

SYLVIA MUPOMBWA  
versus  
MATIRASA KATSVAIRO  
and  
TAWAINGA ARNOLD KATSVAIRO

HIGH COURT OF ZIMBABWE  
MUREMBA J  
HARARE, 15 March 2021 & 15 APRIL 2021

### **Opposed Application**

*S. Chirorwe*, for the applicant  
*Ms M. I. Mutero*, for the 1<sup>st</sup> respondent  
No appearance for the 2<sup>nd</sup> respondent

MUREMBA J: Matirasa Katsvairo and Tawainga Arnold Katsvairo who are the first and second respondents contracted a civil marriage on 25 December 1965. The marriage still subsists. In 1979 the applicant and the second respondent entered into an unregistered customary law union. On 8 November 1989 they purported to register a customary law marriage under the African Marriages Act [*Chapter 238*]. In registering that marriage the second respondent gave his marital status as a person who was already married under the African Marriages Act [*Chapter 238*]. This purported marriage between the applicant and the second respondent was later declared null and void by this court on 8 September 2020 in case number HC 8946/19 at the instance of the first respondent. The first respondent also issued summons for divorce against the second respondent under case number 4775/19. The matter is still pending and is now at pre-trial conference stage.

The applicant who is said to be staying with the second respondent has filed the present application for joinder. She wants be joined as the second defendant in the divorce proceedings that are pending between the respondents. The proceedings in the divorce matter were postponed *sine dine* to enable the applicant to file the present application for joinder.

In support of her application for joinder in the divorce matter the applicant made the following averments. At all material times, based on the information from respondents, the applicant believed that the respondents' marriage was a customary marriage which was potentially polygamous. She only became aware that they had a civil marriage when she received summons for a claim for adultery damages from the first respondent in case number HC 4864/19 in 2019. The applicant averred that she has real, direct and substantial interest in the pending divorce action between the respondents because the court will make a division of the matrimonial assets between them. The applicant averred that she also laboured and contributed immensely for more than forty years towards the marriage and accumulation of the matrimonial property which is subject of the divorce matter. The respondents just like the applicant were teachers before their retirement, hence their income and financial contribution was always within the same range. The applicant has rights over the matrimonial assets listed in the divorce action and is therefore entitled to an equitable share of those assets. The applicant's rights will certainly and seriously be affected by the judgment which will be made in the divorce matter. If the assets are distributed only between the respondents without her being heard, she will suffer irreparable harm whilst the respondents will be unjustly enriched at her expense.

The second respondent did not oppose the application. In opposing the application, the first respondent made the following averments. The applicant has neither direct nor substantial interest in the divorce action between the respondents. The basis of the divorce action is a contract of marriage, contracted between the two respondents alone. The applicant is not a party to that marriage which is the cause of action of the divorce matter. The doctrine of privity of contract entitles the respondents to sue each other but prevents a third party from doing so. The applicant has no claim against the first respondent, but only against the second respondent which claim arises from their association. The applicant was always aware at all material times that the respondents' marriage was monogamous. In 1979 the applicant was deployed to work at Musanhi Primary School in Mutoko where the respondents were teaching as qualified teachers. The respondents took her in and lived with her for two months as she did not have accommodation at that time. Their wedding photos were displayed in the house for the applicant to see. Applicant was therefore well aware at all material times that her marriage to the second respondent was criminal, null and void.

It is the first respondent's further averment that matrimonial assets can only be shared between the parties to the matrimonial action. To include a third party will be an affront to the institution of marriage. The applicant did not contribute to the acquisition of the matrimonial assets. These assets were purchased before her union with the second respondent. The applicant wants to reap where she did not sow. The applicant has no marriage relationship with the first respondent. Her joinder will reduce the respondents' monogamous marriage to a group marriage. By January 1964 the first respondent was already a qualified teacher whereas the applicant only became a qualified teacher around 1990. The second respondent even sent the applicant to a Teacher's College using the first respondent's salary. The applicant is not entitled to any share in the distribution of the respondents' matrimonial assets because she was just but a girl-friend of the second respondent whereas the first respondent was a professional and legal wife for 55 years. Any rights the applicant may have can only be against the second respondent, in a separate claim and under a different cause of action which is not the divorce matter between the respondents. The applicant and the second respondent are currently staying together as husband and wife. Her joinder in the divorce matter between the respondents will enable the applicant and the second respondent to work in cahoots against her (the first respondent) and get the lion's share of the matrimonial assets, which assets the applicant never worked for.

