BARCLAYS BANK OF ZIMBABWE LIMITED
versus
RESERVE BANK OF ZIMBABWE
and
UNIVERSITY OF ZIMBABWE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 29 October 2013

F. Girach, for the applicant
G.N. Mlotshwa, for the first respondent
No appearance for the second respondent

ZHOU J: This is an application for the joinder of the first respondent as a third party in Case No. HC 12970/12. The application was instituted in terms of Order 14 Rule 93 of the Rules of this Court. The application is opposed by the first respondent. After hearing argument from counsel I granted the relief sought with some amendments to the draft order and gave brief reasons. I indicated to the parties that my full written reasons would be given upon the request of either party. The first respondent has written a letter requesting to be furnished with the written reasons for the decision. These are the reasons:

The applicant is a commercial bank incorporated and registered in accordance with the laws of Zimbabwe. The second respondent, the University of Zimbabwe, holds a foreign currency account with the applicant. The first respondent is the central bank for Zimbabwe. It is established in terms of section 4 of the Reserve Bank of Zimbabwe Act [*Cap* 22:15]. On 2 October 2007 and 3 February 2009 the first respondent issued two directives bearing reference numbers **RI: 303** and **RK26**, respectively. The directive referenced RI:303ordered the applicant together with other Authorised Dealers to, *inter alia*, lodge with and transfer to the first respondent all their Corporate Foreign Currency Accounts and Non-Governmental Organisations balances by close of business on 2 October 2007. In compliance with that directive the applicant transferred to the first respondent the money held by it in the second respondent's account. It maintained what is referred to as a "mirror balance", which essentially meant that it only had a record of the balance in the second respondent's account.

In 2012 the second respondent issued summons against the applicant for payment of the money which was held in its account. The action was instituted under Case No. HC 12970/12. The second respondent claims a sum of US$6 475 968.14. Having entered appearance to defend the claim the applicant instituted the instant application in terms of Order 14 Rule 93 of the High Court Rules, 1971 for the joinder of the first respondent as a third party in Case No. HC 12970/12.

Rule 93 provides as follows:

> "Where in any actiona defendant who has entered appearance claims as against any person not already a party to the action (in this Order called a third party) –
> (a) That he is entitled to contribution or indemnity;
> (b) That he is entitled to any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or
> (c) That any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between the plaintiff and the defendant, and should properly be determined, not only as between the plaintiff and the defendant, but as between the plaintiff and the defendant and the third party, or between any or either of them;
>
> the defendant may make a court application to join that person as a third party in the action."

It has been held that the object of the third party procedure is to avoid multiplicity of actions dealing with substantially the same subject matter and largely involving the same evidence. The inconvenience of requiring the parties to prove the same facts over again is obviated, thereby saving time and mitigating the parties' expenses. See *Building Electrical & Mechanical Corp (Salisbury) Ltd v Johnson* 1950 SR 142 at 148; 1950 (4) SA 303; also Herbstein & Van Winsen, *The Civil Practice of the Supreme Court of South Africa 4th Ed.*, p. 165. This Court has a discretion as to whether or not to order joinder. The discretion will, of course, be exercised judicially upon a consideration of the facts and circumstances of the case. The Court will generally order joinder of a third party if a *prima facie* case is shown unless the joining of the third party will embarrass the plaintiff or there are special circumstances militating against such joinder. *Building Electrical & Mechanical Corp (Salisbury) Ltd v Johnson* (*supra*).

The applicant contends that it is entitled to be indemnified by the first respondent for the amount being claimed against it by the second respondent. The applicant further states that the question or issue of its liability to the second respondent in Case No. HC 12970/12 is

substantially the same question or issue to be determined as between the applicant and the first and second respondents.

In its opposition the first respondent objected *in limine* to its citation in the instant application on the ground that it should have been given notice of sixty days as required by section 6 of the State Liabilities Act [*Cap* 8:14]as read together with section 63B of the Reserve Bank of Zimbabwe Act [*Cap* 22:15]. The first respondent also argues that it is immune from suits for "anything done in good faith and without negligence". It argues that the applicants must prove "beyond reasonable doubt" that it acted in bad faith and negligently. At the hearing of the matter *Mr Mlotshwa*for the first respondent raised the defence of prescription from the bar.

Section 63B of the Reserve Bank of Zimbabwe Act [*Cap* 22:15] provides as follows:

> "The State Liabilities Act [*Cap* 8:14] applies with necessary changes to legal proceedings against the Bank, including the substitution of references therein to a Minister by references to the Governor."

