THAMER SAID AHMED AL SHANFARI
versus
G.N. MLOTSHWA & CO. LEGAL PRACTITIONERS
and
GERALD N. MLOTSHWA
and
TAWANDA MAGUWUDZE
and
MINISTER OF DEFENCE, SECURITY AND WAR VETERANS
and
MINISTRY OF DEFENCE, SECURITY AND WAR VETERANS
and
RUSUNUNGUKO NKULULEKO HOLDINGS (PRIVATE) LIMITED
and
MARTIN RUSHWAYA
and
REGISTRAR OF DEEDS, HARARE

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 10 June 2021 & 10 August 2022

Opposed Application – Joinder

R. Kadani, for the applicant
R.G. Zhuwarara, for the 1st- 3rd respondents
J. Samkange, for the 4th respondent

MUSITHU J: The applicant seeks the joinder of the 1st, 2nd and 3rd respondents in proceedings pending before this court under HC 8780/19 (the main application). The application was made in terms of r 87(2)(b) of the High Court Rules, 1971 (the Rules). The relief sought is couched in the draft order as follows:

> "IT IS ORDERED THAT:-
> 1. The Application for Joinder be and is hereby granted.
> 2. The 1st, 2nd and 3rd Respondents be and are hereby joined as 7th, 8th and 9th Respondents in Case No. HC. 8780/19.
> 3. That 1st, 2nd and 3rd Respondents each be given ten (10) days within which to prepare and file their notice of opposition and opposing affidavit(s) to the court application in Case No. HC.8780/19.
> 4. That there be no order as to costs, provided that this application is not opposed. In such case, that an order for costs on a Legal Practitioner and Client scale be made against the opposing party."

BACKGROUND

On 24 October 2019, the applicant filed the main application seeking the placement of a caveat over four (4) immovable properties which were described in that application as:

- Stand No. 98, Glen Lorne Township 8 of Lot 40A Glen Lorne; and
- Stand No. 99 Glen Lorne Township 8 of Lot 40A Glen Lorne; and
- Stand No. 100 Glen Lorne Township 8 of Lot 40A Glen Lorne; and
- Stand No. 101 Glen Lorne Township 8 of Lot 40A Glen Lorne.

In the main application, the 4th to 9th respondents herein were cited as the respondents. According to the applicant, the said properties were acquired through his own finances during the period 1999 and 2001. He intended to have them registered in the name of a trust and companies in which he was the majority shareholder. All the key documentation pertaining to the acquisition and ownership of the properties as well as the applicant's business interests were allegedly in the hands of the fourth respondent's legal practitioners, who happen to be the first and second respondents herein.

The applicant claimed that sometime around 2012, he engaged Chibune & Associates Legal Practitioners to handle his legal affairs pertaining to his various business interests in Zimbabwe. The principal partner in the law firm Mr Chibune fell ill for some time, which led to the applicant transferring his files to the first respondent. He formally engaged the first respondent around 15 March 2012, and gave it mandate to manage his legal affairs. He also handed over to the first respondent for safekeeping, various original and photocopies of documents pertaining to the acquisition and ownership of the said properties. The receipt of those documents was confirmed by an email of 21 March 2012, from an employee of the first respondent one Shumi Pashapa.[1] A documents transfer sheet dated 21 February 2021, also confirmed that one Timothy Mazongo, an employee of the first respondent received the following documents from the applicant:

- 1 box file with company documents/accounts;
- Reports and copies of title deeds;
- 1 flat file with various correspondences and original title deeds for some named companies.[2]

[1] Page 46 of the record
[2] Page 48 of the record.

According to the applicant, the documents handed over to the first respondent confirmed that the said properties were owned by him in his capacity as director of Bourhill Investments (Private) Limited, Graphic Investments (Private) Limited, and as the beneficiary of the Fifty Seven Folyjon Trust. The said documents remained in the possession of the first respondent.

Further, according to the applicant the said properties were vacant when he purchased them except for a small structure on Stand 99 Glen Lorne Harare. That small structure had been demolished to make way for a main structure which was custom made to the applicant's specifications. The applicant had been residing at this property for intermittent periods as he was often resident outside the country.

