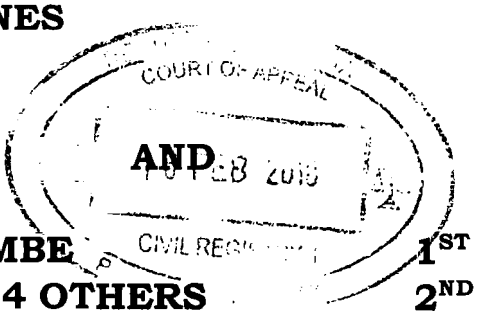
IN THE COURT OF APPEAL FOR ZAMBIA **CAZ/08/312/2017**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

KONKOLA COPPER MINES **APPLICANT**



AND

NYAMBE MARTIN NYAMBE **1ST RESPONDENT**
GABRIEL MWELWA & 24 OTHERS **2ND RESPONDENT**
LEVYSON LWESELA **3RD RESPONDENT**
EVANS MWENYA **4TH RESPONDENT**
KASONGO LINGSON AMOS & 64 OTHERS **(INTENDED) 5TH RESPONDENT**

Before: Hon. Justice Madam C.K. Makungu in Chambers
For the Appellant: Mr. T. Chibeleka & Mr. H. Zulu of ECB Legal Practitioners
For the intended 2nd and 5thRespondent: Mr. B. Katebe of Kitwe Chambers

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RULING

Cases referred to:

1. ***Abel Mulenga and 7 Others v. Mabvuto Adan Avuta Chikumbi & others and the Attorney General (2006) ZR 33***
2. ***Kelvin Hang'andu & Company (a firm) v. Webby Mulubisha (2008) ZR 82 Vol. 2***
3. ***The Attorney General v. Aboubacar Tall and Zambia Airways Corporation Limited SCZ Appeal No. 77 of 1994.***
4. ***Davies Chansa v. Barclays Bank Zambia Limited SCZ 128 of 2011***
5. ***London Ngoma and Others v. LCM Company and another (1999) ZR 75***

6. ***Sachar Narendra Kumar v. Joseph Brown Mutale SCZ Judgment No.8 of 2013 (unreported)***
7. ***Bank of Zambia v. Vortex Refrigeration Company and Dockland Construction Company Limited Appeal No. 004/2013***

Legislation referred to:

1. ***Court of Appeal Rules, 2016 – Order VII Rule 1 and 2, Order X Rules 6 and 16.***
2. ***The Supreme Court Rules, 1999 White Book – Order 15 Rule 6 (2)***
3. ***Industrial and Labour Relations Act Chapter 269 of Laws of Zambia – Sections 83 and 85 (6)***

This is an application for joinder of the intended 5th respondents to this appeal filed on 24th November, 2017. The application has been brought pursuant to ***Order VII Rules 1 and 2*** as read together with ***Order X Rule 16 of the Court of Appeal Rules*** [1] ***and Order 15 Rule 6 (2) of the Supreme Court Rules.*** [2] The affidavit in support thereof was sworn by Kasongo Lingson Amos on his own behalf and on behalf of 65 other intended respondents whose names are listed in the schedule attached to the affidavit. It is deposed that the intended respondents are all former employees of the appellant company. That they were members of the National Pension Scheme. That the National Pension Scheme Act No. 40 of 1996 of the Laws of Zambia revised the retirement age from 55 to 65 years with an option of late retirement at 65 effective 14th August, 2015. Further that the intended 5th respondents were all unlawfully and wrongfully retired at 55 years and not 60 years as provided by the said act.

It was also avowed that they were denied an opportunity to earn more money when they were retired earlier. That their rights to opt to retire at 60 were abrogated by the appellant. That they were retired in similar circumstances as the respondents herein and as such, they are affected by the decision of the lower court. That the appellant would not be prejudiced if they were joined to the appeal.

