

KERRY LYN NISH
and
CHARMAINE DIEDERICKS
and
GORGE SAFARIS (PRIVATE) LIMITED
and
MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS
AND NATIONAL HOUSING
and
REGISTRAR OF DEEDS N.O.

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 13 April 2021 and 27 January 2023

Opposed application for joinder

Mr *E Jera*, for the plaintiff
Mr *T Manjengwa*, for the first respondent

CHINAMORA J:

Introduction and background

This is an application in terms of Order 13, r 87 (2) (b) of the High Court Rules, 1971 (then applicable) where the applicants seek to be joined (as fourth and fifth respondents) to proceedings under HC 3727/20. The applicants aver that they have a direct and substantial interest in the issues involved in HC 3727/20. At this juncture, it is relevant to state that Zuva Petroleum Two (Pvt) Ltd brought an application for joinder to the same proceedings under HC 4323/20, which I granted in a judgment delivered as HH 55-23.

The first and second applicants are brother and sister, who contend that they are the lawful heirs to their late mother, Alison Jean Diedricks. They assert that their late mother was registered as owning an equal undivided share of Lot 2 of Clipsham, Masvingo, together with Shell Zimbabwe (Pvt) Ltd (hereinafter referred to as “Shell Zimbabwe”), at the time of acquisition of the late by the State. This is not disputed by the first respondent in its opposing affidavit. (See p 46 of the record). Giving a basis for their interest, the applicants allege that Lot 2 Clipsham was

registered in the name of the late Ms Diedricks on 4 November 1982 under Deed of Transfer No. 4951/82, and a copy of the said deed appears in the record on pages 22-24 marked Annexure "A". It is further submitted that, sometime in 1992, together with Shell Zimbabwe (now Zuva Petroleum Two (Pvt) Ltd), they built a large filling station complex. The complex comprised a food court, fast food shop, an oils room, toilets for truckers, administrative offices, tyre fitment centre and underground fuel storage tanks. This is the same complex described in HC 3423/20. The applicants further alleged that Shell Zimbabwe was given an undivided half share of Lot 2 Clipsham as security for its share of the costs incurred in constructing the complex. That one half undivided share was transferred to Shell Zimbabwe on 7 February 1995, and the title deed is on pp 25-27 of the record marked Annexure "A2".

Subsequently on 16 July 2012, the first respondent entered into a residential land development partnership with the second respondent at Lot 2 Clipsham. Because of this, the applicants argue that the first respondent had no right or expectation to acquire the permanent improvements on the said land. According to the applicants, following a subdivision, the filling station complex 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 applicants contends that it has rights and interests in Stands 2418 and 2442 and HC 3727 cannot be resolved without their inclusion. In a nutshell, that is the basis upon which the present application is founded.

The law on joinder of parties to proceedings

When this matter was heard, applications for joinder were brought in terms of r 85 of the High Court Rules 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 coned 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 applicant is the registered owner of the properties subject of the dispute in court. His interest in the dispute concerning properties that he holds title is obvious. If he were to be left out of the lawsuit, I do not see how he can protect his interest by placing his case before the court. Additionally, it is inconceivable how any judgment resulting from the litigation can be enforced against him if he 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".

It is for the above reasons that I consider this application to be merited.

Disposition

In the result, IT IS ORDERED THAT:

1. The application for joinder be and is hereby granted.
2. The first and second applicants are be and is hereby joined as the fourth and fifth respondents in Case No. HC 3727/20.

3. The first respondent shall serve upon the applicants the court application under Case No. HC 3727/20 with the necessary amendments within 5 working days of service of this order.
4. Thereafter, the first and second applicants are hereby granted leave file their notices of opposition and opposing affidavits in Case No. HC 3727/20 within 10 days after the date on which they are served with the court application and other papers in terms of para 2 hereof.
5. The costs of this application shall be in the cause.

Moyo & Jera, applicants' legal practitioners
Wintertons, first respondent's legal practitioners