

FEDERATION OF NON-GOVERNMENTAL  
ORGANISATION TRUST  
and  
GOODSON NGUNI  
versus  
SYBETH MUSENGEZI  
and  
ZIMBABWE AFRICAN NATIONAL UNION  
PATRIOTIC FRONT  
and  
EMMERSON DAMBUDZO MNANGAGWA (N.O)  
and  
OBERT MPOFU (N.O)  
and  
PATRICK CHINAMASA (N.O)  
and  
PHELEKEZELA MPHOKO (N.O)  
and  
IGNATIUS CHOMBO (N.O)

HIGH COURT OF ZIMBABWE  
DUBE JP  
HARARE, 6 & 21 September 2022

### **Application for Joinder of Parties**

*T.K Hove*, for the 1<sup>st</sup> & 2<sup>nd</sup> applicants,  
*N Sithole*, for the 1<sup>st</sup> respondent,  
No Appearance for the 2<sup>nd</sup> to 7<sup>th</sup> respondents

### **DUBE JP:**

#### *Background facts*

1. This is an application for joinder of parties.
2. The first respondent instituted proceedings under HC5687 /21 wherein he challenges the ascendancy of President Emmerson Dambudzo Mnangagwa to the helm of the second respondent, the Zimbabwe African National Union Patriotic Front, [ZANU PF, hereinafter referred as the party], to become its President and First Secretary in 2017. He also assumed the role of President of the Republic of Zimbabwe. The first respondent claims that he is a member of the party and is aggrieved by how the

succession of the third respondent to the helm of ZANU PF was handled after an operation termed, “Operation Restore Legacy”. He claims that the conveners of the meeting had no authority to call the meeting. The respondent seeks an order declaring that the special session of the Central Committee convened on 19 November 2017 was *ultra vires* the provisions of the constitution of the party and seeks an order setting aside resolutions made on the basis that they are unlawful and invalid. In addition, he seeks an order that the sixth respondent take the necessary steps to reconvene and preside over a special session of the Central Committee. It is to these pending proceedings the applicants seek to be joined.

3. In this application, the first applicant averred that it is a trust registered in terms of the laws of Zimbabwe and consists of several non-governmental organisations and that its aim is to “achieve a democratic country in which the rule of law and constitutionalism reign supreme”. Further, that the case’s complexion affects the jurisprudence of Zimbabwe in observance of constitutional values as enshrined in the Constitution and that whenever litigation of a public interest is mounted by anyone, involving interpretation of private or public affairs in the context of enforcing the rule of law and legal values, it develops an interest in ensuring that it assists the court in investigating the facts and law and come up with a judicial pronouncement which is in accordance with the prevailing laws of the land.
4. The second applicant averred that he is a private citizen acting on his own behalf based on his membership of the political party. Further that he represents the first applicant as its trustee and has authority to represent it in these proceedings. He seeks to protect his own personal interests as a citizen. He claims that the third respondent’s ascendancy to the helm of the party is legitimate after the resignation of the former President Robert Gabriel Mugabe and chronicles the events leading to the ascendancy. He averred that he has made his own enquiries and established that the first respondent is not a genuine member of the party having assumed his membership fraudulently. He alleges that the first respondent has a misapprehension of the facts and wants to put the correct facts before the court and protect his own personal interest as a citizen and prevent a non-member of the party from abusing court process and causing despondency.
5. The applicants’ position is that the special session of the Central Committee was legal and acceptable. In addition, that first respondent’s court challenge is moot and has prescribed. They contended that the litigation is in the public interest and that they have

a direct and substantial interest in the subject matter and outcome of the proceedings warranting their joinder to the pending proceedings, “to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon”. The applicants argued that the first respondent has failed to show that their joinder will cause him to suffer any prejudice.

