IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 191/2018**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

GARRY NKOMBO	**1ST APPELLANT**
CHISHIMBA KAMBWILI	**2ND APPELLANT**

AND

ROBERT CHABINGA	**1ST RESPONDENT**
HENRY MULENGA	**2ND RESPONDENT**
ATTORNEY GENERAL	**3RD RESPONDENT**

BEFORE: CHISANGA JP, MULONGOTI AND MAJULA, JJA

On the 27th March 2019 and 4th December 2019

For the 1st Appellant:	*Mr. M. H. Haimbe, Messrs Malambo & Company*
For the1st 2nd Appellants:	*Mr. G. Phiri, Messrs PNP Advocates*
For the 1st & 2nd Respondent:	*N/A*
For the 3rd Respondent:	*Mrs. L. S. Chibowa, SSA with Mr. E. Sitali, SA, Attorney General's Chambers*

JUDGMENT

CHISANGA, JP delivered the Judgment of the Court

Cases referred to

1. ***Mulungushi vs Chanda***
2. ***Development Bank of Zambia & Another vs Sunvest Limited (1995-97) ZR 187***
3. ***BP Plc vs Interland Motors Limited and Others (2001) ZR 37***
4. ***Mung'omba and Others vs Machungwa & Others (2003) ZR 17***

5. ***The People vs the Patents and Companies Registration Agency Exparte Finsbury Investment and Another 2017/CCZ/003 selected judgment No 28 of 2018***
6. ***R vs Rent Officer Service, ex-parte Muldoon, R vs Rent Officer Service, ex-parte Kelly (1996) 3 ALL ER 948***
7. ***Jamas Milling Company Limited vs Imex International Limited (2002) ZR 79***
8. ***Access Bank Zambia Limited vs Group Five/Zcon Business Park Venture SCZ/8/52/2***
9. ***General Nursing Council of Zambia vs Ing'utu Milambo Mbangweta (2008) ZR 105***
10. ***Afrope Zambia Limited vs Antony Chate and Others SCZ Appeal No 160/2013.***
11. ***Dan Pule & Others vs The Attorney General & Others, CCZ Selected judgment No 60 of 2018***
12. ***Inland Revenue Coms vs National Federation Interest of Self-employed and Small Business Ltd (1981) 2 All ER 93***
13. ***Zinka vs Attorney General (1990-92) ZR 73***

INTRODUCTION

This appeal is interlocutory. It is against a ruling refusing to join the appellants to an application for leave to move for judicial review. The said leave is being sought by the 1st and 2nd respondents in the court below. They are thus the applicants. Henry Mulenga is Executive Director of Gallant Youth Zambia Foundation Limited, while Robert Chabinga is a Good Governance Activist Politician and businessman. They seek leave to move for judicial review the decision of the Speaker of the National Assembly, recommending that the Notice of Motion for Impeachment of the President be tabled without regard to the active cases in the Constitutional Court.

The Notice of Motion for Impeachment of the President was presented by Gary Nkombo (Member of Parliament) and Chishimba Kambwili. It was couched as follows:

"Supplement to votes and Proceedings
Of Thursday 22nd March, 2018
NOTICE OF MOTION

Hon. Gary Nkombo

IMPEACHMENT OF PRESIDENT: That in terms of Article 108 (1) of the Constitution of Zambia as amended by the Constitution of Zambia Act No. 2 of 2016 ("the Constitution"), this House do resolve that the President of the Republic of Zambia, Mr. Edgar Chagwa Lungu, be impeached for violation of the Constitution and other laws of the Republic of Zambia and for gross misconduct AND THAT, upon adoption of this motion by this House in accordance with Article 108 of the Constitution, a tribunal be established under the provisions of Article 108 aforementioned to investigate the allegations levelled and to render a report to the Chief Justice pursuant to Article 108 (5) (b) of the Constitution.

(For debate on Wednesday 28th March, 2018).

