

**IN THE SUPREME COURT FOR ZAMBIA  
OF 2013  
HOLDEN AT NDOLA  
35/2011  
(Civil Jurisdiction)**

**SCZ JUDGMENT NO. 8**

**APPEAL NO.**

**B E T W E E N:**

**SACHAR NARENDRA KUMAR  
APPELLANT**

**AND**

**JOSEPH BROWN MUTALE  
RESPONDENT**

Coram: Chiboma, Musonda, JJS and Hamaundu AJS.  
On 4<sup>th</sup> December, 2012 and on 25<sup>th</sup> July, 2013.

For the Appellant: Mr. W.B. Nyirenda, SC, of William Nyirenda and Co.  
For the Respondent: In Person

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## **J U D G M E N T**

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**Chibomba JS, delivered the Judgment of the Court**

**Cases referred to:**

1. **Attorney-General vs. Tall & Another (1995-1997 ZR 54**
2. **Krige and Another vs. Christian Council of Zambia (1975) ZR 152**
3. **London Ngoma and Others vs. LCM Company Limited and United Bus Company of Zambia Limited (In Liquidation) SCZ Judgment No. 22 of 1999**
4. **Zambia Revenue Authority vs. Javesh Shah SCZ Judgment No. 10 of 2001**
5. **Wiheim Roman Buchman vs. Attorney-General SCZ Judgment No. 14 of 1994**
6. **Liff vs. Peasly (1980) All ER 623**

**Legislation referred to:**

1. **The High Court Act, Chapter 27 of the Laws of Zambia**
2. **The Rules of the Supreme Court, 1999 Edition**
3. **The Limitation Act. 1939. English Act**
4. **The Law Reform (Limitation of Actions) Act, Chapter 72 of the Laws of Zambia**

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When we heard this appeal, Hon. Mr. Justice Musonda sat with us. He has since resigned. This Judgment is therefore, by the majority.

When we heard this appeal, the Respondent informed the Court that he had a preliminary issue to raise. He alleged that the record of appeal in this matter was filed out of time and that he had so stated and raised the same issue on 5<sup>th</sup> April, 2011, when the appeal came up for hearing. That in response, the learned Counsel for the Appellant had stated that there was an Order by the single Judge of this Court granting Leave to file the record of appeal out of time. But that this Court had ordered that the Order granting such Leave should be filed in a Supplementary Record of Appeal. That however, he was not certain that there was such an Order granting Leave.

In opposing the preliminary issue raised, Mr. Nyirenda, SC, on behalf of the Appellant submitted inter alia, that the single Judge of this Court did grant such Leave.

Since it was not possible for us to verify whether such Leave had been granted, we ordered that the hearing of the appeal would

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proceed and that we would address the preliminary issue in our Judgment. Therefore, the first portion of this Judgment relates to the preliminary issue raised by the Respondent.

We have perused through the record of appeal including the supplementary record of appeal. It is correct that the single Judge of this Court did grant Leave to the Appellant to file the record of appeal out of time. This is evidenced at page 848 and page 851 of the Record. In addition, there is also the Order of this Court at page 850 of the Supplementary Record of Appeal granting Leave to the Appellant to file Supplementary Record of Appeal. Therefore, the preliminary issue raised has no merit. The same is dismissed.

The Appellant appeals against the Judgment of the High Court in which the learned Judge held that this was a proper case in which the learned Deputy Registrar ought to have ordered joinder of A.T. Computer Limited as 2<sup>nd</sup> Defendant to the action.

The history of this matter is that the Respondent commenced an action against the Appellant in the Subordinate Court. The matter came up to the High Court on appeal. The High Court found in favour of the Respondent. It then referred the matter for

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assessment to the Deputy Registrar on the issue of damages. After assessment, the Respondent filed an application for Joinder of a party before the Deputy Registrar. The Appellant, in opposing the application had argued that at the time the Application for joinder of a party was made, the Judgment sum, interest and costs had, to a large extent been satisfied. The basis upon which the joinder application was made is that the motor vehicle that the Respondent was driving at the time of the accident was owned by the proposed 2<sup>nd</sup> Defendant, A. T. Computers Limited. The Deputy registrar, after hearing the

Parties, however, dismissed the application on the ground that since the issue of liability had already been determined and the debt had been liquidated, the Respondent was estopped from reopening the matter as the matter was res-judicata.

