IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.54/2016**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

DEVELOPMENT BANK OF ZAMBIA **APPELLANT**

AND

JCN HOLDINGS LIMITED **1ST RESPONDENT**

POST NEWSPAPERS LIMITED **2ND RESPONDENT**

MUTEMBO NCHITO **3RD RESPONDENT**

Coram: Hamaundu, Kabuka and Chinyama, JJS

On 26th May, 2016 and 20th March, 2019

For the appellant : Mr B.C. Mutale, SC, and Ms M. Mukuka, Messrs Ellis & Co

For the 1st and 2nd respondents : Mr N.Nchito, Messrs Nchito and Nchito

For the 3rd respondent: In person

ALSO IN ATTENDANCE

For Mines Air Services Limited : Mr A. Tembo, Mesrs Tembo Ngulube & Associates

For Zambian Airways Limited and Fred Mmembe : Mr N. Nchito, S.C, Messrs Nchito and Nchito

For Nchima Nchito, S.C, : In person

JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Lucy v W.T. Henleys Telegraph Works Co Ltd (1970) 1 QB 393**
2. **Zambia Consolidated Copper Mines Ltd v Joseph David Chileshe (2002) ZR 86**
3. **Fawaz and Chelelwa v The People (1995/1997) ZR 3**
4. **Zulu v Avondale Housing Project Ltd (1982) ZR 171**
5. **The Attorney General v Aboubacar Tall and Zambia Airways Corporation Ltd (1995/1997) ZR 54**
6. **Patel v Surma Stationery Ltd & Others (2009) ZR 112**
7. **BP Zambia Plc v Zambia Competition Commission & Others (2011) 3 ZR 148**
8. **Kamouh v Associated Electrical Industries International Limited [1980] QB 199**
9. **Hodgson v Armstrong and Another [1966] All E.R. 594**
10. **Liff v Peasely and Another (1980) 1 All E.R. 623**
11. **The Attorney General & Another v Lewanika & Ors (1993/1994) ZR 164**
12. **Ethiopian Airlines Limited v Sunbird Safaris Limited, Sharma's Investment Holding Limited and Vijay Babulal Sharma (2007) ZR 235**
13. **Bristol and West Building Society v Mothew (t/a staplay & Co) [1964] 4 All E.R. 698**
14. **Kelly v Cooper [1993] AC 205**
15. **Conway v Ratiu [2006]1 All ER 571**
16. **Access Bank (Zambia) Limited v Group Five/ZCON Business Park Joint Venture, SCZ/8/52/2014 (unreported)**
17. **Dunlop Pneumatic Tyre Company v Selfridge and Company Limited [1915] AC 847**

Legislation referred to:

1. **The Companies Act, Chapter 388 of the Laws of Zambia, S.383**
2. **The Limitation Act, 1939**
3. **The High Court Act, Chapter 27 of the Laws of Zambia, S.13**
4. **The Constitution of Zambia, Article 118(2)(e)**

Rules of court referred to:

1. **The High Court Rules, Chapter 27 of the Laws of Zambia, Orders XIV and XVIII**
2. **The Rules of the Supreme Court (White Book), Orders 15 and 20**

Other works referred to:

1. **Maxwell on Interpretation of statutes, 12th edition**

This appeal is against mainly the refusal by the High Court to join other parties to this action. The parties sought to be joined are;Mines Air Services Limited, Zambian Airways Limited, Fred Mmembe and Nchima Nchito, SC.

The background to this appeal is this: There is an action pending in the High Court in which the appellant seeks specific performance of legal undertakings. In the course of the proceedings, the appellant became desirous of joining the four intended parties to the action. In pursuance of that desire, the appellant filed several applications.

The first application was made under **Order 15 Rule 4** of the **Rules** of the **Supreme Court (White Book)** to join the following intended parties: Mines Air Services Limited, Zambian Airways Limited, Fred Mmembe and Nchima Nchito, SC.