Signed: ***(signed***_____
Name: Gary G. Nkombo
Signed:_____
Name:_____

It was accompanied by grounds supporting the Motion. In brief, particulars were that the President violated the provisions of the Constitution and other Laws of Zambia contrary to Article 108(1) (a) of the Constitution. As incumbent and President elect, he refused, failed and or neglected to hand over executive functions to the Speaker of the National Assembly during the pendency of the

Presidential Election Petition in the Constitutional Court under cause number 2016/CCZ/0031. Continuing, that he violated Article 104(3) of the Constitution when he purported to exercise executive power contrary to Article 104 (3). Several other violations in relation to Articles 122, 113 and 114(2) of the Constitution were cited.

The second ground was gross misconduct, bringing the Office of the President into disrepute, ridicule and or contempt. Continuing that he conducted himself in a manner which was prejudicial or inimical to the economy or security of the State, as well as engaging in corruption.

Upon receiving the Notice of Motion, the Speaker of the National Assembly tabled it on 28th March 2018, when it was decided that the motion would be tabled and discussed at full length at a given date in June 2018.

It was this decision that prompted the applicants to move for judicial review, being of the view that the Speaker did not address his mind to the fact that the matters were pending in the lawfully constituted Constitutional Court under cause numbers 2016/CCZ/0033 and 2017/CCZ/004, and that allowing the same to be tabled was prejudicial to the court proceedings.

The applicants' views were that the Speaker of the National Assembly should have waited for the Court to determine these mattes, and would then have been in a position to determine whether or not to table the motion. His decision to recommend that the Notice of Motion for impeachment of the President be

tabled is therefore illegal and without adherence to the basic and functional independence of the judiciary. According to the applicants, the Speaker's decision was tainted with procedural impropriety, thus null and void.

The appellants took out a summons for joinder pursuant to Order 15 rule 5] of the High Court Rules Chapter 27 of the Laws of Zambia, and the inherent jurisdiction of the court. They sought joinder on the basis that they were the mover and seconder respectively of the Impeachment Motion subject of the judicial review proceedings before the court. Their interest included being allowed to defend any allegations as to the competence or otherwise of the motion. They asserted that they stood to be affected by the outcome of the proceedings in view of the possibility that it may result in the decision of the Speaker being quashed.

Upon seeing this application, the applicants filed a notice of intention to raise preliminary issues on a point of law by way of objection to the application for joinder pursuant to the provisions of Order 53 rule 3(10) 6 as read with Order 14 A of the Rules of the Supreme Court. The issues raised were as follows:

i. That the joinder application amounted to forum shopping
ii. The parties intending to be joined had no interest whatsoever in the subject matter. The proceedings were not challenging the presentation of the impeachment motion by them, but the decision of the Speaker of the National Assembly to entertain the tabling of the motion

iii. The application for joinder was irregular and speculative as it did not state in what capacity the 1st and 2nd intended joinders desired to be joined to the proceedings

iv. The joinder application before court was irregular and incompetent as it was anchored on the wrong provision of the law

Upon considering the preliminary issues, the learned judge (Bobo J) came to the conclusion that the petition under cause No. 2016/CCZ/003 in the Constitutional Court revealed that one of the grounds complained of was breach of the Constitution and gross misconduct by the President. The matters here were the same as those in the petition. She also expressed the view that the intended joinders had applied to be joined to the proceedings not to protect their interests as movers of the motion in the National Assembly but to ensure that the proceedings instituted against the same opponent on the same matters may be heard, and a favourable decision obtained, if not from the high court, then from the Legislative arm of Government.

Bobo J also expressed the view that the applicants sought to challenge the decision of the Speaker of the National Assembly on his decision to accept to table the motion when there were matters pending before the court on the same grounds.

Continuing, the judge opined that the appellants would only be indirectly affected by the decision of the court, and that the person to be directly affected would be the Speaker of the National Assembly, whose decision was being

questioned. Therefore, they did not have sufficient interest in the matter, warranting that they be joined to the proceedings.

Bobo J found the argument relating to the capacity in which the appellants were to be joined to the proceedings inconsequential, but held that the failure to cite the correct provision was fatal and incurable. She thus upheld the preliminary issues and dismissed the application for joinder with costs.

