**IN THE COURT OF APPEAL OF ZAMBIA** Appeal 259/2020
**HOLDEN AT LUSAKA**
*(Civil Jurisdiction)*

**BETWEEN**

**RECTOR SIMWANZA & 19 OTHERS** **APPELLANTS**

**AND**


**OMEL INVESTMENT LTD** **1ST RESPONDENT**

**SUAD MINING LTD** **2ND RESPONDENT**

***Makungu, Majula and Siavwapa, JJA***

***On 22nd September 2021 and 5th November, 2021***

*For the Appellant :* *Mr. B. Banda - Legal Aid Counsel, Legal Aid Board*

*For the 2nd Respondent :* *Mr. J. Kabuka of J. Kabuka & Company.*

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# JUDGMENT

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MAJULA, JA, delivered the Judgment of the Court.

**Cases referred to:**

1. *Hathaway vs Potter Royalty Pool 269 Mich 686, 69 N.W. 2 D.*
2. *Dunlop Pneumatic Tyre Co. vs Selfride Co. Ltd (1915) AC 847.*
3. *Morris Chisanga Muleba vs Smart Chanda (2011) Vol.2 ZR 285*

## 1.0 BACKGROUND

1.1 The brief background is that the appellants were employed on various dates between September, 2015 and 2016 in different

designations. They are contending that they were verbally terminated in November, 2018 and their grievance is the alleged non-payment of leave days and redundancy benefits.

1.2 Aggrieved by this turn of events they proceeded to the Industrial Relations Division of the High Court and sued the 1st and 2nd Appellants contending that they were employed by both parties on account of the joint venture the two had entered into.

1.3 Before the matter could proceed to trial, the 2nd respondent applied to be removed from the proceedings.

## 2.0 DECISION OF THE COURT BELOW

2.1 In a very short Ruling delivered by Judge D.C. Mumba the 2nd appellant was struck out from the proceedings. The court below was of the view that the 2nd respondent was improperly joined to the proceedings.

2.2 For ease of reference the relevant part of the Ruling reads as follows:

*"Having read the affidavit in support and the answer to the notice of complaint and having heard Counsel for the 2nd respondent, I am satisfied that the 1st and 2nd respondents entered into a joint venture agreement, "HM1" to which none of the complainants were either a party or employee(s) of the two respondents. Further, the two respondents are separate and district legal entities which cannot bind the other to any of either party's obligations.*

*For the foregoing reasons, I am convinced that the 2nd respondent has been improperly joined to these proceedings. Therefore, I order that the said 2nd respondent, SUAD MINING LIMITED be struck out from being a party to these proceedings."*

## 3.0 APPELLANT'S HEADS OF ARGUMENT

3.1 In support of the appeal, Counsel for the appellant filed written heads of arguments. The main point taken by Counsel was that the lower court misdirected itself when it removed the 2nd respondent from the proceedings despite the 2nd respondent being a party with 70 percent shares in the joint venture. We were referred to the definition of a joint venture as stated by the learned author of **Black's Law Dictionary, 8th Edition on page 2456** where as follows:

*"A business undertaking by two or more persons engaged in a single project."*

3.2 Further recourse was made to the definition of a joint venture by the Supreme Court of Michigan in the case of ***Hathaway vs Potter Royalty Pool 269 Mich***[1] where it was stated:

*"An association of such joint undertakers to carry out a single project for profit, that the profits are to be shared, as well as the losses, though liability of the joint adventures for a proportionate part of the losses or expenditures of the joint ventures maybe affected by the terms of the contract."*

3.3 Counsel argued that from the definition, it is clear that parties engage in a business with a view to make profits. They also share in losses. It was contended that the 2nd respondent has an interest in this matter by virtue of the joint venture and since the appellants were employed pursuant to the joint venture agreement, counsel argued that by removing the 2nd respondent, the lower court effectively waived its liability.

3.4 We were accordingly urged to allow the appeal.

## 4.0 RESPONDENT'S ARGUMENTS

4.1 In opposing the appeal, the learned Counsel for the 2nd respondent, Mr. Kabuka filed his heads of argument on 29th January, 2021. The gist of his submission was that the learned trial court was on firm ground for striking out the 2nd respondent as a party to these proceedings as it was misjoinded. That this was on account of the fact that the appellants were strangers to the contractual joint venture agreement that was between the 1st respondent and the 2nd respondent. He therefore argued that the doctrine of privity of contract as enunciated in the case of ***Dunlop Pneumatic Tyre Co. vs Selfridge Co. Ltd***[2] disentitles the appellants from asserting any right or benefit under the contract to which they were not a privy.

