

KASEPLAN GRAND INDUSTRIES (PVT) LTD
versus
TEVIOT TRUST (PVT) LTD
and
MINISTER OF LANDS AGRICULTURE, WATER, CLIMATE AND RURAL
RESSETLEMENT

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 25 October 2023 & 3 June 2024

Court Application for Joinder

T Muhlwa, for the applicant
A Kadye, for the 1st respondent
No appearance for the 2nd respondent

TAKUVA J: This is an application for joinder to join the applicant to action proceedings filed by the first respondent under HC 3383/20 seeking to invalidate the acquisition of the farm which the applicant is occupying as a beneficiary. The present application is made in terms of r 32(12)(b) of the High Court Rules, SI 202 of 2021.

Factual Matrix

The applicant was allocated Lot 1A Teviotdale Farm in Mazowe measuring 310.6189 hectares by the Government of Zimbabwe on 1 December 2011. It was issued with an offer letter by the then Minister of Lands Hon H.M. Murerwa. On 3 July 2020, the first respondent filed an application for a declaratory order under HC 3383/20 without notifying the applicant despite the applicant being an occupier holding a valid offer letter in respect of the farm.

The first respondent is claiming the following:

- “(a) A declaratory order to the effect that the Certificate of Title Number 3873/56 held by TEVIOT TRUST (PVT) LTD over a certain piece of land situate in the District of Salisbury, being LOT 1A OF THE TEVIOTDALE, measuring 147,1169 Morgen is valid and effectual for all intents and purposes.
- (b) A declaratory order declaring that the acquisition of LOT 1A of TEVIOTDALE in terms of Gazette No. 330 published on 18 June 2004 was outside the provisions of the law, more

particularly s 16B(2)(a) and 16A of the Constitution of Zimbabwe was invalid and accordingly set aside.

- (c) A declaratory order declaring that the consequential endorsement of the first respondent's Deed of Transfer is set aside and therefore restoring the validity of the first respondent's Title Deed.
- (d) A declaratory order invalidating and setting aside any offer letter issued after 18 June 2004."

The first respondent obtained an order in default which order he relied upon to file an application for eviction against the applicant. In turn, the applicant filed an application for rescission which was granted under HC 4174/22. Fearing that his rights in the land will be eroded, he filed this application seeking the following relief:

- “(a) The application for joinder be and is hereby granted.
- (b) The applicant be joined to the proceedings under case numbers HC 3383/20 as the second respondent.
- (c) The first respondent herein is to serve the applicant herein with a copy of the application for a declaratory order under case number HC 3383/20 within five days of the granting of this order whereupon the applicant herein files its notice of opposition within ten (10) days of service of the application for a declaratory order.
- (d) Costs on a legal practitioner scale (if opposed).”

The Applicant's Case

The argument advanced by the applicant is that its exclusion from the proceedings under HC 3383/20 was improper in that it is an interested party as a holder of a valid offer letter and the current occupier of the farm. It was further argued that in view of the above rights, applicant has a direct and substantial interest in the matter. Applicant also submitted that in the 12 year period that it occupied the farm, it has made huge investments in terms of infrastructure. Further it argued that its joinder will assist the court in making a just, fair and proper decision that will allow applicant's enjoyment of the right to equal protection of the law and the right to administrative justice afforded to it by the Constitution of Zimbabwe.

As regards prejudice, applicant contented that none will be suffered by first and second respondents, should the applicant be joined to the application proceedings. Applicant submitted that any challenge or allegations of prejudice are “malicious and unfounded” and should be punishable by costs on a higher scale against the first respondent.

It was further submitted that the applicant's rights as provided for in the Constitution in sections 290 – 291, to use and occupy will be trampled upon in the event that first respondent's

relief is granted. Finally, applicant contented that the first respondent does not deserve to be awarded an order of costs on a punitive scale.