Dissatisfied with the decision of the Deputy Registrar, the Respondent appealed to a High Court Judge in Chambers. After Hearing the appeal, the learned Judge took the view that the record did not support the Deputy Registrar's findings that the Judgment sum, interest and costs had been fully settled as there was evidence that showed that there was unpaid interest on the adjudicated

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costs and that the costs which were awarded to the Respondent in the Subordinate Court and in the High Court had not yet been determined or agreed upon or settled.

Based on the above, the learned High Court Judge was of the view that the legal caveat of res-judicata had been improperly invoked by the Deputy Registrar. He then proceeded to review the authorities including the case of **Attorney-General vs. Tall & Another**<sup>1</sup> in which, we held that: -

- “(i) The words ‘at or before the hearing of a suit’ in Order 14, Rules of the High Court Act Cap 50 mean ‘before delivery of a judgment in a suit’ and joinder can validly occur before judgment has been delivered.**
- (ii) Words of Order 15, Cap 50 are too restrictive, but the court has jurisdiction and discretion to order a party to be joined in the interests of justice.**
- (iii) Both Order 14, the English Order 15, as well as section 13 of Cap 50, are intended to avoid a multiplicity of actions.”**

On the above authority, the learned Judge ordered the Joinder of A. T. Computers Limited as 2<sup>nd</sup> Defendant in this matter.

Dissatisfied with the Order for Joinder of the A. T. Computers Limited, the Appellant appealed to this Court advancing two grounds of appeal as follows: -

- “1. The learned trial Justice I.C.T. Chali erred in law and in fact when he held that A. T. Computers Limited be added as a Second**

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**Defendant to the action when the matter had been adjudicated upon, Judgment delivered and paid as well as costs.**

- 2. The learned trial Court erred in law and fact to hold that joining AT Computers Limited would being all parties to dispute relating to one subject matter before the Court at the same time so that the dispute may be determined without delay inconvenience and expense of separate actions and trials when any action by the Respondent against AT Computers was statute barred at the time of the application.**

Mr. Nyirenda, SC, in presenting the appeal, submitted that the appeal is against the Ruling of the High Court in which the Court below granted Leave to the Respondent to join a third party, A. T. Computers Limited, pursuant to **Order 15 of the**

**Rules of Supreme Court (RSC)** when in fact, the matter was at an end as Judgment had been delivered and satisfied and all the dues had been paid to the Respondent. That as such, the Appellant was failing to understand the purpose of the joinder as the Judgment had already been satisfied.

Mr. Nyirenda, SC, also brought to our attention another aspect of this appeal. He submitted that even if it was assumed that the learned Judge was in order, in ordering the joinder, the cause of the action against the third party was Statute barred under the Statute of Limitation of Zambia Cap 72 and the Limitation Act of England. Mr. Nyirenda, SC, pointed out that the cause of action in this

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matter arose out of a claim for negligence for breach of duty and that as such, it ought to have been brought within three years. That however, the Respondent is now trying to bring in a third party after six years has elapsed and that this is what the Appellant finds objectionable as shown by the authorities cited in the Appellant's Heads of Argument.

In the Appellant's Heads of Arguments, it was submitted that this is a proper case in which this Court should upset the Judgment of the Court below. Grounds 1 and 2 were argued together.

It was submitted that the application for Joinder of A. T. Computers Limited was made pursuant to **Order 15 (6) (2)(b)**

**(ii) of the Rules of the Supreme Court** which provides that: -

- "2) Subject to the provision of this rule at any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application.**
- (a) Order any of the following persons to be added as a party namely:**
- (ii) Any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter."**

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It was submitted that Court decisions in such applications ought to be guided by the interest of justice and that the Dicta, in **Attorney-General vs. Tall and Another**<sup>1</sup>, underscores the need to have the interest of justice in focus. In that case, we stated that: -



**“The joining of the Attorney-General in these proceedings would be necessary to ensure that the matters in the cause may be effectively and completely determined and adjudicated upon to put an end to any further litigation. Both our Order 14 and English Order 15 as well as Section 13 of the High Court Act Chapter 27 of the Laws of Zambia are intended to avoid a multiplicity of actions...the Court has still an inherent jurisdiction to make the order in the interest of justice.”**

It was submitted that no injustice would be occasioned to the Respondent as he had not only received Judgment in his favour but the same had also been satisfied as the Judgment sum was paid into Court and the Respondent paid it out of Court as evidenced at pages 648 to 657 of the Record of Appeal.

