

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No. 271 of 2021
CAZ/08/215/2021
CAZ/08/419/2021

BETWEEN:

TOMBWE PROCESSING LIMITED

AND

**BAK STORAGE LIMITED
SALT LAKE HOLDINGS LIMITED
TRESFORD CHALI**



Appellant

1st Respondent

2nd Respondent

Intended Interested Party

**CORAM: Mchenga, DJP, Banda-Bobo, Sharpe-Phiri, JJA
on 17 October 2023 and 8 November 2023**

For the Appellant:	Ms. N. Mbuyi and Mr C. Nkhata of Paul Norah Advocates
For the 1 st Respondent:	Mr. K. Banda of Messrs AMW & Company
For the 2 nd Respondent:	Mr. R. Musumali of Messrs SLM Legal Practitioners
For Intended Int. Party:	Mr. O. Sitimela of Messrs Jonah Sitimela & Partners

R U L I N G

SHARPE-PHIRI, JA, delivered the Ruling of the Court

Legislation referred to:

1. The Court of Appeal Rules, No. 7 of 2016
2. The Legal Practitioners Practice Rules, Statutory Instrument No. 51 of 2002

Cases referred to:

1. Hotelier Limited. Ody's Works Limited V Finsbury Investments Limited (2012) Vol. 1 Z.R.
2. Abel Mulenga and Others v Mabvuto Adan Avuta Chikumbi and Others and the Attorney General (2006) Z.R. 33
3. Morris Chisenga Muleba V Smart Chanda (2011) Z.R Volume 2, page 285.

1.0 INTRODUCTION

- 1.1 This is a Ruling on the application for joinder to the consolidated appeal herein as an interested party filed by the said intended interested party, Mr. Tresford Chali on 15 September 2023. The application was made by way of summons filed together with supporting affidavit and skeleton arguments of even date.

2.0 AFFIDAVIT IN SUPPORT OF APPLICATION

- 2.1 The affidavit in support was sworn by the intended interested party, Mr. Tresford Chali and Managing Partner in the firm Messrs Tresford Chali Legal Practitioners. He deposed that he was a former Partner in the firm named and styled Tresford Chali H.H. Ndhlovu and Company, the former caretakers of the law firm of Messrs Nicholas Chanda and Associates. That it was not unusual that the Law Association of Zambia chose Messrs H.H. Ndhlovu and Company as caretakers of Messrs Nicholas Chanda and Associates when Mr. Chanda fell sick as he was also the Executor of the Last Will and Testament of the late Mr. Nicholas Chanda while his former Partner Mr. Humphrey Hlazo Ndhlovu, SC is the Co-Executor of the Last Will and Testament of Mrs. Mukelebai, the late Nicholas Chanda's mother.

- 2.2 That the notices and memoranda of appeal of the consolidated appeal herein of 10 November 2020 and 24 May 2021 together with affidavits of 5 July 2019 and 10 July 2020 respectively, have been brought to his attention and they contain allegations bordering on professional misconduct on his part made by the Appellant.
- 2.3 The deponent recounted that while working as caretaker for Messrs Nicholas Chanda and Associates, he received a notice of hearing for this matter and upon perusing the file, he found a Business Card of the Appellant's Managing Director, Mr. A. Van Der Vinne whom he reached out to via phone call to advise him on the pending hearing. He also advised the said Managing Director to engage different lawyers if the Appellant so wished but that the Appellant's Managing Director did not seem interested but was rather sarcastic and he responded to him that he was wasting his time to call him about what he termed as useless things after which the said Managing Director abruptly cut the line.
- 2.4 The deponent stated that he then wrote a letter to the Appellant to advise on date of hearing which was ignored as the Appellant refused to receive same. That he was then informed by Mr. Nicholas Chanda's Secretary that the former Member of Parliament for Kalomo, Mr. Request Muntanga used to visit Mr. Chanda's chambers to discuss the same case, hence he contacted Mr. Muntanga who accepted that he had an interest in this case on behalf of the Appellant. That he narrated his experience with the Appellant's Managing Director and Mr. Muntanga promised to revert to him once he engaged the Appellant. That Mr. Muntanga then contacted him after some time and advised him to go to Kabwe High Court where the matter was being

heard so that he can have it adjourned pending further instructions from the Appellant. That he proceeded to Kabwe on 9 August 2012 and applied for an adjournment before the High Court. That he sent an email to the Appellant's Managing Director on 10 August 2012 where he explained the details of the case and informed him of the next hearing date of 30 October 2012.

