

MARIJOMA TRUST  
versus  
TRADCLE ENTERPRISES (PVT) LIMITED  
and  
MOSES FUNGAI MAKONI  
and  
CHRISTIAN CM TRUST

HIGH COURT OF ZIMBABWE  
MUSITHU J  
HARARE, 9 March 2022 & 12 April 2023

### **Opposed Application – Exception**

*S Banda*, for the plaintiff  
*S M Hashiti* with *K Kachambwa*, for the defendants

**MUSITHU J:**

#### **BACKGROUND**

The plaintiff is a trust duly established in terms of the laws of Zimbabwe. The first defendant is a company duly incorporated according to the laws of Zimbabwe. The second defendant is a director of the first defendant. The third defendant is also a trust established in terms of the laws of Zimbabwe. It is the sole shareholder in the first defendant. The plaintiff instituted proceedings against the defendants claiming the following relief:

- a] An order confirming the mutual termination of the agreement of sale of **Stand 487 Quinington Township of Stand 479 Quinington Township, Harare** [hereinafter the property] entered into by the parties in or about November 2018;
- b] An order for payment to the Plaintiff by the First, Second and Third Defendants, jointly and severally and *in solidum*, the one paying the others to be absolved, of the sum of **US\$532,000.00 [Five Hundred and Thirty Two Thousand United States Dollars]** being restitution of part payment of the purchase price for the sale of the property, which amount became due upon the mutual termination of the parties agreement in or about 2020.
- c] Interest on the aforesaid sum from date of demand to the date
- d] Costs of suit.”

The brief background circumstances that triggered litigation are as follows. In November 2018, the plaintiff and the first defendant, which was represented by the second defendant entered into a verbal agreement for the sale of Stand 487 Quinington Township of

Stand 479 Quinnington Township, Harare also known as 487 Scanlen Drive, Borrowdale, Harare (the property). The purchase price of that property was US\$2,300,000.00 (Two Million Three Hundred Thousand United States Dollars).

The plaintiff alleges that pursuant to the agreement of sale, it paid the first defendant, through the second defendant, a sum of US\$532,000.00. It was further alleged that sometime in 2020, the parties mutually agreed to terminate the said agreement of sale. The first defendant was thus obliged to refund part of the purchase price paid by the plaintiff. The first and second defendants undertook to refund the said amount, but failed to do so despite demand by the plaintiff.

The defendants raised an exception in response to the claim. Prior to filing the exception, the defendants had through their legal practitioners of record, written a letter of complaint to the plaintiff's legal practitioners in terms of r 42(3) of the High Court Rules, 2021 (the Rules). The letter called upon the plaintiff's legal practitioners to address the cause of complaint within 12 days of receipt of the letter. It appears there was no response to that complaint. That cause of complaint is what founds the exception that was filed on 29 October 2021.

The exception was taken on three bases. Firstly, it was contended that the plaintiff is not a legal *persona* at law and therefore could not institute proceedings in its name. It followed that there was no summons and declaration before the court. Secondly, it was contended that the third defendant is not a legal persona at law, and for that reason, it could not be sued in its own name. Thirdly, it was averred that the summons and declaration did not disclose a cause of action as against the second and third defendants.

In its replication to the exception, the plaintiff averred that there was no valid exception before the court. It contended that the alleged exception was a hybrid of a special plea and an exception. It was not proper to conflate a special plea and an exception into one. Such an approach made the exception fatally defective both in form and in substance. It had to be struck off.

The plaintiff insisted that it had the requisite *locus standi* to institute proceedings in its own name. It was the same with the third defendant. The rules of court permitted the institution of proceedings by a trust or the citation of a trust as defendant in proceedings in its name. The claim was therefore properly before the court. The third defendant was therefore properly cited

herein. The plaintiff also insisted that the summons and declaration, as further amplified by the further particulars disclosed a cause of action.

## **THE SUBMISSIONS AND THE ANALYSIS**

### **Whether the question of the legal statuses of the plaintiff and the third defendant impinges upon the validity of the exception**

Before delving into the merits of the matter, I must determine at the outset whether the question of the legal statuses of the plaintiff and the third defendant impinge upon the validity of the document titled “Defendants’ Exception” which is before the court. This is because that document raises legal questions that must also be determined at the very outset. One of those legal questions is whether or not there is a plaintiff before the court.