It was pointed out that the rule on Joinder is intended to avoid a multiplicity of actions and hence, it ought not to be applied in the current case as the action against A. T. Computers was Statute barred at the time the application was made as the cause of action arose in 2003, while the Joinder application was made on 24<sup>th</sup> November, 2009, a period of almost 6 years after the incident occurred.

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Further, that under **Practice Note 15/6/2 of the RSC**, it is indicated that this Rule must be read closely with the provisions of **The Limitation Act of England**. And that our own **Law**

**Reform (Limitation of Actions) Act**, which amended **the Limitation Act,**

**1999 of England**, Limits actions for damages for negligence or breach of duty to three years. That, as can be discerned from the affidavit evidence filed in the Subordinate Court, the Respondent's claim was founded on the allegation of carelessness and was for consequential damages.

The Dicta in **Krige and Another vs. Christian Council of Zambia**<sup>2</sup>, was cited in which we stated that: -

**“As to estoppels, the matter is in my view concluded against the Plaintiff by the principle that one cannot set up an estoppels against a statute, and I entertain no doubt that the same rule applies whether the basis upon which a party is alleged to be precluded from relying on the particular state of affairs is estoppels properly so called or some analogous principle or “quasi-estoppel”.**

It was submitted that on the foregoing arguments and authorities, this Court should uphold this appeal and set aside the Ruling by the Court below.

On the other hand, in opposing this appeal, the Respondent relied on the arguments in his Heads of Argument. He began by

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reciting the pages where the evidence is. We have no intention of repeating the said pages; suffice to say that the evidence is on record.

In response to the first ground of appeal, it was argued that there is no law which states that a person cannot be added as a party to an action in Court after the delivery of Judgment. Our decision in **London Ngoma and Others vs. LCM Company Limited and United Bus Company of Zambia Limited (In Liquidation)**<sup>3</sup> was cited in which we stated that: -

**“The arguments by the Respondents that the Appellant cannot be joined after the consent Judgment has been entered cannot be supported.”**

It was argued that in this matter, the Judgment sum, interest on it and part of the costs, and part of the interest on costs had been paid. And that this court will observe that after the Ruling of 26<sup>th</sup> June, 2009, on Taxation, the Appellant appealed and obtained a stay of execution of the Ruling on 13<sup>th</sup> July, 2009. And that on 9<sup>th</sup> October, 2009, the Court below dismissed the Appellant’s appeal and awarded costs to the Respondent as evidenced at pages 609 and 644 of the Record and that after this Ruling, the Appellant, on

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21<sup>st</sup> October, 2009, paid into Court and obtained another stay of execution on 23<sup>rd</sup> October, 2009, claiming that the Judgment debt had been settled when in fact not. That the Respondent incurred more costs to get the payment out of Court and to have the Order of 23<sup>rd</sup> December, 2009 set aside.

The case of **Zambia Revenue Authority vs. Jayesh Shah**<sup>4</sup> was cited in which we stated that: -

**“We accept Mr. Banda’s argument that the payment into Court was not intended as a payment to the Judgment creditor. The obligation of the Judgment debtor was to put to the sum of dollars awarded into the hands of the Judgment creditors.”**

It was submitted that the taxation of costs related to costs that were incurred before 26<sup>th</sup> June, 2009 and not those incurred thereafter. Therefore, that, it was wrong to suggest that all the costs and interest on the costs had been paid.

In response to the argument that the Court below erred by not looking at the provisions of the **Law Reform (Limitation of Actions) Act**, it was submitted that Section 3 of the Act refers to cases of negligence where the claim includes damages for personal injuries. That, in the current case, in the Default Writ of

Summons, the claim was for the sum of K12,952,000.00 being the costs and

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loss of business by the Respondent and not for damages for personal injuries.

It was further, argued that the Appellant did not raise this issue in the Court below and that had the Appellant raised it, the Court below could have addressed it.

The case of **Wiheim Roman Buchman vs. Attorney-General**<sup>5</sup> was cited in which this Court observed that: -

**“Mr. Shamwana has raised before us some matter which was not raised before the Commissioner. Mr. Shamwana has not supported his complaint that the learned Commissioner should have recused himself. If he had done so in the lower Court then the Commissioner would have made a ruling. This matter was not raised before the Commissioner; it cannot be raised in this Court as ground of Appeal before this Court.”**

It was contended that ground one should therefore be dismissed.

