ZIMBABWE TOBACCO ASSOCIATION
versus
THE RESERVE BANK OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 31 January 2013 and 20 March 2013

Advocate *Fitches*, for the applicant
T.H .Chitapi, for the respondent

MTSHIYA J: Section 3 of the Class Actions Act [*Cap 8:17*] provides as follows:-

"Application for leave to institute class action

(1) Subject to this section, the High Court may on application grant leave for the institution of a class action on behalf of any class of persons.

(2) An application for the institution of a class action –
  (a) may be made by any person, whether or not he is a member of the class of persons concerned; and

  (b) shall be made in the form and manner prescribed in rules of court.

(3) The High Court shall grant leave in terms of subs (1) if it considers that in all the circumstances of the case a class action is appropriate, and in determining whether or not this is so the court shall take into account -
  (a) whether or not a *prima facie* cause of action exists; and
  (b) the issues of fact or law which are likely to be common to the claims of individual members of the class of persons concerned; and
  (c) the existence and nature of the class of persons concerned, having regard to –
    (i) its potential size; and
    (ii) the general level of education and financial standing of its members; and
    (iii) the difficulties likely to be encountered by the members enforcing their claims individually:
    and
  (d) the extent to which the members of the class of persons concerned may be prejudiced by being bound by any judgment given in the class action; and
  (e) the nature of the relief claimed in the class action, including the amount or type of relief that each member of the class of persons concerned might claim individually: and
  (f) the availability of a suitable person to represent the class of persons concerned; and
  (g) any other relevant factor.

(4) The High Court may grant leave of sub (1) notwithstanding that-

(a) the claims of individual members of the class of persons concerned involve different issues of fact or law; or
(b) the relief sought by individual members of the class of persons concerned may require individual determination; or
(c) members of the class of persons concerned seek different forms of relief".

On 7 March 2011 and in terms of the above provision of the law, the applicant filed this application. The draft order filed with the application reads as follows:-

"1. THAT, leave be and is hereby granted to the applicant, in terms of the Class Actions Act [*Cap 8:17*], to bring a class action against the respondent;

2. THAT, the applicant be and is hereby appointed to be the representative of the persons concerned in the class actions;

3. THAT, in terms of s 7(1)(a) of the Class Actions Act [*Cap 8:17*], the applicant shall by the day of 2011-
   (a) cause to be published in *The Herald* and *The Independent* on five different dates a notice in the form attached hereto; and

   (b) cause the said notice to be read in Shona, Ndebele and English during prime time on Radio Zimbabwe and Zimbabwe Television of the Zimbabwe Broadcasting Corporation on five different dates;

4. THAT, the costs of this application shall form part of the costs of the class action to be instituted by the applicant on behalf of the persons concerned, unless there is opposition thereto by the respondent".

The respondent opposed the granting of the above relief.

I shall, for the purposes of clarity reproduce large parts of the contents of the affidavits of both parties.

In its founding affidavit the applicant refers to:

(a) a list of its members who are tobacco growers
(b) a scheme allegedly 'produced' by the respondent for the benefit of the applicants; and
(c) a schedule showing amounts allegedly owed to each of its members by the respondent.

The applicant then proceeds to aver in paras 8-13 of its founding affidavit, as follows:-

"(8) The tobacco growers represented by the applicant were obliged to participate in the scheme and did, in fact participate therein, with the result that they are owed certain sums of money by the respondent, as will more fully appear from the schedule hereunto annexed marked "C".

(9) Despite demand, the respondent has failed to pay the monies due to the tobacco growers represented by the applicant, whilst acknowledging its liability to them.

(10) The cause of action of each of the tobacco growers represented by the applicant is the same, although the amounts payable to each of them are different, and it would, therefore, be convenient, less expensive and in the interests of justice for the tobacco growers, represented by the applicant, to bring their claims against the respondent as a class action.

(11) The applicant, since it represents only tobacco growers and they are the ones affected by the Scheme (even those who have not yet given the applicant authority to assert their claims), is the appropriate person to bring the class action contemplated against the respondent.

(12) The applicant has made sufficient provision, through contributions from its members, to pay for the class action and to pay any Order of costs that may be made.