Section 6(1) of the State Liabilities Act [*Cap* 8:14] provides the following:

> "Subject to this Act, no legal proceedings in respect of any claim for –
>
> (a) Money, whether arising out of contract, delict or otherwise; or
> (b) The delivery or release of any goods;
>
> and whether or not joined with or made as an alternative to any other claim, shall be instituted against –
>
> (i) The State; or
> (ii) The President, a Vice-President or any Minister or Deputy Minister in his official capacity; or
> (iii) Any officer or employee of the State in his official capacity;
>
> unless notice in writing of the intention to bring the claim has been served in accordance with subsection (2) at least sixty days before the institution of the proceedings."

The applicant argues, in the main, that the notice requirement does not apply to an application for joinder in terms of the Rules. In the alternative, the applicant submits that in the event that it be found that the provisions apply the court should exercise its powers in terms of s 6 (3) of the State Liabilities Act and condone the non-compliance with the notice requirement.

In my view an application for the joinder of the first respondent as a third party brought in terms of Order 14 Rule 93 is not a claim for money. It therefore falls outside the

ambit of s 6(1) (a) of the State Liabilities Act. The fact that the applicant claims an entitlement to contribution or indemnity does not transform the application for joinder into the claim for money. The averment that the applicant is entitled to contribution or indemnity is necessary to sustain the application for joinder. The claim for contribution or indemnity is the subject of a different case, the main case (Case No. HC 12970/12), in respect of which the joinder of the first respondent is being sought.

I therefore conclude that the objection *in limine* must fail. The application is properly before this Court.

Even if I were wrong in the above conclusion, it seems to me that this would be an appropriate case for condonation of the non-compliance with the requirement for notice. Section 6(3) of the State Liabilities Act provides:

> "The court before which any proceedings referred to in subsection (1) are brought may condone any failure to comply with that subsection where the court is satisfied that there has been substantial compliance therewith or that the failure will not unduly prejudice the defendant."

The first respondent suffers no prejudice by not being given sixty days' notice of the application for joinder. It is not the main claim. The instant application was filed on 23 January 2013, nine months ago. The first respondent has had ample time before being served with the pleadings in the main action to undertake any investigations regarding the factual background to the proposed claim against it. After all, it would be aware of the institutions from whose accounts balances were transferred to it pursuant to its directives. This is not a claim that arises from the conduct of some single official or employee in some remote part of the country. The claim arises from its directives which it readily admits were issued directing authorised dealers to transfer the balances referred to above to it.

The issue of whether the first respondent is excused from liability on the ground that it acted in good faith and without negligence is for determination by the Court when it enquires into the merits of the claim by the applicant against the first respondent. If that is the first respondent's defence to the claim then it must be properly pleaded and established by evidence at the trial. For the purpose of this application the applicant need only satisfy the requirements of Rule 93. The applicant has discharged its onus in that respect.

The submission that the cause of action in the application for joinder has now prescribed must be rejected for two reasons. Firstly, it was only raised from the bar during argument. The first respondent's opposing papers do not seek to rely on that ground. Secondly, and in any event, the defence of prescription is not sustainable on the facts of this

matter. What triggers an application for the joinder of a third party is the service of summons against a defendant (the applicant *in casu*). The application can only be made after the applicant has entered appearance to defend the claim instituted against it. From the time that the summons in the main case was served and the applicant entered appearance to defend a period of three years had not passed when the application for joinder was instituted. Thus the claim for joinder has not prescribed.

The draft order filed on behalf of the applicant does not require the applicant to serve a statement of its claim on the first respondent but merely copies of the pleadings filed of record in the main case. There is a prayer for the first respondent to file its own pleadings in response to those pleadings. In my view, the proper order should include the filing by the applicant of its statement of claim against the first respondent. That is the claim which the first respondent may then respond to.

In the result, it is ordered as follows:

1. That the first respondent be and is hereby joined as a third party in the proceedings in this Court under HC12970/12.
2. The applicant herein shall file and serve on the first respondent as the third party in the proceedings aforesaid, copies of all the pleadings and documents filed of record therein, together with any statement of its claim against the first respondent within ten days of this order.
3. Upon service aforesaid the first respondent herein, as the third party in the proceedings aforesaid, shall be entitled to file pleadings of its own within the normal period of time as prescribed by the Rules of this Honourable Court and the applicant and second respondent shall be entitled to respond thereto in the usual manner.
4. The costs of this application shall be costs in the cause in HC 12970/12.

Scanlen & Holderness, applicant's legal practitioners
G N Mlotshwa & Company, first respondent's legal practitioners