In response to ground two, it was submitted that the Appellant is raising a new ground which was not raised in the Court below. Therefore, that this ground should also be dismissed. And that the Court will observe that A. T. Computers Limited has not appealed against the Ruling of the Court below

and that this means that A. T. Computers Limited was not dissatisfied with the order for Joinder.

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In reply, Mr. Nyirenda, SC, submitted that the Statute of Limitation is a statutory provision which cannot be shoved over. And that, if the Court below did not address its mind to it, then he was urging this Court to address the issue as this is an issue of estoppels. The case of **Krige and Another vs. Christian Council of Zambia**<sup>2</sup> was cited as authority for the above contention.

We have serious considered this appeal together with the arguments advanced in the respective Heads of Argument and the authorities cited. We have also considered the Judgment by the learned Judge in the Court below. **The major question raised in this appeal is whether it was proper to join the said AT Computers Limited as 2<sup>nd</sup> Defendant to this cause after Judgment was delivered.**

The Appellant's main contention is that Joinder ought not to have been ordered as Judgment had already been delivered and

satisfied and that the Appellant had paid into Court the money which the Respondent had paid out Court. Therefore, that the matter was res-judicata. Further, that since this claim arose out of an accident, under **The Limitation Act** of Zambia and that of

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England, the action against the said 2<sup>nd</sup> Defendant was Statute barred by the time the Joinder application and order were made.

On the other hand, the Respondent's contention was that the matter is neither res-judicata nor Statute barred as the claim is not covered by the **Limitation Acts** of Zambia and England.

We have considered these arguments. It is our considered view that Order 15 (6) (2) (B) (ii) of the Rules of the Supreme Court provides good guidance on the powers of the Court to order Joinder of a party. It states clearly that an application for Joinder may be granted at any stage of the proceedings and that this may be so done on such terms as the Court thinks just. And that any person who may be affected may be joined to the matter if in the opinion of the Court, it would be just and convenient.

The rationale for this is to allow the Court to determine all matters in dispute in one cause and is thus meant to prevent

multiplicity of actions. This power is discretionary. We therefore, agree with the submissions by Mr. Nyirenda, SC, that the Court, in deciding whether or not to join a party to the proceedings, must be guided by the interest of Justice. We also agree that the case of

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**The Attorney-General vs. Tall and Another**<sup>1</sup> is still good law and provides guidance to the Court. Our dictum in that case is also illustrative on the rationale that the power is clearly meant to enable the Court to effectively determine all the matters in dispute in one cause so as to avoid any further litigation on the same issues. That case further shows that the Court has inherent jurisdiction to make an order of Joinder in the interest of Justice.

There is, however, a further question in this case as to whether the Judgment in this matter had been fully satisfied. On one hand, The Appellant has argued that it has been satisfied while on the other hand, the Respondent argued that the matter has not been fully concluded as there are still outstanding matters concerning interest on the Judgment sum and interest on the costs that were awarded to the Respondent. And that even



after taxation, the Appellant did appeal and obtained a stay of execution.

We have considered these arguments. The law is very clear that Joinder may be granted even after Judgment has been delivered. The case of **London Ngoma and Others vs. LCM Company Limited and United Buses of Zambia**<sup>3</sup> is authority on

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this. Our decision in *The Attorney-General vs. Tall*<sup>1</sup> case was upheld in the later case and shows that the Court has inherent Jurisdiction to order joinder of a party even after Judgment has been delivered. From an analysis of these cases, it is clear that the Court does not simply grant or deny a joinder, but takes into consideration all circumstances of the case.

The Respondent had relied on Order 15 Rule 6 (1) (b) (ii) of the RSC of England as already stated above in applying for the joinder of AT Computer. However, O.15, r.6 (5) (a) of the RSC of England states that: -

**“No person shall be added or substituted as a party after the expiry of any relevant period of limitation unless the relevant period was current at the date when proceedings were**

**commenced and it is necessary for the determination of the action that the new party should be added or substituted...”**

In the case of **Liff vs. Peasley**<sup>6</sup>, it was stated thus: -

**“The joinder of a person as a defendant when the claim against him is time-barred is contrary to the rule of practice and is not a mere irregularity of process which can be waived but the notice of intention to defend the amended writ since such joinder would take away an accrued right of defence, and the added defendant is entitled to an order that he cease to be a party to the action properly or necessarily joined.”**

