

**DISTRIBUTABLE (19)**

**TIMOTHY MUYAMBO**

**v**

**(1) HORTBAC (PVT) LTD t/a LITTLE FLOWER ENTERPRISES  
(2) JAMES CHIYANGWA (3) RONALD KITULI (4) TENDAI  
BONGA (5) MINISTER OF LANDS, AGRICULTURE AND RURAL  
RESETTLEMENT**

**THE SUPREME COURT OF ZIMBABWE  
HARARE 21 October 2020 & March 31, 2021**

**CHAMBER APPLICATION**

*M. F. Chapeta*, for applicant

*T. W. Nyamakura*, for first Respondent

*K. Maeresera*, for second, third and fourth Respondents

*L. T. Muradzikwa*, for fifth respondent

**Judgment No. SC 20/21  
Civil Appeal No. SC 403/20**

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**CHITAKUNYE AJA:** This is an application for joinder wherein the applicant seeks to be joined in two appeals pending before this Court, that is, SC 304/20 and SC 326/20.

The facts leading to this application may be summarised as follows:

The applicant was a holder of an offer letter in respect of Plot 4 of Glebe Farm, Goromonzi. The second, third and fourth respondents were also holders of offer letters in

respect of separate plots on the same farm. The fifth respondent is the authority which issued the offer letters to the applicant and the second, third and fourth respondents.

The first respondent on the other hand claimed title to the farm in question.

Sometime in 2015 the first respondent approached the High Court at Harare in HC 7006/15 seeking the setting aside of the applicant's offer letter and declaring such offer letter null and void. It also sought that the fifth respondent issue an offer letter in favour of the first respondent. The applicant was cited together with fifth respondent as respondents.

On 25 October 2016 the High Court granted an order setting aside and declaring null and void the offer letter issued to the applicant by the fifth respondent. The fifth respondent was ordered to issue an offer letter to the first respondent in respect of the said piece of land.

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It is pertinent to note that whilst it was alleged that the order was granted in default of the fifth respondent, it was apparent that the applicant was represented by a legal practitioner in those proceedings.

After the issuance of the order on 25 October 2016, in the presence of applicant's legal practitioner, no challenge was raised against that order till February 2018 when the fifth respondent belatedly applied for rescission of the default judgment granted against it. Upon realising that it was out of time the fifth respondent sought the court's indulgence through an application for condonation for late filing of an application for rescission which application was granted on 16 October 2019. The fifth respondent's application for rescission was

thereafter set down for 14 November 2019. On that date the matter was apparently postponed to 28 November 2019. On 28 November the matter was removed from the roll. The applicant alleged that the removal from the roll was to await the determination of a matter at Masvingo High Court, HC 380/18, involving the first respondent on the one hand and the second, third, fourth and fifth respondents on the other hand which pertained to the second to fourth respondents' offer letters for Plots at Glebe Farm. To buttress this point the applicant tendered a notice of set down for 14 November 2019 and a letter from the registrar of the High Court. The two documents did not, however, state the reason for the removal from the roll. In fact the registrar's letter was simply a reminder to the Civil Division of the Attorney General's Office, as fifth respondent's legal practitioners, that failure to set down the matter removed from the roll within 3 months would lead to the matter being deemed abandoned in terms of paragraph 10 of Practice Direction 3/13.

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As fate would have it the application at Masvingo High Court did not go in second to fifth respondents' favour. The second to fourth respondents noted an appeal to this Court in SC 304/20. The fifth respondent also noted an appeal in SC 326/20. The two appeals are in respect of the same judgment.

In September 2020 the registrar wrote to the appellants inviting them to file their heads of arguments within 15 days. It was only after the above invitation to the appellants to file their heads of arguments that on 25 September 2020 the applicant filed this application seeking to be joined in the two appeals as third respondent in SC 304/20 and as fifth respondent in SC 326/20 and that he be allowed to file his heads of arguments within 10 days of such order.

In this application the applicant alleged that he has a direct and substantial interest in the matter as he is a holder of an offer letter for a plot at Glebe Farm. He averred that if he is not joined he may be prejudiced as he would not have been heard yet his rights and interest will be affected by the decision of this Court.

The first respondent opposed the application. It contended that the application is improper as the applicant no longer has any such interests to protect. The decision in HC 380/18 against which the second to fifth respondents have appealed does not relate to the subdivision or Plot that the applicant had been offered as that was determined on 25 October 2016 in HC 7006/15 and the applicant has not challenged that determination to date. The first respondent further contended that from the applicant's own averment he has always been aware about the Masvingo HC 380/18 matter but had not sought to be joined in that matter only to seek such joinder at the appeal stage.

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Counsel for second to fourth respondents indicated that they were willing to comply with any order granted by the court. The fifth respondent, in its response, indicated that it had no objections to the joinder.

As the applicant had not indicated the Rule under which the application was being made on the date of hearing Mr *Chipeta*, for the applicant, submitted that the application was in fact being brought in terms of r 54 of The Supreme Court Rules 2018. He also argued that the application was also premised on the common law principle of natural justice. In this regard he argued that as the applicant will be affected by the determination of the appeals he ought to be heard. It was his contention that the applicant has an interest in the subject of the appeal.

