HH 194/03
HC 9038/02
Ref No: HC 2258/00
BURDOCK INVESTMENTS P/L
versus
TIME BANK OF ZIMBABWE LIMITED
and
THE REGISTRAR OF DEEDS
and
THE SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE 28 October and 19 November, 2003

Opposed Application

Mr *Ziweni* for the applicant
Mr *Mawere* for the 1st respondent.

MAKARAU J: On 29 September 2000, the first respondent obtained judgment from this court against one Kenneth Golden Mpiwa, ("Mpiwa"), The judgment was in the sum of $2 202 546-99 together with interest thereon at the rates of 56,5%p.a from 6 October 1997 to 9 April 1999, 57,5% p.a. from 10 April 1999 to 24 May 1999, 61,5% p.a. from 25 May 1999 to 30 August 1999 and 63,5% from 1 September 1999 to date of payment in full. In terms of the judgment, certain piece of land, mortgaged by Mpiwa to the first respondent, was declared specially executable.

In or about May 1998, the applicant had purchased the same piece of land from Mpiwa for the sum of $1 874 000-00. The applicant is a company that specialises in housing development schemes. After the purchase, the applicant proceeded to subdivide the land into smaller portions before in turn selling the portions to various purchasers.

In due course, a sale in execution of the property was duly scheduled and advertised by the second respondent for and on behalf of the first respondent. When the applicant became aware of the scheduled sale, it approached the first respondent and made certain overtures, the result of which was a cancellation of the sale in execution. It is common cause that the applicant had offered to pay the debt due by Mpiwa to the first respondent. After the sale had been cancelled, the parties entered into negotiations for the settlement of Mpiwa's indebtedness. The negotiations broke down, prompting the applicant to file this application.

When the property was attached in execution, the Registrar of Deeds placed a caveat against the title to the property. The caveat remains so endorsed. It is trite that unless it is uplifted, no registration of a real right can be effected against the title to the property.

Faced with the real possibility that it could not effectively deal with the piece of land, the

applicant, in this application, seeks an order compelling the first respondent to cause the caveat to be uplifted against receipt of the sum of $4 405 093-98 and for the deed of transfer in respect of the land to be released to it within three days of the uplifting of the caveat.

The first respondent has opposed the application and has challenged the applicant *locus standi* in *judico* to bring these proceedings. Whether the applicant has locus *standi,* is the sole issue that I have to determine in this application.

It is not in dispute that the applicant is not seeking to vary or rescind the judgment between first respondent and Mpiwa. What it is seeking to do is to compel the respondent to accept discharge of the judgement debt by accepting payment of the sum of $ 4 405 093-98. The applicant seeks this order against the respondent on the basis that it has a direct and substantial interest in the property that is the subject matter of the judgment. It is in my view, convenient at this stage to note that no schedule has been attached to the applicant's papers showing how the sum of $4 405 093-98 has been arrived at and its relationship, if any, to the judgement debt as set out in the first paragraph of this judgement.

It appears to me from the authorities that the courts have evolved certain principles to guide on what constitutes direct and substantial interest, sufficient to ground locus *standi* in certain circumstances. A convenient starting point in reviewing the authorities may be the case of *Morgan and Another v Salisbury Municipality 1935 AD 167.* In that case it was broadly laid out that joinder and therefore *locus standi*, could be demanded as of right in cases of joint ownership, partnerships, joint contractors and in all cases where there was is a joint financial or proprietary interest. While the list of situations where joinder is a right a laid out in the case has since been held not to be exhaustive, the principle that there are situations where joinder can be demanded as of right has not been challenged. The broadly laid out principle was affirmed in *Amalgamated Engineering Union v Minister of Labour* 1949(3) SA 637 (AD) and in *Sheshe v Vereeniging Municipality* 1951 (3) SA 661. It was in the *Sheshe* case that it was recognised that the court has discretion to grant joinder in cases other than those laid out in the *Morgan* case. In my view, in the cases listed in the *Morgan* case, *locus standi* is not an issue for debate but follows as of right from the joint legal relationship between the parties. The jurisprudential justification for this principle is in my view, not hard to find. It lies in the fact that any decision affecting the rights of one necessarily affects the right of the other because of the special legal relationship between partners and joint owners or contractors. Proceeding to issue a judgment in such cases in the absence of a partner or a joint owner or contractor will offend against the *audi alteram partem* rule in respect of the party not joined as a decision will be made against such a party's rights without affording him or her a chance to be heard. It is trite that a court may not make an order that will affect a party that is not before it.

It is settled in law that where joinder cannot be demanded as of right, then it may be granted by a court after such a court has been satisfied that the applicant has a legal

interest in the subject matter of the action that could be prejudicially affected by the judgment.