In its heads of argument, the plaintiff averred that para(s) (a) and (b) of the purported exception constituted a plea in bar/abatement. Such a plea ought to be in Form No. 11(b) for purposes of r 42 (1) (a) of the Rules. The plaintiff further submitted that para (c) of the same document was the exception that ought to be made in Form No. 11(a), for purposes of r 42(b). The defendants had instead lodged an unknown hybrid pleading which contrasted with Forms 11(a) and 11(b) of the rules. From a consideration of the rules, an exception and a special plea could not be pleaded in that fashion.

In his oral submissions, Mr *Banda* for the plaintiff submitted that the consequences attendant upon a finding by the court on the two courses of action was also material. The upholding of an exception did not lead to a dismissal of the claim. The plaintiff was given an opportunity to regularise its claim. A special plea on the other hand could result in the claim being thrown out of court depending on its nature.

In his response on the point, Mr *Hashiti* submitted that the alleged defect was not fatal to the defendants’ case. He argued that a special plea that went to the root of the matter could be taken at any stage of the proceedings. It could be properly raised as a preliminary point of law. *In casu*, the defendants had chosen to take their objection by way of an exception. Counsel further submitted that the use of the wrong forms did not detract from the contents of the pleading. Such an oversight could be condoned by the court. He cited the case of *Ahmed v Docking Station Safaris Private t/a CC Sales*.<sup>1</sup> The court was urged not to elevate form over substance.

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<sup>1</sup> (SC 70 of 2018, Civil Appeal SC 177 of 2018) [2018] ZWSC 70

Mr *Hashiti* further submitted that in any event, the plaintiff ought to have availed itself of the remedy provided by r 43. That provision permits a party to a cause in which an irregular step has been taken to apply to court to have it set aside. The plaintiff had not done so implying that it condoned the irregularity.

Paragraphs (a) and (b) without doubt constitute an attack on the *locus standi* of the plaintiff and third defendant. Ordinarily such an objection should be taken by way of a special plea and not by way of an exception. But the same objection can also be taken as a point of law, there being a thin line between a point of law that can be taken at any stage of the proceedings and one that should be taken by way of a special plea. It is also important to underline the principle that distinguishes an exception from a special plea. The exception procedure is appropriate where the defect complained of appears *ex facie* the pleading, whereas a special plea is appropriate when it is necessary to place facts before the court that tend to show that there is a defect.<sup>2</sup>

Paragraphs (a) and (b) of the document dubbed “Defendant’s Exception” raise questions of law that can be disposed of without the need to introduce any fresh facts as it were. The questions of law may have been raised in a wrong format, but that does not take away the fact that they are points of law and can be properly dealt with as such. Rule 7 of the High Court Rules (the Rules), 2021, permits this court to condone a departure from any of the provisions of the rules. That in my view also extends to the use of the wrong forms. The caveat must always be that such condonation must not result in undue prejudice to the litigant who has pointed out that irregularity. The overriding factor is the need for the court to deal with the real dispute between the parties, and to avoid being distracted by technical issues that should not impinge upon the resolution of the substantive dispute.

For the foregoing reasons, the court determines that there is a valid exception before the court and para(s) (a) and (b) can and should be dealt with as points of law that the court can dispose of at the outset.

### **Whether the plaintiff and the third defendant are properly before the court**

Mr *Hashiti* submitted that there was no plaintiff before the court. There was also no third defendant before the court. This was because a trust was not a legal *persona*. The plaintiff and third defendants had been cited as trusts, yet they had no legal standing to sue or to be sued

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<sup>2</sup> *National Employment Council for the Construction Industry v Zimbabwe Nantong International (Pvt) Ltd* SC 59/15

in their own names. In reply, Mr *Banda* submitted that both the plaintiff and the third defendant were properly before the court by virtue of r 11 of the Rules. The position of the common law that a trust could not sue or be sued in its name had since been altered by the new rules.

There has been variation to the definition of “trust” in the new Rules as compared to the way it was defined in the High Court Rules, 1971 (the old Rules). It is important to highlight the variations at the outset. Order 2A r 7 of the old Rules described a trust as follows:

**“7. Interpretation in Order 2A**

In this Order—

“associate”, in relation to—

(a) a trust, means a trustee;

(b) an association other than a trust, means a member of the association;

“association” includes—

(a) a trust; and

(b) a partnership, a syndicate, a club or any other association of persons which is not a body corporate.

**8. Proceedings by or against associations**

Subject to this Order, associates may sue and be sued in the name of their association.”

