IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 107/2015**

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

SUHAYL DUDHIA **APPELLANT**

AND

SAMIR KARIA **1ST RESPONDENT**

CITIBANK ZAMBIA LIMITED **2ND RESPONDENT**

Coram: Mwanamwambwa, DCJ., Wood and Kajimanga JJS.

On 6th March, 2018 and 13th March, 2018.

For the Appellant: *No Appearance*

For the Respondents: *Ms. S. Kaingu – Messrs Chibesakunda and Company*

JUDGMENT

Wood, JS, delivered the judgment of the Court.

Cases Referred to:

1. *Mike Hamusonde Mweemba v. Kamfwa Obote Kasongo and Zambia State Insurance Corporation Limited (2006) ZR 101*
2. *Attorney General v. Aboubacar Tall and another (SCZ) Appeal No. 77 of 1994*
3. *Khalid Mohamed v. Attorney General (1982) Z.R. 49*

4. *Tilling v. Whiteman [1979] 1 ALL ER 737*

Legislation referred to:

1. Order XIV rule 5(1) of the High Court Rules, Cap 27 of the Laws of Zambia.
2. Order 15 rule 6 (2) of the Rules of the Supreme Court 1999 Edition

This is an appeal against a decision of the High Court dismissing the appellant's application for joinder.

The appellant commenced proceedings against the 1st respondent on 6th August, 2013 claiming damages for slander, an injunction restraining the 1st respondent whether by himself, his servants or agents or otherwise from publishing or causing to be published the same or similar slander upon the appellant, damages for mental anguish occasioned by the 1st respondent's utterances, aggravated consequential damages for loss of employment occasioned by the 1st respondent's utterances, any other relief and interest.

A defence was filed by the 1st appellant on 22nd August, 2013. On 20th May, 2014, the appellant filed a summons for an order for

joinder pursuant to Order XIV rule 5(1) of the High Court rules, Cap 27 of the Laws of Zambia read together with Order 15 rule 6 of the Rules of the Supreme Court, 1999 edition. In his application in support of the application for joinder, he contended that on account of the 1st respondent's utterances, and on account of the constant harassment and ridicule of him perpetuated by the 1st respondent during the course of his employment, his reputation was lowered in the perception of his superiors to such an extent that the intended joinder and its senior officers became hostile to him. According to him, this culminated into the wrongful and unlawful termination of his employment with the 2nd respondent (hereinafter referred to as the intended joinder). He stated that he was advised by his advocates that the intended joinder should have been joined to these proceedings on account of being vicariously liable for the defamatory utterances of the 1st appellant that were made during the course of his employment as the Corporate Bank Head of the intended joinder.

The application was opposed on the ground that the principles governing joinder of parties and those governing the principle of

vicarious liability are not the same. Counsel submitted in the court below that in considering the application for joinder, it was not the issue of vicarious liability that needed to be proved but rather the issue of whether the joinder was appropriate. Counsel cited the case of *Mike Hamusonde Mweemba v. Kamfwa Obote Kasongo and Zambia State Insurance Corporation Limited*[1] in support of his submission.

The learned judge held that the appellant had not established any connection between the 1st respondent's alleged words and the intended joinder to warrant joining the intended joinder to the proceedings. She added that the appellant had not placed any evidence before her to show that the 1st respondent's utterances were approved by the intended joinder. The learned judge further held that the appellant had not produced any evidence to support his assertion that the intended joinder relied on the 1st respondent's utterances to terminate his employment. In terms of Order XIV rule 5(1) of the High Court Rules, Cap 27, a person will not be joined to the proceedings unless he has an interest in the subject matter of the action or will be affected by any decision made in the action.

The appellant had not shown how the intended joinder will be affected by the suit. In the event that the appellant succeeded in his claim against the 1st respondent, the 1st respondent would be the one who would be liable for any damages for the slander of the appellant. The intended joinder would not be affected in any way by the outcome of the suit as claimed by the appellant. In the circumstances the learned judge agreed with the deputy registrar who had earlier dismissed the appellant's application for joinder.

The appellant has appealed against the decision of the High Court on four grounds.

The first ground of appeal is that the learned judge erred in law and in fact by holding that this is not a fit and proper case to order joinder of the intended joinder as a party to the proceedings.