At the hearing, counsel for the intended 5th respondents Mr. Katebe relied on the list of authorities and skeleton arguments filed herein on 12th January, 2018. The relevant parts of his submissions are as follows:

The applicants have demonstrated sufficient interest for them to be granted the application. He relied on the case of ***Abel Mulenga and Others v. Mabvuto Adan Avuta Chikumbi and Others v. The Attorney General*** (1) wherein the Supreme Court held that:

> ***"In order 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."***

He went on to state that this application is an attempt to avoid forum shopping and to buttress this he referred to the case of ***Kelvin Hang'andu and Company (A Firm) v. Webby Mulubisha*** (2) and the case of ***The Attorney General v. Aboubacar Tall and Zambia Airways Corporation Limited*** (3) where the Supreme Court said the following:

"In our view, without prejudicing the outcome of the trial courts judgment, but going by the documentary and oral evidence on record, the joining of the Attorney General in these proceedings would be necessary to ensure that the matters in the same cause may be effectually and completely determined and adjudicated upon to put an end to any further litigation. Both our Order 14 and English Order 15 as well as Section 13 Chapter 50 are intended to avoid multiplicity of actions. Although the learned trial court relied on a wrong provision of the law in joining the Attorney General to these proceedings, the court had still an inherent jurisdiction to make the Order in the interest of justice."

Counsel also argued that the decision which is a subject of this appeal is binding on the intended 5th respondents according to ***Section 85 (6) of the Industrial and Labour Relations Act*** (3) which states that:

"An award, declaration, decision or judgment of the court on any matter referred to it for its decision or on any matter falling within its exclusive jurisdiction shall, subject to Section ninety – seven, be binding on the parties to the matter and on any parties affected."

In conclusion, he prayed that the intended 5th respondents be added as parties and served with the record of appeal as though they were originally parties to those proceedings pursuant to ***Order X Rule 16 (1) and 2 of the Court of Appeal Rules.*** [1]

In opposing the application, Mr. Chibeleka relied on the Heads of Argument filed herein on 23rd January, 2018 wherein he submitted *inter alia* that the courts have over the years reiterated the circumstances when ***Sections 85 (6) of the Industrial and Labour Relations Act*** [5] will be invoked. In the case of ***Dennis Chansa v. Barclays Bank Zambia Limited PLC,*** [4] it was held that:

> ***"Section 85 (6) gives statutory expression to the doctrine of res judicata. The philosophy underlying the doctrine is that an issue already settled by judicial decision should not be re – litigated. This is intended to save on judicial time, which is a scarce resource and to avoid multiplicity of actions."***

He went on to argue that for the applicants to invoke the said section, they must have commenced an action prior to the date of the Judgment. That the objective is to ensure that they do not re – litigate on the issues already determined by the lower court. That the decision of the trial court ordinarily affects the parties that are amenable to that court's jurisdiction or those that are within the required time frame to commence an action.

He went on to state that an analysis of the letters exhibited in the affidavit in support of the application shows that the applicants were retired between February, 2015 and January, 2016. Therefore, they should have commenced an action in the lower court immediately after their cause of action arose or they should have applied to be joined to the proceedings commenced by the appellants herein at the material time. That two years have elapsed since their cause of action arose and now it's too late for the them to join the proceedings. He relied on the case of ***London Ngoma & Others v. LCM Company and another*** [5] where it was held that:

> ***"For a party to be joined to the proceedings on appeal, he must show: locus standi, sufficient interest and must not have been aware of the proceedings."***

It was counsel's submission that the applicants herein do not meet the above requirements.