The word “association” was broadly defined to include a trust. The word “associate” was also defined to mean a trustee. In terms of subrule 8, associates could sue and be sued in the name of their association. Consequently it followed that trustees could sue and be sued in name of the trust. In other words, the trustees had to identify themselves as trustees for the time being of the trust in whose name litigation was instituted or defended. Rule 11 of the new Rules is now couched as follows:

**“11. Proceedings by or against firms and associations**

(1) In this rule— “associate” in relation to—

(a) a trust, means a trustee;

(b) an association other than a trust, means a member of the association;

“association” means any unincorporated body of persons, and includes a partnership, a syndicate, a club or any other association of persons;

“firm” means a business including a business carried on by a body corporate, carried on by the sole proprietor under a name other than his or her own;

“plaintiff” and “defendant” include applicant and respondent; “sue” and “sued” are used in relation to actions and applications;

“summons” includes a combined summons.

(2) A firm or an association may sue or be sued in its name.

(3) A plaintiff suing a firm or association needs not allege the names of the proprietor or associates. If he or she does, any error of omission or inclusion shall not afford a defence to the association.

(4) Subrule (3) shall apply with the necessary changes to a plaintiff suing a firm.”

Just as was the case in the old Rules, the word “associate” is defined to include a trustee. Unlike in the old Rules, the definition of “association” in the new Rules does not specifically

mention a trust. Rather it refers to an unincorporated body of persons or “any other association of persons”. That definition appears broader than it was in the old Rules. My interpretation of r 11(1)(b) is that where the word “association” is used in relation to a body which is not a trust, then that reference is to a member of that association. Conversely, the word association as it relates to a trust does not mean the members of the trust. It refers to the trust itself. A trust therefore falls within the broad definition of an “association”. In terms of r 11(2) an association may sue or be sued in its name. By extension it also follows that a trust can now sue or be sued in its own name.

The common law position which denied the right to sue or be sued in their own name has radically been changed by this provision in the new rules. That this position represents the correct position of the law was confirmed by the Supreme Court decision in *Sharadkumah Patel & Anor v The Cosm Trust & Ors*<sup>3</sup>, where GARWE JA held that the High Court rules had modified the common law in order to create *locus standi* for a trust.<sup>4</sup> The court therefore determines that the plaintiff and the third defendant are properly before the court as they have the requisite *locus standi* to sue and to be sued in the name of the trust.

### **Whether there exists a cause of action against the second and third defendants**

Authors *Herbstein & Van Winsen*<sup>5</sup> said of an exception:

“An exception is a pleading in which a party states his objection to the contents of a pleading of the opposite party on the grounds that the contents are vague and embarrassing or lack averments which are necessary to sustain the specific cause of action or the specific defence relied upon. The taking of an exception is a procedure which is interposed before the delivery of a plea on the merits by a defendant or before the delivery of a replication or the joinder of issue by a plaintiff. It is designed to dispose of pleadings which are so vague and embarrassing that an intelligible cause of action or defence cannot be ascertained or to determine such issues between the parties as can be adjudicated upon without the leading of evidence. The aim of the exception procedure is thus to avoid the leading of unnecessary evidence and to dispose of a case in whole or in part in an expeditious and cost effective manner”

The exception procedure seeks to achieve a speedy resolution of disputes emanating from defects afflicting pleadings. A defendant must not be at pains to decipher the claim that he or she has to answer to. For that reason, the cause of action must be set out in a manner that is intelligible and concise, leaving the defendant in doubt about the nature of the complaint that he or she has to respond to. The defendants’ letter of complaint and their exception allege that

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<sup>3</sup> SC 163/21. See also *In Re The Malilangwe Trust* SC 13/22 at p 16 of the judgment

<sup>4</sup> Paragraph 44 on page 20 of the judgment.

<sup>5</sup> *The Civil Practice of the High Courts of South Africa*, 5<sup>th</sup> Edition, Vol 1 at p630

the summons and declaration do not disclose a cause of action against the second and third defendants. There is merit in the complaint.

The first defendant is an entity duly incorporated according to the laws of Zimbabwe. According to the declaration, it is the first defendant that entered into a verbal agreement with the plaintiff. It is alleged that the first defendant was represented by the second defendant when the verbal agreement was consummated. It is also alleged that the second defendant received on behalf of the first defendant, the amount which is the subject of the plaintiff's claim herein. The second defendant's involvement ends there. As regards the third defendant, its involvement in the transaction is not set out at all in the summons and declaration. It is only in the prayer that relief in the form of payment is sought against it.