The second application was made under **Order XVIII** of the **High Court Rules, Chapter 27 of the Laws of Zambia** and **Order 20, Rule 10** of the **Rules** of the **Supreme Court(White Book)** to amend the writ of summons and statement of claim. According to the appellant, the joinder of the intended parties necessitated setting out specific claims against the new parties; and also re-casting the existing claims against the current parties. It also

necessitated re-casting the averments in the statement of claim. The appellant exhibited the proposed amended writ of summons and statement of claim. We shall briefly mention some of the proposed claims and averments because they, by and large, charted the direction which the arguments took. So, there was a proposed claim for one of the intended parties, Mines Air Services Limited, to pay back the sum of K14billion that was advanced. Another claim was proposed for an order that the present defendants, together with messrs Fred Mmembe and Nchima Nchito fraudulently omitted to facilitate the common stock equity arrangement. There was a claim for an order to be made pursuant to **Section 383** of the **Companies Act** that the current respondents together with messrs Fred Mmembe and Nchima Nchito be held personally liable for the loan of K14billion. There was a claim for an order that the corporate veil of Mines Air Services Limited be pierced so that the current respondents and messrs Fred Mmembe and Nchima Nchito are held liable for the loan of K14billion. We must say that we do not understand why the appellant intended to seek this last order when it also intended to seek an order under **Section 383** of the **Companies Act**. This is because the doctrine of piercing a company's corporate veil is a common law one. The object of that

doctrine is now provided for under **Section 383 of our Companies Act**. So, in our case, it is the provisions of the statute that prevail; and a person who seeks to make directors of a company liable for its debt must do so under **Section 383**. Therefore, in this case, there was a duplication of the order that the appellant intended to seek.

In the proposed statement of claim, the appellant averred generally that the 3rd respondent, (Mutembo Nchito) together with messrs Fred Mmembe and Nchima Nchito have carried on the business of Mines Air Services Limited fraudulently with regard to the K14billion loan.

The third application was made in anticipation of the success of the two foregoing applications. Therefore, the appellant applied for leave to file additional bundles of documents and witness statements.

The fourth application was for an order to expunge from the record witness statements for two of the witnesses intended to be called by the respondents, namely, Richard Phiri and James Bilias Kapasa.

The fifth application was for an order to expunge from the respondents' bundle of documents the due diligence report that they had included among the documents produced.

Opposing the applications, the respondents raised five questions which, then, formed the basis on which the applications were argued. The questions were these:

> **"(i) Is it lawful to join parties to an action by amending pleadings in such a manner that the effect is to commence actions on issues that are statute-barred?**
>
> **(ii) Is it lawful to amend a writ and statement of claim by adding new claims which have passed the statutory limitation period?**
>
> **(iii) Is there property in a witness and is it lawful to seek to expunge a witness statement?**
>
> **(iv) Is there legal basis for expunging the due diligence report when it was supplied by the plaintiff?**
>
> **(v) Is it lawful for the plaintiff to seek to pierce the corporate veil when its cause of action against the principal debtor is statute barred"**

The arguments in opposition to the application for joinder were based on the **Limitation Act, 1939**. The respondents argued that the cause of action in this matter accrued on or before 13th January, 2009 while the appellant was seeking to join the intended parties on 31st July 2015. According to the respondents the

Limitation Act, 1939 provides that actions such as this one should be commenced within six years; and yet the appellants were seeking to join the parties well after six years from the time that the cause of action had accrued. The respondents cited some English cases which propound the rule that a party cannot be joined to an action after the expiry of any relevant period of limitation. One of those cases is; **Lucy v W.T. Henlys Telegraph Works Co. Ltd**[1] which holds that leave to add a defendant will not be granted after the expiry of any period of limitation. On those grounds the respondents urged the court below not to join the parties that the appellant intended to join to the action.

The application to amend was also opposed on the basis of the **Limitation Act, 1939**. Here, the respondents' argument was that the amendments sought by the appellant were introducing new causes of action against the existing defendants (respondents) and that, because the said causes of action were statute barred, the amendments should not be allowed. For this proposition the respondents relied on our decision in the case of **Zambia Consolidated Copper Mines v Joseph David Chileshe**[2].

In the third application, namely to expunge the witness statements of the witnesses intended to be called by the

respondents, the respondents relied entirely on our decision in the case of **Fawaz and Chelelwa v The People**[3] where we held that there is no property in a witness and that, therefore, on the facts of that case, it was not the duty of the prosecution to offer three witnesses, whose names were not on the list of prosecution witnesses, for cross-examination by defence counsel. Counsel for the respondents in this case argued that the holding in that case was very clear; and that, therefore, the respondents were at liberty to call any witness they so wished to call. Hence, argued the respondents, the appellant could not seek to expunge the witness statements.

