TAKTA INVESTMENTS (PVT) LTD
versus
UNITIME INVESTMENTS (PVT) LTD
and
ONIYAS GUMBO
and
SHOPEX (PVT) LTD
and
ANTHONY TADIWA PAREHWA

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 25 January, 2022, 1 June 2022

Opposed Application

Adv. T Magwaliba, for the applicant.
No appearance for the first Respondent.
Adv T Mpofu, for the 2nd and third respondents
Adv L Uriri, for the 4th Respondent.

DEME J: The Applicant approached this court seeking the following relief:

"1. The application for joinder be and is hereby granted.

2. The applicant be and is hereby joined as co-Applicant in HC 5990/19.

3. The applicant shall, if it so wishes file supporting affidavits in HC 5990/19 within ten (10) days of the granting of this order.

4. The rest of the pleadings shall be dealt with in accordance with the rules of the court.

5. There shall be no order as to costs."

I will proceed to give a brief summation of the facts. The applicant is a company duly incorporated in terms of the laws of Zimbabwe. According to the applicant, it enjoyed business relationship with the first to fourth respondents. The applicant averred that it registered several affiliate companies including Tbic Investments (Pvt) Ltd, Timevest (Pvt) Ltd, Time Bank Holdings (Pvt) Ltd Time Bank of Zimbabwe Ltd and Watermount Estates (Pvt) Ltd.

It is the applicant's case that during the time it enjoyed business relationship with the respondents, the parties to this case developed disputes of commercial and criminal nature. Consequently, some police reports were made against the second respondent, according to the applicant.

The applicant also affirmed that on 31 January 2011, the first, second and the third respondents entered into the settlement agreement (hereinafter called "the agreement") to resolve the disputes between and among the parties. The applicant also asserted that it was a material term of the agreement that the second and third respondents were not going to have any claim against the applicant in respect of transactions, shares or properties sold before the date of the agreement.

The applicant further claimed that the agreement was violated in many respects which saw the first respondent seeking a declaratory order upholding the agreement under case number HC 5990/19. According to the applicant, under case number HC 5990/19 the first respondent sought to interdict the second to forth respondents from suing or claiming anything from the applicant and its affiliate companies for anything done prior to the agreement. The applicant further stated that the second respondent violated the agreement by suing the applicant under case numbers HC 2129/19 and HC 10318/19. It is the applicant's case that the second respondent also violated the agreement by suing Tbic Investments (Pvt) Ltd under case number HC 8497/18. The Applicant further alleged that the law suits in question are related to the transactions that occurred before 31 January 2011 that is to say before the agreement.

The applicant claimed that on 22 May 2020 the first respondent's legal practitioners advised the applicant of the pending proceedings under case number HC 5990/19. It is the applicant's case that it has substantial interest in case number HC 5990/19 which it is seeking to be a party thereto. According to the applicant, the first respondent is seeking the interpretation and enforcement of the agreement under case number HC 5990/19. The applicant further highlighted that it has direct and substantial interest in the interpretation and enforcement of such agreement. According to the applicant, the agreement confers the rights and benefits upon the applicant. The applicant drew the court's attention to Clauses 5(i) and 5(iii) of the agreement. The applicant also asserted that the relief sought by the first respondent under case number HC 5990/19 has direct effect on these clauses since the first respondent is seeking the enforcement of these Clauses which confer interests on the applicant. It is the applicant's affirmation that the second and 4th respondents made an amendment to the agreement which saw the deletion of Clause 5(iii). The applicant further averred that the Clause in question cannot be varied without its consent to such variation.

The applicant further alleged that the doctrine of privity of contract does not apply to it on the basis that the agreement satisfies the requirements of *stipulatio alteri* which is an *exception to the privity of contract*.

The application is being opposed by the second to fourth respondents. The second and third respondents denied that there were commercial and criminal disputes between themselves and the applicant. They further asserted that even if there were such disputes, the same disputes cannot be resolved by way of the matter filed under case number HC 5990/19. The second and third respondents further stated that the agreement does not in any way assist the applicant in resolving the alleged disputes as the agreement was amended. They also affirmed that the amendment made to the agreement obliterated the direct and substantial interest of the applicant.

On behalf of the second and third respondents, Adv Mpofu submitted that the present application is an abuse of court process by Mr. Tande, the shareholder of the Applicant's affiliate companies who is employing dilatory tactics. He further argued that this can be verified by the applicant's desire to be joined to case number HC 5990/19 as a co-Applicant and not as a respondent. He also contended that the doctrine of privity of contract prevents the applicant from filing the present application since it was not a party to the agreement.

The fourth respondent averred that he fully associates himself with the Opposing Affidavit filed on behalf of the second and the third respondents. He further affirmed that the applicant has no direct and substantial interest in case number HC 5990/19. The fourth respondent also asserted that the applicant is not privy to the addendum which amended the agreement and therefore the applicant lacks interest in case number HC 5990/19, according to the fourth respondent. The fourth respondent, in addition, averred that the applicant has failed to establish its claim against him.