- 2.5 Counsel stated further that in addition, he wrote a letter to advise on the next date but Mr. Moses Phiri, the messenger reported back with the letter undelivered and told him that he was called a monkey, a dirty black man and that the Appellant refused to receive the said letter.
- 2.6 That the deponent then personally proceeded to the Appellant's premises on Mungwi Road to deliver the said letter, and while there, he met a white man and introduced himself and the business he had gone there for, but that he was ignored, and the white man went upstairs without saying a word to him. That he followed the man upstairs where he met another white man to whom he re-introduced himself to but the said white man told him that he does not deal with black people.
- 2.7 Mr. Chali went on to depose that he then proceeded to locate the office of the Managing Director and when the Secretary informed the Managing Director about his visit, the Managing Director refused to see him. That he served the letter on the Appellant and the Secretary acknowledged receipt. That following the said service, he never heard from the Appellant again and when the matter came up on the scheduled date, he withdrew from the record

and subsequently formalized the application for withdrawal which the Appellant yet again refused to receive, and it came back unopened.

- 2.8 That he received a letter from the Appellant's former Advocates, Messrs Musa Dudhia and Company on 27 April 2016 requesting him to help them in their application to review the judgment against the Appellant to which he responded advising that he could only help if their legal fees were paid.
- 2.9 That on 13 July 2016, the Appellant made a complaint against him to the Legal Practitioners' Committee requesting them to compel him to cooperate with them without the legal fees being paid but that the Legal Practitioners' Committee dismissed the complaint and ordered the Appellant to pay the legal fees.
- 2.10 That despite advising the Appellant's lawyers that the fees were intended for Mr. Chanda's medical bills, the same have never been paid to date and Mr. Nicholas Chanda has died mainly due to lack of money for his medical care. That this was despite the Appellant's lawyers agreeing via phone to pay. That the affidavits allege professional misconduct on the deponent's part and if he is not joined to the proceedings, the outcome will affect him.

3.0 AFFIDAVIT IN OPPOSITION

- 3.1 The Appellant filed an affidavit in opposition on 13 October 2023 which was deposed by Aldert Van Der Vinne, the Managing Director in the Appellant company.

3.2 The deponent largely disputed the allegations contained in the affidavit in support claiming that when the applicant called him, he asked for money but never mentioned the date when the matter was coming for hearing of the counterclaim. He stated that the allegations against him of being racist are meant to influence this Court in viewing him as a racist when in fact not, stating that he works and supports many black Zambian families through his company. He also denied being privy nor being aware of the discussions the applicant had with Mr. Request Muntanga. He clarified that Mr. Muntanga was not the authorised representative of the Appellant. He also denied ever receiving any emails or correspondence from the applicant as alleged in the affidavit in support. The deponent deposed that the applicant had not demonstrated sufficient interest to enable him to join the proceedings herein.

4.0 HEARING OF JOINDER APPLICATION

4.1 The application for joinder as interested party was heard on 17 October 2023. The Appellant was represented by Ms. N. Mbuyi and Mr. C. Nkhata of Messrs Paul Norah Advocates, the 1st Respondent was represented by Mr. K. Banda of Messrs AMW & Company Legal Practitioners, the 2nd Respondent by Mr R. Musumali of SLM Legal Practitioners while the intended interested party was represented by Mr. O. Sitimela of Messrs Jonah Sitimela and Partners.

4.2 Mr. Sitimela submitted on behalf of the intended interested party that the application is premised on provisions of **Order X Rule 16(1) of the Court of Appeal Rules** and would rely on same together with the affidavit in support filed hereof. Counsel contended that Ground 2 of the memorandum

of appeal under Cause Number CAZ/08/419/2020 is anchored on the conduct of the intended interested party who is also an officer of the Court. That the appeal alleges professional misconduct on the part of the intended interested party and that it is thus proper for him to be heard before Court.

- 4.3 Ms. Mbuyi on behalf of the Appellant submitted that in as much as the intended interested party has been mentioned in some documents on record, it did not impute any responsibility or liability on his part to warrant being joined to the appeal. She urged the Court to dismiss the application.
- 4.4 Mr. Nkhata submitted on behalf of the Appellant that all the necessary documents are before the Court records for its determination. He augmented that the intended interested party has adopted a procedure which is alien at law. He submitted that it is on record that the Court below declined the intended interested party's earlier application for joinder to the proceedings and that if the intended interested party or any of the parties was not satisfied with the said decision of the Court below, they ought to have appealed against it. That the intended interested party has not disclosed before this Court that the lower Court had previously made a pronouncement on the joinder application and said party seeks to raise new issues which were not raised in that earlier application. He urged the Court to dismiss the application.
- 4.5 Mr. Musumali submitted on behalf of the 2nd Respondent that it had no objection to the application for joinder as the intended interested party is an officer of the Court and the rule of natural justice requires that he be given the right to be heard.