4.2 A myriad of authorities were referred to by Counsel including paragraph 4 of the Encyclopedia of Forms and Precedents,

Volume 19 (2) 5th Edition 2009 edition where it was observed that in a joint venture parties remain completely independent contractors, with the result that one participant or party cannot be held liable to a third by reason of the default or omission of the other party.

4.3 Further recourse was made to clause 4.5 of the joint venture agreement to support the proposition that they were separate corporate entities.

4.4 For ease of reference clause 4.5 read as follows:

*"Neither SUAD nor OMEI may bind the other as surety or co principal debtor, identifier for any obligation, incur any obligation on behalf of the other."*

4.5 With these authorities, Mr. Kabuka submitted that the appellants' action against the 2nd respondent was misguided as it was premised on the assumed general liability under partnership law.

4.6 We were urged to dismiss the appeal with costs.

**5.0 OUR DECISION**

5.1 We have scrutinized the arguments by both parties. The authorities cited as well as the Ruling of the court below, the subject of this appeal.

5.2 The unhappiness on the part of the applicants has been triggered by this Ruling. They have spiritedly argued that the court below misdirected itself on account of the fact that the two parties were in a joint venture and the 2nd respondent had a greater share of 70% and therefore had an interest in the matter. As far as the applicants are concerned they were employed pursuant to the joint venture agreement.

5.3 The 2nd respondent on the other hand contended that the lower court was on firm ground in striking out the 2nd respondent as the applicants were not party to the joint venture agreement. The doctrine of privity of contract was called in aid.

5.4 We will begin by addressing the rationale for joinder. Order 15, Rule 6, Rule 2 (b) and (3) of the White Book states as follows:

*"Subject to the provisions 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...*

*(b) order any of the following persons to be added as a party,*
*(i) any person who ought to have been joined as a party, or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon.*

*(ii) or 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 his and that party, as well as between the parties to the cause or matter.*

*(3) An application by any person for an order under paragraph (2) adding him as a party must, except with the leave of Court, be supported by an affidavit showing his interest in the matter in dispute in the cause or matter or, as the case may be, the question or issue to be determined as between him and any party to the cause of matter."*

5.5 In the case of ***Morris Chisanga Muleba vs Smart Chanda (suing as Administrator of the Estate of the late Joseph Bwalya Chamba)***[3] Mutuna J. (as he then was) had occasion to summarize the rationale in the following terms:

*"The rationale for Order 15 rule 6(2) of the Rules of the Supreme Court relating to joinder of a party is to ensure that all interested parties to the suit are before the Court to ensure that all matters in dispute in the cause or matter may be effectively and completely determined, and adjudicated upon."*

5.6 In addition, Order 14, Rule 6 states as follows:

*"If it shall appear to the Court or a Judge, at or before the hearing of a suit, that all the persons who may be entitled to, or claim some share or interest in the subject matter of the suit, or who may be likely to be affected by the result, have not been made parties, the Court or a Judge may adjourn the hearing of the suit to a future day to be fixed by the Court or a Judge and direct that such persons, shall be made either plaintiffs or defendants in the suit, as the case may be."*

5.7 It is abundantly clear from the foregoing that any party who may be affected by the outcome of a matter in dispute can be joined to the action either as a plaintiff or defendant.' That said, is this one such matter where the 2nd respondent ought to be joined?

5.8 The complexity in this matter arises from the joint venture agreement which we have combed through.

5.9 We are alive to the fact that a joint venture agreement is where two or more parties put their resources together to achieve a particular goal. The parties share the risks and rewards associated with the enterprise. The parties however have distinct separate legal personalities.

5.10 It is important to note that we are cognizant of the fact that there is a distinction between a joint venture and a partnership although they may appear similar on the face of it. The main difference between a joint venture and a partnership is that in the latter the partners are jointly responsible for the activities of the partnership and a partner will be liable for the partnership debts if the other is unable to pay.

5.11 The parties are governed by the contractual agreement they enter into. In this case, the joint venture that the 1st and 2nd respondent entered into is the one that determined their rights and liabilities, obligations and duties.

5.12 Whilst we accept that the appellants were not parties to the joint venture, we take the view that the said agreement should be interrogated by the trial court. This is to ascertain what the parties rights and obligations were, simply put what did they agree to. In the view that we take the 2nd respondent may find itself likely to be affected by the outcome of the proceedings and if so removing it would be rather premature at this stage. If it is found not to be affected, there would have been no prejudice occasioned.

5.13 For the foregoing reasons and in light of the decided cases alluded to above, we are inclined to find merit in the appeal and we do. We order that the 2nd respondent be joined to the proceedings.

5.14 Costs in the cause.

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C.K. Makungu

**COURT OF APPEAL JUDGE**

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B.M. Majula

**COURT OF APPEAL JUDGE**

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M.J. Siavwapa

**COURT OF APPEAL JUDGE**