REPORTABLE ZLR (68)

Judgment No. SC 80/02
Civil Appeal No. 6/02

LESLIE LEVENTE PETHO v

(1) MINISTER OF HOME AFFAIRS
(2) REGISTRAR-GENERAL OF CITIZENSHIP

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & GWAUNZA AJA
HARARE, SEPTEMBER 3 & OCTOBER 9, 2002

A P de Bourbon SC, for the appellant

A Dururu, for the respondents

SANDURA JA: This is an appeal against a judgment of the High Court which dismissed the appellant's application, brought in terms of s 3(1) of the Class Actions Act [*Chapter 8:17*] ("the Act"), for leave to institute a class action on behalf of the following class of persons –

(a) all persons who are citizens of Zimbabwe by birth; and

(2) either of whose parents was or both of whose parents were born in a foreign country; and

(3) who have never applied for and/or been granted the citizenship of another country.

The background facts are as follows. Before December 1984 the law of Zimbabwe permitted dual citizenship. However, that state of affairs changed on 1 December 1984 when the Citizenship of Zimbabwe Act, No. 23 of 1984 (now [*Chapter 4:01*]) abolished dual citizenship and, in terms of s 9(7), provided that a citizen of Zimbabwe who, on 1 December 1984, was also a citizen of a foreign country would cease to be a citizen of Zimbabwe one year after that date unless, on or before the expiry of that period, he renounced his foreign citizenship in the form and manner prescribed.

Subsequently, it transpired that the renunciation forms signed by the citizens of Zimbabwe intending to renounce their foreign citizenship did not have the desired effect. That was so because the law of Zimbabwe at the time did not require a person intending to renounce his foreign citizenship to do so in accordance with the law of the foreign country in question. See *Carr v Registrar-General* 2000 (2) ZLR 433 (S).

As a result, on 6 July 2001 the Citizenship of Zimbabwe Amendment Act, No. 12 of 2001, was promulgated and came into effect on the same day. It repealed subs (7) of s 9 of the Citizenship of Zimbabwe Act [*Chapter 4:01*] and substituted the following:

> "(7) A citizen of Zimbabwe of full age who –
>
> (a) at the date of commencement of the Citizenship of Zimbabwe Amendment Act, 2001, is also a citizen of a foreign country; or
>
> (b) at any time before that date, had renounced or purported to renounce his citizenship of a foreign country and has, despite such renunciation, retained his citizenship of that country;

> shall cease to be a citizen of Zimbabwe six months after that date unless, before the expiry of that period, he has effectively renounced his foreign citizenship in accordance with the law of that foreign country and has made a declaration confirming such renunciation in the form and manner prescribed."

Subsequently, a dispute arose in respect of the interpretation of the new subs (7) because the second respondent insisted that what had to be renounced was not merely the fact of holding a foreign citizenship, but also any right to claim a foreign citizenship, arising out of the place of birth of the parents of a person born in Zimbabwe. The purpose of the class action which the appellant intended instituting was to determine whether that interpretation was correct.

The learned judge in the court *a quo* dismissed the appellant's application on the ground that he did not consider the appellant a suitable person to represent the best interests of all the members of the class, bearing in mind the need to carry out the task of reaching out to the largely rural, poor and unsophisticated members of the class.

Aggrieved by that decision the appellant appealed to this Court.

Before considering the main issue in this appeal, I would like to deal with the appellant's application for leave to adduce further evidence in the form of an affidavit. The additional evidence was intended to remove the basis for what the learned judge in the court *a quo* perceived to be limitations on the appellant's ability to communicate with the class of persons he purported to represent.

The basic requirements of an application for the leading of evidence on appeal were set out by HOLMES JA in *S v de Jager* 1965 (2) SA 612 (A) at 613 C-D as follows:

> "(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.
>
> (b) There should be a *prima facie* likelihood of the truth of the evidence.
>
> (c) The evidence should be materially relevant to the outcome of the trial."

These requirements have been quoted with approval by this Court in *S v Mutters & Anor* 1987 (1) ZLR 202 (S) at 204G-205A; *S v Osborne* 1989 (3) ZLR 326 (S) at 336 C-G; and *S v Kuiper* 2000 (1) ZLR 113 (S) at 116 A-C. The non-fulfilment of any of the requirements would ordinarily be fatal to the application.