With regard to the application to expunge the due diligence report, the respondents argued that in fact it was the appellant itself which gave the report to the respondents. The respondents went on to argue that the only reason that the appellant sought to have the report expunged from the record now was because the report fortifies the position of the respondents in this claim.

As regards the question posed by the respondents, namely, the legality of seeking to pierce the corporate veil of an alleged principal debtor against whom the action is statute barred, the respondents' argument was that, even before the question of lifting the corporate

veil arises, there must first be liability on the part of the company whose corporate veil it is intended to be lifted. Applying that argument to the case at hand, the respondents submitted that the cause of action against Mines Air Services Limited is statute barred, and that, therefore, the question of lifting the corporate veil cannot arise.

The appellant's counter-argument to the respondents' objection on joinder was that the limitation period applies to the time when an action is commenced; and not to joinder of parties. The appellant pointed out that, in this case, the action was commenced in 2009, well within the limitation period. The appellant also added two further arguments: The first one was that **section 13** of the **High Court Act** grants power to the High Court to grant all remedies or reliefs in such a manner that all matters in controversy between the parties may be completely and finally determined; and that all multiplicity of legal proceedings concerning any of such matters are avoided. Relying on our decision in **Zulu v Avondale Housing Project Ltd**[4], the appellant argued that adherence to the provisions of **Section 13** required that all interested parties should be before court; and that those interested

parties who have not been joined to the action should be allowed to do so.

The second argument was anchored on **Order XIV rule 5(1)** of the **High Court Rules** which gives a court liberty to join any party to the proceedings if it appears to that court that such party ought to be joined. The argument was couched on the basis of our decision in the case of **The Attorney General v Aboubacar Tall and Zambia Airways Corporation**[5] where we said that joining the Attorney General to the proceedings therein would be necessary in order to ensure that the matters in that cause would be effectively and completely determined so as to put an end to further litigation. Therefore, the appellant argued that, on the facts of this case, the addition of the intended defendants would assist the court in disposing of all issues arising herein; and that commencement of a separate action against the intended defendants would constitute a multiplicity of actions.

The appellant's arguments on the objection concerning the amendment of the pleadings were based on **Order XVIII** of the **High Court Rules** and **Order 20** of the **Rules** of the **Supreme Court (White Book)**. As regards **Order XVIII** of the **High Court Rules**, the appellant argued that, by that provision, amendments may be made

at any stage of the proceedings. As regards **Order 20**, **rule 5** of the **Rules** of the **Supreme Court of England**, the appellant argued that that provision empowers the court to allow amendments even after any relevant period of limitation has expired in certain limited circumstances. In this case the appellant cited two of those circumstances, namely; (i) an amendment to correct the name of a party and (ii) an amendment to alter the capacity in which a party sues. The appellant placed particular reliance on **Order 20**, **rule 5(5)** of the **Rules** of the **Supreme Court** which provides that an amendment may be allowed notwithstanding that the effect will be to add or substitute a new cause of action if the new cause of action arises out of the same, or substantially the same facts as the cause of action in respect of which relief has already been claimed. The appellant cited the case of **Patel v Surma Stationery Ltd and Ors**[6] where we allowed an amendment on the strength of that provision. The appellant then argued that it was very clear that the amendments that it sought to make arose out of the same facts as the cause of action currently subsisting.

The appellant's counter-argument on the question whether there is property in a witness was that a witness, for good and sufficient reasons, may be precluded by an order of the court from

testifying against a party to the proceedings; or in the matter at all. It was argued that, consequently, a witness statement being merely a document containing the evidence of such witness, it can be expunged from the record.

Arguing with regard to the objection raised against the appellant's application to expunge the due diligence report, the appellant submitted that the deponents of its affidavit had clearly stated that they had never sent the report to the respondents.