APPEAL BEFORE THIS COURT

The intended joinders have launched three grounds of appeal against the decision of the trial judge as follows:

i. The learned trial judge erred in law and in fact when she upheld the respondent's first ground of objection to the applicant's application for joinder to the effect that the appellants had engaged themselves in forum shopping.

ii. The learned trial judge misdirected herself when she held that the appellants had not demonstrated sufficient interest in the proceedings in the court below to warrant them being joined thereto.

iii. The learned trial judge erred in law and in fact when she held that the application for joinder was fatally flawed on account of having been brought under a wrong provision of the law when in fact the appellants had invoked the inherent jurisdiction of the court in making the application.

iv. The learned trial judge erred in law and in fact when she dismissed the appellant's application with costs.

APPELLANT'S SUBMISSIONS

It was submitted in the appellant's heads of argument as follows:

The judge in the court below misapprehended the facts surrounding the question of forum shopping, and exceeded her mandate by delving into the substantive matter in arriving at her decision. She ought to have restricted herself to the question of joinder.

There was no evidence on which she could impute knowledge of the proceedings in the constitutional court to the appellants. Therefore, the court made a dangerous assumption not supported by any evidence before her.

The court imputed commencement of the two actions in two different fora to the appellants, when the appellants were not parties to those actions. This was in defiance of logic, implying that the learned judge was laboring under a misapprehension of both fact and law.

The parties to the proceedings in the constitutional court were different from the parties in the matter before the lower court save for the Attorney General in cause No 2017/CCZ/004, the subject matter being the tenure of the President, distinct from the issue of impeachment raised in the National Assembly.

On the foregoing it was erroneous to state that the opponent, Mr. Edgar Chagwa Lungu was being hauled before different fora and that the appellants we deploying their grievances piecemeal in scatted litigation and fora.

The finding that:

> ***"the intended joinders are applying to be joined to these proceedings not to protect their interests as movers of the motion in the National Assembly but to ensure that proceedings instituted against the same opponent over the same matters may be heard and they may obtain a favourable decision if not from this court, then from the legislative arm of Government."***

was a complete misnomer and a misapprehension of the law. It was not only speculative and not factual but also totally misconceived as the process in the National Assembly is separate and distinct and seeks a completely different outcome from that which was before the court below in the substantive proceedings before it. While one sought impeachment of the President, the other sought an order of certiorari against the Speaker of the National Assembly. It could not therefore be said that seeking to be joined to the judicial review proceedings amounted to seeking the same relief from different fora.

Development Bank of Zambia & Another vs Sunvest Limited[2]***, BP PLC vs. Interland Motors Limited and Others***[3] in which the common thread was that, unlike in the present case, the offending parties were parties in one action and chose to commence other actions and proceedings in other fora in an effort to frustrate the earlier actions, were distinguishable from this one.

The appellants, by seeking joinder to an action began by the respondents, avoided multiplicity of action by doing the opposite of what was done in the *Mukumbuta* case.

The proceedings in this case were intended to have the decision of the Speaker to entertain the motion declared null and void *ab initio* and quashed on the ground that entertaining it was unreasonable, procedurally improper and illegal because the motion contained grounds that were the subject of proceedings that were pending before the constitutional court under cause number 2016/CCZ/0033 and 2017/CCZ/004.

The respondents sought to seal the fate of the whole impeachment motion on the ground that two out of seventeen sub grounds advanced were allegedly not properly put before the National Assembly. The high handed and carte blanche manner in which the respondents approached the matter should have put the trial judge on notice of the undesirability to only look at two sub grounds in determining the propriety, legality and reasonableness of his decision to entertain the motion. This should have allowed the appellants to argue that it was reasonable, procedurally proper and legal for the Speaker to entertain an impeachment motion substantially in conformity with the requirements of the law, as the two grounds that had been challenged could be severed from the motion if necessary, to avoid the entire motion being defeated.

The trial judge's approach to the question of sufficient interest was narrow, contrary to Order 53/14/24. As movers of the motion in their individual and personal capacities, the appellants have a direct personal interest in the relief being sought in the judicial review proceedings, which is ultimately that the motion should be tabled in the National Assembly. There was a direct relationship between the appellants and the tabling of the motion, which in turn is the subject matter of the entire judicial review proceedings in the court below.