Applying the test set out above, I am satisfied that the application for leave to adduce additional evidence cannot be granted. I say so because the evidence which it is sought to adduce was available when the application was heard by the learned judge in the court *a quo*, and no explanation has been given as to why the evidence was not adduced then, other than that it was not considered necessary to adduce such evidence as the appellant believed that all the requirements of the Act had been complied with. In my view, that explanation cannot be a basis for granting the leave sought. There must be finality to litigation. If, at the hearing of an application, a party elected to stand by the evidence he had adduced, he should not be allowed to adduce further evidence on appeal unless there are special reasons for not having adduced the evidence when the application was heard. No such reasons exist in this case, and that is the end of the matter.

I now wish to deal with the main issue in this appeal, which is whether the learned judge was correct when he dismissed the appellant's application for leave to institute a class action. I shall set out the relevant provisions of the Act.

Subsections (1), (2) and (3) of s 3 of the Act read as follows:

> "(1) Subject to this section, the High Court may on application grant leave for the institution of a class action on behalf of any class of persons.
>
> (2) An application for the institution of a class action –
>
> (a) may be made by any person, whether or not he is a member of the class of persons concerned; and
>
> (b) …
>
> (3) The High Court may grant leave in terms of subsection (1) if it considers that in all the circumstances of the case a class action is appropriate, and in determining whether or not this is so the court shall take into account –
>
> (a) whether or not a *prima facie* cause of action exists; and
>
> (b) the issues of fact or law which are likely to be common to the claims of individual members of the class of persons concerned; and
>
> (c) the existence and nature of the class of persons concerned, having regard to –
>
> (i) its potential size; and
>
> (ii) the general level of education and financial standing of its members; and
>
> (iii) the difficulties likely to be encountered by the members enforcing their claims individually; and
>
> (d) the extent to which the members of the class of persons concerned may be prejudiced by being bound by any judgment given in the class action; and
>
> (e) the nature of the relief claimed in the class action, including the amount or type of relief that each member of the class of persons concerned might claim individually; and

(f) the availability of a suitable person to represent the class of persons concerned; and

(g) any other relevant factor."

It is pertinent to note, in passing, that in terms of s 3(2)(a) of the Act an application for the institution of a class action may be made by any person, whether or not he is a member of the class of persons concerned. The learned judge in the court *a quo* was alive to this fact. Consequently, the decision to dismiss the appellant's application was not based upon the finding by the learned judge that the appellant was not a member of the class of persons concerned.

Section 5 of the Act reads as follows –

5 Appointment of representative

(1) When the High Court grants an application under section *three* for leave to institute a class action it shall appoint the applicant or any other suitable person to be the representative of the class of persons concerned in the class action.

(2) In making an appointment for the purpose of subsection (1), the High Court shall have regard to –

(a) the suitability of the appointee to represent the best interests of all the members of the class of persons concerned; and

(b) any conflict of interest between the appointee and the members of the class of persons concerned; and

(c) the ability of the appointee to make satisfactory arrangements to pay for the class action and to pay any order of costs that may be made."

After considering the provisions of this section and the averment by the appellant that the Test Case Committee of the Legal Resources Foundation, a non-

governmental organisation, had agreed to finance the application, the learned judge said:

> "From this averment it seems that the applicant has made some arrangements to pay for the class action. … In the circumstances I think the only key issue for determination is (the) suitability of the applicant to represent the best interests of all the members of the class of persons concerned as required by section 5(2)(a). In other words, I am satisfied that the applicant has made satisfactory financial arrangements as required by section 5(2)(c)."

The learned judge then considered whether the appellant was a suitable person to represent the best interests of all the members of the class and concluded that he was not.

In reaching that conclusion, the learned judge relied upon what the appellant said about the manner in which he intended bringing the class action to the notice of the members of the class, as he was required to do in terms of s 7(1)(a) of the Act. In his draft order the appellant indicated that he would cause to be published in *The Daily News* and *The Herald* a notice, a copy of which was attached to the draft order.

After considering the manner in which the notice was to be published, the learned judge concluded that the appellant's target was a small portion of the class of persons concerned. He said:

> "Although the applicant declared an intent to represent all members of the class, his draft order and the notice reflect that his target is those who read and have access to newspapers or print media. In my view, that is a minority of the persons in the class."

For that reason, the learned judge concluded that the appellant was not a suitable person to represent the best interests of all the members of the class. Accordingly, he dismissed the application.

I have no doubt in my mind that the learned judge misdirected himself and erred.