4.6 Mr. Sitimela replied stating that it is only the interested party who can speak to the issues of concern in relation to the documents filed before Court and urged this Court to allow the application.

4.7 We reserved the Ruling to a later date, which we now render herein.

5.0 OUR ANALYSIS AND DECISION

5.1 We have considered the affidavit evidence before us, the history leading up to this application, the arguments, and submissions by Counsel on record. The application for joinder of an interested party has been brought pursuant to **Order X Rule 16(1) of the Court of Appeal Rules** which reads as follows:

‘When an appeal is called for hearing or at any time before the hearing, the Court or a Judge may, on the application of an interested party or on the Court’s or the Judge’s own motion, direct that the record of appeal, or the respondent’s notice, be served on a party not already a party to the cause or matter.’

5.2 Although the above provision was cited as the authority for the joinder application before us, it does not specifically relate to joinder applications, nor does it elaborate how the Court should consider applications for joinder of parties. The provision simply empowers the Court to direct that an interested party be served with the record of appeal.

- 5.3 In dealing with the question of joinder of parties, we are guided by other Court authorities such as the case of **Abel Mulenga and Others v Mabvuto Adan Avuta Chikumbi and Others and the Attorney General**, where the Court held that *‘for the appellants to be joined as parties in the action, the appellants ought to have shown that they have an interest in the subject matter of the action.’*
- 5.4 The Court also held in the above case that *‘the mere fact that the appellants may have been affected by the decision of the court below does not clothe them with sufficient interest or locus standi entitling them to be joined in the dispute.’*
- 5.5 For a party to be joined to an action, the applicant must have an interest in the subject matter or must be affected by the outcome of the action. In the **Morris Chisenga Muleba v Smart Chanda** case, the Court also held that the rationale for joining a party is to ensure that all interested parties are before the Court and that all matters in dispute between the parties are effectively and completely determined and adjudicated upon.
- 5.6 In determining this application, we consider whether Mr. Tresford Chali has a real interest in the subject matter before the Court or if it is necessary to join him to the proceedings so that the issues between the parties are effectively adjudicated upon. From the evidence before this Court, it is undisputable that the interested party has no interest or *locus standi* in the subject matter in contention between the parties. It is also certain that the presence of the interested party in the action is not essential to effectively consider the issues in controversy between the parties.

- 5.7 Further, we are mindful that the intended interested party is an officer of the Court who stood in the shoes of being the Appellant's Advocate at some point during proceedings in the Court below. The intended interested party took instructions from the Appellant by virtue of the retention of his former practice, Messrs H.H. Ndhlovu and Company as caretaker Counsel for Messrs Nicholas Chanda and Company, who initially represented the Appellant in this matter (in the Court below).
- 5.8 From the affidavit in support of this application, whose contents substantively repeat the contents of the intended interested party's affidavit in support of joinder launched in the Court below and filed on 25 November 2020, shown at page 4 of the 2nd Respondent's Supplementary Record of Appeal, it is very clear that the intended interested party appeared to have had a difficult and uncomfortable relationship with the Appellant from the time he took over the Appellant's brief as caretaker Counsel on behalf of Messrs Nicholas Chanda and Company. Notwithstanding, Counsel has conceded to having placed himself on record before the Court below as representing the Appellant as caretaker Advocate pending receipt of full instructions from the Appellant.
- 5.9 The foregoing situation automatically places the Appellant in the shoes of a former client in relation to the intended interested party. This is because, the intended interested party who also conceded to be the Executor of the late Nicholas Chanda, the substantive former lawyer of the Appellant, could be deemed to have received privileged information in relation to the Appellant which he ought to always safeguard as their former Advocate.

5.10 In making this conclusion, we rely on the provisions of **Rule 32(4)(e) of the Legal Practitioners' Practice Rules, 2002** which provides that:

(4) A practitioner shall not-

...

(e) disclose, unless, lawfully ordered to do so by the Court or as required by statute what has been communicated to the practitioner in the capacity as practitioner even if the practitioner has ceased to be the client's practitioner, and this duty extends to the partners associates or assistants of a practitioner.