The appellants having met the criteria, should have been joined to the proceedings by the inherent power of the court to do so, pursuant to the rule in ***Mung'omba and Others vs Machungwa & Others***[4].

The appellants' locus standi is even greater than that of the respondents, who may be said to be private Attorneys General.

The court erred in treating the failure to cite the correct order relied upon in the application for joinder as fatal. It did not consider that the appellants cited the inherent jurisdiction of the court to join a party to the proceedings and its own motion. This was contrary to the case of ***The People vs the Patents and Companies Registration Agency Exparte Finsbury Investment and Another***[5], which enjoins that in circumstance as those here, a matter should be heard on the merits as opposed to being defeated for procedural irregularity.

In matters such as this one, which border on public interest issues, costs should, as per established practice, be borne by each party, so as not to stifle litigants from litigating in the public interest. The application having wrongly been decided, the costs should follow the event.

The third respondent's arguments as per the heads of argument, were as follows:

Courts disapprove of parties commencing a multiplicity of actions over the same subject matter, per ***Development Bank of Zambia Limited and KPMG vs Sunvest Limited***[2], and ***BP Zambia PLC vs Interland Motors Limited***[3].

The intended joinders had filed the Motion of Impeachment in the National Assembly and cannot be given another forum to litigate over the same matters which are also before the Constitutional Court under the guise of being joined to the judicial Review matter before the High Court, which does not seek to challenge the impeachment motion.

The intended joinders should have joined the proceedings before the constitutional court under cause number 2016/CCZ/003 and 2017/CCZ/004 which are similar to the impeachment motion before the National Assembly instead of the judicial review proceedings which do not seek to challenge the relevance of the grounds for impeachment, but seeks to challenge the decision of the Speaker of the National Assembly to accept the motion for tabling when there are matters pending before court using the same grounds.

The subject matter of the judicial review proceedings was the exercise of powers of the Speaker of the National Assembly, a matter in which the intended joinder had no interest. ***R vs Rent Officer Service, ex-parte Mulchoon***[6], ***R vs Rent Officer Service, ex-parte Kelly***[6] referred to. The person to be directly affected was the Speaker of the National Assembly whose decision was being questioned. As the appellants would be indirectly affected, they did not have sufficient interest to be joined to the matter. The subject matter of the action was the exercise of the powers of the Speaker of National Assembly. The court below correctly determined the question of sufficient interest in accordance with Order 53 rule 14 (24) Rules of the Supreme Court.

Although there is a direct relationship between the appellants and the tabling of the motion in the National Assembly, that is not the subject matter of the entire Judicial Review proceedings in the court below as the subject matter is the decision of the honourable Speaker in the exercise of his constitutional powers. The Appellants do not meet the criteria for joinder to the judicial review proceedings. Judicial review being supervisory, and not concerned with the merits of a decision, is not an ordinary action between private individuals or an individual and an agency of the state. It would not be justifiable to join the appellants to the judicial review proceedings.

The court was on firm ground in holding that it was fatal to bring the application under the wrong law. ***Jamas Milling Company Limited vs Imex International Limited***[7], ***Access Bank Zambia Limited vs Group Five/Zcon***

Business Park Venture[8] referred to. The application should have been brought pursuant to order 53 RSC.

The learned trial judge properly exercised her discretion in awarding costs to the respondents, per ***General Nursing Council of Zambia vs In'gutu Milambo Mbangweta***[9] and ***Afrope Zambia Limited vs Antony Chate and Others***[10].

ORAL ARGUMENTS

At the hearing, reliance was placed on the respective parties' heads of argument. In response to questions from the court, Mr. Haimbe, learned counsel for the appellants, invited the court to take judicial notice of the record before the constitutional court, as the two matters there had been determined with finality.

In cause number 2017/CCZ/004, the eligibility case of the President to go for an additional term has been disposed of by the court by a final judgment unrelated to the questions now in the court below. Cause number 2016/CCZ/0033 was dismissed without the merits of the question as to whether or not the actions of the President violated the Constitution being determined.

If the decision of the Speaker is quashed, the appellants being movers of the motion would have their personal interest directly barred. This is sufficient interest warranting joinder.

