ASSWELL AFRICA GURUPIRA
and
JEAN JANE GURUPIRA
versus
EARTHMOVING & CONSTRUCTION COMPANY (PVT)LTD
and
SANDRA MAUREEN MUIR
and
REGISTRAR OF DEEDS
and
THE SHERIFF
and
THE DEPUTY SHERIFF

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 22 January 2015 and 25 February 2015

OPPOSED MATTER

T Mpofu, for the applicants
de Bourbon, for the 1st, 3rd, 4th, 5th and 6th respondents
D Stephenson, for the second respondent

MTSHIYA J: This is an application for a joinder. The draft order attached to the application reads as follows:-

> "1. The 6th Respondent be and is hereby joined as the 6th Respondent in Case No. H.C 1393/08.
> 2. The 6th Respondent shall, if he wishes to defend the 1st and 2nd Applicants' claim, file a Notice of Opposition within (10) ten days of service of the pleadings in Case No. H.C. 1393/08 on him.
> 3. The rest of the pleadings shall be dealt with in accordance with the rules of the Court.
> 4. There shall be no order as to costs."

I give, here-below, a brief background to the relief sought.

On 7 March 2008 the applicants filed an application under case number HC 1393/08 (the main matter) for the following relief:-

"IT IS ORDERED THAT

1. The 1st Respondent [the plaintiff herein] is hereby interdicted from transferring the property known as No 98 Churchill Avenue, Harare, also known as a certain piece of land situate in District of Salisbury Township Lands measuring 3066 square metres under Deed of Transfer 39/76 to anyone except the 1st and 2nd Applicants.

2. The property in paragraph 1 above be transferred to Asswell Africa Gurupira and Jean Jane Gurupira and the 2nd Respondent [Sandra Muir] is directed to sign all the necessary documents to finalise the transfer within 10 days of the Order.

3. Should be 2nd Respondent fail or refuse to sign the necessary documents to effect transfer the 4th or 5th Respondent [sheriff and deputy sheriff respectively] are hereby directed to sign all the necessary documents to effect the transfer by the 3rd Respondent [registrar of deeds] to 1st and 2nd Applicants.

4. The 1st and 2nd Respondents shall bear all the costs of this application on attorney-client scale jointly and severally one paying the other to be absolved"

On 21 May 2008, I granted the above order in default.

On 22 August 2008, the sixth respondent, in his capacity as the Managing Director of the first respondent, filed an application under case number HC 4211/08 for the rescission of the default judgment granted in favour of the applicant on 21 May 2008. I must mention that when the rescission application was filed, the default order had already been executed/enforced.

In para 14 of the founding affidavit in the rescission application filed on 22 August 2008 in HC4211/08, the sixth respondent averred as follows:-

> "14. I humbly submit that the Applicant has got a prima facie right and a bona fide defence to the 1st and 2nd Respondents claim. Applicant bought all the shares from the 3rd Respondent through its Managing Director and took transfer of the shares well before the 16th of June, 2008 when the 1st and 2nd Respondents took transfer of the immovable property. In fact the Order granted by this Honourable Court see Annexure "I" was granted in error. The alleged Agreement of Sale between 1st, 2nd and 3rd Respondents was not for the sale of the immovable property but for the sale of shares. In fact, it is quite doubtful that the same could have been granted if the 1st and 2nd Respondents' Legal Practitioners had been candid with this Honourable Court and included Annexure "H" which is the Notice of Opposition to the Court Application. As it is 1st and 2nd Respondents Legal Practitioners saw it fit to cherry pick the information and omitted to mention or attach the Opposing Affidavit to Case No. HC6660/07. In a nutshell the transfer of the immovable property to the 1st and 2nd Respondents is null and void as the company shares in the Applicant were bought and transferred to JOHN LEGGETT who in his capacity as the sole shareholder became the owner of all assets owned by the Applicant well before it purported to take transfer of the immovable property on the 16th of June, 2008." (My own underlining)

The first and the second respondents referred to in the above passage are the first and the second applicants herein. The third respondent is the second respondent in this matter. John Leggett, referred to in the above passage is the sixth respondent that the applicant herein seeks to join in the main matter (HC 1393/08).

