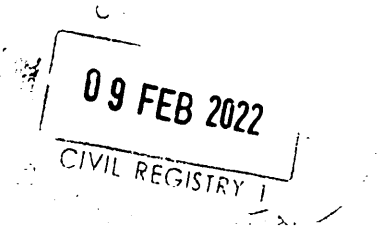
CA2/08/310/2020

**IN THE COURT OF APPEAL OF ZAMBIA APPEAL No. 001/2021**

**HOLDEN AT LUSAKA**

(Civil Jurisdiction)




**BETWEEN:**

| | |
|---|---|
| **SOLOMON LABAN JUMBE NGWENYA** | **1ST APPELLANT** |
| **GEORGE MUBIPE** | **2ND APPELLANT** |
| **KALOBWE CHIKOTI CHANSA** | **3RD APPELLANT** |
| **REMMY PEPALA** | **4TH APPELLANT** |
| **CHOLA NOBLE BWEUPE** | **5TH APPELLANT** |
| **CHIBEKA MWENYA** | **6TH APPELLANT** |
| **CHISHALA TEMBO KAPAYA** | **7TH APPELLANT** |
| **ALIDI KAMBWILI NKHOMA** | **8TH APPELLANT** |
| **ISAAC GUNDA** | **9TH APPELLANT** |
| **AND** | |
| **HOPE CHANDA** | **1ST RESPONDENT** |
| **FOCUS FINANCIAL SERVICES LIMITED** | **2ND RESPONDENT** |

**Coram: Makungu, Sichinga and Muzenga JJA**

***On 20th day of October, 2021 and 9th day of February, 2022***

*For the Appellants: Mr. F. E Mulenga Junior of Messrs August Hill & Associates*

*For the 1st Respondent: Miss W. Chirwa of Messrs J & M Advocates*

*For the 2nd Respondent: No appearance*

## JUDGMENT

**Makungu JA,** delivered the judgment of the Court.

**Cases Referred to;**

1. *African Banking Corporation Zambia Limited (T/A BancABC) v Plinth Technical Works Limited & 5 Others (2015) 2 Z.R 458*
2. *Minster of Home Affairs, The Attorney General v Lee Habasonda suing on behalf of the Southern Africa Centre for the Constructive Resolution of Disputes (2007) Z. R. 207*
3. *Zambia Telecommunication Company Limited v Aaron Mweene Mulwanda, Paul N'gandwe (2012) 1 Z.R 404*
4. *Zlatan Zlatco Arnautovic v Stanbic Bank Zambia Limited SCZ Appeal No.130 of 2018*
5. *New Plast Industries v The Commissioner of Lands and The Attorney General (2001) ZR 51*
6. *Morris Chisenga Muleba v Smart Chanda (sued as Administrator of the Estate of the late Joseph Bwalya Chamba) (2011) H.C volume 2 Z.R 285*
7. *Simbeye Enterprises Limited and Investrust Merchant Bank (Z) Limited v Ibrahim Yousouf (2000) ZR 159*
8. *Re Patrick & Lyon Limited (1935) Ch 786 at page 790*
9. *Ethiopian Airlines v Sunbird Safaris Limited & Others (2007) ZR 235*

10. *Sable Hand Zambia Limited v Zambia Revenue Authority (2005) ZR 109 (S.C)*
11. *Partrick Kunda and Robertson Muleba Chisenga v The People (1980) ZR 105 (SC)*
12. *Carlson v King (1947) 64 WN (NSW) 65*
13. *Pettitt v Dunkey (1971) I NSWLR 376*
14. *Donovan v Edwards (1922) VLR 87, 88.*
15. *Brittinghan v Williams (1932) VLR 237, 239;*
16. *De Lacovo v Lacanale (1957) VR 553, 557.*
17. *Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172 (SC)*

*Legislation Referred to*:

1. *The Court of Appeal Rules S.I No. 65 of 2016*
2. *The High Court Act Chapter 27 of the Laws of Zambia*
3. *The Rules of The Supreme Court – 1999*
4. *The Companies Act No 10 of 2017 of the Laws of Zambia*

*Other Authority Referred to:*

1. *WWW.quora.com/ What is the difference between ruling and judgment? accessed on 6th January, 2022*

## 1.0 INTRODUCTION

1.1 This is an appeal against the ruling of Mr. Justice E.L Musona of the High Court, refusing to strike out the appellants from the proceedings for misjoinder.