With regard to the question concerning the piercing of the corporate veil, the appellant argued that the evidence relating to the roles, actions and representations of the proposed defendants in the transactions that form the subject of this action were central to the question of liability. The appellant did not appear to explain clearly how this argument addressed the respondents' argument that in order to pierce the corporate veil of Mines Air Services Ltd, there had to be liability attached to it; that in order to attach liability to it, it had to be successfully joined to the action; and, that in order to successfully join it to the action one problem had to be surmounted, namely, that the cause of action as against Mines Air Services Ltd was statute barred. That is how the argument was presented to the court below.

Upon examining the background, as disclosed by the several affidavits filed, the court below found that two of the parties that the appellant was seeking to join to the action, namely Fred Mmembe and Nchima Nchito were not party to the syndicated loan agreement which was executed between Mines Air Services Limited and the appellant. And neither did they play any role in their individual capacities so as to have any interest in, or to be said to be likely to be affected by the outcome of the proceedings; these being circumstances which would have qualified them to be defendants in the action. Instead the court found that Nchima Nchito was a shareholder in Zambian Airways Limited while Fred Mmembe was a shareholder in the Post Newspapers Limited. For those reasons, the court below held that the two could not be joined to the action.

With regard to the other two intended parties, namely, Mines Air Services Limited and Zambian Airways Limited, the court below found that they were the borrowers of the money which was the subject of the loan agreement and were, therefore, privy to that agreement.

The court, however, looked at the **Limitation Act, 1939** and found that, for this particular action, the period of limitation was

six years. Applying that period to the facts of this case, the court found that the period for commencing an action had expired on 13th January, 2015. The court then looked at the provisions of **Order 20, rule 5** of the **Rules** of the **Supreme Court (White Book)** which deal with amendment of pleadings. It looked particularly at the following provisions: (i) **para 5(3)** which provides that an amendment to correct the name of a party may be allowed where there was a genuine mistake notwithstanding that the relevant period of limitation has expired; (ii) **paragraph 5(4)** which provides that an amendment to alter the capacity in which a party sues may be allowed notwithstanding that the relevant period of limitation has expired; and, (iii) **paragraph 5(5)** which provides that an amendment which adds a new cause of action may be allowed if the new cause of action arises out of the same, or substantially the same, facts as a cause of action which has already been claimed.

The court then found that the application for joinder was made after the 13th January 2015, and was therefore out of time. The court then held that the application for joinder did not fall under any of the exceptions in **Order 20, rule 5**. For those reasons, the court held that the application to add parties with respect to Mines Air Services Limited, Zambian Airways Limited, Fred

Mmembe and Nchima Nchito was caught up by the **Limitation Act, 1939** and was, therefore, statute barred.

The court then fortified its decision by reference to some decided cases, namely the Zambian case of **BP Zambia Plc v Zambia Competition Commission & Ors**[7] and the English cases of **Kamouh v Associated Electrical Industries International Limited**[8] , **Hodgson v Armstrong & Another**[9], and **Liff v Peasley & Another**[10].

The court granted the application to amend the pleadings on the strength of **Order 20 rule 5(5)** of the **Rules** of the **Supreme Court (White Book)**. In this case, the court observed that the proposed amendments arose substantially out of the same facts as the current cause of action.

The court then considered some authorities on the principle of the veil of incorporation, but, in the end, decided that, in its application to lift the corporate veil, the appellant was relying on **Section 383** of the **Companies Act, Chapter 388** of the **Laws of Zambia**. In the court's view, that section only applies when a company is being wound up. The court held that this was not the case in these proceedings and, consequently, dismissed the application.

The court granted the application to file additional witness statements and supplementary bundles of documents on the ground that it had granted the application to amend pleadings.

The court refused to grant the application to expunge the witness statements of Richard Phiri and James Bilias Kapesa on the ground that the relationship between the appellant and its former employees was not the same as that of a lawyer and his client where the law did provide for restraint on a lawyer by way of an injunction from testifying against his client in circumstances of conflict of interest.

The court also declined to grant the application to expunge the due diligence report on the ground that the appellant had sat on its rights by not seeking to object to it when the proceedings were at the *"Discovery"* stage.

The appellant appealed.