The contents of the above passage are further reinforced in the answering affidavit filed by the sixth respondent on 25 September 2008 in HC 4211/08 on behalf of the applicant therein. In paragraphs 6 and 7 of the answering affidavit, the sixth respondent states as follows:

> "6. Annexures "B1" and "B2" clearly show that 3rd Respondent transferred her shareholding to John Leggett. I also attach hereto as Annexure "A" a Share Certificate which clearly shows that John Leggett is the owner of 100 fully paid ordinary shares in the Applicant. It is true that the Applicant was the owner of all its assets including the immovable property in dispute and the same (Applicant) was owned by the 3rd Respondent hence her power to sell and transfer the shares to John Leggett who became the owner of the Applicant. Simple logic testifies that the purpose of purchasing shares is to own and control that company and how "The deponent did not become the owner of the Applicant's property by acquiring shares in it" is confusing (for want of a better word). Is it being suggested that Applicant's shareholder (John Leggett) elected to buy the name of the company and did not want to become owner of Applicant's property by acquiring shares in it?" The averments in this paragraph by the 1st and 2nd Respondents is with respect confusing. Initially it is alleged that "3rd Respondent did not transfer any shares to the Applicant." Then a few lines down it is alleged that "the deponent did not become owner of the Applicant's Property by acquiring shares in it." The issue is not who entered into an Agreement with 3rd Respondent first. The issue is simply, who took transfer of the shares first. As at 28th May, 2008 John Leggett was the new shareholder and owner of the Applicant. Annexure "A" attached hereto clearly shows that the Share Certificate was issued to John Leggett on the 5th of June, 2008 and 1st and 2nd Respondents took transfer improperly of the immovable property on the 16th of June, 2008. The 1st and 2nd Respondents either deliberately or through a genuine error on their party overlooked the fact that the Applicant has a new shareholder who took transfer of the Shares from 3rd Respondent and as such has got a vested interest in the matter. The Applicant is the owner of the immovable property and other movable property and if it cannot be the Applicant who deposes to the Founding Affidavit who should then be?
> 7. The Applicant had new Shareholders who should have been cited by the respondents. The law is quite clear". (My own underlining).

As per his own averments, the sixth respondent was actually the new sole shareholder of the first respondent in *casu*. The foregoing brings to the fore the sixth respondent's vested interest in the main matter. Clearly the relief sought in paragraph 2 of the draft order in the main matter (HC 1393/08) would adversely impact on the vested interest of the sixth respondent. That position requires no argument and would indeed form the legal basis upon which a joinder is being sought.

When the rescission application was placed before Patel J, as he then was, he directed that, because of the disputes of fact in the matter, it should go to trial.

The matter eventually went to trial before Mafusire J who granted the rescission on 19 March 2014. The rescission meant that the main matter, (HC 1393/08) should now be heard in terms of the rules of this court. However, before the hearing of the matter, the applicants correctly deemed it necessary to join the sixth respondent, who was not cited in the main matter.

Curiously, the application for joinder is opposed by the sixth respondent. This is despite the fact that according to him, he is now the Managing Director and sole shareholder of the first respondent. Ownership of the property, which is really at the center of the dispute between the parties, is said to vest in the first respondent, whose total shares the sixth respondent now claims to own.

In his founding affidavit, in *casu*, the first applicant explains, in part, as follows:

> "8. On the 7th of March 2008, I together with 2nd Applicant filed a Court Application before this Honourable Court, seeking an order for specific performance against the 1st and 2nd Respondents, among other things. The order was granted in default and has since been rescinded by this Honourable Court. Parties are back to the previous status quo. I beg leave to refer to the pleadings in 1393/08 as if specifically traversed herein. At the time of the issuing of the said application the 2nd Respondent had in her possession on the Share Certificates reflecting her as the sole shareholder of the 1st Respondent had in her possession the Share Certificates reflecting her as the sole shareholder of the 1st Respondent, the Company owning Stand 12896 Salisbury Township measuring 3066 square metres also known as No. 98 Churchill Avenue, Gunhill, Harare. I together with 2nd Applicant, entered into an agreement to buy the said shares to facilitate ownership and control of Stand 12896 Salisbury Township measuring 3066 square metres also known as No. 98 Churchill Avenue, Gunhill, Harare. However it subsequently came out that the 2nd Respondent had later purported to issue and sell the same shares in the 1st Respondent to the 6th Respondent, John Legett, without our knowledge. Therefore the said John Legett nearly has an interest in the outcome of the Case No. HC 1398/08 which seeks to have us declared the true shareholder of the 1st Respondent and subsequently, the process of Stand 12896 Salisbury Township measuring 3066 square metres also known as No. 98 Churchill Avenue, Gunhill, Harare at 6th Respondent's expense.
>
> 9. The 2nd Applicant and I insist that we are the rightful shareholders in 1st Respondent and believe that the purported transfer to John Legett was improper and a legal nullity. We would want the court to rule that purported sale of the shares to John Legett be deemed null and void and it is only proper that the 6th Defendant Respondent be given an opportunity to give his side of the story.
>
> 10. Therefore it is necessary that the 6th Respondent, John Legett be joined in this case to enable us to enforce the order we are seeking before this Honourable Court. In fact the

> Court can properly determine the issue of the purported sale of shares to the 6th Respondent by the 1st and 2nd Respondents as all the interested parties would be before it".

Indeed, the relief sought in the main matter is the one reproduced in full at page 2 of this judgment. In the main, the applicants pray for the transfer of the property in dispute to themselves.

In the main matter (HC 1393/08), the opposing affidavit sworn to by the sixth respondent states, in part, as follows:-

> "a) ……
> b) The 2nd Respondent's interest in this matter ceased on the 28th of May 2008 when 2nd Respondent sold and transferred to me her two shares in the 1st Respondent. I must mention that by this date I already held 98 shares in the 1st Respondent.
> c) As from 11 December 2007 I had been the majority shareholder in the 1st Respondent as I had ninety eight shares. Following the agreement of 28 May 2008 I had then assumed 100% shares of the 1st Respondent.
> d) ……."

The above is consistent with other averments made in the rescission application (HC 4211/08) and already quoted in this judgment.

Notwithstanding the sixth respondent's clear interest in the main matter (HC 1393/08), he remains opposed to the joinder.

In his opposing affidavit in the main matter the sixth respondent states as follows:-

> "4. The First Applicant has deliberately misrepresented the relevant facts of this matter which facts are well known to him. Undoubtedly he has chosen to adopt a course based on incorrect and incomplete facts in order to justify this extremely belated application for joinder.
>
> 5. It is correct that on 7 March 2008 the Applicants instituted a Court Application in Case No HC 1393/2008. I was not cited as a party in that application. In that matter the Applicants sought an order, without any factual or legal basis, for the transfer of the property in Churchill Avenue from the name of the First Respondent in to their personal names. There had not been any proper service of the papers in the matter on the First Respondent, but notwithstanding a judgment in default was granted.
>
> 6. As soon as I learnt to the default judgment, I caused an application for rescission of that default judgment to be made on behalf the First Respondent, which was Case No. HC 4211/2008. It was an application brought in the main by the First Respondent for the rescission of the judgment obtained without notice or proper service and without any basis for the transfer to the Applicants of the property belonging to the First Respondent.

7. However, that application was referred to trial by the Honourable Mr Justice Patel on 24 September 2009, and the parties were directed to file pleadings. Among the pleadings filed was one termed "1st and 2nd Defendants' Counterclaim', filed on behalf of the present Applicants on 2 November 2009. In the so-called Counterclaim I was cited as the Second Defendant, and the relief sought in that Counterclaim was in essence precisely the same relief as is now being sought through the application for joinder. I attach a copy of that so-called Counterclaim as **Annexure "A"** for the benefit of this Honourable Court. Objection was taken to the attempt to join me as a party as none of the original papers had been served on me, and the legal practitioners representing the present Applicants thereafter withdrew the so-called Counterclaim. When the trial took place earlier this year before the Honourable Mr Justice Mafusire there was no claim made by the present Applicants against me in my personal capacity.