In *Nyamweda v Georgias* SC 200/88, while the court did not enunciate any legal principle upon which it was acting, it *mero motu* postponed the hearing of an appeal to allow a bond holder in the property in dispute in the appeal to elect whether or not it wanted to be joined to the proceedings. The respondent had purchased a house in the name of his mistress and in the High Court, had won an order directing the appellant to transfer the property to him. The property was mortgaged to a building Society. Part of the High Court order was to the effect that the liability to the building society be discharged before transfer was effected to the respondent. McNALLY JA (as he was then) had this to say on page 2 of the cyclostyled judgment:

"When the matter first came before us we were concerned that insufficient thought had been given to the interests of the third party involved, namely the Building Society. It has a real right in the property by virtue of the registered mortgage bond. Granted the order of the high court was conditional on " a discharge by the plaintiff of the mortgage registered by the defendant over the said property in favour of Central Africa Building Society", nonetheless, it was our view that the Building Society should be advised of the situation so that it could determine its attitude on the question of joinder."

It would appear to me that although the Supreme Court did to advert to any legal principle in the matter, it recognised that the holder of a real right may be joined to proceedings where the property over which the right exists is in dispute. As such right may be adversely affected by the judgment. In other words, the court recognised that a real right in property may be a sufficient and direct interest upon which *locus standi* can be grounded.

It is also clear from the authorities that it is not every right that will be sufficient to establish *locus standi*. The interest must be legal. It must be direct.

In my view, it is easier to understand what a legal interest in this regard is by defining what it is not. 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. In the authorities, the two qualities of the interest are often dealt with together. Thus, the interest has been described as a direct and substantial legal interest in the subject matter of the judgement. (See *United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another 1972 (2) SA 409 (CPD* and *Amalgamated Engineering Union v Minister of Labour* (supra). *).* In my view, it is easier to understand the legal nature of the interest when all its qualities are viewed together.

The interest that is sufficient to found *locus standi* must be based on a direct legal relationship between the parties. Thus it has been put in the *Shashe* case, (humorously in my view), that it is unacceptable that in "an action for the ejectment of his tenant, a landlord must join to the action as defendants his tenant's milkman, vintner or charwoman." Apart from indicating the era when the proposition was found unacceptable, the point is made that there is no direct legal relationship between the tenant's milkman, winemaker and charlady and the landlord. To allow all these to be parties to the action for eviction is as absurd as suggesting that guests in a hotel can resist

any action to evict the hotelier by the landowner. Thus in the case of *United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another 1972 (4) SA 409 (CPD),* it was held that the generally accepted view is that a subtenant has no legal interest in the contract between the landlord and the tenant, although he may have a very substantial financial or commercial interest therein that may be prejudicially affected by the judgment. In coming to this decision, the court relied among others, on the decision in the case of *Henri Viljoen (Pvt) Ltd v Awerbuch Brothers 1953 (2) SA 151 (OPD)* where after reviewing several authorities on the subject of joinder and intervention, 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.

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. An explanation of this concept is clearly given by HAROWITZ A. J. P. in the *Henri* case when he discuses the legal relationship obtaining amongst a landlord, a tenant and a subtenant. The learned judge reasons that where a landlord sues a sub-tenant for ejectment, the tenant has to be joined in the proceedings as the rights of the subtenant are derived from the rights of the tenant and a resolution upon the rights of a sub-tenant *vis a vis* the property owner, also involves an adjudication on the rights of the tenant. However, when the landlord sues his tenant, the rights of the sub- tenant are not in issue in the proceedings as the position and rights of the tenant shield these. The subtenant has no legal interest in the contract between the landlord and the tenant although he may have a very substantial financial or commercial interest therein.

It is my respectful opinion that the above represents the law and practice of this court in matters of joinder and intervention by parties in proceedings before this court. Before a party may be joined or may be allowed to intervene in proceedings before the court, he or she must establish a direct and substantial interest in the subject matter of the judgement. The interest must be such that the judgement cannot be carried into effect without adversely affecting the legal position of the party mis-joined and in circumstances where the defence of *res judicata* will not be raised against that party in future proceedings to protect that interest.

In the application before me, the applicant cannot claim as of right that it ought to have been joined to the initial proceedings under which a judgment was obtained against Mpiwa by the respondent. It has no joint proprietary interest with Mpiwa in the subject matter nor does it have a direct legal relationship with the first respondent.

In my view, the applicant has no legal interest in the judgment between the respondent and Mpiwa, although it clearly has a very substantial financial interest in the subject matter of the judgement. Using the analogy of the relationship between a landlord and a subtenant used in the *United Watch* case, it would appear to me that the applicant is placed in a similar position to that of a sub-tenant. There is no direct legal relationship between it and the respondent. Both owe the other no obligations and cannot compel each other to perform or discharge any duties. Thus, whatever interest the applicant has in the subject matter of the judgment remains financial or commercial and does not amount to a legal interest upon which it can claim *locus standi* in proceedings between the respondent and Mpiwa.

In the result, the application is dismissed with costs.

Ziweni & Company, applicant's legal practitioners
Ziumbe & Mtambanengwe, respondent's legal practitioners