The second ground of appeal is that the learned judge erred in both law and fact when she held that although the words by the 1st respondent were uttered in the course of employment there was no connection between the 1st respondent's alleged words and the intended joinder herein.

The third ground of appeal is that the learned judge erred in both law and fact in failing to distinguish the case of *Mike Hamusonde Mweemba v. Kamfwa Obote Kasongo and Zambia State Insurance Corporation Limited*[1] from the current case and in particular, in the *Hamusonde* case, there was express denial of the decision/and or action of the employee by the employer, which is not the case in this matter.

The fourth ground of appeal is that the learned judge erred in law in failing to appreciate that where an opponent fails to file an affidavit in opposition to an affidavit alleging certain facts, then the facts alleged in the supporting affidavit are deemed to be unchallenged and uncontested, and as such admitted by the other party.

The appellant has submitted in support of the first ground that it was pertinent for the intended joinder to be joined to the proceedings, as the intended joinder was likely to be affected by the result of the suit. Furthermore, in terms of Order 15 rule 6 (2) of the Rules of the Supreme Court, the court must add any person or

all persons 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. The appellant argued that the learned judge failed to take cognizance of Order 15 rule 6 (2) of the Rules of the Supreme Court and proceeded to restrict the application of the rules concerning joinder of parties hereto. The appellant has cited our decision in *Attorney General v. Aboubacar Tall and another*[2] in support of his argument. He argued that in that case we took cognizance of the fact that our Order 14 rule (5) as regards joinder of parties is too abbreviated and restrictive as it only related to *"all persons who may be entitled, or claim some share or interest in the subject matter of the suit, or who may likely be affected by the results... and have not been made parties"* who could be added to proceedings. Such an abbreviated and restrictive interpretation of Order XIV rule 5 of the High Court Rules is bound to bring absurdities to the fore. We had however pronounced in the *Tall* case cited above that the answer to such a problem lay in any case in section 13 of Cap 50 (now section 13 of Cap 27 of the Laws of Zambia), which section gives jurisdiction to the court to

determine all matters in controversy between the parties in order also to avoid a multiplicity of litigation. Accordingly, the appellant argued that in *Attorney General v. Aboubacar Tall*, this Court was alive to the fact that it could not see how the Attorney General can be a person entitled to, or claim a share or an interest in the suit or may be likely to be affected by the result of the present suit. However, on the basis of section 13 of the High Court Rules as read together with Order 15 rule 6 (2) of the Rules of the Supreme Court, this Court was satisfied that the lower court had jurisdiction and discretion to join the Attorney General as party to the proceedings. Similarly, the court below had to consider the real issues in controversy between the parties, before making a decision whether it was proper to join the intended joinder to the proceedings.

In the statement of claim issued by the appellant, it was stated by the appellant that on the 1st day of March, 2013, at a meeting the 1st respondent spoke and published of the appellant in the presence of named colleagues defamatory words. The appellant further averred at paragraph 10 of his statement of claim in the following terms:

"On account of the said utterances by the defendant, and on account of the consistent harassment and ridicule suffered and perpetuated by the defendant, the plaintiff's reputation and the perception of his superiors was incredibly lowered to such an extent that the bank and its senior officers became hostile to the plaintiff and culminated in the wrongful and unlawful termination of the plaintiff's employment..."

The appellant has further argued that in presenting his claim before the court, he also sought damages for slander and aggravated consequential damages for loss of employment occasioned by the 1st respondent's utterances. These issues needed to be determined at a full trial without requiring the lower court to preempt the same at an interlocutory hearing. He wondered how possible it was for the lower court to determine the fact of the intended joinder relying on the alleged utterances by the 1st respondent without having the intended joinder before court. While the fact of loss of employment was common cause in this matter, he argued that the factors that led to such loss of employment stood to be determined at trial among other issues. On the basis of the foregoing, he argued that the court below misdirected itself in holding that it was not a fit and proper case to order joinder of the intended joinder to the proceedings.

Ms Kaingu has, on behalf of the 1st respondent and the intended joinder, argued that Order XIV rule 5 (1) allows for joinder of parties on two grounds namely where a person may be entitled to, or claim some share or interest in the subject matter of the suit and where a person may be likely affected by the result of the suit. In this particular instance, the 1st respondent is merely an employee of the intended joinder. The intended joinder is neither entitled to nor does it claim some share or interest in the subject matter of the suit which is defamation. Further, the intended joinder is not likely to be affected by the result of the suit. With regard to Order 15 rule 6 of the Rules of the Supreme Court and the *Tall case,* she submitted that the basis for adding the Attorney General as a party to the proceedings was the documentary and oral evidence on record which showed the necessity of adding the Attorney General as a party. It was necessary to do so in the *Tall case* but it is not necessary to do so in the present appeal. Ms Kaingu submitted that the appellant could not rely on paragraph 10 of his statement of claim as a basis for joining the intended joinder to the proceedings because the factors that led to the appellant's termination of employment stood to be determined in a trial before

the Industrial Relations Court in Complaint No. 211 of 2013. In addition to that the court below had held that no evidence had been adduced before it to support the assertion that the intended joinder had relied on the utterances to terminate the appellant's employment.

In relation to the second and third grounds of appeal, Ms. Kaingu submitted that the application before the court below was an application for joinder and as such the court did not err when it did not invoke the principles of vicarious liability at that stage.

Ms Kaingu submitted with regard to the fourth ground of appeal that the appellant was not entitled to be granted his application for joinder simply because there was no affidavit in opposition. The learned Judge was therefore correct, despite the absence of an affidavit in opposition, to examine the affidavit in support on record and holding that there was no evidence placed before her to support the assertions that the intended joinder relied on the utterances in terminating the appellant's employment.

The first ground of appeal raises the issue of when is joinder appropriate generally and in particular whether in the

circumstances of this case an order for joinder should have been made. Order XIV rule 5(1) of the High Court Rules Cap 27 of the Laws of Zambia and Order 15 rule 6(2) of the Rules of the Supreme Court provide the parameters within which an application for joinder may be entertained and granted. Order XIV rule 5(1) of the High Court Rules reads as follows:

> *"If it shall appear to the Court or a Judge, at or before the hearing of a suit, that a person 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 date, 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. In such case, the Court shall issue a notice to such person, which shall be served in the manner provided by the rules for the service of a writ of summons, or in such other manner as the Court or Judge thinks fit to direct; and, on proof of the due service of such notice, the person so served, whether he shall have appeared or not shall be bound by all proceedings in the cause..."*

Order 15 rule 6(2) of the Rules of the Supreme Court 1999 edition on the other hand states as follows:

> *(2) 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 an application-*

(a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;

(b) order any of the following persons to be added, namely-

(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, or

(ii) 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 it would be just and convenient to determine as between him 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 the Court, be supported by an affidavit showing his interest in the matters 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 or matter."

Our reading of both Order XIV rule 5(1) of the High Court Rules and Order 15 rule 6(2) shows that for an application to be made pursuant to these two rules the following basic conditions must be met:

(i) There must be a person 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;

(ii) The person's 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;

(iii) The affidavit in support or the pleadings must establish a nexus with the person sought to be joined to the proceedings.

We have closely read the statement of claim and the affidavit giving rise to the application for joinder. As pointed out by the learned judge, this is an action against the 1st respondent for slander, an injunction and aggravated consequential damages for loss of employment occasioned by the 1st respondent's utterances. The primary defendant in the court below is, for all intents and purposes, the 1st respondent. The prayer in the statement of claim seeks relief from the 1st respondent. The appellant has argued that paragraph 10 (a) of his statement of claim goes to show the real issues in controversy between the parties and it should have been considered whether it was proper to join the intended joinder to the proceedings. Paragraph 10(a) reads as follows:

> *"On account of the utterances by the defendant, and on account of the constant harassment and ridicule suffered by the plaintiff perpetrated by the defendant, the plaintiff's reputation and the perception by his superiors was incredibly lowered to such an extent that the bank and its senior officers became hostile to the plaintiff and culminated in the wrongful and unlawful termination of the plaintiff's employment..."*

We do not think that paragraph 10(a) as drafted opens a window to an application for joinder nor does the affidavit in support. The argument that the intended joinder is likely to be vicariously liable is a tenuous argument and we find it surprising that it is being advanced by the appellant and not the 1st respondent through third party proceedings. It should be of no concern to the appellant as to who ultimately should pay him damages. His focus should be on proving his case as against the 1st respondent. It would have been an arguable point if he had shown through his statement of claim and the affidavit in support a prima facie case that for instance, the 1st respondent was acting in the course of his employment or had the tacit support of his employers when he made the alleged disparaging utterances or that his employer relied on the defendant's utterances to terminate his employment. It would not auger well for the administration of justice to haul an intended joinder through the court system at great cost without a scintilla of evidence showing what interest it has or how it may be affected by the result of the proceedings. We also find that even the argument that there is need to effectually

and completely determine and adjudicate upon matters to avoid multiplicity of actions does not apply to this case for the simple reason that the appellant has not established any connection between the slander and the intended joinder. We cannot therefore fault the reasoning of the learned judge when she held that the appellant had not shown that the utterances were approved by the intended joinder or that the intended joinder relied on the utterances to terminate his employment. We find no merit in the first ground of appeal.