The present application was filed under Rule 85 of the High Court Rules, 1971 which provides as follows:-

"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—

(a) If separate action 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

(b) All rights to relief claimed in the action, whether they are joint, several or alternative, are in respect of or arise out of same transaction or series of transactions."

A careful analysis of the dispute among the parties, in my view, gives emergence to a common question of law or fact between the Applicant and its affiliates on one hand together with the respondents in this matter. The mentioning of the applicant in the agreement further supports the development of a common question of law or fact among the parties hereto. The applicant and its affiliates are mentioned in Clauses 5(i) and 5(iii) of the agreement.

Clause 5(i) of the agreement provides as follows:

"The parties noted that two properties, namely Stand 140 Christonbank Township 9 of Maryvale of Mugutu of Great B measuring 20 hectares and Lot 4 of Bannockburn measuring about 72 hectares being a proposed subdivision of the remainder of Bannockburn, which when sold by Assetfin (Pvt) Ltd had not been transferred to the purchasers. Parties hereby agree that Antony Parehwa on behalf of Assetfin (Pvt) Ltd shall make an offer to purchase from Takta Investments (Pvt) Ltd the above mentioned two properties, at a total price of US$50 000 for both properties."

Clause 5(iii) provides as follows:

"Shopex (Pvt) Ltd, Assetfin (Pvt) Ltd and Oniyas Gumbo in their personal capacities or on behalf of a company shall not have a claim on Takta Investments (Pvt) Ltd, Watermount Estates (Pvt) Ltd, Trimiant Investments (Pvt) Ltd, Chrisco (Pvt) Ltd, TBIC Investments (Pvt) Ltd, Timevest Company (Pvt) Ltd, Time Bank Holding Company (Pvt) Ltd and Time Bank of Zimbabwe Ltd, in respect of transactions or shares or properties purchased or sold before the date of this agreement."

In addition to mentioning the applicant and its affiliates, the agreement confers some interests on the applicant and its affiliates. The agreement, having been prepared by the first, second and third respondents, mentions the names of the applicant and its affiliates. Clause 5(iii) confers a degree of immunity, in favour of the applicant and its affiliates, from some claims by the second, third and fourth respondents in respect of transactions or shares or properties purchased or sold before the date of the agreement. In my view, this creates a common question of law or fact among the parties hereto.

Having established that a common question of law or fact arises by virtue of this agreement, it is now pertinent to examine whether all rights to relief claimed may arise out of the same transaction or series of transactions. In my view, it is apparent that the rights to relief that the applicant is seeking to have determined arises out of the same transaction, the same

agreement which the first respondent is seeking to have enforced under case number HC 5990/19. The first respondent, under case number HC 5990/19, is seeking the following relief:

".(a) The settlement agreement, namely Annexure 2 to the founding affidavit, which was entered into by the applicant, the first respondent and the second respondent on 31 January 2011 is valid and binding on the first and second respondents.

(c) All changes made to the settlement agreement by the first, second and third respondents are of no force or effect.
(d) The rights conferred by the said settlement on the companies mentioned in clause 5(iii) of such agreement cannot be taken away from them without their consent.
(e) First and second respondents are hereby interdicted from claiming any company shares or property from any of the companies named in clause 5(iii) of the agreement referred to in paragraph of this order.
(f) The first and second respondents are interdicted from suing any of the companies named in the said clause 5(iii) in connection with any transaction or a sale or purchase or shares or property which was done by or in connection with such companies before 31 January 2011.
(g) The first, second and third respondents shall, jointly and severally the one paying and the others to be absolved, pay the costs of suit on a legal practitioner and client scale."

A careful assessment of the first respondent's relief under case number HC 5990/19 and Clause 5(iii) of the agreement establishes that the first respondent is also seeking to protect the interests of the applicant. The relief sought by the first respondent under case number HC 5990/19 creates a common question of law or fact between the parties under case number HC 5990/19 and the applicant. In my view, the present application satisfies the requirements set out in r 85 of the High Court Rules, 1971.

Our courts have over time established jurisprudential discourses on the basic requirements of the present application. In the case of Marais & Anor v Pongola Sugar Milling Co & Ors[1], the following have been confirmed to be some of the key requirements for the present application:

1. That a party must have a direct and substantial interest in the issues raised in the proceedings.
2. That his rights may be affected by the judgement of the court.

In light of the arguments advanced by the applicant in relation to its interests under case number HC 5990/19, in my view, the applicant has managed to set up a reasonably arguable

[1] 1961 (2) SA 698 (N).

case of its substantial interest in that matter. The applicant may, if the present application is not granted, be affected by the judgment under case number HC 5990/19.

Courts have, on numerous occasions, emphasised that where it is clear that the application for joinder is without merit, the court must decline to grant the application as doing so would cause injustice to the Respondents in the form of being put to unnecessary expense. Mathonsi J., as he then was, in the case of MBCA Bank Ltd vs RBZ and Anor[2], cited with approval the case of Pitsiladi & Ors vs ABSA Bank & Ors[3], where the court emphasised that—

"It must be accepted that where the applicant's case against the third party is undoubtedly without any merit, the granting of leave to join the third party would be pointless and be prejudicial to the plaintiff, whose claims would be unnecessarily delayed and to the prejudice of the third party, who would unnecessarily become a party to the proceedings and incur costs."