6. The sixth and seventh respondents are the former Vice President of Zimbabwe and former secretary for administration of the party respectively and did not oppose the application. The first respondent shall henceforth be referred to as the respondent. In his opposing affidavit, the respondent averred that a trust acts through all its trustees and may not delegate its collectivity to a single trustee and is not properly before the court in that it has been brought to court by an ill constituted and unauthorised person to represent it in this litigation. He contended that the trust has not exhibited a legal or substantial interest in the affairs of the party and established why it should concern itself with and be affected by suits involving political interests.
7. The respondent did not impugn the existence or identity of the trust and proceeded from the premise that there is a trust. He did not request for a copy of the trust deed nor did he refute that the trust is registered or duly constituted. He did not challenge the purpose or objectives of the trust, the identity and number of the beneficiaries and the failure on the part of the applicants to show that the second applicant is a trustee thereof. With regards the second respondent, he contended that the second applicant is a member of the party whose interests and rights are sufficiently protected in the pending proceedings where the party is represented by the secretary for legal affairs. He contended that the second applicant’s input does not add value to the pending proceedings and that he lacks substantial interest and *locus standi* to join the pending litigation.
8. The respondent’s case took a new twist in his heads of argument and launched a factual attack on the trust. In response, the applicants contended that the respondent’s heads of argument do not comply with rule r59(18), of High Court Rules 2021 in that the respondent chose to repeat evidence from his opposing affidavit, introduced new evidence and failed to outline the law he relied on and urged the court to strike off the heads of argument.
9. The core of this application is the interest of the applicants in the pending proceedings. The question whether the trust exists, its terms and whether the second applicant is a

trustee thereof is a question of fact and raises contentious issues. The applicants were not alerted to questions of the formation, contents of the trust deed and structure of the trust would be put into issue. The issues were not properly placed before the court. The purpose of a pleading is to bring to the attention of the other party as well as the court the issues in contention between the parties. Pleadings must be crafted with clarity and precision. This objective can only be met in circumstances alluded to in *National Director of Public Prosecutions v Phillips & Ors* 2002 [4] SA 60 W at 106E-H where the court remarked thus:

“Pleadings must be lucid, logical and intelligible. A litigant must plead his cause of action or defence with at least such clarity and precision as is reasonably necessary to alert his opponent to the case he has to meet. A litigant who fails to do so may not thereafter advance a contention of law or fact if its determination may depend on evidence which his opponent has failed to place before the court because he was not sufficiently alerted to its relevance.”

10. It is a principle of our law that a party must deal with each and every material allegation of fact which he does not admit by denying it clearly. Any facts not specifically dealt with are taken to have been admitted and need not be proved by an opponent who has no legal obligation to prove allegations that are not raised as part of a defence in a notice of opposition or plea. This approach has given rise to the principle that what has not been denied specifically or by implication in pleadings is taken as have been admitted.
11. The respondent's trajectory in his heads of argument is that the trust does not exist. By raising new factual issues in his heads of argument, the respondent has led evidence and pleaded his defence in his heads of argument. The respondent ought to have pleaded his defence with clarity and precision thereby alerting the applicants of the case they were required to meet. A litigant who fails to do so may not thereafter be able to advance any contention of law or fact if its determination may depend on evidence which his opponent has failed to place before the court because he was not sufficiently alerted to its relevance. The respondent cannot be allowed to rely on these issues and contentions in his heads of argument without him having alerted the applicants to these issues thereby alerting them to the case they were required to meet. There being no challenge to the averment that the first applicant is a trust, the fact of the existence of the trust, identity of its trustees and related issues which are questions of fact, these contentions cannot be properly advanced. The position is trite that he who alleges must prove. No evidence to the contrary was produced. The court need not decide these

points. I get a sense that the opposition to the application is an afterthought and reject an attempt to pull the carpet from under the applicants' feet.

12. Rule 11(2) of the High Court Rules 2021 provides that a trust can sue and be sued in its own name. A trustee or trustees may sue on behalf of a trust, see *Gold Mining and Minerals Development Trust v Zimbabwe Miners Federation* 2006(1) ZLR 174; *WLSA & Ors v Mandaza* 2006(1) ZLR 174: A trust has no legal personality. It acts through its trustees who and carry out its objectives for and on behalf its beneficiaries. It is controlled by the trust deed which specifies what the trustees can and cannot do. Where proceedings are brought by a trust, it ought to be represented by all its trustees in all litigation unless the trust deed stipulates otherwise, see *Trustees of Leonard Cheshire Homes Zimbabwe Central Trust v Chiite and Ors* SC 306 / 10; *Mutanga v Mutanga* SC 85/22. Where a trust deed stipulates that one trustee may represent a trust in litigation and a trustee is duly nominated and authorised by other trustees to bring proceedings on behalf of a trust, he has an entitlement to bring proceedings on behalf of the trust thereby obviating the requirement for citation or joinder of all the trustees.
13. In this case ,the provisions of the trust deed are not known and it was not shown that the trust deed does not allow one trustee to bring proceedings on behalf of the trust. The applicants produced a document termed “minutes of a meeting of trustees and members” authorising the second applicant, a president and a trustee of the first applicant to represent the trust in these proceedings. The respondent has not produced contrary evidence .The court is obliged to accept that the second applicant was duly authorised to institute proceedings on its behalf. It should not matter that a document authorising institution of proceedings is in one format or another where there is evidence of a resolution authorising institution of proceedings.
14. Section 32 (12) (b) of the High Court Rules 2021 provides for joinder of parties and stipulates as follows:
  - “(12) 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 initiative or on application—
    - (a) .....
    - (b) 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 may be effectually and completely determined and adjudicated upon, to be added as a party:”
15. The purpose of r32 (12) (b) is to prevent unnecessary multiplicity of litigation and ensure expeditious and wholesale resolution of matters. The rule seeks to ensure that all matters involving interested parties are adjudicated upon at the same time where