In her answering affidavit the applicant averred the following. She has a direct and substantial interest in the divorce action because if she is not joined in the proceedings, the assets that she worked for in good faith in a marriage which she genuinely believed to be valid will be distributed between the respondents only. The issue of the cause of action in the main matter is not a primary consideration in an application for joinder. The applicant was never aware that the respondents had a civil marriage. When she was taken to the second respondents' rural home in 1979 she was introduced as second respondent's second wife and lobola was paid for her in October 1979. The first respondent by conduct condoned her union with the second respondent. She never told the applicant personally that she and the second respondent had a civil marriage yet as far back as 1979, the first respondent became aware of her union with the second respondent. In 1989 she became aware that the applicant and the second respondent had registered a customary marriage but she never protested. In 1990 the first respondent became aware that the applicant had adopted the second respondent's surname but she never protested. The applicant and the second respondent went on to bear five children together between

1981 and 1997 which children grew up together with the first respondent's children as one big family and the first respondent never complained or protested.

The applicant averred that Stand 8067 Salisbury Township was purchased in 1979 through a Beverley Building Society mortgage; Budja 18 Farm was purchased in 1987 mainly to provide enough pasture for their cattle and Stand No. 2173 Chinzanga Township, Mutoko was purchased around 2004. These three immovable properties were acquired after her customary law union with the second respondent had been contracted. It is the first respondent's plan to take away a large chunk of the matrimonial assets. It is the applicant's contention that her joinder is meant to avoid a multiplicity of actions between the same parties, involving the same issues and the same evidence on the same subject matter. Joinder will bring convenience to both the parties and to the court. The divorce action will largely involve evidence relating to each party's contribution for the court to make an equitable distribution of the assets. A suit the applicant would make against the respondents will also largely involve the same evidence on each party's contribution to the acquisition of the same assets that are for distribution between the respondents hence the convenience of joinder. The properties are registered in the second respondent's names but the first respondent is claiming shares from them based on the contributions she allegedly made as an employed spouse. It is on the same basis that the applicant wants to be joined in the matrimonial proceedings because she also contributed as a spouse.

The applicant averred that at the pre-trial conference between the respondents, she appeared and raised her interests in the matter to the judge who postponed the pre-trial conference *sine die* to enable her to file her application for joinder. The applicant averred that her marriage to the second respondent was a putative marriage as she did not know that the two respondents had a civil marriage. She averred that in a putative marriage, the courts deal with division of the matrimonial assets in the same fashion that is adopted when distributing matrimonial assets pursuant to a divorce action.

### *Analysis*

Rule 87 (2)(b) of the High Court Rules, 1971 provides that:

“(2) 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 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 or matter may be effectually and completely determined and adjudicated upon, to be added as a party;

The rule has been interpreted in several cases such as *Marais & Another v Pongola Sugar Milling Co & Ors* 1961 (2) SA 698 (N); *Burdock Investments (Pvt) Ltd v Time Bank of Zimbabwe Ltd & Ors* HH 194/03; *Katsande v Katsande* HH 249-13; *Sibanda v Sibanda & Anor* 2009 (1) ZLR 64 (H). Basically what these cases say is that for a person to be joined in proceedings, firstly, they must have a direct and substantial interest in the issues raised in the proceedings before the court. And secondly, their rights must be affected by the judgment of the court.