First Respondent's Case

The first respondent opposed the application. In a nutshell it submitted that the application has no merit and ought to be dismissed with costs on a higher scale. It was also argued that the order sought in HC 3383/20 is against the second respondent. It is a challenge to Land Acquisition and not an eviction of the application. On whether or not applicant has a direct interest in the resolution of a challenge to land acquisition, first respondent submitted that applicant has none in that second respondent is the acquiring authority in terms of the law. Further, it was argued that the fact that the second respondent has not opposed the proceedings under HC 3383/20 means that applicant's direct interest has been diminished substantially. Applicant's recourse was alleged to be against second respondent who ought to have given it vacant possession. In other words, the argument is that if applicant has a right in terms of the offer letter, its remedy lies with the second respondents.

First respondent believes applicant has misinterpreted s 291 of the Constitution. The proper interpretation is that only occupiers of land by a lease agreement or any other agreement such as a Bilateral Investment Agreement are included in s 291. This excludes an occupier of land based on an offer letter. Reliance was placed on the cases of:

- (i) *Sigadu v Minister of Lands & Anor* 2013 (1) 48 (H) and;
- (ii) *Guvarada v Johnson & Ors* 2009 (2) ZLR 159 (H).

The Law on Joinder

Rule 32 (12) (b) of the High Court Rules 2021 provides that:

- “(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 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 maybe effectually and completely determined and adjudicated upon, to be added as a party, Provided that no person shall be added as a plaintiff without his or her signed written consent or in such other manner as maybe authorised
- ” (emphasis added)

Since the above rule is worded in similar terms to the previous Order 13 r 87(2)(b) of the former High Court Rules, 1971, the Court's interpretation on the former Rules is also adopted.

What is noteworthy is that joinder may be ordered where:

- (a) it is of necessity;
- (b) it is convenient; and
- (c) it leads to justice.

The court in *Marais & Anor v Pengota Sugar Million Co. & Ors* 1961 (2) SA 698 (N) formulated a two tier approach 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. See also *Sibanda v Sibanda* 2009 (1) ZLR 64 where CHEDA J stated:
‘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.’”

Generally, parties are joined either as a matter of convenience or as a matter of necessity. A joinder of necessity was explained by the authors Herbstein and Van Winsen: *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5th ed p 215 as follows:

“A third party who has, or may have, a direct and substantial interest in any order the court might make in proceedings or if such an order cannot be sustained or carried into effect without prejudicing that party, is a necessary party and should be joined in the proceedings, unless the court is satisfied that such person has waived the right to be joined. Such a person is entitled to demand joinder as a party as of right and cannot be required to establish in addition that joinder is equitable for convenience. In fact, when such person is a necessary party in this sense the court will not deal with the issues without a joinder being effected, and no question of discretion or convenience arises.” (my emphasis)

It is not every interest that warrants joinder. There must be a legal as opposed to a financial or commercial one. This requirement was emphasised by EBRAHIM J (as he then was) in *Zimbabwe Teachers' Association & Ors v Minister of Education* 1990 (2) ZLR 48 (H) at 52F – 53B as follows:

“It is well settled that, in order to justify its participation in a suit such as the present, a party has to show that it has a direct and substantial interest in the subject matter and, outcome of the application. In regard to the concept of such a direct and substantial interest.”

For a right to be a legal interest, it must satisfy the following:

1. It must be a direct interest.
2. The interest must be substantial.
3. The interest must pertain to the subject matter and outcome of the matter or litigation.

Analysis

I take the view that the following are the issues confronting this court in this matter:

- (a) Whether or not the applicant has a legal and direct interest in the matter.
- (b) Whether or not the first respondent suffers any prejudice if the applicant is joined to HC 3383/20.
- (c) Whether or not it is in the interests of justice to have the applicant joined to HC 3383/20.