possible. Courts frown upon multiplicity of matters and will readily order joinder of a party where a direct and substantial interest in the subject matter of litigation and is likely to be affected by the judgment of the court.

16. A party to joinder must have a direct and substantial interest in the issues raised in the proceedings which may be prejudicially affected by the judgment of the court, see *Marais & Anor v Pongola Sugar Milling Co* 1961(2) SA 698 *Nyamweda v Georgias* SC 200/88; *Eunice Sumbairirwa v Chiraramo* HH 731/15; *Maceys Supermarket and Bottlestore v Edwards* 1964 (2) SA 698 (N). The interest in issues raised by the matter must be sufficient. Not every form of interest entitles one to be joined to pending proceedings. Only a showing of legal interest will suffice for joinder as party. In *SA Riding for the Disabled Association v Regional Land Claims Commissioner & Others* 2017 (5) SA 1 (CC) the test for joinder was articulated as follows:

“It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought. But the applicant does not have to satisfy the court at the stage of intervention that it will succeed. It is sufficient for such applicant to make allegations which, if proved, would entitle it to relief.”

17. A litigant who seeks to join or intervene in proceedings must show that he has a legal interest in the subject matter of the proceedings and hence that he has *locus standi*. He must show that his interest is separate and does not share his interest with any other person already cited as part of the proceedings he wishes to join. The rules of justice demand that any person who is likely to be affected by an order of court be afforded an opportunity to take part in the litigation. Joinder will be refused where the party sought to be joined has no direct and substantial interest in the pending case, the joinder is likely to cause prejudice to the other party and where the litigation has been mounted solely to embarrass the other party. The powers given to the court by r32 (12) (b) are very wide and extensive and give to the court wide discretionary powers. The court’s discretion must be exercised judiciously, see *MBCA Bank v RBZ* HH 482-2015.
18. It is generally accepted that a public interest organisation has an entitlement to participate in litigation where it seeks to bring to the attention of the court issues that are new or have not been dealt with before. The only way that a public interest organisation may be able to intervene in pending litigation is if it applies for its joinder.

This is possible even in a case where the public interest organisation is not directly connected to the facts in dispute as long as it can show that it has a legal interest in the proceedings. It should be able to advance further evidence or argument that will assist the court in resolving the dispute before it.

19. In *Hlope v Freedom Under Law (FUL) 2022 (2) SA 523, (GJ)* the court dealt with an application by a trust to intervene in pending proceedings and held that a public interest trust or organisation could interfere in proceedings where it has as its objectives enforcement of constitutional values and concerns. The court articulated the approach the courts should take as follows:

“In respect of matters that implicate constitutional values and concerns, a generous approach to joinder has been recognised and consistently applied”.

20. The first applicant defines itself as a public interest trust which subscribes to democracy, rule of law, governance issues and the enforcement of constitutional values and concerns. Its objectives as stated by the applicants are to ensure that constitutionalism reigns supreme in the country, safeguard the rule of law and ensure the presence of democracy in the country. It has an interest in public interest litigation in pursuit of the rule of law with the objective of championing of democracy. The first applicant trust is a public interest organisation and pursues that objective. The appearance is that the first applicant is a *bona fide* public interest organisation.
21. The pending proceedings concern the conduct of party members vis -a vis the provisions of the ZANU PF constitution and implicate constitutional values and concerns of the first applicant. It has a cause of action. Where it is shown that a party seeking joinder to pending litigation has a legal rather than political interest in proceedings joinder ought to be allowed.
22. As put in *Hlope v FUL*, a generous approach to joinder ought to be adopted. It is a fundamental tenet of the rule of law that every citizen has an entitlement to challenge or test the validity of conduct of any person and laws. This is so especially in cases where the litigation sought to be brought is in the public interest. No doubt this matter is of both public and national interest. It is in the interest of every Zimbabwean to know the correct facts regarding how the third respondent ascended to the helm of the party and ensure that these facts are placed before the court.