In *Burdock Investments (Pvt) Ltd v Time Bank of Zimbabwe Ltd & Ors supra* MAKARAU J (as she then was) analysed decided cases on what constitutes a direct and substantial interest. She concluded that it is not merely a financial interest in the matter. The right must be a legal obligation or position that can be held, enforced, or defended against all the parties to the litigation in which joinder is sought. MAKARAU J went on to refer to the case of *Henri Viljoen (Pvt) Ltd v Awurbuch Brothers* 1953 (2) SA 151 (OPD) where it was held that direct and substantial interest for the purposes of joinder and intervention is a legal interest and excludes any indirect and commercial interests. She went on to say that a legal interest must be such that proceeding without the party seeking joinder or intervention, amounts to denying that party the right of audience before the court passes a judgment that adversely affects the legal position of that party. The interest must be such that the judgement cannot be carried into effect without adversely affecting the legal position of the party mis-joined.

Case authority shows that joinder prevents multiplicity of litigation and facilitates speedy and wholesale resolution of disputes<sup>1</sup>. A wholesale resolution of disputes prevents an inconvenience to both the courts and the parties that are likely to be involved in future litigation. Circuitous actions are avoided as all the matters are brought together and dealt with in one proceeding. In some instances, the order that is being sought can only be carried out by a third party. Therefore, joining such a third party is convenient as the court cannot make an order that will affect a party that is not before it. Besides, determining all disputes under one umbrella once and for all is cost effective to the parties both financially and in terms of time.

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<sup>1</sup> *Shumbairerwa v Chiraramiso & Ors* HH 731/15; *Sibanda v Sibanda* 2009 (1) ZLR 64 (H); *Chasiya v Qiang & Ors* HH 128/04; *MBCA Bank v RBZ & Anor* HH 482/15.

Furthermore, joinder of all the persons that are involved in a dispute brings finality to that dispute.

As was correctly contended by the applicant's counsel, there has never been an exhaustive list of situations where joinder is firmly regarded as a right or out rightly prohibited. The court has wide discretion to grant joinder in any case and at any stage as it thinks just. See *Sheshe v Vereening Municipality* 1951 (3) SA 661. What should guide the court in exercising its discretion under rule 87(2)(b) on whether or not to grant an order for joinder are the facts specific to each case. Irrespective of the nature of the main matter, be it a divorce matter or any other matter, a third party seeking to be joined should simply show that he or she has a direct and substantial interest in the issues raised in the main matter; and that his or her rights may be affected by the judgment of the court in that matter. The rationale of joining third parties in divorce proceedings is no different from the rationale of joining third parties in any other matters. In *Shumbairerwa v Chiraramiro & Ors* HH 731-15 CHIGUMBA J said that the person seeking to be joined must have interest in the thing, and not in a person, which is of sufficient importance to persuade the court to exercise its discretion in ordering joinder in the interests of justice.

In divorce actions, the purpose is to sever the marital relationship between husband and wife. However, issues of distribution of matrimonial property may impact persons other than the husband and wife. In light of this, third parties can be joined to the divorce action to protect their interests. These interests should be substantially related to the disputes of the divorce. I will deal with two cases which the applicant's counsel referred to where joinder of third parties was ordered in divorce proceedings. In *Sibanda v Sibanda & Anor supra* the parties to a marriage had separated. The husband then registered a Notarial Deed of Trust and a Trust to which he was a settlor. He then donated all the matrimonial assets to the Trust without the wife's knowledge. After issuing summons for divorce, the wife then discovered that the matrimonial assets had been donated to the Trust. The effect of this donation was that the assets would not form part of the matrimonial property in the divorce proceedings and this was to her prejudice. She applied for the joinder of the Trust to the divorce action. It was the husband's argument that it would be unprocedural for the Trust to be joined as a party to the main action as it was a matrimonial matter. In granting the application for joinder CHEDA J held that r 87 (2) (b) of the High Court Rules is all encompassing and covers all matters. He said that the rationale behind it is to ensure that the court is better placed to deal with issues at hand. The

court is so placed, if all the facts are before it. He further stated that the court should consider the effect of the joinder to the parties and the consequences of non-joinder. The issue of joinder should be determined in accordance with the requirements of convenience and common sense. The court considered that if the Trust was not joined there would be a lot of inconvenience not only to the applicant but to the court as well. There was no doubt that the applicant would be oppressed in the divorce proceedings and this would consequently result in a multiplicity of actions in future. In the interests of justice the Trust was joined as the second defendant to enable all the issues to be ventilated in court once and for all.