The Application for the Caveat HC 8780/19

The applicant claimed that on 27 February 2019, his agent Alan Passaportis received a letter of demand from the fourth respondent's legal practitioners, who happens to be the first respondent herein. In the letter, the law firm claimed to be representing the fifth and sixth respondents herein. The same letter further claimed that the fifth respondent had regularised the ownership documents for the applicant's said properties under one of its investment companies, Folyjon Gardens (Private) Limited, the seventh respondent herein. In light of those developments, the applicant was required to facilitate a handover and takeover of the properties to the said respondents.[3]

The applicant denied ever giving authority for the disposal of his properties to the fifth and sixth respondents. His new legal practitioners, Atherstone & Cook responded to the letter from the first respondent requesting: clarification on the relationship between the Minister of Defence and War Veterans Affairs and Rusununguko Nkululeko Holdings (Pvt) Ltd; documentation pertaining to the alleged regularisation of ownership of the said properties; and clarification as to ownership of the seventh respondent.[4] Attempts to get the said information was all in vain prompting the applicant to institute proceedings under HC 8780/19. He claimed that the conduct of the fourth to eighth respondents pointed to the possibility of a fraudulent disposal and transfer of title in said the properties.

In their opposition in HC 8780/19, the first and second respondents raised preliminary points at the outset alleging that: the applicant was *peregrinus* and had not offered security; the

[3] See letter of 27 February 2019 from Titan Law on p51 of the record.
[4] p 52 of the record

applicant was a fugitive from justice with two outstanding warrants of apprehension; he was also a prohibited immigrant. The respondents also averred that GN Mlotshwa & Co Legal Practitioners should have been cited as party to those proceedings in view of all the allegations made against them.

It was within the context of the background above that the applicant sought the joinder of the first to third respondents to the main case.

The Opposition to the Application for Joinder

The application for joinder was only opposed by the first to third respondents. For that reason, any further reference to respondents hereafter shall mean the first to third respondents. The brief opposing affidavit was deposed to by the third respondent. It raised two preliminary points. Firstly, it was averred that there was no cause of action to found an application for the joinder of the three respondents. It was further averred that the applicant was seeking to join the said respondents out of necessity. It was clear from the order sought under HC 8780/19 that the first to the third respondents had no direct or substantial interest in the relief sought. The order sought could be carried into effect without any prejudice to the first to third respondents.

Secondly, the respondents averred that the application was defective for want of proper procedure. The respondents argued that r 87 (2) (b) in terms of which the application was filed only applied to action proceedings and not motion proceedings.

In conclusion, the respondents denied each and every averment made by the applicant in its case.

The Submissions and the Analysis

At the hearing of the matter, Mr *Samkange* for the fourth respondent advised that his client was content with abiding by the ruling of the court on the present application.

Wrong Procedure

Mr *Zhuwarara* for the respondents argued that r 87(2)(b) was wrongly invoked as it only applied to action procedure. Council cited the case of *Confederation of Zimbabwe Industries* v *Mbatha*[5] to support his argument. Counsel further submitted that the rule had to

[5] HH 125/15 at p3 of the judgment where the court said:

"Mr *Mpofu* also submitted that the application cannot be defeated by reason of the non-joinder of the arbitrator considering the provisions of r 87(1) of the High Court of Zimbabwe Rules, 1971 that:-

"No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party……"

be interpreted in the context of Oder 13 of the rules for one to appreciate its context. He further submitted at present, no rule existed for the joinder of a party in motion proceedings.

In his response, Mr *Kadani* for the applicant argued that the respondents were adopting a rather narrow and parochial interpretation of r 87(2)(b). There is no way that the law would have envisaged non-joinder of parties in motion proceedings. If a party could not be joined in terms of r 87(2)(b), then in terms of which other rule could they be joined? The use of the phrases *"in any cause or matter"* in r87 (2) meant that joinder in motion proceedings was catered for. The court was also urged to use its wider discretion as envisaged by r 4C to condone a departure from the rules.