(13) If the present application were to be granted, the applicant would give notice to other potential claimants by way of a notice in *The Herald* and other newspapers enjoying a wide readership and may also cause notice of the class action to be given to other potential claimants by means of broadcasts on the radio and on television in the three official languages. It is also open to the above Honourable Court to give directions as to any other manner in which notice may be given to potential claimants, as contemplated by the Class Actions Act [*Cap 8:17*].

I must point out at the outset that annexure 'B' (the Scheme) is only produced in part, starting from para 5.19- 5.38. The extract is pulled out from the respondent's Monetary Budget Statement of 26 April 2007. The full details of the statement are not available.

As already indicated the respondent is opposed to the relief sought and in its opposing affidavit it states, in part, as follows:-

"1. Ad para 1 and 4

The respondent denies that the deponent to the affidavit is authorised to act for and by the various would be applicants as listed in annexure 'A' to the founding affidavit. In fact annexure 'A' can hardly qualify to be a power of attorney. Further, one of the intended applicants Dr Kereke whose name appears in annexure 'C' to the founding affidavit has dissociated himself from this application as more fully shown in annexure 'D' annexed hereto.

2. Ad para 2 and 3

The contents are admitted.

3. Ad para 5-8

The respondent denies that the allegations made by the applicant in these paragraphs suffice to raise a *prima facie* cause of action entitling the court to grant leave for the institution of the class action for the following reasons;

(a) Annexure 'A' to the founding affidavit as already indicated purports to be a power of attorney by the persons listed therein authorising applicant to act for them. There is nothing in the document to suggest that any one of the listed persons has authorised the applicant or the deponent to the founding affidavit to act for them.

(b) Annexure 'B' to the founding affidavit purportedly constitutes the "mechanics" of the scheme. However, the applicant does not lay down in its papers with any degree of clarity, the nature of the claim or the legal basis upon which the respondent should be liable to the farmers. In particular, it is not clear as to whether the claim is founded in contract or delict. For the avoidance of doubt the respondent denies being liable to the applicant or intended applicants in either contract or delict.

(c) It is also to be noted that the applicant makes a blanket reference to annexure 'B'. Annexure 'B' however is an extract from the Reserve Bank of Zimbabwe Monetary Budget Statement of 26 April 2007. The extract refers to "top up bonus" and "top up support price". The applicant does not state whether its intended class action arises from which of the two. This makes the claim vague and embarrassing.

(d) Even assuming that a valid *prima facie* claim exists, which is denied, the respondent avers that any relationship which could be said to have been created between it and the intended applicants was created by the monetary statement of 26 April 2007. Any action based thereon has obviously prescribed.

(e) The applicant purports that the respondent owes the intended applicants the amounts set out in annexure 'C' to the founding affidavit. Annexure 'C' when analysed is a statement produced by the respondent. It is clearly headed in bold lettering "**Schedule B – List of Tobacco Farmers owed by Government"** (my own underlining). A consideration of annexure 'C' thereof does not raise a case of liability by the respondent to the person listed thereon but a liability by Government.

(f) The respondent further notes that the applicant avers that the applicants were obliged to participate and in fact participated in the scheme. It is however not stated or clear from the papers how the alleged obligation to participate arose or how participation was carried out. This demonstrates further the failure by applicant to proffer a *prima facie* cause of action.

4. Ad para 9

Respondent denies that it has acknowledged its liability to the applicants and puts the applicant to the proof thereof. In fact the applicant has annexed annexure 'C' which clearly shows that the liability to the persons listed is by the Government of Zimbabwe and not by the respondent".

I must point out that the issue of authority to represent the would plaintiffs listed in Annexure 'A' of the applicant's founding affidavit was addressed by the applicant when, in its answering affidavit filed on 12 April 2011, it furnished powers of attorney signed by the would be plaintiffs prior to 7March 2011 when this application was filed. That issue therefore fell away.

In its heads of argument, the applicant argues for the grant of leave to file a class action mainly because:-

"2. ……. a *prima facie* cause of action exists; and the issues of fact or law are common to the claims of the individual members of the class of persons concerned. The existence and size of the class; their general level of education and financial standing and the difficulties likely to be encountered by the members enforcing their claims individually, are factors in their favour. In addition the applicant is available as a suitable person to represent the class concerned".