In *Katsande v Katsande & Ors* HH 249/13 *supra* the wife in a divorce action sought to join a third party in whose name an immovable property alleged to be matrimonial property was registered. In granting the application CHITAKUNYE J said that the rights of the third party in whose name the property was registered could be affected by the court's decision. He said that it was only proper and in the interests of justice to join the third party as a co-defendant in the divorce action.

The above two cases show that in divorce actions joinder of a third party can be ordered in situations where the third party is an owner of all or part of the property that is said to be liable for distribution between the divorcing parties. I would like to believe that even in situations where property is owned by either spouse or both spouses in conjunction with a third party, the third party can be joined in the dissolution action. Whilst the third party has nothing to do with the claim for severing the marital relationship between the two divorcing spouses, the third party is allowed to join for the limited purpose of distribution of property. This enables it to protect its rights and interests in the property. In other words, when the legal and property rights of third parties are sought to be adjudicated in divorce actions, such third parties must be joined. Therefore, in deciding whether or not to grant joinder, the court should consider the extent of the third party's claimed interest and the merits of it. Just like in any other case, the joinder is by no means automatic. The court should ask itself what the third party will be defending if it is joined to the divorce action *vis a vis* the property to be distributed between the spouses. The above cited cases also demonstrate that third parties who can be joined to divorce proceedings can be entities or individuals. If the third party is not joined to the divorce proceedings by either of the parties, the third party itself can apply for joinder because it has a right to protect its interests.

In view of the foregoing, what it means is that the applicant in *casu* must show that she has direct and substantial interest in the properties to be distributed between the respondents in their divorce action and that her rights may be affected by the judgment of the court in that matter. It does not matter that she is not a party to the respondents' marriage and that their assets are going to be distributed in terms of the Matrimonial Causes Act [*Chapter 5:13*]. To begin with, let me hasten to point out that the applicant does not own any of the property that was listed for distribution between the respondents. None of the properties are registered in her name. She averred that all the properties are registered in the name of the second respondent, the husband with whom she has been cohabiting since 1979. The applicant's argument is simply that she contributed to the acquisition of all the property that was listed for distribution by the first respondent in her declaration. She further argues that if distribution is done between the respondents alone in her absence and without her being heard, her rights to a share in the matrimonial assets will be prejudiced.

In the heads of arguments it is submitted that joinder will enable the applicant to lodge her counter claim which will be dealt with at the same time with the divorce action. It was further submitted that the applicant's claim to a share in the matrimonial assets of the respondents is based on the putative marriage which she entered into with the second respondent in 1989 that was later declared null and void at the instance of the first respondent in 2020. A putative marriage is an apparently valid marriage, entered into in good faith on the part of at least one of the partners, but that marriage is legally invalid due to a technical impediment, such as a pre-existent marriage on the part of one of the partners. A putative spouse is not legally married, although he or she believes himself or herself to be married in good faith. He or she is given legal rights as a result of his or her reliance upon this good-faith belief. The innocent spouse is entitled to the protections of a divorce for division of property.<sup>2</sup> In *casu* the applicant contends that her marriage was a putative marriage because when she contracted it she was not aware that the respondents had contracted a monogamous marriage in 1965. Both respondents had misled her into believing that they had a potentially polygamous marriage. The applicant's counsel submitted that certain rights arise from a putative marriage. Citing the cases of *Makovah v Makovah* 1998 (2) ZLR 82 (S) and *Sibanda v Sibanda* SC 117/04 the applicant's counsel submitted that distribution of property in a putative marriage like the

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<sup>2</sup> [https://en.wikipedia.org/wiki/putative\\_marriage](https://en.wikipedia.org/wiki/putative_marriage) accessed on 2 April 2021

applicant's, is governed by s 7 of the Matrimonial causes Act. In *Makovah v Makovah* the appellant had married his wife in a civil marriage in church. He then entered into a customary marriage with the respondent in terms of the African Marriages Act [*Chapter 238*]. The second marriage was held to be null and void on the grounds that it was bigamous. MUCHECHETERE JA said that it is not a necessity that a finding of a putative marriage be made in order for the provisions of s 7 to 11 of the Matrimonial Causes Act to be triggered since s 7 (1) (a) simply provides that:

“Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage or at any time thereafter an appropriate court may make an order with regard to the division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to the other.”