In support of the appeal, the appellant filed five grounds. These are as follows:

"1. That the court below misdirected itself in law and in fact when it held that Messrs Nchima Nchito, Fred Mmembe, Mine Air Services Limited and Zambian Airways Limited should not be added as parties to the action on the grounds that:–

(i) **The plaintiff had not** *'put across a strong and convincing case as to why they should be joined as defendants to these proceedings apart from attempting to lift the corporate veil'*

(ii) That the cause of action was statute barred

(iii) That Messrs Nchima Nchito and Fred Mmembe' *were not privy to the syndicated loan agreement, neither do they come into the picture as having played any role in their individual capacities so as to qualify them as defendants in this matter. They were not parties to the syndicated loan agreement which was executed between Mines Air Services Limited t/a Zambian Airways and the plaintiff'*

2. The court below erred in law and in fact when it failed to invoke the doctrine on piercing the veil of incorporation so as to justify the inclusion of Messrs Nchima Nchito and Fred Mmembe as defendants to the action.

3. The court below misdirected itself when it held at page R54 that:—

'the plaintiff in bringing this application has placed reliance on Section 383 of the Companies Act. That provision deals with winding up of the company which is not the case with the current proceedings. This application therefore is improperly before this court'

4. The court below erred both in law and fact when it refused to expunge the witness statements of Richard Phiri and James Bilias Kapesa on the basis of their contracts of employments with the plaintiff".

The fifth ground of appeal was abandoned.

The appellants argued the appeal generally on two areas; namely, the refusal by the court below to join Messrs Fred Mmembe and Nchima Nchito, SC, on one hand and the refusal by the court

to join Mines Air Services Limited and Zambian Airways Limited, on the other.

Regarding the refusal to join Messrs Fred Mmembe and Nchima Nchito, the appellant took a swipe at the High Court's reasoning that the two parties intended to be joined were not party to the relevant contract and could therefore not be joined to the action. Mr Mutale, S.C, on behalf of the appellants, argued that the application in the court below was clearly aimed at piercing the veil of incorporation. He submitted that to lift the veil of incorporation is precisely to look beyond the names or companies in the transactions and lay bare the dealings of the people behind the company. State Counsel argued that, in the light of the purpose of lifting the corporate veil, it begged the question to say that the corporate veil could only be lifted if the shareholders and directors were party to the contract involving the company.

Learned State Counsel also took issue with the reasoning given by the court below for dismissing the appellants' reliance on **section 383** of the **Companies Act**, namely that the section only applied to winding-up proceedings. It was State Counsel's argument that, in the Court's reasoning, no attempt was made by it to justify its omission of the words **"or any proceedings against a**

company". We were referred to the works **"Maxwell on Interpretation of Statutes"** *(12th ed)* and the case of **The Attorney General & Another v Lewanika & Others**[11] for the principle regarding the literal rule of construction of statutes and documents.

Relying on our decision in **Ethiopian Airlines Limited v Sunbird Safaris Limited, Sharma's Investment Holding Limited and Vijay Babulal Sharma**[12] where we held that the managing director of a company ought to have been held personally liable for the company's debts, learned state counsel argued that under **section 383(1)** once a court is satisfied that a person was knowingly a party to the carrying on of any business of the company for a fraudulent purpose, it can make an order that the person shall be personally responsible for any liability for the debts or other liabilities of the company.

We were also referred to further authorities on the common law principles regarding the veil of incorporation. However, we shall not cite them here because, as we have said earlier, section 383 of our Companies Act sufficiently addresses situations where persons run affairs of a company for a fraudulent purpose.

With the foregoing arguments, learned State Counsel submitted that the court below ought to have joined messrs Fred

Mmembe and Nchima Nchito primarily for the purpose of lifting the corporate veil and holding them personally responsible for the debt. Counsel submitted that, for the above reason, grounds 1(i), 1(iii), 2 and 3 of the appeal should be allowed.

With regard to ground 1(ii) of the grounds of appeal, the only argument advanced was that the action against the intended parties must be allowed to be heard notwithstanding that the said parties were not joined within the time stipulated by the statute of limitations. For this submission, reliance was placed on **Article 118(2)(e)** of the **Constitution of Zambia** which states:

> **"(e) justice shall be administered without undue regard to procedural technicalities"**