Before filing the exception, the defendants made a request for further particulars. The request sought to establish the basis upon which all the three defendants were sued. It also sought to establish the parties to the agreement. In response to the first request, the plaintiff alleged that the second defendant was the one who not only received payments on behalf of the first defendant, but he also guaranteed its performance. As regards the second request, it was dismissed as vexatious apparently because para 5 of the summons was clear as to the parties to the agreement. It is necessary to recite para 5 of the declaration (because the summons do not have para 5) in order to give the response a context. It reads:

“In or about November 2018, the Plaintiff and the First Defendant who was represented by the Second Defendant, entered into a verbal agreement for the sale of Stand 487 Quinington Township of Stand 479 Quinington Township, Harare.....”

The only parties identified in para 5 are the plaintiff and the first and second defendants. The third defendant is not mentioned in that paragraph. On what premise was the third defendant then sued, if the plaintiff's own pleaded case as amplified by the further particulars fails to explain that basis? The court finds no justifiable reason for the citation of the third defendant herein. The same can also be said of the second defendant to a certain extent. The further particulars justify the suit against the second defendant on the basis that he received payments on behalf of the first defendant and that he also guaranteed performance of the agreement by the first defendant. It is not clear how receiving payments on behalf of the first defendant tied the second defendants to the agreement. Further, the alleged guarantees given by the second defendant regarding the performance of the agreement by the first defendant were not explained or highlighted.

It seems the hallowed principle of the law that the first defendant is a juristic legal entity and with a distinct legal personality from its owners and directors was forgotten by the plaintiff. Also forgotten was the principle of privity of contract which in simple terms means that a contract cannot confer rights or impose obligations arising under it on any person other than the immediate parties to the contract. While an attempt was made to justify the citation of the second defendant, clearly the same cannot be said of the third defendant. In its replication, the plaintiff refuted the allegation of the absence of a cause of action against the second and third defendants as follows:

“This is also denied. The summons and Declaration (amplified by the Further Particulars) disclose that Second and Third Defendants were parties to the Agreement of Sale and guaranteed the First Defendant’s performance.”

As I have already noted, the said further particulars are glaringly deficient in explaining the cause of action against the second and third defendants. While the plaintiff can be afforded an opportunity to regularise its claim as against the second defendant, definitely the same indulgence cannot be extended to the third defendant which appears to be a complete stranger to these proceedings.

The defendants’ heads of argument sought to extend their complaint to also incorporate the first defendant.<sup>6</sup> I have already highlighted that the letter of complaint and the exception all sought to demonstrate the absence of a cause of action against the second and third defendants. The complaint was never about the absence of a cause of action against the first defendant. The reference to the first defendant in the heads of argument appears to have been made in passing or as an afterthought. No further submissions were made to sustain the same complaint on behalf of the first defendant. In the premises, the court determines that the alleged absence of a cause of action against the first defendant was never meant to be an issue for determination under the present exception. The exception must therefore be resolved with specific reference to the second and third defendants.

## **COSTS**

The general rule is that costs follow the event. In determining whether or not to penalise a party through an order of costs, the court takes seriously the manner in which the party against whom costs are sought conducted itself in litigation. The conduct of the plaintiff cannot escape censure here. Not only were the plaintiff’s legal practitioners forewarned of the deficiencies in

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<sup>6</sup> See paragraphs 13, 16 and 18 of the defendants’ heads of argument

the plaintiff's cause of action against the second and third defendant through a letter of complaint, the further particulars supplied by the plaintiff in response to a request for further particulars and the replication to the exception were similarly deficient in their justification of the claims against the second and third defendants. Had the plaintiff taken heed of the complaint at that early stage, then these proceedings would have been averted.

**Accordingly it is ordered as follows;**

1. The second and third defendants' exception to the summons and declaration is upheld.
2. The plaintiff's claim against the third defendant is hereby dismissed with costs.
3. In respect of the claim against the second defendant, the plaintiff shall amend its summons and declaration within ten days of the service of this order, failing which the second defendant shall be entitled to approach the court for the dismissal of the plaintiff's claim.
4. Costs shall be in the cause in respect of the exception by the second defendant.

*Sinyoro and Partners*, legal practitioners for the plaintiff  
*Maunga Maanda & Associates*, legal practitioners for the defendants