## 2.0 BACKGROUND

2.1 Initially the 1st respondent was the plaintiff, the 2nd respondent company was the 1st defendant and the appellants were the 2nd to 10th defendants respectively. We shall refer to the parties by their designations before this Court.

2.2 The 1st respondent commenced an action by way of writ of summons and statement of claim against the 2nd respondent and the appellants seeking the following reliefs:

1. Payment of the sum of ZMW1,738,973.19 being the outstanding matured balance as at 2018, on the amount due to her from the appellants and 2nd respondent in relation to an investment agreement entered into by the parties.

2. Interest at the contractual rate of 34% per annum from March, 2018 until full payment or such period as the court shall deem just.
3. Damages for fraud and misrepresentation.
4. Damages for breach of contract.
5. Damages for loss of use of funds.
6. Costs
7. Any other relief the court may deem fit.

2.3 The 2nd respondent and the appellants each entered a conditional memorandum of appearance and defence on various dates.

2.4 On 24th June, 2020 the appellants made an application for misjoinder of parties pursuant to **Order 14 Rule 5 (2)** of the **High Court Rules** and **Section 13** of the **High Court Act**, **Chapter 27 of the Laws of Zambia**[2] as read together with order **15 Rule 6(2)** (a) of the **Rules of the Supreme Court**.

2.5 The application was supported by an affidavit sworn by the 6th appellant Mr. Chibeka Mwenya, on his own behalf and on behalf of the rest of the appellants. He stated that

on or about 16th January, 2017, the appellants held the following positions in the 2nd respondent company, the 1st, 2nd and 4th appellants were all shareholders and directors. The 3rd appellant was merely a director. The 5th to 9th appellants were all shareholders. That this is evidenced by exhibit CM1 a copy of the printout from the Patents and Companies Registration Agency (PACRA).

2.6 That the 1st, 2nd and 4th appellants are no longer Directors and the 4th appellant has since passed away.

2.7 He further deposed that on or before 16th January, 2017 the 1st respondent entered into an investment agreement with the 2nd respondent company whereby the 1st respondent freely and voluntarily agreed to invest the sum of ZMW1,500,000.00 into the 2nd respondent company as per the investment placement certificate exhibited as CM2. That none of the appellants were privy to the investment agreement.

2.8 On or about 6th February, 2018 the 1st respondent entered into another investment agreement with the 2nd respondent whereby the 1st respondent freely and

voluntarily agreed to invest the sum of ZMW 2,010,000.00 into the 2nd respondent as shown by exhibit CM3 which is a copy of the investment agreement. None of the appellants were privy to this agreement.

2.9 He went on to state that the 2nd respondent was at all material times registered as a financial business under the Banking and Financial Services Act as shown by exhibit CM4 a true copy of the licence issued by the Registrar of Banks and Financial Institutions.

2.10 That the 2nd respondent by virtue of being registered as a financial business could not accept any deposits and the appellants did not present to the 1st respondent falsely or otherwise that the 2nd respondent was licensed to carry out banking business and receive deposits from the public.

2.11 He also deposed that on or about 29th January, 2018 the 2nd respondent obtained an order from the High Court under cause No.2018/HB/013 appointing a meeting of the listed creditors therein to consider a proposed scheme of arrangement.

2.12 That the appellants did not in their personal capacity make any assurances that the 1st respondent's investment was secure.

2.13 He further deposed that the assurances of payout made to the 1st respondent were made for and on behalf of the 2nd respondent based on the meetings held by the parties to the proposed scheme of arrangement and the explanatory statement in anticipation of the scheme of arrangement.