There is, however, nothing in this application that reveals the "general level of education and financial standing and the difficulties likely to be encountered by the members enforcing their claims individually". In all honesty, the above submission does no satisfy that requirement.

The applicant goes on to allege unjust enrichment. It submits:-

"6. This constitutes unjust enrichment, and is an alternative cause of action available to the applicant and its growers. The general action against unjust enrichment has been recognized in Zimbabwe law since 1996 when it was accepted in the leading watershed case of **Industrial Equity Limited v Walker 1996 1 ZLR 269 (H).**

7 As held in that case at p 298 and 300B – 302G, "The principle prerequisites for a general action on enrichment are:-

(a) The defendant must be enriched;

(b) The enrichment must be at the expense of another (i.e. the plaintiff must be impoverished and there must be a casual connection between enrichment and impoverishment)

(c) The case should not come under the scope of one of the classical enrichment actions

(d) There should be no positive rule of law which refuses an action to the impoverished person".

8. In the instant matter, the facts reveal that the respondent has been enriched; the enrichment was at the expense of the tobacco growers, namely they have been impoverished and the causal connection between the enrichment and impoverishment was the nexus of the Tobacco Retention Scheme imposed by the respondent".

The applicant also makes the following submission on the issue of prescription.

"1. The other vain attempt to avoid liability is the respondent's purported assertion of prescription. This cannot avail the respondent as liability for the debt was acknowledged in the respondent's public notice dated 27th April 2009. Acknowledgement of debt interrupts the running of prescription. (Prescription Act [*Cap 8:11* s 18], and it is not a factor that need detain the Honourable Court for the purpose of the present enquiry".

On the issue of who should be sued for the debt, the applicant submits as follows:-

"1. As stated in para 4(e) of the answering affidavit, the scheme was devised by the respondent, which according to statute is a body corporate, capable of suing and being sued in its own name. Ineluctably, since the respondent devised this scheme, and promised to pay the amounts in question, the liability attaches to the respondent. Over and above this, when each sale took place during the 2008 tobacco selling season, 25% of the amount due to each grower was deducted and paid over the respondent … The *vinculum iuris* pertains between the applicant and the respondent.

2. This purported assertion is merely a chimera or mirage, and is answered by joining the party whom the respondent points to. The Honourable Court, has the power in terms of High Court Rule 87 (1) which stipulates that: "No cause or matter shall be defeated by reason of the mis-joinder or non-joinder of any party and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interest of the persons who are parties to the cause or matter".

3. In addition by Rule 87 (2)(a), a court has the power at any stage of the proceedings to order any person who has been improperly or unnecessarily made a party to or who has for any reason ceased to be a proper or necessary party, to cease to be a party.

4 High Court Rule 87 (2) (b) puts the matter beyond doubt. It stipulates: "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 motion or on application, 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 maybe effectually and completely determined and adjudicated upon, to be added as a party":

5. This has been the approach where, for instance, a person sued intimates that a company ought to have been sued".

On its part the respondent submitted that the applicant had failed to present a *prima facie* case before the court and that the purported cause of action had prescribed.

In the main the respondent submitted that:-

"3. The applicant simply avers in para 8 of its founding affidavit that its members were obliged to participate in the scheme but does note mention with any degree of clarity as to how the obligation arose or the nature of the same. In other words the applicant does not show whether it sues in contact or delict and indeed if in contract or delict, it does not give the details of how the cause of action arose.

4. The monetary policy referred to in the applicant's founding affidavit and annexed thereto as annexure 'B' does not raise a cause of action against the respondent. In clause 5.32 of the said annexure, it is clearly stated that the respondent's role is to assist the Government to raise the necessary funding. The rendering of such assistance would not amount to the creation of a legal obligation between the applicant's members and the respondent.

5. There is nowhere in annexure 'B' where the respondent has promised or undertaken to make a payment. At best, there is reference in clause 5.33 of annexure 'B' to the Minister of Agriculture as having made a pronouncement. A clear reading within context would simply lead to a conclusion that the respondent simply stated a policy which would be implemented by Government and never took upon itself the responsibility to implement the policy.