Applications of this nature falls squarely within the discretion of the court which must conscientiously and thoughtfully consider the application placed before it. In the case of MBCA Bank Ltd vs RBZ and Anor (supra) the court held that—

"So joinder of a party to proceedings is something within the discretion of the court, which discretion of course should be exercised judiciously."

In the case of Sibanda v Sibanda and Anor[4], cited with approval in the case of MBCA Bank Ltd v RBZ and Anor (supra), the court held that:

"It is therefore, pertinent to enquire as to the consequences of a non-joinder. The prejudice is there for anyone to see: there will be a lot of inconvenience, not only to the applicant, but to the court as well. No doubt this will result in the applicant being oppressed and, in an attempt to extricate herself there from, there will be a multiplicity of actions, a situation which should be avoided if possible. See Morgan & Anor v Salisbury Municipality 1933 AD 167."

[2] HH482/15.
[3] 2007 (4) SA 478.
[4] 2009 (1) ZLR 64.

Thus, prejudice is not only to be viewed from the Applicant's perspective but from the court's perspective as well. Without doubt, the Applicant may stand to suffer if the relief sought is not granted. Proceedings where the provisions of Clause 5(iii) are at the centre of the dispute under case number HC 5990/19 would attract the interests of the Applicant as that clause conferred some immunity upon the Applicant. The Applicant may need to make its representations, if any, under case number HC 5990/19 for the court to be well informed about its interests. If the present application is refused, the court may be inconvenienced as there may be multiplicity of cases filed by the Applicant and its affiliates in endeavour to seek the enforcement of the agreement.

The second to fourth Respondents argued that the January agreement is no longer enforceable as this was amended to remove Clauses 5(i) and 5(iii) of the agreement. Whether or not such amendment to the agreement was procedurally done is not before my attention. The merits of the amendments are going to form part of the issues under case number HC 5990/19. It is premature for me to discuss the merits of such amendments as doing so would pre-empt the proceedings under case number HC 5990/19.

The second to fourth Respondents have, banking on the doctrine of privity of contract, also argued that the Applicant cannot seek to enforce the agreement to which it was not a party. On the other hand, the Applicant, relying on the doctrine of *stipulatio alteri* which *is an exception to the privity of contract*, contended that its case meets the test of the doctrine. Patrick Bracher[5], emphasised the following to be principles of the *stipulatio* alteri doctrine:

"whether the third party accepts the benefit or actually becomes a party to the contract;

- when the third party is entitled to accept the benefit;
- how the third party is entitled to accept the benefit;
- whether a person stipulating for a benefit in favour of the third party can withdraw that stipulation before acceptance."

[5] https://www.financialinstitutionslegalsnapshot.com › pri

I am of the view that the Applicant's circumstances present a reasonably arguable case for the exemption to the privity of contract. Thus, the Applicant should be allowed to argue its case under case number HC 5990/19.

The Applicant is seeking to be joined as a party to case number HC 5990/19 as the co-Applicant. The counsel for the second and the third Respondents argued that this may prejudice parties to the proceedings as doing so would reopen the case which has been closed.

Most, if not all paragraphs of the draft order under case number HC 5990/19 focus on the enforcement and interpretation of Clause 5(iii) of the agreement. As highlighted before, this clause confers rights and interests upon the Applicant and its affiliates in the form of immunity to law suit. Thus, I find it convenient that the Applicant be joined as a party to HC 5990/19 as the second Applicant. This will place the Applicant in a better position to assert its rights. Given that the Applicant will be given a time frame within which to file its supporting affidavit if it so wishes, there will be no undue delay of proceedings under case number HC 5990/19, in my view. Further, the Applicant will not be prejudiced if the first Respondent chooses to withdraw or abandon the matter under case number HC 5990/19. Under such circumstances, the Applicant may continue with that matter in the event of the first Respondent's withdrawal or abandonment. Thus, it is in the interest of justice that the Applicant be joined in case number HC 5990/19 as the second Applicant.

I am of the view that the present application has met the basic or minimum requirements of the application for joinder. In the result, it is ordered as follows:

(a) The application for joinder be and is hereby granted.
(b) The applicant be and is hereby joined as the second Applicant in HC 5990/19.

(c) The applicant shall, if it so wishes file supporting affidavit in HC 5990/19 within ten (10) days of the granting of this order.

(d) The rest of the pleadings shall be dealt with in accordance with the rules of the court.

(e) There shall be no order as to costs.

Kadzere, Hungwe and Mandevere, Applicant's Legal Practitioners.
Gill, Godlonton and Gerrans, second and third Respondents' Legal Practitioners.
Ngarava, Moyo and Chikono, fourth Respondent's Legal Practitioners.