2.14 That as at 16th January, 2017 when the 1st respondent initially invested with the 2nd respondent, the 2nd respondent was a going concern and there were reasonable prospects of all its creditors including the 1st respondent being paid.

2.15 He stated that, the proposed scheme of arrangement aforementioned, was only effected in January, 2018 and the sum of ZMW400,000.00 was paid to the 1st respondent by the 2nd respondent in February of 2018.

2.16 He further deposed that he was advised by his advocates and believed the same to be true that the appellants are

not proper parties to these proceedings as the 2nd respondent is a limited liability company with a separate corporate personality.

2.17 The gist of the affidavit in opposition dated 16th July, 2020 sworn by the 1st respondent is that a perusal of the statement of claim reveals that the cause of action before the lower court related to lifting of the corporate veil for the appellants to be held personally liable for monies admittedly due to her.

2.18 That she outlined the particulars of fraudulent misrepresentation on the part of the appellants in clauses 17(i) to (Viii).

2.19 She further deposed that she was advised by her advocates that the appellant's application was misconceived as her statement of claim raises serious contentious issues which the appellants need to address at trial. That in any event, the appellants already filed a defence on the merits and trial commenced on 13th July, 2020 to be continued on 21st September, 2020.

2.20 She further stated that to strike out the parties directly targeted by the cause of action would be against the interest of justice as there is no misjoinder.

2.21 That the questions raised in the pleadings are not suitable for determination through an application for misjoinder.

## 3.1 DECISION OF THE LOWER COURT

3.1 The lower court delivered an extempore ruling on 20th July, 2020 framed as follows:

> "***I have read what parties have filed. Needless to recite them because they are filed and are therefore on record.***
>
> ***The parties wishing to be misjoined have given reasons. I have understood the reasons. The plaintiff has responded. I have understood the response.***
>
> ***I have found that on the basis of the opposing views which the parties have filed, it would not be in the interest of justice to misjoin the***

***applicants. The application for misjoinder is therefore refused.***

***Leave to appeal is granted."***

## 4.0 GROUNDS OF APPEAL

4.1 In the amended memorandum of appeal filed on 15th October, 2021, the appellants raised two grounds of appeal:

1. ***That the lower court erred in law and fact in abdicating its duty to ensure that all the issues raised in the application for misjoinder were completely determined.***
2. ***That the lower court erred in law and fact when it found that it would not be in the interest of justice to misjoin the appellants.***

## 5.0 APPELLANT'S ARGUMENTS

5.1 The appellant's counsel relied on the heads of argument filed on 15th October, 2021.

5.2 On ground one, with respect to the duty of the court on determination of matters, he referred to **section 13 of**

**the High Court Act** and the case of **African Banking Corporation Zambia Limited (T/A BancABC) v Plinth Technical Works Limited & 5 Others**[1] in support of the argument that the court must ensure that it completely and finally determines all the matters in controversy whether at interlocutory stage or at the end of the matter. According to counsel, the ex-tempore ruling in casu, did not determine the matters in controversy.

5.3 As regards ex-tempore rulings and rulings in general, counsel submitted that rulings should not be delivered ex-tempore unless in very simple and straight forward matters. He contended that the application before the court below was not straightforward. That the application and supporting arguments clearly show that the questions to be determined by the court were fairly complex in nature and as such the court below should have taken time to write and deliver a reasoned ruling.

5.4 He went on to submit that even in the exceptional event that an ex-tempore ruling is rendered in a fairly complex matter, the form of the ruling should determine

completely and finally the matters in controversy between the parties. To support this position, he referred to the case of **Minister of Home Affairs, The Attorney General v Lee Habasonda suing on his own behalf and on behalf of the Southern African Centre Constrictive Resolution of Disputes**[2] where the Supreme Court gave guidelines on judgment writing that;

> ***"Every judgment must reveal a review of the evidence where applicable, a summary of the arguments and submissions if made, findings of fact, the reasoning of the court on the facts and applicable law and authorities if any, to the facts and a conclusion."***

5.5 Counsel also referred to the case of **Zambia Telecommunications Company Limited v Aaron Mwene Mulwanda and Ngandwe**[3] where it was held inter alia that a judgment must not be interpreted; it should be thorough, exhaustive and clear on all issues.