The approach advocated by Mr *Zhuwarara* herein would lead to a rather untenable and absurd scenario where a party with an interest in a matter or affected by the outcome of a matter cannot be joined to motion proceedings simply because the rules of court are silent on such joinder. That could never have been the intention of the drafters of those rules. In the *CZI* v *Mbatha* case referred to by Mr *Zhuwarara*, the issue before the court was whether the non-joinder of the arbitrator in the application to set aside an arbitral award was fatal to the application. In the exchange between the court and counsel for the applicant, it was conceded that r 87(2) did not apply to motion proceedings and as a corollary the non-joinder of the arbitrator was of no effect. The issue about whether or not r 87(2) did not apply to motion proceedings was not before the court, and I hasten to say it was not argued before the court.

Rule 87 provides in the material part as follows:

"***87. Misjoinder or nonjoinder of parties***
(1) …….
(2) At <u>any stage of the proceedings in any cause or matter</u> the court may on such terms as it thinks just and either of its own motion or on 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 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;
but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised.

After we had exchanged a few "war stories" Mr *Mpofu* conceded that r 87 does not apply to application procedure, falling as it does under Order 13 dealing with actions. He however, robustly submitted that I must take a cue from that rule especially given that there is no rule whatsoever providing for joinder in applications. I agree. In fact the issues before me are capable of determination in the absence of the arbitrator. I will therefore, allow the matter to proceed without the citation of the arbitrator."

(3) A court application by any person for an order under subrule (2) adding him as a defendant shall, 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." (Underlining for emphasis).

The heading to Oder 13 under which r 87(2) resides applies to "JOINDER OF PARTIES AND ACTIONS". In my view a reading of the heading alone does not even suggest that its scope is limited to the joinder of parties in actions. Further, the use of the words "*in any cause or matter*" in subrule 2 seems to suggest to me that the intention was not to limit r 87(2) to actions alone. If that was truly the intention, then the drafters would have simply made reference to *"in any action"*. The words *"cause"* or *"matter"* are rather varied in scope and would tend to suggest a wider array of possibilities. That would support the view that r 87(2) is not just confined to the action procedure.

Assuming I am wrong in my conclusion, I would still find r 87(2) applicable to motion proceedings for the following reasons. Rule 4C of the rules reposes in this court, the power to direct, authorise or condone a departure from any provision of the rules in any case before it. That rule states as follows:

4C. Departures from rules and directions as to procedure
The court or a judge may, in relation to any particular case before it or him, as the case may be—
(*a*) direct, authorize or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of justice;
(*b*) give such directions as to procedure in respect of any matter not expressly provided for in these rules as appear to it or him, as the case may be, to be just and expedient."

Rule 4C applies to both motion and action proceedings. In fact the High Court rules of 1971 apply to both action and motion proceedings. It follows that this court is at large to direct, authorise or condone a departure from any provision of the rules in any case before it, for as long as the court is satisfied that the departure is in the interests of justice. In the absence of any other provision whether in the rules or the law permitting the joinder of parties in motion proceedings, this court's view is that it will be in the interests of justice to permit an applicant to seek the joinder of a party in motion proceedings through r 87(2).

I must also add that r 4C is in consonant with s 176 of the Constitution of Zimbabwe which vests this court with powers to regulate its own processes. That section provides as follows:

"**176 Inherent powers of Constitutional Court, Supreme Court and High Court**
The Constitutional Court, the Supreme Court and the High Court have inherent power to protect and regulate their own process and to develop the common law or the customary law, taking

> into account the interests of justice and the provisions of this Constitution." (Underlining for emphasis).

If the same rules of court permit the joinder of a party in action proceedings, there is no reason why the same rules should not be utilised in seeking the joinder of a party in motion proceedings. After all, s 56(1) of the Constitution entrenches the right to equal protection and benefit of the law. I find no merit in the preliminary objection and it is accordingly dismissed. The application is properly before the court.