23. The first applicant brings this application in its own right and interest. It is not a part of ZANU PF and its interest is separate and different from it and does not share its interest with any other person already cited as part of the proceedings it wishes to join. Whilst the issue of fraud was raised in the pending proceedings, there are other issues that the applicants raise that the second to fifth respondents did not raise in the pending proceedings. Issues to do with democratic governance, the rule of law and constitutional issues were not raised under HC 5687/21. Participation of the applicants in the pending proceedings will enable a fuller consideration of all issues before the court. The fact that the political party concerned and some members of the party are involved in the litigation is not a bar to the participation of the first applicant in this litigation. Its interest is legal and not political has shown an entitlement to interfere in these proceedings in pursuance of its objectives to enforce constitutional values and concerns and in pursuance of the rule of law.
24. The second applicant is a party member and averred that he is a private citizen and does not purport to be joined on behalf of the party. He stands in his own right in this litigation. His interest must not only be viewed from the stand point that he is a member of the party. The second applicant is not merely saying that he knows the circumstances in which the third respondent ascended to the helm of the party or that the respondent is a fraud. He seeks joinder in his own capacity as well as in his capacity as the president of the trust and a trustee. His interest, especially as a trustee of first applicant is separate and not shared with the second to seventh respondents who all have a political as well as legal interest in the proceedings. Consequently, his interest in this litigation is legal and has an entitlement to be joined to the pending proceedings on his own ticket and as a trustee of the first applicant.
25. The applicants did not have to show that they have a strong case. The court has also considered that the joinder of the applicants will not have the effect of altering the cause of action or introducing a new one. The second to fifth respondents have not objected to the joinder which naturally has the effect of bolstering their case. The sixth to seventh respondents do not seem to care whether or not the applicants are joined. The joinder of the applicants is necessary to ensure that all constitutional issues and concerns in the pending proceedings are effectively, completely determined and adjudicated upon. I must conclude that the applicants having shown a direct and substantial interest in the

proceedings, have *locus standi* and an entitlement to intervene in these proceedings. The interests of justice will be better served by the joinder of the applicants.

26. The approach is that joinder of a party should not prejudice any of the parties. The respondent conceded that he failed to show that he will suffer any prejudice should the applicants be joined to the pending proceedings. As the applicants have a legal interest in the subject matter of the proceedings and the outcome of the pending proceedings, they are likely to be prejudicially affected if they are unable to pursue the objectives of the trust and the personal interests of the second applicant. Pertinent is that the applicants have shown that the litigation brought by the respondent may lead to a result which may affect not only their rights but the public interest. The applicants did not have to show an economic interest in the matter. Whilst there is no dispute between the applicants and the respondent, the interest of the applicants is real and not hypothetical. The case they seek to advance is not academic.
27. The joinder must not overly hold up or complicate the pending proceedings. The joinder of the applicants will not unduly delay the hearing of the matter filed under HC5787/21 as the applicants have shown readiness to file their opposing affidavit and heads of argument within five days of this judgment, with the application being argued immediately thereafter. All what I can say is that the respondent is annoyed by the fact that the applicants have sought joinder to the pending proceedings. That is not good enough. Annoyance is not a legal ground for refusing joinder of a party. I find no basis for refusing to accede to the request for joinder. Costs follow the event.

Accordingly, it is ordered as follows:

1. The first and second applicants be and are hereby joined in proceedings under HC5687/21 as the 7<sup>th</sup> and 8<sup>th</sup> respondents respectively.
2. The applicants be and are hereby ordered to file their opposing affidavit and heads of argument under HC5687 /21 within 5 days of this judgment.
3. The 1<sup>st</sup> respondent shall pay the costs of this application.

*T.K. Hove & Partners*, applicants' legal practitioners  
*Ncube Attorneys C/O Mbidzo Muchadehama & Makoni*, 1<sup>st</sup> respondent's legal practitioner  
*Dube Manikai & Hwacha* 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup>, respondents' legal practitioner