5.6 Counsel submitted that the said guidelines also apply to rulings. That any ruling whether ex-tempore or not must

disclose the reasoning of the court and the court ought to explain why particular arguments raised by the parties have either been rejected or accepted unless, the matter is very simple. He contended that the ruling in issue does not indicate the reasoning and the applicable law.

5.7 In support of ground two, it was submitted that had the court taken time to consider the arguments raised by the opposing parties, it would have reached the inescapable conclusion that the appellants herein are not proper parties to the proceedings for the following reasons:

1. The enabling provisions for an order for misjoinder which are; **order 14 rule 5 (2)** of the **High Court Rules** and order **15 rule 6 (2) (a)** of **the Rules of the Supreme Court** require that only parties that are necessary to a suit ought to be part of it. Any party that is not necessary to an action may be struck out from the action at any stage of the proceedings.
2. According to **order 14 rule 5 (1)** of the **High Court Rules** and **order 15 Rule 6 (2) (b)** of the **Rules of**

**Supreme Court**, a necessary party to a court proceeding is one who:

a) May be entitled to claim or have an interest in the subject matter of the suit.

b) Is likely to be affected by the suit.

c) Is necessary to ensure that all matters in the dispute in a suit are completely determined.

d) Is necessary in order to determine an existing question or issue claimed in the matter.

5.8 In light of the foregoing, it was submitted that the question as to who a necessary party is cannot be answered abstractly but on a case by case basis.

5.9 Counsel further submitted that the appellants are not proper parties to the proceedings based on the following considerations and points of law:

a) Separate corporate personality and piercing the corporate veil: Counsel submitted that the 2nd respondent with whom the 1st respondent had a contractual relationship is a separate legal entity from its directors and shareholders. However, there are instances when the

court would pierce the corporate veil such that the directors and or shareholders would have to defend themselves for the liabilities incurred by the company. Such instances, however, are rare in that a plaintiff seeking such a relief must show sufficient evidence of fraud or impropriety. In the present case, the 1st respondent has claimed that the appellants engaged in fraudulent misrepresentation and fraudulent trading but these claims were not substantiated.

5.10 There is no evidence on record to show that the appellants indicated to the 1st respondent that the 2nd respondent was a deposit taking institution when in fact not. In fact, the documents on pages 37-41 of the record of appeal clearly show that the money was placed as an investment and not as a deposit.

5.11 Counsel further contended that there is no evidence on record to prove the 1st respondent's allegation that the appellants coerced her to invest in the company when to their knowledge, there was no reasonable prospect of her ever receiving payment. Moreover, the 1st respondent

received a payment of ZMW 400,000.00 from the 2nd respondent which indicates that the business was not being run for any fraudulent purpose.

5.12 The prayer was that the appeal be allowed and the appellants be struck out from the proceedings.

## 6.0 1st RESPONDENT'S HEADS OF ARGUMENT

6.1 The 1st respondent's advocates relied on the heads of argument dated 27th October, 2021. To counter the appellant's argument on ground one, that the trial judge did not determine all the issues in controversy between the parties, counsel submitted that the case of **African Banking Corporation Zambia Limited (T/A Banc ABC) v Plinth Technical Works Limited & 5 others**[1] cited by the appellants is distinguishable from this case. In the African Banking Corporation Zambia Limited case the appellant commenced proceedings by originating summons against six respondents for payments of the sums owing with interest, foreclosure of mortgaged property and other relief. The trial judge dismissed all the claims despite the fact that the securities were secured

by a third party mortgage, personal guarantees and a debenture. It was on this basis that the Supreme Court held that the judgment should have been entered under the debenture and personal guarantees which were not defended. There was clearly a case of the learned trial judge not addressing the issues of the debenture and personal guarantees thus there was no compliance with the provisions of section 13 of the High Court Act.