Absence of Cause of Action

Whether or not the applicant has established a cause of action is tied to the merits of this application. This is because once a cause of action is established in the context of r 87(2) then there is a case for the joinder of the respondents to the main application. In *Chiwawa* v *Mutzuris & 4 Ors*[6], MAKARAU JP (as she was then), described a cause of action as follows:

> "It may be pertinent at this stage to observe that the term "cause of action" as used by *Advocate Zhou* above has been the subject of many court decisions. It is now the settled position in our law, in my view, that the term refers to when the plaintiff is aware of every fact which it would be necessary for him or her to prove in order to support his or her prayer for judgment. It is the entire set of facts that the plaintiff has to allege in his or her declaration in order to disclose a cause of action but does not include the evidence that is necessary to support such a cause of action. (See *Shinga* v *General Accident Insurance Co (Zimbabwe) Ltd* 1989 (2) ZLR 268 (HC) at 278 A- C).

For purposes of the present proceedings, the issue becomes whether the applicant has made material averments which point to the need for the respondents to be joined to these proceedings. In his heads of argument, counsel for the applicant cited the case of *Marais & Anor* v *Pangola Sugar Milling Co. & Ors*[7], where it was held that for a party to qualify for joinder, it must be established that: they have a direct and substantial interest in the issues raised in the proceedings before the court; and that their rights may be affected by the judgment of the court.

In his oral submissions, Mr *Kadani* argued that the question of interest as it relates to r 87(2)(b) is not just about the outcome of the proceedings. He also submitted that the applicant's cause of action had to be understood in the context of the role played by the respondents which gave rise to the main application. Of importance was the letter of 27 February 2019, in which the first respondent made reference to the regularisation of ownership papers in respect of properties owned by the applicant. Yet the same law firm was allegedly

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[6] HH 7/09
[7] 1961 (2) SA 698 (N)

the custodian of the same documents for the same properties on behalf of the applicant. Further, in her opposing affidavit to the main matter, the fourth respondent herein made extensive reference to the first and second respondents, and the fact that it was anomalous not to cite them in the main application.

In his submissions, Mr *Zhuwarara* argued that the mere fact that the first respondent had been mentioned in the fourth respondent's affidavit in the main application did not justify its joinder therein. The mere fact that negative factual conclusions could be drawn in the main matter did not justify the joinder of the respondents. Counsel cited the case of *Gordon* v *Department of Health Kwazulu Natal*[8].

In their heads of argument, the respondents averred that the main application was concerned with a prohibitory interdict. The requirements for such an interdict were very clear. The respondents did not claim ownership of the properties in respect of which the applicant was seeking to place a caveat. The determination of the requirements of a prohibitory interdict did not require the presence of the respondents. The respondents further alluded to two tests that can be applied in determining whether or not a party should be joined to proceedings. One approach was to ask whether there exists a separate action likely to be brought against the persons sought to be joined which would give rise to a common question of law. The second test was whether such third party had a direct and substantial interest in the order that the court might make in such proceedings.

In the case of *Shumbairerwa* v *Chiraramiro & 3 Ors*[9], CHIGUMBA J extensively dealt with the requirements of r 87(2) as follows:

> "The purpose of r 87(2)(b) is to prevent unnecessary multiplicity of litigation and to facilitate the speedy and wholesale resolution of disputes by ensuring that everyone whose legal interests are likely to be affected by the outcome of the proceedings is joined as a party to the proceedings. This ensures that all interested parties are aware of the proceedings, and advised of the outcome, which gives them an opportunity to protect their interests and fight for their rights if they so wish, rather than to wait until judgment is handed down and execution is imminent, to 'discover' that an interested party was not even aware of the proceedings. See also ***Macey's Supermarket & Bottle Store (Greencroft) Ltd* v *Edwards*[10], *Marais & Another* v *Pangola Sugar Milling Co. & Ors*[11],** where it was stated that in order to qualify to be joined as a party to any proceedings;
> (a) A party must have a direct and substantial interest in the issues raised in the proceedings before the court; and that;
> (b) His rights may be affected by the judgment of the court.

