LYTTON INVESTMENTS PVT LTD
and
STANDARD CHARTERED BANK (ZIMBABWE) LTD

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 14 July 2016 and 19 January 2017

Opposed Application

L. Madhuku, for the applicant
A de Bourbon, for the respondent

MUNANGATI-MANONGWA J: The applicant a business entity, applied for leave to institute a Class Action in terms of s 3 of the Class Actions Act [*Chapter 8:17*] (hereinafter referred to as "the Act") against the respondent. The respondent is a bank which *inter alia* is in the business of lending money. The class of persons for which leave is sought by the applicant comprises persons who, after paying the respondent in advance, an amount calculated as a percentage of the value of the loan in their contract, received a loan amount much less than that stipulated in the loan contract. The application was vehemently opposed by the respondent on the basis that it has no merit.

The applicant has put the facts of the matter giving rise to the application at hand as follows: On 18 March 2013 the applicant and respondent entered into a loan contract wherein the respondent granted a short term loan facility to the applicant in the sum of US$160 000. The loan was meant to finance applicant's business activities. The loan was conditional upon the applicant paying an advance amount equivalent to 4.5% of the value of the loan. The applicant alleges that despite meeting its own obligations the respondent failed to advance the agreed amount but only advanced US$49 237-00. As a result, the applicant suffered damages as the failure to secure the loan adversely affected its operations. It is out of this whole scenario, that the applicant's

application arises. The applicant seeks leave to institute a class action to force the respondent to pay damages for breach of the loan contract or alternatively to have respondent pay pro rata refunds of facility fees. It is applicant's case that the respondent is making huge profits from demanding facility fees based on an amount it never intends to avail to the borrower, and that, such injustice can be corrected through a class action which will determine once and for all the legality of such an approach to banking.

The respondent on the other hand indicates that the total amount available to be accessed by the applicant under the 2013 facility was US$160 00-00 (including the short term loan of US$40 000-00). The US$40 000-00 was however immediately utilised to settle a 2012 facility which was still outstanding on the applicant's account. Further, respondent states that the applicant was obliged to pay management fees of 3% of the total limit of the 2013 facility which amount was not refundable. However, Applicant failed to deposit a minimum of US$45 000-00 into its bank account held with the respondent which has been termed "the deposit covenant." The respondent further stated that the parties had entered into an 'uncommitted' facility which was subject to the availability of funds which aspect the applicant was aware of. In that regard, the respondent argued that the applicant had no cause of action and also the application failed to satisfy the requirements for instituting a class action as set out in s 3 of the Act and should thus fail.

When the matter was initially entertained representatives of both parties agreed that there is not much in terms of precedence vis class actions and they agreed that a legal practitioner be identified by the registrar to assist the court. Ultimately Mr *Mpofu* to whom the court is greatly indebted, filed heads of arguments which were served on both parties and form part of the record. On the day of hearing Mr. *Madhuku* sought to urge the court to disregard the heads of argument filed by the *amicus curiae* on the basis that they did not assist the court on points of law but were rather an opinion from the bar. The court reminded Mr. *Madhuku* that this was an arrangement agreed to by the parties with his participation and in any case, the *amicus curiae*'s opinion is the very thing that the court was seeking. Whilst the court was not bound by Mr. Mpofu's submissions, it was free to consider them.

It is imperative to note that the applicant had prior to instituting this application issued summons on 13 July 2015 against the respondent seeking damages arising out of breach of the

loan contract. The case is pending in this court and it became an issue during the consideration of this application on whether applicant could make this application in the light of that pending case.

The Act is clear regarding what the court considers in dealing with an application for leave to institute a class action. Section 3 states as follows:

> "**3 Application for leave to institute class action**
> (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*) shall be made in the form and manner prescribed in rules of court.
> (3) The High Court shall 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.
> (4) The High Court may grant leave of subsection (1) notwithstanding that—
> (*a*) the claims of individual members of the class of persons concerned involve different issues of fact or law; or
> (*b*) the relief sought by individual members of the class of persons concerned may require individual determination; or
> (*c*) members of the class of persons concerned seek different forms of relief."

Given the above stated requirements, it is not this court's duty to substantively make a finding for any of the litigants regarding the merits of the damages case as what the applicant seeks is leave to institute a class action against the respondent. The furthest this court can go is to consider whether given the facts of the matter, the applicant has a *prima facie* case as it is one of the considerations in such applications. The rest of the requirements are in my opinion mostly factual, the information of which must come from the applicant to enable the court to make a

value judgment. Whilst it is from the facts that the basis of the class action arises, in my view the applicant must then fill in the court with information that will cater for the requirements stated in the section like the potential size of claimants, level of education and financial standing, the effect of the judgment on those bound by it especially the extent of prejudice if any and any information which gives the court foresight into the repercussions of granting leave. Similar sentiments were projected by Mtshiya J in the matter of *Zimbabwe Tobacco Association* v *Reserve Bank of Zimbabwe*[1].

Mr. *Madhuku* for the applicant argued that the fact that the applicant had a pending case was no bar to it instituting this application as the Act provided that any person could make this application; Further, he argued that the Act does not state that access has to be denied to those that have instituted action; that in any case, the fact that the Act even allows those outside the class to still apply for leave buttresses the point. Since the Act was silent on that aspect the court was at liberty to then give directions regarding what has to happen to the pending case. The applicant made it clear in its affidavit that it had issued summons out of abundance of caution to arrest the running of prescription and could not be penalized for that in the absence of such provision. To thus deny applicant leave on the basis of the pending action would in essence be taking a narrow view which is not supportive of the whole purpose meant to be served by the Act.