6.2 On the other hand, in the present case, what was before the learned trial judge was an application for misjoinder to which affidavits and submissions were made on behalf of the parties concerned, except the 2nd respondent. In the ruling dated 20th July, 2020 the trial judge referred to the documents that the parties filed. Therefore, it cannot be said that the learned High Court judge did not address all the issues in controversy between the parties. There was clearly no dereliction of duty on the part of the learned trial judge.

6.3 As regards ex-tempore rulings and rulings in general, Counsel for the 1st respondent submitted that the rules

of this court are clear with respect to the manner in which the grounds of appeal should be drafted in the memorandum of appeal. **Order X rule 9 (2) of the Court of Appeal** Rules provides as follows:

> ***"A memorandum of appeal shall set forth concisely and under distinct heads without argument or narrative, the grounds of objection to the judgment appealed against and shall specify the points of law or fact which are alleged to have been wrongly decided, such grounds to be numbered consecutively."***

6.4 In light of the above rule, it was submitted that ground one as set out in the appellant's memorandum of appeal does not in any way set out the issue of the ruling not conforming with the principles of rulings and or judgment writing. Counsel urged us to dismiss the appellant's contentions based on the following grounds:

1. That the appellants ought to have sought leave to canvas any argument outside the grounds set out in the memorandum of appeal as required under **Order X rule**

**9(3) of the Court of Appeal Rules**. Perusal of the record shows that the appellants did not have any issue with the format of the ruling. Since leave to amend the memorandum of appeal was not obtained, the appellants' arguments regarding principles of judgment writing should be disregarded. To support this argument, counsel cited the case of **Zlatan Zlatco Arnautovic v Stanbic Bank Zambia Limited**[4] where the Supreme Court declined to consider an issue which did not fall under the grounds of appeal.

2. Failure to obtain leave goes to jurisdiction and this court cannot entertain arguments by the appellants regarding principles of writing ex-tempore rulings. That this Court being without the requisite jurisdiction to entertain grounds other than those advanced in the memorandum of appeal, cannot be drawn into considering ingeniously crafted grounds outside the memorandum of appeal.

6.5 Counsel submitted that the appellant's in their heads of argument, argued the application for misjoinder itself on the merits, which should not be the case. In addition, the

allegation that the application was not determined on its merits is unfounded as the trial judge duly considered all the documents filed before it and noted the parties opposing views. The case of **New Plast Industries v The Commissioner of Lands and the Attorney General**[5] was cited on what amounts to the parties being heard; that it is not only physical appearance by the parties but consideration of documents on record per se would suffice.

6.6 Counsel contended further that the appellants' application is misconceived as the statement of claim reveals triable issues between the 1st respondent and the appellants. In fact, the entire cause of action is premised on the lifting of the corporate veil. The position at law, is that all parties necessary for triable issues to be finally concluded must be part of the proceedings for proper administration of Justice. Counsel cited the cases of **Morris Chisenga Muleba v Smart Chanda (sued as administrator of the Estate of the Late Joseph Bwalya Chamba)**[6] **and Simbeye Enterprises Limited and**

**Investment Merchant Bank (Z) Limited v Ibrahim Yousouf**[7] in support of this position.

6.7 The 1st respondent's counsel went on to state that a perusal of the statement of claim reveals that the 1st respondent has acknowledged the fact that the 2nd respondent has corporate personality. However, the alleged misrepresentations were made by the said directors of the 2nd respondent company without which the 1st respondent would not have entered into any agreement with the 2nd respondent. These fraudulent misrepresentations warrant the lifting of the corporate veil. Counsel contended that there is therefore insufficient cause to strike out the appellants from the proceedings.

6.8 Counsel went on to cite authorities on instances when it would be appropriate to pierce the corporate veil and submitted that the directors of the 2nd respondent company had and still have a duty to the 1st respondent as creditor of the 2nd respondent, not to carry on

business in a manner that causes serious loss or substantial risk as is the case.

6.9 Further that it is alleged that the appellants acted outside their duties in allowing for business to be conducted as they did by representing to the 1st respondent that the 2nd respondent had all the necessary licences or certificates to offer fixed deposit account facilities when in fact not.