[8] 2008 (6) SA 522 (SCA) p529-530
[9] HH 731/15 at p 3 of the judgment
[10] 1964 RLR 13 (SR)
[11] 1961(2) SA 698 (N)

> The concept of a 'direct and substantial interest' in the issues raised was explored in the case of ***Henri Viljoen (Pty) Ltd* v *Waterbuck Brothers***[12]. It was concluded that a direct and substantial interest is an "interest in the right which is the subject matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation. See also ***United Watch Diamond Co & Ors* v *Disa Hotels & Anor***[13]**, and Samuel Mugano v *Fintrack & Ors***[14]**, *Nyamweda* v *Georgias***[15]**,** Zimbabwe ***Teacher's Association & Ors* v *Minister of Education & Culture*** [16]**."**

Rule 87 (2)(b) vests the court with discretion to order any person whose presence before the court is necessary to ensure that all issues in dispute in the main matter may be effectually and completely determined. The respondents herein are key players in the dispute in the main matter. The evidence before the court shows that the first respondent has custody of the crucial documents pertaining to the properties in dispute. The applicant was its client. It is the same law firm that then turned against its client and requested his presence in facilitating the handover of the same property to its other client. Surely if the documentary evidence before the court is anything to go by, there is a serious conflict interest that the respondents must explain.

The main application makes material allegations against the respondents. The applicant denied ever authorising the disposal of the properties to the fifth and sixth respondents. The documents that would have been necessary to facilitate such disposal were allegedly in the hands of the respondents. The respondents acknowledged receiving those documents. It is the respondents' letter of 27 February 2019, which triggered an approach to this court.

In her opposing affidavit in the main matter, the fourth respondent, correctly in the court's view, deferred all matters to do with allegations of impropriety in the disposal of the properties to the respondents. They are the ones who have to respond to the allegations that triggered the main application. In a letter dated 30 May 2019 addressed to the first respondent, the applicant's current legal practitioners even alluded to the *"possibility of a complaint being lodged with the Law Society against yourself personally and against your law firm, and possibly the institution of litigation against yourself and your law firm…."*[17] That letter was addressed to the second respondent herein.

Considering the circumstances of the present matter, I am satisfied that the respondents herein have a direct and substantial interest in the issues raised in the main application, and that

[12] 1953 (2) SA 151 (O)
[13] 1972 (4) SA 409(C)
[14] HH 394-13
[15] SC 200-88
[16] 1990 (2) ZLR 48 (HC).
[17] See letter on p 63 of the record.

they may be affected by the judgment of the court in that matter. There is no way that the respondents can escape any involvement in those proceedings since it is their conduct that the applicant complains about in the main application. It is partly because of the respondents' conduct that proceedings were instituted therein.

For the foregoing reasons, this court is satisfied that this is an appropriate case for the joinder of the respondents in the main matter.

COSTS

In the draft order and the heads of argument, the applicant asked for costs on a legal practitioner and client scale in the event that the application was opposed. The application was only opposed by the first to third respondents. It is partly because of the conduct of the first, second and third respondents that proceedings were instituted in the main application. The application ought not to have been opposed at all given that the respondents in the main matter had rightly argued that most of the averments made in that application could only be addressed by the three respondents herein. Mr *Zhuwarara* for the respondents did not address the court on the issue of costs. I see no reason to deny the applicant costs at the level sought.

DISPOSITION

Resultantly it is ordered that:

1. The application for joinder be and is hereby granted.
2. The first, second and third respondents be and are hereby joined as seventh, eighth and ninth respondents in Case No. HC 8780/19.
3. That first, second and third respondents each be given ten (10) days within which to prepare and file their notice of opposition and opposing affidavit(s) to the court application in Case No. HC 8780/19.
4. The first, second and third respondents shall pay the applicant's costs on a legal practitioner and client scale jointly and severally the one paying the others to be absolved.

Atherstone & Cook, legal practitioners for the applicant
Mlotshwa & Maguwudze, legal practitioners for the first, second and third respondents
Venturas & Samkange, legal practitioners for the fourth respondent