ZUVA PETROLEUM TWO (PRIVATE) LIMITED
(formerly Shell Zimbabwe (Private) Limited)
versus
GEORGE SAFARIS (PRIVATE) LIMITED
THE MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS AND NATIONAL HOUSING
REGISTRAR OF DEEDS N.O.

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 13 April 2021 & 25 January 2023

Application for joinder of a party

Adv K Kachambwa, for the applicant
Mr M Nkomo, for the 1st respondent
Mr T Dzvetero, for the 2nd respondent

CHINAMORA J:

Introduction and background

On 13 April 2021, the parties argued an application for a joinder before me, and I reserved judgment. The applicant seeks to be joined as a respondent in the matter under HC 3727/20, where the first respondent is seeking an order compelling the second respondent to transfer, namely, 2418, 2442 and 1712 of Lot 2 of Clipsham situated in Masvingo. The application was made in terms of Order 13, Rule 87 (2) of the High Court Rules, 1971 ("the old Rules").

The background facts are that: The applicant avers that it was the owner of an undivided half share of a piece of land called the remainder of Lot 2 of Clipsham, in Masvingo, measuring 205,228 hectares held under Deed of Transfer Number 633/95 (hereinafter referred to as "the property"). The applicant states that the other half was held by the late Alison Jean Diedericks. Additionally, the applicant asserts that, in about 1991 or 1992, the late Diedericks and the applicant built a commercial complex on the property, which had a fuel service station, superette,

restaurant/fast food outlet, administration offices, truckers' rest room and curio shop. The property was lawfully acquired by the State, but the applicant and co-owner remained on the property.

Following a subdivision, the applicant avers that the complex which it built is now sitting on stands 2418 and 2442 of Lot 2 of Clipsham, which are the stands that the first respondent seeks a transfer under HC 3727/20. The applicant contends that it has always advocated for the right of retention over these properties. This is confirmed by the various correspondence that has exchanged hands amongst the applicant, the first and second respondents via their legal practitioners, among other things. I must say that these exchanges were filed and appear in the record. There is also indisputable evidence filed of record showing that the fate of the property in question has never been conclusively resolved. In this respect, the letter dated 8 November 2018 (on pages 60-61 of the record) from the applicant to the second respondent has a part which reads:

> "We have been engaging the Ministry of Local Government since 2011 and have not managed to resolve this issue. We had our last meeting with Mrs Mlalazi as the Principal Director in July 2018 together with Chief Musara, who has since taken over our service station and Diedricks who were our partners after the intervention by the Minister, Hon July Moyo. This meeting was adjourned without a resolution and we were asking the government to consider giving us back our service station". **[My own emphasis]**

Also interesting is the second respondent's letter of 27 June 2018 (on pages 58-59) to the first respondent which, in its concluding paragraphs states:

> "Zuva has since submitted a report to the Ministry that you did not meet your obligations to buy off its investment from Stand 2418 as agreed at the last meeting convened by the Ministry. … The Ministry is therefore disappointed with the way you have unilaterally, and behind our backs, changed what we agreed. Thus, given the situation as narrated, the Ministry is withholding the processing of the title deeds for the above mentioned stand because Zuva Petroleum has lodged complaints to the Minister appealing for a reversal of the deal …"

Later in this judgment, I will return to comment on the two letters whose portions I have referred to. What is further apparent from the papers is that, on many occasions the applicant sought to negotiate sale or lease of the stands in issue, but with its ultimate goal being the retention of the properties. In addition, there is an averment by the applicant, which has not been

controverted, that pursuant to one of the several discussions the applicant has held with the second respondent concerning these two immovable properties, it paid the second respondent a sum of US$17,302.50. According to the applicant, this payment preceded the agreement that was entered into between the first respondent and the second respondent on 29 September 2012, which agreement triggered the proceedings in HC 3727/20. It is the applicant's submission that the acceptance of the payment, which was not refunded, effectively created a double sale in circumstances where the applicant was the first purchaser. I will now examine the relevant law.