In the present case and as advanced by the Appellant, the application to join AT Computers was made almost six years after

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the proceedings had already commenced. **The Law Reform (Limitation of Actions) Cap 72 of the Laws of Zambia**, in amending the **Limitation Act 1939 of the United Kingdom**, states thus: -

**“In its application to the Republic, the Limitation Act, 1939, of the United Kingdom, is hereby amended as follows:**

**(a) by the insertion of the following proviso at the end of subsection (1) of section 2:**

**Provided that, in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as**

**if for the reference to six years there were substituted a reference to three years.”**

An examination of this amendment clearly shows that, if the claim for damages for negligence includes, or consists of damages in respect of personal injuries to any person, then the limitation period reduces from six years to three years. Otherwise, the limitation period remains six years. what we need to determine in this case is whether the Respondent was within the limitation period at the time he decided to join AT Computers as Second defendants? The affidavit in support of default Writ of Summons filed in the

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Subordinate Court, clearly shows in paragraph 7 that the accident that gave rise to this action occurred on the 5<sup>th</sup> of December, 2003. The Respondent decided to apply to add AT Computers as second defendants on the 24<sup>th</sup> of November, 2009. This in essence means that, there was still a period of 11 days before the expiration of the limitation period **if the claim did not include or consist of damages for personal injuries**. The default Writ of Summons filed by the Respondent on the 4<sup>th</sup> March, 2004

shows that the claim was for loss of earnings and costs incurred as a direct consequence of the road accident involving Toyota Corolla ACE9639 belonging to the Respondent. There is no claim anywhere for damages for personal injuries.

Now coming to the question of whether it was proper for the Court below to have added AT Computers after Judgment had been delivered, all the circumstances of the case have to be considered in the interest of justice. Would it be in the interest of justice to add AT Computers at this stage?

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The Respondent was within his rights apply to add the second defendant and he was also within the time stipulated in the **Statute of Limitation Act of England** as amended by our own **Limitation Act**. But then what would he gain from this application if it succeeded? What would be the essence of joining another party when Judgment has already been passed and a major part of it already satisfied? Is it absolutely necessary that

the new party should be joined in order for there to be proper determination of all the issues in this case? Will the Respondent's cause suffer or be defeated if the second defendant were not added? All these are questions that we have asked ourselves in considering whether or not the learned Judge in the Court below properly exercised his discretionary power in ordering the Joinder of the said **AT Computers Limited** to this action as 2<sup>nd</sup> Defendant after Judgment had already been passed and has mostly been settled.

Our firm view is that the current case can be distinguished from the case of **The Attorney-General vs. Tall and Another**<sup>1</sup>. It is clear that there is no danger in the current case that if the 2<sup>nd</sup>

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Defendant is not joined as a party, the Respondent's cause would be defeated. The Judgment delivered in the Court below will not change by the addition of AT Computers; the only difference will be that the defendants will share costs. In the **Tall** case, it was necessary that all matters be effectually and completely determined to avoid a multiplicity of actions and hence, the order

of joinder. There is no such danger in the current case. What it would breed though, if taken back to the lower Courts for rehearing, would be further and unnecessary delay and costs on the part of the 1<sup>st</sup> defendant who is now the Appellant in this appeal. If the Respondent is concerned that the Appellant would not satisfy the whole of the Judgment, then there are rules of the Court that aid enforcement of Judgments instead of adding another party as assurance at this late hour.

It is therefore, our considered view that even though the application was within time and the law allows the Respondent to add or substitute a party, it would not be in the interest of justice in the current case to add AT Computers at this late hour simply

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because the rules of Court allows such joinders. We would be failing in our duty as the Court, if we allowed all kinds of applications simply because a party is within his rights to do so. We say so as we are not persuaded that it would be in the interest of justice to order the joinder of AT Computers Limited as the interest of justice also demands that cases must come to finality.

For the reasons given above, this appeal succeeds.

In the circumstance of this appeal, we order that each party bears own costs.

.....  
H. CHIBOMBA  
**SUPREME COURT JUDGE**

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P. MUSONDA  
**SUPREME COURT JUDGE**

.....  
E. M. HAMAUNDU  
**ACTING SUPREME COURT JUDGE**