6. Annexure 'C' to the applicant's founding affidavit, is a list of farmers compiled by the respondent as being owed money by the Government. It is naïve with respect for applicants to say that it cannot draw a distinction between Government and the respondent. The respondent as a creature of statute and a body corporate cannot be and is not Government. Annexure 'C' does not amount to an admission of liability by respondent and if the applicant's members did not understand the context within which the word Government was used, the logical thing was to seek clarification from the publisher of the article.

7. There are no credible facts alleged such as would support the applicant's assertion in para 9 of the founding affidavit that the respondent has acknowledged liability to the tobacco growers. The cause of action cannot

therefore be based upon an acknowledgment of liability as there is no such acknowledgment shown by applicant.

In determining this application I take note that annexure 'A' is the list of tobacco growers who intend to bring a class action against the respondent. In respect of that list a total 114 signed powers of attorney authorising Rodney Ambrose to file this application. Nine of the powers of attorney were defective in that they were either not signed or properly dated. That means a total of 105 tobacco growers authorised the filing of this application.

I also notice that when it comes to the total 'debt', Annexure 'C' lists the number of tobacco growers and indicates the sums of money they are owed by "Government". That list, (Annexure C), has a total of 1 095 tobacco growers as opposed to the 105 tobacco growers who have formally authorised the filing of this application.

Given the fact that the sum of US$18 000 000-00 attaches to a total of 1 095 tobacco growers owed money by 'Government', I do not think the application provides enough information to be taken into account by this court in terms of s 3(3)(c) of the Act namely:-

"(c) the existence and nature of the class of persons concerned having regard to

(i) Potential size; and
(ii) the general level of education and financial standing of its members; and
(iii) the difficulties likely to be encountered by the members enforcing their claims individually".

Furthermore, in its founding affidavit, the applicant makes reference to "even those who have not yet given the applicant authority to assert their claims …. potential claimants". There is therefore a lot that remains unknown.

This application, as already said, does not give the court adequate information relating to the aspects referred to above. Notwithstanding the actual number of the would be plaintiffs *in casu*, there is nowhere in this application where one would find useful information relating to 'the general level of education and financial standing of each member' to be included in the class action.

The above observation, however, can only become relevant upon this court having found that:-

"(a) …… a *prima facie* cause of action exists; and

(b) The issues of fact or law which are likely to be common to the claims of individual members of the class of persons concerned"

In my view, everything else should be anchored on whether or not the applicant has, in terms of s 3(3) (a) of the Act, established a *prima facie* case. If that fails, then there is no merit in the application. I do not find that to be the case in this application.

In c*asu*, the respondent has, in the main, argued that in administering the Tobacco Retention Scheme it was acting as an agent of Government. That position, it argued, never changed even when it issued the public notice on 27 April 2009.

I find it extremely difficult to reject the position taken by the respondent. The applicant makes no secret that it relies on Annexure C, which is attached as a supporting document to its founding affidavit. That annexure, whose details are not before the court, confirms that the tobacco farmers listed therein are owed by "Government" (i.e the moneys listed against their names). That confirmation, in my view removes any doubt as to who the would be "plaintiffs" should proceed against. The papers before me do not disclose any contractual relationship between the applicant and the respondent. The respondent was a mere a vehicle through which Government carried out the Tobacco Retention Scheme. I therefore believe that whatever proceeds the respondent retained, such proceeds were intended for the principal i.e Government. There can therefore be no issue of unjust enrichment attaching to the respondent.

The finding that there is no *prima facie* case) disposes of the application without the need to go into the detailed submissions made by both parties on other aspects of the application. This includes the issue of prescription which would only arise if there was a contractual relationship between the applicant and the respondent.

The Tobacco Retention Scheme was a national scheme put in place by Government to assist tobacco farmers. It did not create a binding contract between the applicant and the respondent, who, as I have said, was a mere agent of Government. The scheme was put in a place by Government at a time when the issue of foreign currency was generally controlled by Central Government through the respondent (See *Reserve Bank of Zimbabwe* v *CAFCA Ltd* SC 36/2012) In that case the role of the respondent was similar to its role *in casu*.

In view of the foregoing, this application cannot succeed.

The application is dismissed with costs.

Atherstone & Cook applicant's legal practitioners
T.H. Chitapi & Associates, respondent's legal practitioners