Section 7 (1) (a) therefore governs the distribution of property of parties that are legally married at the time of divorce or judicial separation or at any time thereafter. The provision also governs the distribution of property of parties whose marriage is nullified for whatever reason at the time of nullification of the marriage or at any time thereafter. This means that the applicant and the second respondent's marriage situation is covered. Whether their marriage was putative or bigamous it does not matter. This is so, so as to prevent an injustice to the party who laboured and contributed towards the marriage and the accumulation of the matrimonial property. In the *Makovah* case MUCHECHETERE JA at page 90 A –D said,

“In my view, the above provisions cover a marriage, such as the present one, which is declared null and void. If it were not the case it would work an injustice and hardship on a party, such as the respondent in this case, who laboured and contributed towards the marriage and the accumulation of the matrimonial property under the impression that the marriage was valid. It would also unjustly enrich a dishonest party such as the appellant in this case simply because the property in question is either registered in his name or is under his control. Such a position is unconscionable and the legislature by using the expression “nullity of marriage” must have envisaged that a situation such as the present one would be covered. I should state that such situations are very common in African society because of the failure by many to realise that once they contract a “church” marriage their marriage becomes monogamous. In the circumstances, the trial judge acted properly in applying the provision of s 7 of the said Act on the issue of the division of matrimonial property.”

The applicant can therefore sue the second respondent for division of property that was acquired during their marriage in terms of s 7 (1) (a) of the Matrimonial Causes Act. The applicant has rights flowing from her nullified marriage with the second respondent. It therefore makes sense that she wants to be joined in the divorce proceedings between the respondents. Whilst the first respondent has no claim against the applicant, the applicant who was in marriage with the second respondent for forty years says she also contributed to the

same property that is going to be distributed between the two respondents. She also wants a share of that property. Clearly the applicant has established that she has a direct and substantial interest in the subject matter in the divorce proceedings between the respondents, the subject matter being the property to be distributed. S 7(1) (a) of the Matrimonial Causes Act entitles her to make a claim for the same property that the first respondent is claiming from the second respondent. Undoubtedly her rights may be adversely affected by the judgment that is going to be granted in the divorce matter. With this it cannot be disputed that the applicant is entitled to be joined in the divorce proceedings of the respondents so that she can defend her interests. She has satisfied the requirements of r 87(2)(b) of the High Court Rules.

It was submitted that once the applicant is joined in the divorce action she will file her counter claim. Whether or not she will succeed in her claim, that is for the court dealing with the divorce action to determine. My mandate in the present matter is to simply determine the issue of her joinder. The applicant's non-joinder to the respondents' divorce action will have consequences to the respondents since she can still sue the second respondent at any time for distribution of the same property the first respondent is suing for in the divorce action. The question is if she sues, what then happens to the respondents' divorce matter? Clearly this will result in two separate matters or legal proceedings against the second respondent for the distribution of the same property in terms of the Matrimonial Causes Act. The end result is multiple litigation which can be circumvented by joining the applicant to the divorce action between the respondents. The applicant's joinder in the respondents' divorce proceedings will bring convenience to the parties and to the court since two suits which largely involve the same evidence on each party's contribution to the acquisition of the assets will be dealt with at once. Joinder will enable a wholesale resolution of the issue of distribution of property between the three parties once and for all. This will also be cost effective to the parties.

In view of the foregoing the application for joinder succeeds.

In the result, I give the following order:

1. The application for joinder is granted with costs.
2. The applicant, Sylvia Mupombwa, be and is hereby joined as the 2<sup>nd</sup> defendant in Case No. HC 4775/19.
3. The applicant shall enter her appearance to defend and plea in Case No. HC 4775/19 within 10 days of this judgment.
4. Thereafter the normal rules of procedure shall apply.

*Chirorwe and Partners*, applicant's legal practitioners  
*Sinyoro and Partners*, 1<sup>st</sup> respondent's legal practitioners