)

In his reply to oral submissions on behalf of Zambia State Insurance Corporation Limited, counsel for the Defendant pointed out that the High Court did not consider the merits of the application.

Replying to the written heads of argument on behalf of Zambia State Insurance Corporation Limited, counsel argued that the application before the High Court was for Joinder of Zambia State Insurance Corporation Limited as 2nd Defendant; but instead, the High Court delved into the question of whether Zambia State Insurance Corporation Limited was vicariously liable or not; and that in doing so, the trial Judge erred in law. Counsel cited the case of **John Mungala and Kenneth Kabenga V. Attorney-General**⁶ where this court said:-

"There are countless authorities on vicarious liability especially where an employer seeks to avoid his own liability on the basis that the employee was then on a frolic of his own: for example, we cite only Acropolis Bakery V. ZCCM (3) where the Employer was held not liable, contrasting this with Attorney-General V. Landless (4) where the employer was held to be liable. It all depends on the facts and circumstances of each case and the time to make that decision is after all the evidence has been heard. There was no indication from the defence that they would not be calling any evidence and we do not know if after the drinking

(P.380)

spree the offending officer had resumed the course of employment or not. In view of the fact that the appeal is liable to succeed on the point concerning the erroneous ruling of non-joinder or misjoinder we do not wish to prejudice the course of the new hearing, which we propose to order before another Judge of the High Court, but commenting any further on the ground relating to a prima-facie case."

Counsel submitted that it was a misdirection on the part of the trial Judge to arrive at a decision that the intended 2nd Defendant was not vicariously liable; and as the time to make such a decision is after trial and after all the evidence has been heard.

We have very anxiously addressed our minds to the arguments and submissions by both learned counsel on the three grounds of appeal. On account of the view we take of this appeal, we propose to deal with the arguments and submissions on grounds one and two together as they raise one issue of vicarious liability and when a party can be held vicariously liable.

According to these two grounds, the trial judge erred when he refused the application for Joinder of Zambia State Insurance Corporation Limited as 2nd Defendant on the grounds that the

(P.382)

It was further submitted that the Defendant was in the employment of the Zambia State Insurance Corporation Limited and therefore Zambia State Insurance Corporation was and is supposed to be vicariously liable for the Defendant's actions.

We have considered the arguments and submissions on the two grounds. The application for Joinder of parties before the trial judge was supported by affidavit evidence already referred to. The Defendant's own affidavit evidence supporting his application raised the issue of capacity in which he was being sued and that Zambia State Insurance Corporation Limited was likely to be affected by the outcome or the result of these proceedings.

In opposition, there was also affidavit evidence which raised the basis upon which the defendant was being sued from which Zambia State Insurance Corporation Limited disassociated itself. That affidavit in opposition also gave reasons why the Defendant could not claim to have acted for and on behalf of Zambia State Insurance Corporation Limited as he had no authority to do what he did in removing the Company Secretary without the resolution of the Board.

Having considered the affidavit evidence in support of the Joinder and the affidavit in opposition, the trial judge had this to say:-

(P.383)

"I am satisfied that the affidavit evidence in opposition clearly shows that the Defendant was informed that his actions did not have the blessings of the authorities and the Board of the Corporation. In fact he was directed to rescind his decision and requested to place the matter before the Board, but he ignored the directive."

We are also satisfied that from the nature of the application and from the affidavit evidence in support of and in opposition to the application, the trial judge had no alternative but to refuse the application for Joinder on the ground that the Defendant's actions were not approved by Zambia State Insurance Corporation and on the ground that the Defendant had been advised not to dismiss the Plaintiff even if the two issues properly fell to be determined on the merits in the normal course of trial.

In our considered opinion, the issues of approval of the Defendant's actions and the advice given to him not to dismiss the Plaintiff, were crucial and cardinal in determining the application for Joinder. It was at that stage not an issue of vicarious liability but an issue of Joinder of a party. Indeed, even if the court had ruled in favour of the Defendant and joined Zambia State Insurance Corporation Limited, the court in the normal course of trial and at the end of the trial would

still have been obliged to resolve the issue of vicarious liability of Zambia State Insurance Corporation Limited even if it had joined Zambia State Insurance Corporation Limited. The trial Judge, on the evidence before him, was entitled to resolve the issue of Joinder as the preliminary issue.

Our conclusion on grounds one and two is that the court did not err in law by refusing the Defendant's application to join Zambia State Insurance Corporation Limited on the grounds that the Defendant's actions were not approved and that he was advised not to dismiss the Plaintiff. The two issues in our view could have been determined either before trial or in the course of trial or at the end of the trial. They were raised before trial. The court properly considered them on the basis of the evidence and refused the application. The trial judge cannot be faulted. The cases cited on behalf of the Defendant in so far as they relate to vicarious liability did not certainly apply to the facts of this case. The principles governing Joinder of parties do not necessarily depend on the principles governing vicarious liability. In the case of *Attorney-General V. Tall and Zambia Airways*², the Attorney-General was joined as a party in a case where the claim was for payment of moneys for breach of contract because the Respondent's contract was signed by the Minister of Transport. No issue of vicarious liability was discussed; and it was not raised.

For the reasons stated, grounds one and two of appeal, are dismissed for lack of merit.

Ground three is that the trial Judge misdirected himself in law and fact by failing to find that the Defendant's former employers were persons who would be affected by the outcome of the action.

We have considered the submissions on this ground. The question as we see it is when can a court order Joinder under Order 14, Rule 5(1). The Rule reads:

"If it shall appear to the Court or 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 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."

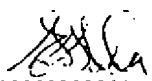
It is clear from the Rule that first and foremost it must appear to the Court or Judge that all persons who may be entitled to, or claim some share or interest in, the subject matter of the


suit, or who may be likely to be affected by the result, before a party can be joined.


The Judge having made a finding that the Defendant's actions were not approved, it did not appear to him that Zambia State Insurance Corporation Limited could be affected by the result if not made a party. Joinder per se, does not necessarily raise issues of vicarious liability. Ground three, too, is dismissed.

All the grounds of appeal having been unsuccessful, the appeal is dismissed with costs.

We direct that the trial in the main action should commence without any further delays.


.....
E. L. Sakala
CHIEF JUSTICE


.....
F.N.M. Mumba
SUPREME COURT JUDGE


.....
S. S. Silomba
SUPREME COURT JUDGE
/mc