In respect of the first issue, it is common cause that the applicant is a holder of an offer letter granted by the Government on 1 December 2011. It has also not been denied that applicant has been in occupation since then. The applicant has been using and developing the farm. In my view, interests of a party must be measured against the relief sought. What this means is that a direct and substantial interest relates to a real and not imagined interest, which is not too remote as to be capable of being genuinely protected by law. It is common cause that in the event of first respondent's success under case number HC 3383/20, the applicant's fate is sealed as the applicant would be evicted. In fact the first respondent has already sued for eviction. Clearly the order sought by the first respondent would greatly prejudice the applicant. I am aware that a lot has been said by the first respondent regarding the status of an offer letter. However the bottom line is that offer letters entitle holders to possess and use the land they relate to. An offer letter grants personal rights as opposed to real rights similar to those awarded by a Title Deed.

The difference does not mean that a holder of personal rights has no legal interest in the subject matter in this litigation. In order to appreciate the applicant's legal interest, it is helpful to examine the brief history of the farm's acquisition.

Firstly, the acquisition of the farm in question was gazetted in the Government Gazette on 18 and 25 June 2004 while the incorporation of the farm in question was only approved by the Council on 27 January 2005. The meaning of this is that the first respondent's argument that the Government's action was unlawful has no merit.

Secondly, after the granting of the offer letter, applicant acquired rights of use and occupation since 2011. I do not agree with first respondent's argument that holders of offer letters are excluded from the protection afforded by s 291 of the Constitution of Zimbabwe. I come to this conclusion because the section uses the phrase "lease or other agreement."

These arguments make it compelling that the applicant be joined to the proceedings under case number HC 3383/20 as it has a direct and legal interest in the outcome of this matter.

As regards prejudice to the first respondent if applicant is joined, it is clear from the totality of facts that instead of suffering prejudice, first respondent's interests will be enhanced by having all the issues effectively and effectually considered and determined at once. No flood gates will be opened as we are dealing with only one offer letter here. There is no suggestion or evidence that there are other similarly placed litigants waiting to pounce. What we have are three players whose interests converge on the farm. The first party is the first respondent who originally owned the farm. The second is the State (second respondent) that compulsorily acquired the farm and the third is the applicant, the recipient of an offer letter. The link between the first respondent and the applicant is that, para (d) of its draft order under HC 3383/20 seeks an order *inter alia* "invalidating and setting aside any offer letter issued after 18 June 2004." If the court hears the application under HC 3383/20 in the absence of the applicant and cancels the offer letter, this would be a violation of the *audi alterum partem* rule. Clearly, the court will not have dealt with the issues effectively and effectually. While it is correct that the applicant should resolve its problems with the second respondent the matter does not end there because applicant is not being evicted by the second respondent.

The interests of justice will be served by joining the applicant in that it is the holder of a valid offer letter which contains rights recognised in s 291 of the Constitution. Further, given the dispute or controversy surrounding the first respondent's application for a declaratur, joinder of the applicant will assist the court arrive at a proper and just decision as all the relevant parties would have participated. If a non-joinder is maintained, the court will be clogged with numerous litigation between these parties over the same subject matter. For example already an application for rescission of the first respondent's order has since been argued and granted and now there is this application. Such results can be avoided for a good cause if the joinder in the main matter is ordered – see *Sibanda's case (supra)*.

Disposition

I find therefore that a joinder of necessity is inevitable and is largely in the interests of justice.

Order

It is hereby ordered that:

- (a) The application for joinder be and is hereby granted.
- (b) The applicant be joined to the proceedings under case number HC 3383/20 as the second respondent.
- (c) The first respondent herein is to serve the applicant herein with a copy of the application for a declaratory order under case number HC 3383/20 within five days of the granting of this order whereupon the applicant herein files its notice of opposition within ten (10) days of service of the application for a declaratory order.
- (d) Each party bears its own costs.

Chimwamurombe Legal Practice, applicant's legal practitioners
Mlotshwa Solicitors, first respondent's legal practitioners