8. The result of that trial, handed down on 19 March 2014, was that the judgment given in default was set aside. Subsequent thereto on 2 April 2014 I caused to be filed on behalf on the First Respondent the necessary opposing papers to the application brought in Case No. HC 1393/2008, together with a counter-application for the eviction of the Applicants from the property belonging to the First Respondent. The response thereto on behalf of the Applicants was to file on 8 May 2014, the Applicants filed an opposing affidavit to the counter-application. The delay in filing that opposing affidavit had been the subject of correspondence between Gill, Godlonton & Gerrans and Sawyer & Mkushi. As agreement had been reached to allow the late filing of the Opposing Affidavit I make nothing of that delay.

10. On 30 May 2014 Heads of Argument for the Applicants were filed in Case No. HC 1393/2008. I am advised that these Heads of Argument were filed out of time, and that issue will be raised at the hearing of the application. Some five business day later the present application for joinder was filed and served.

12. The papers in Case No HC 1393/2008 are now closed and the matter ready for hearing, rendering it inappropriate to reopen all those papers simply because the Applicants have eventually decided to bring an application for joinder. Most certainly, the Applicants have had since 19 March 2014 to make any such application, but have delayed – I would suggest deliberately – until 6 June 2014 to bring that application in order to extend their unlawful occupation of the house in Churchill Avenue. It is also intended to interfere with the administration of justice and the proper determination of the issues raised in Case No. HC 1393/2008.

11.3 Furthermore, more than three years have elapsed since the Applicants knew that I had entered into two agreements relating to the shares of the First Respondent. Those details had been set out in the founding papers which I caused to be filed on behalf the First Respondent in Case No. HC 1393/2008 as long ago as 22 August 2008. I am therefore advised that the claim purported to be brought by way of the joinder application is prescribed and cannot be pursued".

I take note of the withdrawal of the counter-claim wherein the sixth respondent had been cited.

In addition to the above objections, which, I have, for the purpose of clarity, quoted at lengthy, during the hearing of this application the sixth respondent raised another issue. It was an issue of law and the submission was:-

> "19. The Form 29 used to institute this present application for joinder specifically states that the application is made in terms of Order 13 Rule 85 of the High Court Rules 1971. This reads:
> 85. 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 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
> (b) 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 rule clearly applies solely to actions, and not to applications. It is submitted that there has been no extension of this rule in the procedure relating to applications. Therefore, the attempt to make an application in terms of Rule 85 in the present circumstances was ill-founded.
>
> 21. This is not to say that in application procedures and Order 32 the Court cannot order the joinder of an interested party. But it does mean that any such joinder cannot be to permit substantive relief different to that sought in the founding application to be claimed".

I find myself in a situation where the party to be joined is clearly an interested party and to me that is the major issue in this case. The sixth respondent has indeed loudly pronounced his interest in the matter. However, for the detailed reasons given above, the interested party (i.e. the sixth respondent) does not want to be joined. To the extent that my finding, based on his own statements, is that he is indeed an interested party, it becomes difficult to accept the issue of delay as militating against the joinder. The main matter is yet to be set down and heard.

I also believe that the issue of prescription is a matter to be determined during the hearing of the main matter. The same applies to whether or not because of disputes of fact, the matter should have been by way of action. That, in my view, is an issue to be determined by the judge who will deal with the main matter. It will be his/her prerogative to either dismiss the matter or give directions as happened in the first respondent's application for rescission (i.e. HC 4211/08).

It is also important to understand the full import of the rescission order granted by Mafusire J.