Arguing the fourth ground of appeal, learned State Counsel submitted that the appellant had established before the High Court that one of the intended witnesses for the respondents, Richard Phiri, had once held a managerial position as a Director in the appellant bank and that his contract of employment had prohibited him, during or after his employment, from disclosing to any person information relating to the appellant. Learned State Counsel submitted also that as regards the other intended witness, James Bilias Kapasa, the respondent had established before the court

below that the witness statement was drawn by the advocates for the respondent without the appellant's consent. According to learned State Counsel, the two former employees were in breach of the confidentiality clauses in their contracts of employment. Disagreeing with the court's reasoning that the fiduciary duty in this case was not on the same footing as that placed on the lawyer/client relationship, learned State Counsel argued that the lawyer/client relationship was only one such relationship in which the duty exists; the others being employer/employee relationships, etc. It was submitted that a long line of jurisprudence exists which supports that proposition. The following cases were drawn to our attention as examples of such jurisprudence. **Bristol and West Building Society v Mothew (t/a Staplay & Co)**[13], **Kelly v Cooper**[14] and **Conway v Ratiu**[15].

Concluding arguments on this ground, learned State Counsel submitted that a court of justice ought not to assist a fiduciary in breaching his duty of confidentiality to the beneficiary.

All in all, we were urged to allow the appeal and join the intended parties to the action, as well as expunge the witness statements for the two former employees.

In response learned State Counsel, Mr Mutembo Nchito, dealt with ground 1(ii) first; that is the ground that impugns the judgment of the court below for holding that the cause of action was statute barred as against the parties intended to be joined. According to learned counsel, the theme of the appellant's application is this: first, to join Mines Air Services Limited as a party and, secondly, to join Messrs Nchima Nchito and Fred Mmembe so that they be held personally liable for the liability incurred by Mines Air Services Limited. Counsel argued that for the appellant's desire to be achieved, it must first be established that it is possible for Mines Air Services Limited to be sued or added to this action as a party. Citing a number of authorities on the subject of limitation of actions, such as **BP Zambia Plc v Zambia Competition Commission & Ors**[7], **Lucy v W.T. Henleys Telegraph Works Co Ltd**[1] and **The Limitation Act, 1939**, counsel argued that Mines Air Services Limited cannot be joined to this action because, according to the above authorities, the period of limitation is mandatory; and once it has expired, it cannot be extended.

In response to the appellant's appeal to the court to ignore the limitation period on the strength of **Article 118(2)(e)** of the

Constitution of Zambia, counsel referred us to our decision in **Access Bank (Zambia) Limited v Group Five/ZCON Business Park Joint venture[16] (unreported)** where we held that the Constitution never means to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the courts.

Responding to the arguments in grounds 1(i) & (iii), 2 and 3 learned counsel submitted that the reason why the court below refused to join Messrs Fred Mmembe and Nchima Nchito to the action was because the action was statute barred. According to counsel, the two parties could not be joined to the action without any action against Mines Air Services Limited; and that in this case, however, the cause of action against Mines Air Services Limited was statute barred. It was counsel's argument that, in any case, the court below was on firm ground when it held that Messrs Fred Mmembe and Nchima Nchito were not privy to the syndicated loan agreement because it is trite that a contract cannot confer rights, or impose obligations, arising under it on any person except the parties to it. For that submission we were referred to the case of **Dunlop Pneumatic Tyre Company v Selfridge and Company Limited[17].**

Finally, on these grounds, learned State Counsel submitted that **section 383** of the **Companies Act** on which the appellant relies to lift the corporate veil cannot apply because there are no proceedings against Mines Air Services Limited; and neither is that company being wound up.

Responding to the arguments on the fourth ground, learned State Counsel noted, first, that Mr Kapesa had never been an employee of the appellant. Then counsel supported the holding by the court below that the relationship between the appellant and its former employees was not on the same footing as that between a lawyer and his client whereby the law provides for the restraining of a lawyer from testifying against his client in circumstances of conflict of interest. Counsel argued further that it is against public policy for a statutory body, such as the appellant, to be selective as to which facts to present in a matter. Counsel argued that the two witnesses are relevant to these proceedings because they are the ones who are most suited to give factual information of the details of the transactions and dealings between the parties; and, therefore, it would be unjust for the appellant to wish to conceal the information.

In his final argument on this ground, learned State Counsel argued, just as he had argued in the court below, that a party has no ownership of a witness; and that parties were at liberty to elicit evidence from any witness of their choice.

With the foregoing arguments learned State Counsel urged us to dismiss this appeal.