6.10 There was evidence before the lower court that the 2nd appellant also assured the 1st respondent of having the necessary documents and he was the one who signed the Placement Certificate evidencing the placement of the 1st respondent's funds on fixed deposit. The 1st respondent entered into an agreement with the 2nd respondent company based on the representations made by its directors and shareholders. These representations being false, render the directors and shareholders jointly and severally liable to the 1st respondent.

6.11 It was further submitted that the appellants failed and or neglected to advise the new registered office or place of

business contrary to **section 28 (2)** of the **Companies Act no. 10 of 2017**[4]. The 1st respondent also claims that the 2nd respondent was trading from secret locations. According to counsel, the said failure constitutes an act of fraud. Reliance was placed on the case of **Re Partrick & Lyon Limited**[8] to the effect that fraud connotes actual dishonesty, involving according to current notions of fair trading among commercial men, real mortal blame.

6.12 Counsel also cited the case of **Ethiopian Airlines v Sunbird Safaris Limited**[9] to argue that the appellants were aware of the day to day running of the 2nd respondent's business as evidenced by the emails exhibited at pages 44 to 45 on the record of appeal where assurances where given to the 1st respondent.

6.13 The appellants knowing full well that the 2nd respondent has no ability to meet its liabilities, persuaded the 1st respondent to enter into another agreement with the 2nd respondent to her detriment.

6.14 Reference was made to the case of **Sable Hand Zambia Limited v Zambia Revenue Authority**[10] which states

that where fraud is an issue in the proceedings, a party wishing to rely on it must ensure that it is clearly and distinctly alleged. On the basis of this authority, it was submitted that the 1st respondent specifically pleaded fraud in her statement of claim and it is therefore pertinent that the appellants remain joined to the proceedings so that the court can make a determination on the allegations of fraud and whether or not the corporate veil should be lifted. We were therefore urged to dismiss the appeal and uphold the decision of the lower court.

## 7.0 APPELLANT'S ARGUMENTS IN REPLY

7.1 The appellant's arguments in reply were more or less a repetition of the main arguments.

## 8.0 OUR DECISION

8.1 We shall tackle both grounds of appeal together as they are related.

8.2 We will begin with the pivotal issue raised by the 1st respondent; whether the first ground of appeal complies

with order 10 rule 9 (2) of the Court of Appeal Rules, 2016 which is captured herein in paragraph 6.3.

8.3 Out of necessity, we reiterate both grounds of appeal:

1. **"The lower court erred in law and fact in abdicating its duty to ensure that all issues raised in the application for misjoinder were completely determined".**
2. **"The lower court erred in law and fact when it found that it would not be in the interest of justice *to misjoin the appellants.*"**

8.4 Our view is that the grounds of objection to the judgment appealed against are stated in ground one to the effect that, there was dereliction by the lower court of its duty to determine all the issues raised in the application for misjoinder and that by so doing the court erred in law and fact.

8.5 The points of law and fact which were allegedly wrongly decided were specified in ground two.

8.6 It must have been challenging for the appellants to specify the points of law and fact which were purportedly

wrongly decided in relation to ground one because in its ruling, the lower court did not include an analysis of the affidavit evidence and the applicable law.

8.7 In the **Habasonda**[2] case, the Supreme Court was faced with a High Court judgment without findings of fact. The trial judge had merely reproduced verbatim the notice of motion, the affidavits and skeleton arguments. The Supreme Court was therefore unable to make findings of fact on grounds raised in the application. The Court referred to the case of **Patrick Kunda and Robertson Muleba Chisenga v The People**[11]where a trial within a trial was held to determine whether to admit statements allegedly made by the appellants. The learned trial commissioner rendered a very short ruling in which he stated that he was satisfied beyond reasonable doubt that the appellants made voluntary statements, and that he would give reasons later. In his judgment, the commissioner gave brief reasons which the Supreme Court found unsatisfactory.