5.11 The Legal Practitioner's duty to safeguard privileged information on behalf of the client or duty to avoid acting in a manner that conflicts or compromises the interests of his clients extends even beyond termination of retainership services. This position was also confirmed by the High Court in the case of **Hotelier Limited. Ody's Works Limited v Finsbury Investments Limited** where the Court found that:

"It is also no defence to state that the practitioner has taken out an action in judicial review against the ruling of the Legal Practitioners' Committee. This is because for as long as he shall remain former counsel for the second plaintiff, he will be revisited by rule 37(l)(f) whenever he is confronted with a decision whether or not to take an instruction from a client who is against the second plaintiff. This rule will be in place and continue to haunt the practitioner whether or not the decision of the Legal Practitioners' Committee is quashed in the judicial review proceedings."

5.12 It is thus clear that a consideration must be made in such circumstances whether joining the Appellant's former Advocates would be in the interests of justice or not. The answer seems to weigh heavily on the latter as opposed to the former.

5.13 Furthermore, a review of the purported grounds of appeal which are being alleged to touch on the intended interested party's professional misconduct do not appear to allege any substantive misconduct or culpability on the part of the applicant herein. Rather, the said grounds appear to raise issues which we believe can be determined with the evidence on record without having to join the Appellant's former Advocate to the proceedings herein. The grounds of interest are grounds 2 and 3 of the memorandum of appeal filed on 10 November 2020, reproduced below:

ii) The Court below misdirected itself when it accepted the account of Mr. Tresford Chali that he had corresponded with the appellant in the absence of any evidence on record to prove that allegation in the face of the appellant's uncontested account that it had never had any contact with Mr. Tresford Chali,

iii) The Court below erred in law and in fact when it determined that the appellant had constructive notice of the trial through the caretaker counsel when there was no evidence on record to show that the caretaker counsel had in fact brought the trial to the attention of the appellant to disprove the appellant's evidence that it had never had any contact with caretaker counsel.

5.14 Also, grounds 2 and 4 of the memorandum of appeal filed on 21 May 2021, are reproduced below respectively:

ii) That the Honourable Court misdirected himself in law and in facts when it proceeded to hear the Respondent's counterclaim in the absence of the Appellant based on the sole statement of the Advocate Caretaker of Messrs Nicholas Chanda and Associates one Mr. T. Chali who said that he wrote to obtain instructions from the Appellant and that the latter did not respond. The Court proceeded to hear the Respondent's counterclaim in the absence of the Appellant without Mr Chali actually providing evidence of the said letter seeking instructions from the Appellant. This being a grave miscarriage of justice that to pass a judgment against a party who was not given the opportunity to be heard, this Court should refer the matter back to the High Court for re-trial.

iv) That the 1st Respondent having not given any instruction to any lawyers in Zambia to pursue any matter against the Appellant makes the judgment that was obtained in the High Court against the Appellant a nullity and a grave miscarriage of justice hence the judgment should be set aside.

5.15 We have noted that an application for joinder was also made in the Court below which was declined. If aggrieved, the intended interest party ought to have renewed the said application before a single Judge pursuant to the provisions of **Order VII Rule 2(1)** which provides as follows:

“An application to the Court not involving the decision of an appeal shall, unless made in the course of the hearing of an appeal, be made in the first place to a single judge.”

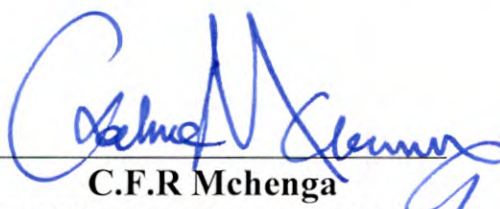
5.16 As earlier noted, the provisions of **Order X Rule 16(1) of the Court of Appeal Rules** do not explicitly deal with joinder applications. However, **Order VII of the Court of Appeal Rules** addresses the manner and procedure to be adopted in making applications such as the one the intended interested party has brought before us.

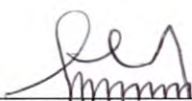
5.17 For the reasons we have given above, we find no basis to sustain the intended interested party's application for joinder to the proceedings as the application is irregular and misplaced. The same is dismissed accordingly.

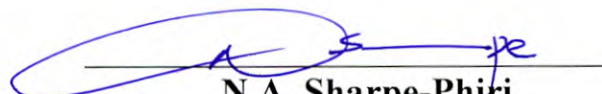
6.0 Conclusion

6.1 Having found no merit in the application before us, we order and direct that costs of this application be borne by the intended interested party, to be taxed in default of agreement.

6.2 The main appeal will be heard in Ndola on 15 November 2023.


C.F.R Mchenga
DEPUTY JUDGE PRESIDENT


A.M. Banda-Bobo
COURT OF APPEAL JUDGE


N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE