YOUNG LAWYERS ASSOCIATION OF ZIMBABWE
versus
JOSHUA JOHN CHIRABWE
and
MINISTER OF JUSTICE, LEGAL & PARLIAMENTARY AFFAIRS
and
THE LAW SOCIETY OF ZIMBABWE
and
ATTORNEY GENERAL

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 27 February & 5 May 2023

A Dracos with Mr *M Mpofu* for the applicant
Mr *T Chinyoka*, for the respondent

Opposed Matter

MANGOTA J: On 31 December, 2021 one Joshua John Chirambwe ("chirambwe"), the first respondent herein, sued the Law Society of Zimbabwe which is the third respondent *in casu*, among other two respondents, seeking a declaratur and consequential relief. He filed his suit under HC 7421/21 ("the main matter"). He is a legal practitioner by profession and he is therefore a member of the third respondent herein.

The applicant which applies to be joined to HC 7421/21 is an association of young lawyers. It premises its application for joinder on the allegation that the relief which Chirambwe is seeking in the main matter, if granted, would directly affect its members in that the latter are legal practitioners whose privileges and rights emanate from the legislation which is sought to be impugned. Its members, the applicant asserts, ought to be allowed to make representations before a determination of the main matter takes place. It states that it has a direct and substantial interest in HC 7421/21 to which it should be joined. It moves that its application be granted in terms of the draft order which it filed of record in this case.

Only Chirambwe who is the applicant in the main matter opposes the application. Those whom he cites as respondents and are also respondents *in casu* did not file any notice of opposition to this application. My assumption is that they intend to abide by my decision.

The application cannot succeed. An applicant for joinder must allege and prove that it should have been joined to, but was unfortunately excluded from, the suit to which it seeks to be joined. It follows, from the stated set of matters, that once the applicant fails to prove that his joinder is a must or a necessity in the sense that it would ensure that all matters in dispute in the cause or matter may be effectually and completely determined as well as adjudicated upon, the application for joinder shall fail.

It is pertinent for me to observe that joinder is not there for the mere asking. Joinder is granted at the discretion of the court which must be satisfied, either on its own initiative or from an application such as the present one, that the presence of the person or the applicant in the suit will enable it to adjudicate upon the case as a whole.

Joinder is provided for in r 32(12) of the High Court Rules, 2021. It is available to the applicant at any stage of the proceedings before judgment has been issued in the case.

The current application was filed under para (b) of sub rule (12) of Rule 32 of the rules of court. It reads, in the relevant part, as follows:

> " (12) At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either on its own initiative or on application –
> (a) ……………………………………………………………….;
> (b) Order 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 may be effectually and completely determined and adjudicated upon, to be added as a party".

The question which begs the answer is whether or not the applicant ought to have been joined to HC7421/21 as it insists it should. The applicant, it is observed, is an association of young lawyers. It has its own constitution. It boasts of a membership of 109 young lawyers as at 1 January, 2022. Its purpose and goals as stated in its constitution are many and varied amongst some of which are the following:

i) to protect and advance the interests of its members;

ii) to advocate for, promote and support the adequate representation of young lawyers within the legal profession in Zimbabwe;

iii) to advocate for fair labour standards that enhance and protect the welfare and dignity of young lawyers in the work-place.

Whilst the applicant appears to be a stand-alone organization with its own constitution which spells out its purpose as well as its own goals, the applicant's members are also members of the Law Society of Zimbabwe which is one of the respondents in HC 7421/21. The statement of the applicant is to the stated effect. It states, in para 14 of its founding affidavit, that its members are also members of the third respondent.

Proceeding on the premise that the applicant's members are members of the Law Society of Zimbabwe which opposed HC 7421/21, the applicant's members cannot be said to have been left out of the equation at all. They are part and parcel of the main matter. The applicant's application does not, therefore, satisfy the provision of sub-paragraph (b) of sub-rule (12) of r 32 of the rules of court. That is so because the applicant's members are not excluded from, but are included in, the main matter. Whatever matter of concern which they want to raise with Chirambwe can be raised by them through the Law Society of Zimbabwe. They, on their part, did not ever suggest that the Law Society of Zimbabwe cannot represent, or is not representing, them. Nor do they claim that it does not have the capacity to represent its members, themselves included, in the main matter.

As Chirambwe correctly asserts, the applicant is, in fact, very happy with the Law Society of Zimbabwe's representation of its members. Its narrative, as contained in its founding affidavit, is that it is a member of the third respondent which does not only represent its members but is also its preferred representative. Nothing therefore prevents the applicant from opposing HC 7421/21 through the Law Society of Zimbabwe which is a respondent in the same. The applicant, it is emphasized, is within and not out of HC 7421/21. Its application for joinder is therefore without merit. It is an exercise in futility which, on a proper construction of the circumstances of the case, should not have been allowed to see the light of day.

It is well established that, in application proceedings, the cause of action should be fully set out in the founding affidavit and that new matters should not be raised in an answering affidavit: *Mangwiza* v *Ziumbe N.O. & Anor*, 2000 (2) ZLR 489 (SC) at 492 E-F. GARDNER JP brings out the meaning and import of the law on the point which is under consideration when he remarked in *Coffee, Tea and Chocolate Co. Ltd* v *Cape Trading Company*, 1930 CPD 81 at 82 that:

> "*A very bad practice, and one by no means uncommon, is that of keeping evidence on affidavit until the replying stage, instead of putting it in support of the affidavit filed upon the notice of motion. The result of this practice is either that a fourth set of affidavits has to be allowed or that the respondent has not an opportunity of replying."*

The above stated principle of law becomes ugly when a party to any proceedings makes an effort to qualify his founding affidavit as the applicant appears to want to do in this application. It is for the mentioned reason, if for no other, that the law has enunciated in a number of case authorities that an application stands or falls on its founding affidavit :*Maurberger* v *Maurberger,* 1948 (3) SA 731 (c); *De Villiers* v *De Villiers,* 1943 TPD 60; SA *Railways Club* v *Gordonian Licensing Board,* 1953 (3) SA 256.