The full order read as follows:-

> "IT IS ORDERED THAT:
> In the circumstances this matter is disposed of as follows:

1. The default judgment granted by this court on 21 May 2008 in HC 1393/08 is hereby set aside.
2. The Registrar of deeds is hereby ordered and directed to cancel deed of transfer No. 4778/08 over certain piece of land situate in the district of Salisbury, called Stand 12896 Salisbury Township Lands, measuring 3 066m^2, dated 16 June 2008 in the name of Asswell Africa Gurupira and Jean Jane Rudo Gurupira and to restore the prior deed of transfer No. 39/76.
3. The following residual issues shall be determined in the main application in HC 1393/08:
    3.1. Whether or not the agreement of sale between the first and second defendant, namely Asswell Africa Gurupira, of the one part, and the third defendant, namely Sandra Maureen Muir, of the other part, was duly performed.
    3.2. Whether or not the transfer of shares in the plaintiff company, namely Earthmoving & Construction Company Private Limited, by the third defendant to one John Legget, should be set aside.
    3.3. Whether or not the first and second defendant should vacate the premises situate on the property more fully described in paragraph 2 above and which is also known as 98 Churchill Avenue, Gunhill, Harare.
4. The plaintiff shall file its notice of opposition or other such papers in HC 1393/08 within ten (10) days of the date of this order and thereafter the filing of any further documents shall be in accordance with the rules.
5. The costs of the application and of the trial in HC 4211/08, and the costs of the application in HC 6660/07 shall all be borne by the first and second defendant jointly and severally, the one paying the other to be absolved". (My own underlining)

As can be seen under the Judge's directions, given under paragraph 3.2. of the order, the sixth respondent is brought into the main matter. Given the import of para 3.2. of the court order, I do not see how the residual matters referred to in that order can be determined without the participation of the sixth respondent. My view is that the order indirectly called for the joinder of the sixth respondent.

With regards to the legal issue, I acknowledge the fact that both rules 85 and 87 appear to confine themselves to actions. However, I take the view that a rigid construction of those rules will result in a miscarriage of justice. I therefore believe that reference to "any cause" in rule 87 should enjoy a wider and encompassing meaning. In that case, an interested party can join or be joined as long as the matter is yet to be determined i.e. at any stage. It would therefore, in the circumstances, be appropriate to invoke rule 4C of the High Court Rules 1971 which provides as follows:-

> "4C. Departures from rules and directions as to procedure
> The court or a judge may, in relation to any particular case before it or him, as the case may be –

(a) direct, authorize or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of justice,
(b) give such directions as to procedure in respect of any matter not expressly provided for in these rules as appear to it or him, as the case may be, to be just and expedient".

In view of the foregoing and given the fact that this court can manage its own rules in order to render justice to litigants, I am unable to accept that an application for joinder cannot be made in a matter/cause brought by way of application. That, in my view, would be an unfair law.

It was correctly argued that pleadings had closed and the matter was ready for hearing. That may be the case, but this court has, in the interests of justice, a discretion which it can, without prejudice to the sixth respondent, use to accommodate the situation that the sixth respondent is uncomfortable with. That extends to the possibility of supplementary affidavits being filed subject to leave being granted by the court. I cannot therefore at this stage, pronounce on how the main matter will be handled upon the sixth respondent being joined. I can, however, boldly declare that the sixth respondent has a vested interest in the main matter and should therefore be joined as a party to the main matter. That move will enable the court to properly interrogate the issues to be addressed in the main matter.

The application must succeed.

IT IS ORDERED THAT:

"1. John Leggett be and is hereby joined as the 6th Respondent in Case No. H.C. 1393/08
2. The 6th Respondent shall, if he wishes to defend the 1st and 2nd Applicants' claim, file a Notice of Opposition within (10) ten days of service of the pleadings in Case No. H.C 1393/08 on him.
3. The rest of the pleadings shall be dealt with in accordance with the rules of the Court.
4. There shall be no order as to costs".

Messers Sawyer & Mkushi, 1st & 2nd applicant's legal practitioners
Messers Gill Godlonton & Gerrans, 1st & 6th respondent's legal practitioners
Messers Thompson Stevenson & Associates, 2nd respondent's legal practitioners