Whilst Mr. *Madhuku* dwelt much on the issue of whether the fact that the applicant already had a case before the court was a bar to these proceedings, which in fact was a crucial point, the respondent in its submissions did not adequately cover the issue so as to assist the court in reaching a decision. The respondent's thrust was more on the merits of the application itself, arguing that the applicant wanted people who have never complained to be brought into the action, and dwelt on the inadequacy of the application in so far as it did not satisfy the requirements of section 3 of the Act. Mr. *Mpofu*'s stance on this particular issue, as reflected in his written submissions, was that the applicant could not be allowed to proceed with the application in light of the pending action he had instituted. For to allow it to do so would be to improperly sanction a joinder of parties. He further submitted that this application was not an application to condone proceedings which had already been instituted, therefore the applicant

[1] HH77/13

should not be entertained. It is the court's view that this issue certainly has to be decided first before getting into the merits of the application because a finding on whether the pending case is a bar to these proceedings would determine the fate of the application.

The essence of a class action or the reasons behind this provision of the law is pertinent in deciding this issue. Clearly the act facilitates justice where any member of society feels there is injustice, that is why the act provides that it does not matter whether you are a member of that class or not. It gives room to "good samaritans" to fight others' causes although they have to satisfy the court at the first instance that indeed there is a cause and a class which needs to be protected. Herbstein & Van Winsen the authors of *The Civil Practice in South Africa* hailed Zimbabwe as being progressive by having promulgated the Act.[2] This is so because in South Africa class actions are limited to matters concerning the infringement of constitutional rights whilst there is no such limitation provided in this country's legislation, which means consumer class actions can be instituted as *in casu*.

The procedure to institute a class action is detailed and provides for the manner in which it has to be done as is apparent from s 3 of the Act. Is it therefore available to a party who has already instituted proceedings for a similar cause as *in casu*? The applicant is already before the court and has challenged the respondent's banking practice. To allow him to institute class action would be to accede to a wish to join potential litigants to a matter, who at the time are unknown and have not been identified with specificity apart from being referred to as "respondent's clients who received a loan amount much less than that stipulated in the loan contract" and the "class of persons exists and is big." The court is alive to Mr. *Madhuku*'s argument that, as the legislature is silent on this aspect the court can then decide on what has to be done with the initially instituted claim. Taking such a position cannot be correct because the applicant herein is the one that instituted the earlier proceedings to protect its interests. It should have occurred to the applicant that it is not the only one in this predicament and not proceeded on its own. Alternatively, withdrawal of proceedings may have been ideal if it then intended to apply for class action. The applicant is the driver of that process. The applicant has to decide what it is it wants. The applicant's initial case is in limbo whilst it chases other persons' interests. Indeed the law allows the good and concerned to institute class actions but given the applicant's

[2] Volume 1 fifth edition p199

circumstances, it is not the court's view that applicant can be allowed another bite at the cherry. It seems the applicant by making this application wants to draw others to its cause. This in other words would be an attempt at joinder proceedings via the back door. The courts cannot be clogged by matters by the same entity pertaining to the same respondent on a similar matter where a decision can clarify an issue and put end to the legal point. The applicant's case pertaining to breach of contract by the respondent is still before the court. In my view the decision that the court will make will be binding in similar cases where the facts point to breach of contract arising out of failure to provide loan amounts agreed to despite paying the requisite facility fees. Thus if the applicant succeeds in its initial claim, those that the applicant seeks to protect would derive legal benefit from the precedence set.

It lies within the court's discretion to grant leave sought. I am not satisfied that the applicant's circumstances warrant the granting of leave sought. It is due to the aforegoing reasons that leave to institute class action is denied. The respondent had called for dismissal of the application with costs on a client attorney scale. I am not convinced that the application is abuse of court process. The damning predicament which the applicant found itself in, arose out of the need to protect its claim against prescription and at the same time pursuing a cause which it firmly believed is grounded on the law. The outcome may have been different had the applicant not found itself in that predicament. A full ventilation of the application on the merits would certainly have brought up very interesting legal points beneficial to the legal profession, moreso given the drought in precedence *vis* class actions. At present there are hardly any considerable decisions in this jurisdiction which deal with class actions. Suffice to note that whilst the case of *Zimbabwe Tobacco Association* v *Reserve Bank of Zimbabwe* (*cited supra*) considered to some extent the provisions of section 3 of the Act, the ultimate decision rested on the fact that the applicants had taken the wrong party to court. Incidentally in *Petho* v *Minister of Home Affairs & Anor*[3] where class action was in issue, the decision rested upon whether applicant was a suitable representative of all the members of the class of persons concerned. The applicant's pursuit cannot therefore be said to have been vexatious, frivolous, or reckless so as to warrant award of costs on a higher scale. Accordingly it is ordered that:

[3] 2002 (2) ZLR 436 (5)

1. The application be and is hereby dismissed.
2. The applicant to pay respondent's costs

Mundia & Mudhara, applicant's legal practitioners
Gill, Godlonton & Gerrans, respondent's legal practitioners