Learned counsel referred to ***Dan Pule & Others vs The Attorney General & Others***[11], where the Constitutional Court held at J57, that:

> ***"The modern approach is to depart from the narrow confines of interest and allow the citizens of the country to bring whichever question before it."***

He argued that the intended joinders, being representatives of the people, have sufficient interest in the matter. The decision making process commenced when a motion was moved in Parliament, and his decision cannot be reviewed in isolation from the specific motion that was laid on the table of the house.

On behalf of the 3rd respondent, it was argued by Mrs. Chibawa, that the appellants were triavialising the sufficient interest test. It was not clear what sufficient interest the appellants were pushing before the court. The appellants seemed to think they had a better understanding of the contents of the motion before the National Assembly which the Speaker chose to entertain. Contrary to this view, the Speaker, with the Attorney General, was properly placed to speak to the propriety, legality and rationality of the decision that he took. She was of the view that caution ought to be exercised, and that in constitutional matters the test of what an interest would constitute, is quite different from what sufficient interest is in judicial review proceedings.

Thus the court below was correct to refuse the appellants joinder in the premises.

In response, Mr. Haimbe read Order 53 rule 2 RSC, and argued that there was a direct interconnection, association and interrelation between the rights of the appellants and the decision of the Speaker.

DECISION OF THE COURT

We have considered the arguments of the parties in seeking to impugn the decision of the court below. We are at pains to grasp the meaning of the 3rd respondent's arguments on ground one. Forum shopping was imputed to the appellants, when they sought joinder to an action not begun by them, but by the 1st and 2nd respondents to this appeal. The appellants were not party to the action in the constitutional court.

The 3rd respondent was aware that the judicial review proceedings did not seek to challenge the relevance of the grounds for impeachment. The judicial review concerned the decision of the Speaker to accept the Motion for tabling when there were matters pending before court on the same grounds. Despite this, the respondent argued that the movers of the Motion should have sought joinder to the cause in the Constitutional Court. We understand the 3rd respondent's argument to be that the appellants had no interest in the matter, and should have ventilated their grievances elsewhere. It has not been shown however that the appellants were parties to other proceedings seeking the same relief.

BP Zambia Plc vs Interland Motors Limited[3] addresses forum shopping as follows:

"(i) A party in dispute with another over a particular subject should not be allowed to deploy his grievance piecemeal in scattered litigation and keep on hauling the same opponent over the same matter before various courts.

(ii) The administration of justice would be brought into disrepute if a party managed to get conflicting decisions which undermined each other from two or more different judges over the same subject matter."

It will be observed that this decision addresses a situation involving several court proceedings on the same subject matter, leading to possible conflicting decisions. In the proposed judicial review in this case, the lower court will be examining the decision making process, and not its merits. It will consider the grounds on which the Speaker's decision is being questioned by the applicants and not whether or not the conduct of the President is impeachable. By no means can this process be equated to the matter in the Constitutional Court. We agree that the learned judge misapprehended the law in holding that the joinder was sought, "not to protect the appellants' interest, as movers of the Motion in the National Assembly but to ensure that proceedings instituted against the same opponents over the same matter may be heard and they may obtain favourable decision if not from this court, then from the Legislative Arm of Government."

The judicial review concerns the tabling of the Motion before Parliament by the Speaker. It would not culminate into a favourable outcome for the appellants, in the event the judicial review succeeded, and the court granted the orders sought, the Motion as tabled would not be considered. It would be stopped in its tracks. Conversely, if the judicial review failed, the Motion would be tabled

and considered in Parliament. There was no question therefore of obtaining a favourable decision on the substantive matter from the High Court. We thus agree that there was no basis to impute forum shopping to the appellants.