Counsel went on to argue that an application for joinder will not be granted where the party seeking to be added could not possibily bring up an action in the lower court. To fortify this he relied on the case of ***Sachar Narendra Kumar v. Joseph Brown Mutale.*** [6] He argued further that the question for determination is whether the complainants are still within the statutory period to make them amenable to the jurisdiction of the lower court and entitle them to enjoy the fruits of the Judgment delivered on 10th October, 2017 by joining them to these proceedings. His contention was that ***Section***

83 of the ***Industrial and Labour Relations Act*** [3] requires that an action be commenced within 90 days from the occurrence of the event giving rise to the grievance. He stated that the parties seeking to be joined to these proceedings are caught up by the said period of limitation as they are about 2 years late. Allowing this application would deny the appellant the right to be heard on whether the intended 5th respondent could now commence a case before the Industrial Relations Court.

In the alternative, he argued that in an event that the application is granted, a declaration must be made that the decision of the lower court should apply with modifications to the applicants particularly regarding costs which were awarded to the respondents. He submitted that the applicants should not be granted costs as no work was done regarding their case and to support this, he referred to the case of ***Bank of Zambia v. Vortex Refrigeration Company and Dockland Construction Company Limited.*** [7]

I have considered the affidavit evidence and the written submissions filed by both counsel. ***Order 15 Rule 6 (2) (B) of the Rules of the Supreme Court*** [2] is instructive on the powers of the court to order joinder of a party. It is clear that an application for joinder may be granted at any stage of the proceedings and that this is done on terms deems fit by the court. The whole essence for this is to enable the court determine all matters in dispute in one cause and to prevent multiplicity of actions. It is clear from the

above provisions of the law and the authorities cited by both counsel that this power is discretionary.

The view I take is that joinder of parties may be granted even after judgment has been delivered and this was the position in ***London Ngoma and Others.*** [5]

The three considerations that a court dealing with an application for joinder should consider apart from putting an end to any further litigation by avoiding multiplicity of actions and the interests of justice are whether the applicant has *locus standi* and sufficient interest in the matter and whether the applicant was aware of the proceedings. This is in line with the holdings in the cases of ***The Attorney General v. Aboubacar Tall and Zambia Airways Corporation Limited,*** [3] ***London Ngoma and others v. LCM Company and another*** [5] and ***Abel Mulenga and 7 others v. The Attorney General.*** [1]

Having considered the affidavit in support, there being no affidavit in opposition, it is clear to me that the applicants have demonstrated that they have *locus standi* in this matter because according to ***Section 85 (6) of the Industrial and Labour Relations Act*** [3] they are indeed bound by the decision of the Industrial Relations Court which is appealed against. Furthermore, the applicants left employment under similar circumstances as the existing respondents to the appeal herein. The foregoing indicates that the applicants have sufficient interest in the matter. There is

no indication that the applicants were aware of the proceedings in the lower court. Therefore, I take it that they were not.

The argument that the application should not be granted because it was made more than 90 days from the date when the cause of the action arose is misconceived because this is an application for joinder at appeal stage and it is clear that the applicants have no intention to commence a fresh action in the Industrial Relations Court. Therefore, ***Section 83 of the Industrial and Labour Relations Act*** [3] is inapplicable. The statute referred to in the case of ***Sachar Narendra Kumar v. Joseph Brown Mutale*** [6] is the Statute of Limitations of 1939 and not the ***Industrial Relations Act.*** [3] It is inconsequential that this application has been brought for some of the applicants about a year since they were retired and for others about 2 years after retirement because their action is not statute barred in accordance with the Statute of Limitations 1939.

Under the circumstances and for the forgoing reasons, I hereby exercise my discretion and order that the applicants be joined to this appeal. In my view the appellant will not be prejudiced by the joinder because the purpose is to serve costs and avoid over burdening the court with further litigation on the same issues.

The contention by the appellant that the 5th respondents should not benefit in costs as ordered by the lower court can only be suitably determined when determining the appeal.

I further order that the parties be amended accordingly and that each party shall bear its own costs. The new respondents should be served with the Record of Appeal and Appellants Heads of Argument within 14 days from the date hereof.

Delivered this 16th day of February, 2018

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C.K. MAKUNGU

COURT OF APPEAL JUDGE