The appellant argued the second and third ground of appeal together. The appellant argued that the *Hamusonde* case should be distinguished on the basis of its facts with this appeal. In the *Hamusonde* case, when the intended joinder became aware of a libelous letter, it informed the defendant that his actions did not have the blessings of the authorities and the board of the corporation. Furthermore, the intended joinder filed an affidavit in opposition and produced evidence before the court where it had directed the defendant to rescind his decision, which directive the defendant ignored. The trial judge considered the affidavit evidence

in support of the joinder application and the affidavit in opposition and in refusing to add the intended joinder, held that the affidavit evidence in opposition had shown that the defendant had been informed that his action did not have the blessings of the authorities and the board of the corporation and had in fact been directed to rescind his decision but had ignored the directive. On appeal we held that the judge had no alternative but to refuse the application for joinder on the ground that the defendant's action was not approved by the Zambia State Insurance Corporation Limited. Using the *Hamusonde* case as a litmus test, the appellant has now argued that in the absence of evidence being adduced by the intended joinder, the court would have been inclined to add the intended joinder and request it to enter a defence in the cause. Accepting this argument, attractive as it may be for its simplicity and persuasiveness, would erode the principle established in *Khalid Mohamed v. Attorney General*[3] that a plaintiff must prove his case and if he fails to do so, the mere failure of the opponent's defence does not entitle him to judgment. It is therefore not automatic that if there is no affidavit in opposition to an application then that application should be granted as matter of course. Doing so would

pave the way for frivolous and hopeless applications to be granted in default. It is the court's responsibility to assess what has been deployed before it and make a decision based on the material before it. Needless to say it is also the court's responsibility to apply the law to the facts. It is quite clear to us that apart from the fact that the 1st respondent was an employee of the intended joinder, there is no other nexus which could have persuaded the court below to grant an application for joinder. Put differently, there should have been something more connecting the 1st respondent's alleged utterances to the intended joinder so as to make the intended joinder come within the ambit of Order XIV (5) (1) of the High Court Rules or Order 15 rule 6(2) of the Rules of the Supreme Court.

The appellant has referred us to the case of *Tilling v. Whiteman [1979] 1 ALL ER 737*[4] in which the House of Lords strongly protested against the practice of the court of first instance allowing preliminary points of law to be tried before and instead of first finding all the facts. This argument would have been more persuasive had the appellant shown what the real connection was with the intended joinder in the first place. It is apparent from

what we have stated above that there is no merit in the second and third ground of appeal.

The fourth ground of appeal attacks the learned judge's dismissal of the appellant's application in the absence of an affidavit in opposition. We have dealt with this issue in the second and third ground of appeal. We see no need to repeat ourselves. For the reasons given above, we find no merit in the fourth ground of appeal.

We note from the intended joinder's heads of argument that the appellant had commenced proceedings in the Industrial Relations Court under Complaint Number 211 of 2013 challenging the termination of his employment on the basis of the alleged utterances by the respondent. By attempting to join the intended joinder to these proceedings when there are already similar proceedings in train against it in another court is a classic example of a multiplicity of actions. It does not help the appellant at all to argue that the two causes of action are distinct and different. This is so because in the final analysis the intended joinder would in the event that it is found to be vicariously liable, be liable for the 1st

respondent's actions. It would also be liable for terminating the *appellant*'s employment should the Industrial Relations Court find the intended joinder liable. It would be unjust to make the intended joinder liable twice.

The net result is that all grounds of appeal are dismissed with costs to the 1st respondent and the intended joinder, to be agreed or taxed in default of agreement.

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M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

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A.M. WOOD
SUPREME COURT JUDGE

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C. KAJIMANGA
SUPREME COURT JUDGE