We move to consider the second ground of appeal. This ground is on the issue whether or not the appellants had sufficient interest. Perhaps a good starting point in considering this issue is Order 53/14/24 which explains the meaning of sufficient interest:

> ***"Sufficient interest" – the overriding rule governing the standing of the Applicant to apply for judicial review is that the court must consider that he has sufficient interest in the matter to which the application relates...., if the Applicant has a direct personal interest in the relief which he is seeking, he will very likely be considered as having a sufficient interest in the matter to which the application relates. If, however, his interest in the matter is not direct or personal, but is of general public interest, it will be for the court to determine whether he has the requisite standing to apply for judicial review. Clearly, the formula "sufficient interest" is not intended to create a class of person, properly referred to as a "private attorney-general", who seeks to champion public interest, in which he is not himself directly or personally concerned, under the guise of applying for judicial review.***
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> ***The question of what is a sufficient interest in the matter to which the "application relates" appears to be a mixed question of fact and law, a question of fact and degree and the relationship between the applicant and the matter to which the Application relates, having regard to all the circumstances of the case.....The term "interest" should perhaps not be given a narrow construction, but should be regarded as including any connection, association.***

Sufficient interest was discussed in ***Inland Revenue Coms vs National Federation Interest of Self-employed and Small Business Ltd***[12].

The court held that the question whether for the purposes of RSC Ord 53, r 3(3) an applicant for judicial review had a 'sufficient' interest in the matter to which the application relates was not, except in simple cases where it was obvious that the applicant had no sufficient interest, a matter to be determined as a jurisdictional or preliminary issue in isolation on the applicant's ex parte application for leave to apply. Instead it was properly to be treated as a possible reason for the exercise of the court's discretion to refuse the application when the application itself had been heard and the evidence of both parties presented, since it was necessary to identify 'the matter' to which application related before it was possible to decide whether the applicant had a sufficient interest in it.

We acknowledge the accuracy of the court's view. We note however that the application for joinder was made after the 1st and 2nd respondents had applied for leave to move for judicial review. The appellants were not the initiators of the application. It was therefore necessary to examine whether they had sufficient interest in the matter, warranting joinder. Instead of filing an opposing affidavit the respondents raised preliminary issues. This prompted the parties to make the same arguments they would have raised on the application for joinder. This was totally unnecessary. The application for joinder should have been argued instead.

The appellants' premise for joinder is that they are the movers of the Motions as individuals. They have a direct personal interest in the relief being sought in

the judicial review proceedings in the lower court, which is that the Motion should not be tabled in the National Assembly.

Mung'omba and Others vs Machungwa and Others[4] provides guidance. In that case, the appellant had initiated complaints to the Chief Justice to appoint a Tribunal under the Parliamentary and Ministerial Code of Conduct Act, No 35 of 1994. When judicial review was launched concerning the matter, the appellants applied to be joined to the proceedings in the High Court. The learned judge acceded to the application, having formed the view that the appellants were interested parties as they had initiated the complaints under the Parliamentary and Ministerial Code of Conduct. His decision was upheld on appeal.

Similarly in this case, the appellants were the movers of the Motion. They have sufficient interest in the matter, as the Motion they had presented is in issue.

The court will consider whether the decision by the Speaker to table it was properly made. On the authority of the *Mung'omba* case, the appellants had sufficient interest in the matter. Ground two succeeds.

Turning to ground three, we agree that it was erroneous to hold that the application for joinder was fatally flawed for having been brought under the wrong law. It is established that judicial review proceedings are governed by Order 53 RSC. Our High Court Rules are inapplicable. It is undeniable however, that according to Order 53 RSC, a party with a sufficient interest in a matter may apply to be joined to the judicial review. Although the appellants

approached the court under the wrong rule, they could have done so under the correct rule. The court having heard the application, nothing would have prevented it from making the Order pursuant to the correct rule. ***Zinka vs Attorney General***[13] refers. We therefore find merit in ground three.

Turning to ground four, we agree that costs should not have been awarded to the respondents by the court below, so as not to stifle litigants. A leaf should have been taken from the approach of the courts in election petition matters.

On the foregoing, the appeal succeeds. The decision of the court below is set aside. As the parties practically argued the joiner, we add the appellants to the judicial review proceedings as respondents, and remit the matter to the same judge for hearing. Although the appellants have succeeded, each party will bear own costs.

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F. M. CHISANGA
JUDGE PRESIDENT
COURT OF APPEAL

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J. Z. MULONGOTI
COURT OF APPEAL JUDGE

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B. M. MAJULA
COURT OF APPEAL JUDGE