Rule 54 upon which Mr *Chipeta* said the application was premised states that:

- “(1) If prior to the hearing of an appeal it appears to a judge, or at the hearing it appears to the court, that a person who is not a party to the appeal may be so affected by an order made in it that he or she must be heard, notice may be given to that person to enable him to apply to intervene in the appeal if he or she so wishes.
- (2) If notice is given in terms of subrule (1) the person to whom notice is given may apply to the judge or to the court, as the case may be, for permission to enable him or her to intervene in the appeal.
- (3) The judge or the court hearing an application in terms of subrule (2) may refuse the application or grant it upon such terms and conditions as may seem just.” (emphasis added)

It is apparent that the Rule provides for the intervention by a third party at the instance of a judge or court. It is that initiative that enables a third party to apply to a judge or to the court to intervene in order to protect his rights and interests that may be affected by the judgment to be rendered.

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In *casu*, the application was not initiated by a notice given by a judge or court. It was at the applicant’s own initiative to be joined as a party to the appeal. Equally the applicant is not seeking to merely intervene as a third party but to be joined as a party to the appeal proceedings. It was upon Mr *Chipeta*’s failure to address the requirements of r 54 that he then resorted to the right to be heard principle arguing that the applicant has an interest that may be adversely affected by the determination of the appeal.

It is apposite to point out that the applicant, in his founding affidavit, did not refer to r 54 or to any of its requirements. It is trite that an application stands or falls on the averments made in the founding affidavit. See *Austerlands P/L v Trade and Investment Bank & Others* SC 92/05 and *Muchini v Adams & Others* SC 47/13.

The founding affidavit should have stated in terms of which rule the applicant was approaching the court to be joined on appeal and made reference to the requirements of the procedure adopted. It is clear that reference to r 54 was an ill-informed afterthought and in any case that rule is inapplicable in the circumstances of this case.

The other argument by counsel for the applicant, premised on what he referred to as the common law principle of natural justice, was equally ill-informed. This argument was premised on paragraph 3.7 of the applicant's founding affidavit in which he stated:

“My interest in the matter is obvious. As exhibited by the offer letter which I have attached as annexure A, I have a real and substantial interest to the land, and any decision to be made affecting me adversely has to be made in compliance with the laws of natural justice, including the *audi alteram partem* rule. The order sought by the 1<sup>st</sup> respondent is one such example. Clearly, the interests of justice, fairness and equity demand that I be given audience before a decision on the land is made, hence the need for my joinder as a party to the proceedings.”

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In asserting the above the applicant chose to ignore the High Court's extant order of 25 October 2016 which nullified the offer letter he is making reference to. He also chose to ignore the fact that in HC 7006/15 he was given audience and despite his participation the court granted the order against him. His greatest undoing in protecting what he deemed to be his rights and interests was in his failure to challenge the order in HC 7006/15.

Whilst it is true that a party with a direct and substantial interest may seek joinder in terms of appropriate rules to court proceedings, such joinder should relate to rights and interests that are subsisting and are subject of the proceedings.

In *Marais & Another v Pongola Sugar Milling Co. & Ors* 1961(2) SA 698(N), a two tier approach was formulated in the determination of a joinder as follows:-

- “(1) that a party must have a direct and substantial interest in the issues raised in the proceedings before the court; and that
- (2) his rights may be affected by the judgment of the court.”

In *casu*, the founding affidavit shows that the applicant premised his direct and substantial interest on the offer letter for plot 4, Glebe farm. In that vanity he seeks to ignore the extant order of 25 October 2016 which declared that offer letter null and void. It is common cause that after that order was granted the applicant never challenged it up to this date yet it is the order which affected his rights and interests.

This application, in my view, is a subtle plot to be heard by the appeal court in a matter the applicant never appealed against. The applicant cannot certainly have interests in issues to do with the plots of other offerees. As the extant order of 25 October 2016 was given with his participation and presence, he cannot ignore its consequences which are that his rights and interests deriving from his offer letter were nullified.

It is erroneous to contend that if the appeals are heard without his participation he would have been denied the opportunity to be heard. Such opportunity was afforded him before the order against him was issued. After that order he had the right to challenge that judgment but he chose not to. He cannot seek to ride on his neighbours' appeal to pursue his own case.

In any event no relief was granted against him in HC 380/18. He therefore has no basis for attacking or challenging that judgment. His grievance should be with the order in HC 7006/15 which nullified his offer letter.

Consequently, the applicant has lamentably failed to make a case for joinder.

The first respondent asked for costs. Upon considering the circumstances of the matter and the lack of merit in the applicant's case I find no reason why costs should not follow the cause.

Accordingly, it is ordered that:

1. The application be and is hereby dismissed with costs.

*Antonio & Dzvettero*, applicant's legal practitioners

*Mlotshwa & Maguwudze*, 1st respondent's legal practitioners

*Chizengeya Maeresera & Chikumba*, - 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents' legal practitioners

*Civil Division, The Attorney General's office*, 5<sup>th</sup> respondent's legal practitioners

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