In stating as it did, the law intended to place finality to issues which relate to pleadings. These have to come to a close at some stage so that the matter-action or application- becomes ready for hearing as well as determination. Where a party changes his pleadings at every turn of the case, therefore, the change leaves the affected party without any remedy except to implore the court to allow him to re-act to the set of changed circumstances making the work of the court to remain not only tedious but also difficult to fathom with any degree of precision.

The applicant states, in para 14 of its founding affidavit, as follows:
" ……., Applicant's members are also members of the third respondent". The third respondent, in this application, is the Law Society of Zimbabwe.

Judicial notice is taken of the fact that members of the Law Society of Zimbabwe are all practicing legal practitioners. No one, in terms of the Legal Practitioners Act [*Chapter 27:07]*, remains a member of the Law Society when he or she has had his/her name struck off the register of practicing lawyers. No one becomes a member of the Law Society unless and until he/she has passed a set of examinations and has been registered as such with the court and has a practicing certificate issued to him/her to enable him/her to practice law in the courts of Zimbabwe.

It follows, from what the applicant states in its founding affidavit, that it is being economic with the truth when it asserts, as it is doing in para 7 of its answering affidavit, that some of its members are not legal practitioners but are holders of legal qualifications and, as such, are not represented by the Law Society of Zimbabwe. The falsehood which the applicant peddles on this aspect of the case makes the same sad reading which the law excludes from the applicant's

founding affidavit. The applicant's attempt at approbating and reprobating remains untenable at law. It renders the founding papers of the applicant unworthy of belief.

Correspondence which Chirambwe filed with his notice of opposition to this application shows that he, at some point in time in the existence and/or progression of HC 7421/21, accorded a leeway to the applicant to file its application for joinder before he filed his answering affidavit and his Heads in respect the main case. Reference is made in the mentioned regard to Annexures A, B, C and D which respectively appear at p35, 36, 37 and 38 of the record. The applicant, for some unexplained reasons, failed to take advantage of the window period which had been extended to it. It does not tell why it did not file its application for joinder for three consecutive months which followed its correspondence with Chirambwe.

Chirambwe states, and I agree, that the application for joinder after he has filed his answering affidavit and Heads to the main case remains thoroughly prejudicial to him. He tabulates the prejudice which he claims he will suffer at p 30 of the record wherein he states as follows:

" e) The application is therefore useless and serves only to increase my costs burden. It is an application that is prejudicial to me in that:

i) I have already filed all my pleadings;
ii) these extra pleadings will involve me in additional unnecessary costs;
iii) the members of the Applicant organization are already represented by the third respondent in their interests in the main matter;
iv) I have already applied for the main matter to be set down for hearing, and these proceedings will delay my case;
v) reading the applicant's constitution (where several articles are missing), I do not notice any mention of it having any assets, and if I was to succeed in getting a costs order against it, there would be no way to enforce it".

The prejudice which Chirambwe makes reference to emanates from the fact that, if the application for joinder was to succeed, the applicant would prepare and file its notice of opposition to which he would have to respond in the form of an answering affidavit as well as further Heads which address the applicant's cause. Apart from the fact that the process delays a matter which has tentatively been set down, Chirambwe's legal practitioners will not perform that extra work on his behalf for charity. The extra work will adversely affect his pocket. His case is therefore well-made when regard is had to the above-stated matters which are coupled with the finding that the applicant's members are not out of, but within, HC 7421/21.

The applicant cannot continue to draw Chirambwe's case back for no clear reason. Nor can it be allowed to have a second bite of the cherry when the Law Society of Zimbabwe which it admits represents its members' interests filed a comprehensive notice of opposition to HC7421/21.

Chirambwe states, in his notice of opposition, that there is nothing which the applicant can get from its joinder that it cannot already get from the Law Society of Zimbabwe's involvement in the main matter. I agree. Joinder, as he correctly puts it, should not be for the taking.

An applicant for joinder, it is trite, must prove, on a balance of probabilities, that he has been excluded and that his rights and interests are affected as well as that without protection other than through such joinder, an order for him to be joined remains necessary. *In casu*, a finding has already been made to the effect that the applicant's members for whom the application is filed have not been excluded from the main matter. They are in the main matter,

As the court aptly states in *Maxwell Matsvimbo Sibanda* v *Gwynne Ann Stevenson* & 7 Ors, HH 474/18 joinder is an exercise of the discretion of the court on a proper consideration of the facts. The facts which the applicant placed before me satisfy me that the applicant's members are properly and adequately represented in the main matter by the Law Society of Zimbabwe. The applicant therefore failed to discharge the *onus* which rests upon it. It failed to prove on a preponderance of probabilities that its joinder to HC 7421/21 is necessary. The application is, in the result, dismissed with costs.

Honey & Blankckenberg, applicant's legal practitioners
Mutumbwa Mugabe & Partners, respondent's legal practitioners