The law on joinder of parties to proceedings

When this matter was heard, the application for joinder was brought in terms of rule 85 of the High Court Rules, 1971, which provides that:

> "Subject to rule 86 two or more persons may be joined together in one action as plaintiffs or defendants whether in convention or in reconvention where -
>
> 1. if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions; and
> 2. all rights to relief claimed in the action, whether they are joint, several or alternative, are in respect of or arise out of the same transaction or series of transactions".

The joinder procedure was designed to prevent such multiplicities of actions which involve the same parties, issues or questions of law and fact. In *Building Electrical & Mechanical Corp (Salisbury) Ltd* vs *Johnson* 1950(4) SA 303 SR BEADLE J as he then was had this to say about the main object of this procedure at 308 C-D –

> "It is to avoid multiplicity of actions dealing with substantially the same subject matter and involving much the same evidence. Its object is to combine such actions together in one trial and so save time and expense, particularly to save the defendant from the inconvenience of proving over again the same facts for the purpose of getting the remedy to which he is entitled …"

The learned Chief Justice continued at 309 G:

> "I think therefore that when the same facts have to be conned over in order to ascertain the liability and to give relief to one or other of the parties in such a case the rule now provides that it is unnecessary to have separate actions or separate proceedings but that a third party notice may be served."

Applying the law to the facts

In *casu*, the basis of the application is that the applicant has a direct and substantial interest in the two stands in question, and that it is practically impossible for case no HC 3727/ 97 to be resolved without infringing on its own claimed entitlement to the two immovable properties. Indeed, the papers on record show that the applicant is the registered owner of the properties subject of the dispute in court. Thus, its interest in the dispute concerning properties in respect of which it holds title is obvious. Applications of this nature are in general rarely subjected to opposition unless there are compelling circumstances to do so. My view is that, at the slightest indication of a party demonstrating some direct and substantial interest in the proceedings under scrutiny, the court must avoid shutting the door against such litigants. Fairness demands they must be afforded their day in court. In other words, such a litigant must be given an opportunity to be heard. If the applicant were to be left out of the lawsuit under HC 3727/20, I do not see how it can protect its interest without placing its case before the court. Additionally, it is inconceivable how any judgment resulting from the litigation can be enforced against the applicant if it was not a party. In this context, the rendering of a judgment in the absence of an interested party was criticized by the Supreme Court in *Indium Investments (Pvt) Ltd* v *Kingshaven (Pvt) Ltd & Ors* SC 40/15, when GOWORA JA pointedly stated:

> "In *Hundah* v *Murauro* 1993 (2) ZLR 401 the point was made that for a party who has a real interest in the matter to be bound by a judgment of the court such party should be cited…If only to ensure that it is bound by whatever judgment is given. Such an order does not bind it if it was not a party".

In my view, when the applicant says it has a direct and substantial interest in HC 3727/20, it cannot sensibly be argued that the applicant's claims must not be tested. In fact, among other correspondence, I find the letter of 27 June 12018 (on pp 58-59 of the record) from the Secretary of the second respondent to The George Properties as well as the letter of 8 November 2018 (on pp 60-61 of the record) from B Shumba (the Chief Executive Officer of the applicant) to the Permanent Secretary of the second respondent to be particularly significant. I say so because the letters demonstrate that there is a live issue concerning the ultimate fate of the two properties in issue amongst all the parties involved in this case.

It is for the above reasons that, I am satisfied that there is merit in the application for joinder of the applicant to proceedings in HC 3727/20.

Disposition

In the result, it is ordered that:

1. The applicant be and is hereby joined as the third respondent in Case No HC 3727/20.
2. The first respondent shall serve upon the applicant the court application under Case No. HC 3727/20 with the necessary amendments within 5 working days of service of this order.
3. Thereafter, the applicant be and is hereby granted to file its notice of opposition and opposing affidavit(s) in Case No HC 3727/20 within 10 days after the date on which it was served with the court application and other papers in terms of para 2 hereof..
4. There shall be no order as to costs.

Ahmed and Ziyambi, applicant's legal practitioners
DNM Attorneys, first respondent's legal practitioners
Antonio & Dzvetero, second respondent's legal practitioners