HB 209-18
HC 1255/16
XREF HC 965/16

DILIP KUMAR HASSAMAL
and
DOLORES (PRIVATE) LIMITED
versus
JERONDA (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 21 JUNE 2018 AND 9 AUGUST 2018

Opposed Matter

P Dube for the applicants
L Nkomo for the respondents

MOYO J: This is an application for joinder wherein the first applicant seek to be joined to the proceedings in HC 965/16.

The applicants seek an order that first applicant be joined as second defendant in those proceedings. The first applicant gives his reasons for joinder in paragraph 7 of his founding affidavit wherein he states thus;

> "My reasons for seeking to be joined are that I am an interested party in this matter, and the full facts of this matter are such that there can be no full adjudication of the dispute between the present parties without mention of actions taken personally by myself---."

The first applicant then goes to state that around 1984 an oral agreement was entered into amongst first applicant, Gulabrai Rijhumal Hassamal, Narandas Rijhumal Hassamal, Hiranand Rijhumal Hassamal the terms of which were that these four would contribute cash towards the purchase of the immovable property at the comer of JMN Nkomo and 8th Avenue. The property was owned by HM Harbour and CO Pvt Ltd. The objective was to acquire commercial premises from which the parties would carry on various businesses. These were four close family members and the idea was to acquire commercial property to be held and used as a family. There was a further agreement that these four would be awarded 25% shareholding in the

respondent. The respondent was already incorporated and had as Directors the other three parties to the agreement excluding first applicant.

First applicant avers that it was agreed that upon payment of 25% of the purchase price, he would have 25% shares in respondent and that he would become a director thereof. He further avers that it was also agreed that the four parties to the agreement would each take a portion of the building owned by the respondent.

He avers that he paid his portion of the purchase price and took occupation of his section of premises with second applicant since 1984.

Respondent opposes the joinder of first applicant in HC 965/16 on the ground that he has no *locus standi* or interest since he did not receive the shares he alleges he was supposed to receive and that he has not done anything in 30 years to enforce the alleged agreement as well as that the claim by first applicant has prescribed. He is therefore neither a director nor a shareholder of the respondent. Respondent also avers that first applicant's claim if any is against the members of respondent and not the respondent itself as it is that of being admitted into the shareholding and directorship in respondent. Respondent also attacks the first applicant's claim on the basis of acquisitive prescription in that first applicant's case does not qualify under this principle of our law.

I hold the view that at this juncture what is of importance is whether first applicant has shown an interest substantial enough to allow him to be joined to the proceedings in HC 965/16.

Rule 85 provides for the joinder of parties to actions and/or proceedings. It provides thus:

> "Subject to rule 86, 2 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 at the case may be, some common question of law or fact would arise in all the actions, and
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> b) all rights to relief claimed in the action, whether they are joint, several or alternative, are in respect of an arise out of the same transaction or series of transaction."

In terms of this rule, all an applicant for joinder needs to show in such an application is that he has claims or interests in the transactions leading to either the relief sought or the action

itself. I believe that then it is a question of an interpretation of the facts before a court that sways the court either in favour of joinder or against.

I do not believe that instances of joinder can be dealt with as a rule of thumb, for rule 85 subjects the court's decision to either the law or facts. The factual basis of a case is a wide net and this in essence means that each case depends on its own facts.

In my view a pertinent question that needs to be answered in this matter is whether, there is a common question of law or fact and whether the relief sought arises from the same transaction or a series of transactions.

Applicant has chronicled how first applicant and respondent came about, he has chronicled his involvement in the transactions leading to the ownership of the property at stake by the respondent. He has chronicled how himself and second applicant came to operate within respondent's premises. He avers that himself and second applicant, together have a right to occupy the property being the subject matter of the dispute in HC 965/16. I believe that a case for joinder should be made on a *prima facie* basis. That is, the facts as presented by an applicant for joinder should formulate a *prima facie* basis upon which his case is stands.

Respondent avers that there is no question of law or fact arising in the proceedings in HC 965/16. Respondent avers that first applicant has not alluded to any transaction in terms of which he got ownership of the property and that the brothers with whom he entered into an agreement are since deceased. That his claim for a portion of the immovable property cannot succeed in light of the provisions of the Deeds Registration Act [Chapter 20:05]. I believe though that all applicants needs do is to have a *prima facie* case. A *prima facie* case is just that *prima facie*, on the face of it. The parties can then go into the prospects of any counter claim or defence in the proceedings in HC 965/16. I hold the view that whichever direction or whatever practical steps first applicant needs to take to lay a proper foundation for his claim, should be dealt with in HC 965/16.

At this juncture I believe the question should only be whether applicant has shown an interest sufficient enough to be allowed audience in HC 965/16. I believe the events chronicled by first applicant that:

1) He has been in occupation of the portion for over 30 years while managing the affairs of second applicant
2) An averment has been made that applicant directly contributed to the acquisition of respondent and the building in question.
3) That he and second applicant want to counter claim through raising acquisitive prescription.
4) That currently second applicant and himself are occupying the portion being the subject matter of these proceedings.
5) That the eviction order will directly affect his interests given the background.

I hold the view that first applicant has managed to present a *prima facie* case warranting that I exercise my discretion in his favour and allow him to be joined to the proceedings in HC 965/16. On the other hand, I do not see any prejudice likely to be suffered by respondent as a result of the joinder. In any event, it will assist the court to deal with all the relevant parties once and for all, and for the court to give an effective order that is all encompassing in so far as potential claims are concerned.

It is for these reasons that I am inclined to exercise my discretion in favour of the first applicant.

I accordingly grant an order for the joinder of first applicant in HC 965/16 with costs being in the cause.

Longhurst, Boyce and Company, applicant's legal practitioners
Messrs Dube-Banda, Nzarayapenga and Partners, respondent's legal practitioners