8.9 Our focus is on the ruling which was obviously made extempore. The Supreme Court held that;

> ***"The result of such brevity was in effect that there was no ruling on the trial within a trial and the appellants were deprived of an opportunity to appeal against it."***

8.10 The Court declined to allow the admission of the statements to stand and dealt with the appeal on the basis that the statements had been excluded. And that is how the Supreme Court enunciated the guidelines for judgment writing which are already quoted in paragraph 5.4 of this judgment.

8.11 In light of the preceding binding authority, we opine that it is undesirable for a trial court to render an unreasoned ruling and give reasons later. Further, extempore rulings are impromptu and do not entail the same preparation as reserved decisions. Such a ruling whether the judge gives it orally immediately after a hearing and publishes a written one at a later stage, must indicate briefly the index, introduction, the facts and a clear articulation of

the points of determination, the relevant evidence, the applicable law to the facts of the case, the findings, reasoning, and conclusion. The guidelines for writing rulings including extempore ones are similar to the ones for judgment writing given in the Habasonda case *Supra.*

8.12 However, an extempore ruling ought to be succinct as it cannot be honed and fashioned like a reasoned judgment. On the other hand, a reserved judgment should preferably be elaborate as the judicial officer should take time to prepare it. See the case of ***Zambia Telecommunications Company Limited v Aaron Mweene Mulwanda and Paul Ngandwe***[3] *Supra.*

8.13 In the case of **Carlson v King**[12]**,** the New South Wales full court had to consider an appeal from an extempore judgment of a Judge of the District Court which was in the following terms;

> **"I do not agree with the submissions on behalf of the defendant. I find a verdict for the plaintiff for £175. Judgment accordingly."**

8.14 It was held that this was insufficient, Jordan C.J. delivering the judgment of the Court said;

> ***"It has long been established that it is the duty of the court of first instance, from which an appeal lies to a High Court, to make, or cause to be made a note of everything necessary to enable the case to be laid properly or sufficiently before the appellate court if there should be an appeal.***
>
> ***This includes not only the evidence, and the decision arrived at, but also the reason for arriving at the decision.***
>
> ***The duty is incumbent, not only on Magistrates and District Courts, but also upon this court, from which an appeal lies to the High Court and the Privy Council."***

8.15 The New South Wales Court of Appeal case of **Pettitt v Dunkey**[13] involved a claim by a pedestrian plaintiff who was bashed by a motor vehicle in a pedestrian crossing. The trial judge in the District Court delivered an

extempore judgment in favour of the defendant with the following reasons;

> ***"It would not help in view of this lady's condition of health, psychomatic [SIC] or otherwise, for me to give any other reasons, I simply enter my verdict. I return a verdict for the defendant."***

8.16 By reference to the earlier authority of the New South Wales Court, and also to decisions in Victoria notably **Donovan v Edwards**[14]**; Brittinghan v Williams**[15]**; De Lacovo v Lacanale**[16] the Court of Appeal held that the findings that were recorded by the primary judge were inadequate to meet the legal standard imposed upon judicial officers sitting without a jury who were declared, by Asprey JA, in **Pettit v Dunkey**[13] to be subject to the following rule;

> ***"Where...there are real and relevant issues of fact which are necessarily posed for judicial decision, or where there are substantial principles of law relevant to the determination***

***of the case dependent for the application upon findings of fact in contention between the parties and the mere recording of a verdict for one side or the other leaves the appellate tribunal in doubt as to how these various factual issues or principles have been resolved, then, in the absence of some strong compelling reason, the case is such that the judge's findings of fact and his reasons are essential for the purpose of enabling a proper understanding of the basis upon which the verdict entered has been reached."***

8.17 Asprey (JA) made a profound statement in the same case thus;

***"The judge has a duty as part of the exercise of his judicial office to state the findings and reasons for his decisions adequately for that purpose. If he decides in such a case not to do so, he has made an error in that he has not properly fulfilled the function which the law***

***calls upon him as a judicial person to exercise and such a decision on his part constitutes an error of law."***

8.18 We are persuaded by the foregoing authorities to hold that in the present case the trial judge did not properly execute or fulfil his function which the law calls upon him to exercise.

