DEPOSIT PROTECTION CORPORATION
(In its capacity as the Provisional Judicial Manager of Tetrad Investment Bank Limited)
versus
ELMBRIDGE (PRIVATE) LIMITED
and
QUICK-TO SECURITY (PVT) LTD

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 26 September & 13 December 2017

Opposed Application- Joinder of Parties

N Madya, for the applicant
F Girach, for the respondent

CHAREWA J: This is an application for joinder of the applicant as a party to the proceedings in HC 4080/16 on the grounds that as the provisional judicial manager of Tetrad Investment Bank Limited (the bank), it has a direct and substantial interest in the outcome of those proceedings as 2nd respondent is a wholly owned subsidiary of the bank whose every activity is controlled by the bank and of which the bank is a 100% shareholder. Further, 2nd respondent is not a trading company but was set up by the bank for purposes of holding the assets of the bank. In addition, the sole asset of 2nd respondent, which is held as security by 1st respondent, was put up by the bank as part of the capital of the bank towards meeting the minimum capital requirements set by the Reserve Bank, and this is reflected in the returns to the Reserve Bank. And at the time that the bank negotiated with its creditors to appoint 1st respondent as the creditors' agent and made the mortgage arrangement with 1st respondent, involving 2nd respondent's sole asset, (which is also the bank's sole capitalisation asset), the bank was already insolvent.

The first respondent opposes the application for joinder on the basis that applicant lacks *locus standi* as it is not the judicial manager of 2nd respondent. Secondly, 2nd respondent is a separate legal persona from its shareholders with the right to own its own assets. Thirdly, applicant is not privy to any of the transactions between the respondents and its joinder will not assist to ensure that all matters in dispute in HC 4080/16 may be effectually and completely

determined. In any event, the bank being the owner of shares in 2nd respondent, its rights with regard thereto are not being interfered with, and thus there can be no substantial interest of the provisional judicial manager in the assets of 2nd respondent.

The law

I will not reiterate the law regarding joinder which has long been trite and has been ably captured in the parties' heads of argument. Suffice it to say that in order to decide whether to allow applicant to be joined to the proceedings in HC 4080/16, I must be satisfied that applicant has a direct and substantial interest in the outcome of those proceedings.[1] As to what constitutes a direct and substantial interest, our courts have defined this as an interest in the right which is the subject matter of the litigation, i.e. a legal interest as opposed to a financial interest.[2]

Analysis

Points <u>in limine</u>

I will quickly dispose of what the 1st respondent raised as a point *in limine*: that applicant does not have *locus standi* to seek to be joined to the main action.

I believe this submission misses the entire point of applications for joinder. Joinder is sought and granted where a third party has a legal right. The starting point therefore is to establish that legal right to be joined. That then grounds the *locus standi*. To then declare, as a point *in limine*, that a party seeking to be joined has no *locus standi* is to effectively close the door in its face and bar it from establishing its right to be joined. It cannot then be proper to bar an applicant from establishing that right to be joined.

I am therefore happy to note that 1st respondent's counsel did not persist with this stance in his heads of argument.

Has applicant established a right to be joined?

It seems to me that the very issues and questions posed by the 1st respondent cry out for joinder of applicant to answer to them, *viz*; whether the bank and 2nd respondent are indeed a single economic unit? Why was a bank asset not registered in the name of the bank? Whether there were common directors (the bank being now under judicial management does not of course have current directors) between the bank and its subsidiary? Whether a fraud was committed on 1st respondent when it was given as security, an asset which did not belong to

[1] See *r87 of the High Court Rules*. See also *Herbstein & Van Winsen in The Civil Practice of the Supreme Court of South Africa* (4th Ed) p170.
[2] *See Munn Publishing (Private) Limited v Zimbabwe Broadcasting Corporation* 1994 (1) ZLR 337 (SC).

2nd respondent? Or how the bank could give as security for loans to itself by 1st respondent, property belonging to 2nd respondent?

In addition to this, it seems to me that the provisional judicial manager, as the person stepping in to correct what may have been done improperly or wrongly leading to diminution in a company and thus causing prejudice to creditors, has a legal right to be joined to a suit which directly affects the assets of the company and thus its value and trading capacity. In this case, it is apparent from the issues raised by 1st respondent that the directors' conduct may not have been above board, in which case it is unreasonable to expect that they would attest to any affidavit that would tie a noose around their own necks. Reference is made to the manner in which they used 2nd respondent's asset as security for loans obtained from 1st respondent by the bank when they well knew that, that same asset was also the sole capitalisation asset of the bank, or how they pledged that asset to 1st respondent at a time they were aware that the bank's liabilities exceeded its assets.

Further, the bank being also liable to depositors in addition to creditors like the 1st respondent, it is important that anything that might affect its survival as a viable institution should concern the provisional judicial manager. If it is correct, as appears from both parties submissions, that 2nd respondent is a non-trading entity which sole asset is the property given to 1st respondent as security, surely it is a given that stripping 2nd respondent of that asset will render it a shell? While applicant's shareholding will remain intact, those shares will be rendered valueless, thus directly affecting applicant's right to a viable asset.

I make no stock of the argument that the provisional judicial manager is swearing to issues he has no personal knowledge of. Clearly he came onto the scene after the fact, but given that the bank is under provisional judicial management, in circumstances where my assessment of the former directors of the bank is less than kind, who else could have sworn to the affidavit for joinder?

It also seems to me that 1st respondent is mistaking joinder as finalisation of its suit against 2nd respondent. In fact, I see no burdensome prejudice that would be suffered by either party from such joinder. Rather, more opportunity for shedding further clarity on the questions 1st respondent raises will open up.

In the circumstances, I am of the view that joinder of applicant is necessary in this case as it has a direct and substantial interest in the final outcome of the proceedings regarding the

assets of 2nd respondent, in so far as they are alleged to be intertwined to Tetrad Investment Bank Limited.

Disposition

CONSEQUENTLY, IT IS ORDERED THAT

1. The applicant be and is hereby joined as the second defendant in the proceedings in HC 4080/16
2. The applicant, as the second defendant in HC 4080/16 shall file its Appearance to Defend within ten (10) days of the granting of this order and shall file any other pleadings in terms of the rules of the High Court
3. That costs be in the cause.

Wintertons, applicant's legal practitioners
Matizanadzo & Warhurst, 1st respondent's legal practitioners