We have considered the arguments advanced in this appeal from both sides. We observe that the issue on which the court below anchored its judgment as regards the application for joinder of parties; namely as to whether or not there can be joinder of a party after the expiry of the relevant period of limitation as discussed in **Order 15/6/4** of the **Rules** of the **Supreme Court (White Book)**, was not pursued before us. Perhaps that can be attributed to the categorical nature of our decision in **BP Zambia Plc v Zambia Competition Commission**[7] and Others where we held that joinder of a party where the claim is time barred is not an irregularity which can be waived and, therefore, such joinder cannot be allowed. So, before us, the appeal, with regard to the aspect of joinder of parties, was presented and argued on the following single proposition: That the **Limitation Act,1939** could not prevent the joinder of the four intended parties because; (i) the

appellant sought to pierce the corporate veils of Mines Air Services Limited and Zambian Airways Limited in order to get to the directors, Fred Mmembe and Nchima Nchito. Or put more correctly, the appellant would like to apply **Section 383** of the **Companies Act** to show that the two companies were run by Mutembo Nchito, Fred Mmembe and Nchima Nchito for a fraudulent purpose as far as the loan in this case was involved, and (ii) the Constitution of Zambia, in any case, provides that there should not be strict adherence to procedural technicalities.

With regard to the applicability of **Section 383** of the **Companies Act**, the appellant argued that the court below erred when it held that the section applies only in winding up proceedings. In their arguments, the respondents do not dispute that argument. We, too, agree with the appellant's argument because the section clearly provides that it applies in any proceedings, as well. However, as rightly argued by the respondents, the proceedings should be against the company whose debt an applicant wishes to be attached to the directors. In this case, for **Section 383** to apply, the proceedings should be against Mines Air Services Limited and Zambian Airways Limited. And that is why there is this contest over the joinder.

Now, the first limb of the proposition by the appellant suggests that there is a provision in the **Limitation Act, 1939** which states that where a party seeks to pierce the corporate veil, the limitation placed by the **Act** is waived.

We have looked at the **Limitation Act, 1939**. Part II of that statute provides for extension of the limitation period in certain instances; these are;

(i) where the person to whom a right of action had accrued was under a disability;

(ii) where there has been acknowledgement and part payment; and

(iii) where the action is based on the fraud of the defendant or agent or where the right of action has been concealed by the fraud of any such person or where the action is for relief from the consequences of a mistake.

Clearly, there is no provision for the waiver or extension of the limitation period where the action is intended to be for the purpose of lifting the corporate veil.

Coming to the second limb of the argument we say that, quite apart from the fact that we held in **Access Bank (Zambia) Limited v Group Five/Zcon Business Park Joint Venture**[16] that the Constitution never means to oust the obligations of litigants to comply with procedural imperatives, the limitation period imposed for any action to be brought is a fundamental aspect of the action;

it goes to the jurisdiction of the court to entertain that action. Therefore, it does not come within the meaning of procedural technicalities.

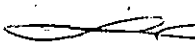
Consequently, we hold the view that the appeal with regard to the intended joinder of the new parties has no merit. The court below was on firm ground in refusing to grant the application.

With regard to the fourth ground of appeal, we have read the authorities which the appellant relied on in its submissions regarding the fiduciary duty which the proposed witnesses owe to the appellant. We note that, in all these cases, the action was against a party that was alleged to have breached their fiduciary duty. So, all the principles set out in those cases were made against that background. What we have in this case is an objection to the reception of evidence from people who are alleged to owe the appellant a fiduciary duty. While in an action against them for breach of fiduciary duty the court might easily decide against them, we do not think that the court should go so far as to prevent them from breaching their fiduciary duty considering that a remedy exists in the form of an award of damages for breach of such duty. We, therefore, agree with the court below that the duty that the two prospective witnesses may owe to the appellant is not on the same

footing as that between a lawyer and client to warrant injuncting the witnesses from testifying. Consequently, we find no merit in this ground.

All in all, the appeal is without merit. We dismiss it, with costs to the respondents and the intended parties.

E. M. Hamaundu
SUPREME COURT JUDGE



J. K. Kabuka
SUPREME COURT JUDGE

J. Chinyama
SUPREME COURT JUDGE