8.19 Basically, the extempore ruling in casu is too brief as it did not take note of everything necessary to enable the case to be laid properly and adequately before this court, we hold that the decision constitutes an error of law.

8.20 It is commonly accepted that judicial reasons are given chiefly to the litigants (especially the losing litigants), to the legal profession, to one's judicial colleagues and finally to oneself and to conscience.

8.21 Further, we take the view that the application that was before the lower court for misjoinder was simple and appropriate for an extempore ruling.

8.22 Considering the application and affidavit evidence on record, we find no need to remit the case to the High Court for determination of the application for misjoinder.

8.23 Coming back to the issue of how the first ground of appeal was couched, we are of the view that the 1st respondent raised the issue late in the day after filing heads of argument canvassing the issue of the form of the ruling. It would have been appropriate to raise it as a preliminary issue before the hearing of the appeal or before filing the respondent's heads of argument, pursuant to **Order 13/5 of the Court of Appeal Rules**.

8.24 We hold that the issue of the form of the ruling clearly stems from the first ground of appeal. It is not a separate ground of appeal. Under the circumstances, there was no need for the appellant to apply for leave to file another ground of appeal. In any case, **Order 10 rule 9 (3)** of the **Court of Appeal Rules, 2016** states in part that in deciding the appeal, the Court shall not be confined to the grounds put forward by the appellant. This entails that if the issue of the format of the extempore ruling

should be considered as a separate ground of appeal, we are at liberty to determine it especially for the reason that the 1st respondent had sufficient opportunity of contesting the appeal on that ground. See **order 10 rule 9(4) of the Court of Appeal Rules**.

8.25 The other issues for us to determine are whether the lower court's verdict was correct and whether all the issues in controversy between the parties should have been considered and determined.

8.26 We hold that the lower court's duty at that stage was to decide whether the appellants should be struck out of the proceedings and not to determine substantive matters raised in the pleadings such as misrepresentation and fraud and lifting of the corporate veil. So not all matters in dispute between the parties were supposed to be determined at that interlocutory stage.

8.27 To clarify the above point, we have thought it wise to state the difference between a judgment and a ruling.

8.27 According to **Dan Park, Attorney, author and educator at quora. com;**

***"A judgment is the final decision of a court. A judgment answers the ultimate question of who wins and who loses and what each party takes away from the lawsuit. For every lawsuit there can only be one judgment."***

***"A ruling is a decision by the court on an issue that has arisen in a lawsuit."***

8.28 Moving on to the applicable law, it is as stated by the appellants; **order 14 rule 5(4) of the High Court Rules** and **order 15 rule 6 (2) (a) and (b) of the Rules of the Supreme Court**. Accordingly, as the appellants are likely to be affected by the suit, it is necessary that they remain parties to the suit as it is obligatory to ensure that all matters in dispute in the suit are completely determined after trial, that is to say, matters of fraud by the shareholders and directors of the 2nd respondent company and the lifting of the corporate veil and whether there is merit in the other claims made in the pleadings by all the parties concerned.

8.29 Thus the lower court's dismissal of the application for misjoinder is upheld to pave way for all the matters in dispute between parties to be finally determined as required by law; See the cases of **Wilson Masauso Zulu v Avondale Housing Project Limited**[17], **Morris Chisenga Muleba v Smart Chanda (sued as administrator of the Estate of the Late Joseph Bwalya Chamba)**[6] **and Simbeye Enterprises Limited and Investment Merchant Bank (Z) Limited v Ibrahim Yousouf**[7].

## 9.0 CONCLUSION

9.1 In the final analysis, we find no merit in this appeal and dismiss it with costs to the 1st respondent. The same may be taxed in default of agreement.

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**C.K. MAKUNGU**
**COURT OF APPEAL JUDGE**

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**D.L.Y. SICHINGA, SC**
**COURT OF APPEAL JUDGE**

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**K.MUZENGA**
**COURT OF APPEAL JUDGE**