Section 7 of the Act, in relevant part, reads as follows:

> "**7 Notice of class action**
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> (1) Where –
>
> (a) the High Court has granted leave to institute a class action, the representative shall cause a notice specifying the matters referred to in subsection (2) to be given to members of the class of persons concerned in such manner and within such period as the court shall specify.
>
> (b) …
>
> (2) A notice referred to in subsection (1) shall specify –
>
> (a) the cause of action giving rise to the class action, with sufficient detail to enable the circumstances giving rise to the action to be identified; and
>
> (b) the nature of the relief being sought in the class action; and
>
> (c) the class of persons concerned in the class action, with sufficient detail to enable the members to identify themselves with the intended action;
>
> and shall advise members of the class concerned that –
>
> (i) each member of the class concerned will be bound by the class action and its results unless the member notifies the Registrar of the High Court, within a period fixed by the court or rules of court, as the case may be, and specified in the notice, that he wishes to be excluded from the action; and
>
> (ii) …

(3) A failure on the part of a member of a class of persons concerned in a class action to receive notice in terms of this section shall not –

(a) invalidate the class action; or

(b) prevent the member from being bound by the class action and its results."

It is pertinent to note that in terms of s 7(1)(a) of the Act it was the duty of the learned judge in the court *a quo*, and not that of the appellant, to specify the manner in which and the period within which the notice was to be given to the members of the class of persons concerned. Accordingly, having accepted that the class of persons existed and that a class action was appropriate, the learned judge should have given directions to the appellant on the best way of notifying as many members of the class as possible about the proposed class action.

The learned judge could, for example, have directed, as was done in *Ngxuza & Ors v Permanent Secretary, Department of Welfare, Eastern Cape, & Anor* 2001 (2) SA 609 (C), that, in addition to the publication of the notice in the newspapers, the notice was to be read in various languages on one of the radio stations operating in the country.

Regrettably, the learned judge gave no directions on the matter and, therefore, failed to comply with the provisions of s 7(1)(a) of the Act. In the circumstances, the only basis on which the appellant was found to be unsuitable falls away.

However, even if the appellant were not a suitable person to represent the class of persons which the learned judge found to exist, that would not have justified the dismissal of the appellant's application. I say so because in terms of s 5(1) of the Act, when the court grants the application for leave to institute a class action "it shall appoint the applicant or any other suitable person to be the representative of the class of persons concerned in the class action". Assuming, therefore, that the appellant were unsuitable, the learned judge should have appointed some other suitable person to represent the class.

Finally, it seems to me that the learned judge overlooked the fact that the members of the class in this case had nothing to lose. That is so because if the class action succeeds it would mean that the provisions of s 9(7) of the Citizenship of Zimbabwe Act [*Chapter 4:01*], as amended by the Citizenship of Zimbabwe Amendment Act, No. 12 of 2001, do not apply to the members of the class. In other words, it would mean that the second respondent's interpretation of s 9(7) of the Citizenship of Zimbabwe Act [*Chapter 4:01*], as amended, is incorrect.

On the other hand, if the class action does not succeed and the appellant is ordered to pay the respondents' costs, those costs would be paid by the Test Case Committee of the Legal Resources Foundation, and not by the members of the class. It is, therefore, very unlikely that any member of the class would like to be excluded from the class action.

Having said that, I wish to consider the best way of notifying as many members of the class as possible about the class action.

Mr *de Bourbon*, who appeared for the appellant, submitted that in addition to the publication of the notice in *The Herald* and *The Daily News*, the members of the class should be notified about the class action by way of five separate announcements in the three main languages on Radio Two (now Radio Zimbabwe) of the Zimbabwe Broadcasting Corporation during prime time. I agree with that submission. Undoubtedly, the notice would have a much wider coverage than it would have if it were merely published in the two newspapers.

In the circumstances, the following order is made –

1. The appeal is allowed with costs, which costs shall be borne by the second respondent.

2. The order of the court *a quo* is set aside and the following is substituted –

> "The application is granted in terms of the draft order, with paragraph 4 thereof amended so that it reads as follows –
>
> 'In terms of s 7(1)(a) of the Class Actions Act [*Chapter 8:17*] the applicant shall by 30 November 2002 –
>
> (a) cause to be published in *The Herald* and *The Daily News* on five different dates a notice in the form attached hereto; and

(b) cause the said notice to be read in Shona, Ndebele and English during prime time on Radio Zimbabwe of the Zimbabwe Broadcasting Corporation on five different dates.'"

CHEDA JA: I agree.

GWAUNZA AJA: I agree.

Gill, Godlonton & Gerrans, appellant's legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners