

TRIMIANT INVESTMENTS (PRIVATE) LIMITED  
and  
WATERMOUNT ESTATES (PRIVATE) LIMITED  
and  
ONIYAS ZIDANDA GUMBO  
versus  
TBIC INVESTMENTS (PRIVATE) LIMITED  
and  
CHRISTOPHERF WESLEY TAKURA TANDE  
and  
KWAZISO BHOSHA  
and  
THE REGISTRAR OF COMPANIES (NO)

HIGH COURT OF ZIMBABWE  
CHITAPI J  
HARARE, 23 November 2021, 22 & 23 March,  
19 May, 14 & 15 June and 13 July 2022

### **Civil Trial – Judgment on Preliminary Points**

*T Mpofu* with *R Mabwe* for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiff  
*K Gama* for 1<sup>st</sup> defendant  
*T Magwaliba*, for the 2<sup>nd</sup> defendant  
*M Ndlovu*, for the 3<sup>rd</sup> defendant

CHITAPI J: This is an old matter in which summons was issued in September 2018. The pre-trial conference was finalized in April 2021. The matter was set down for trial on 23 November 2021. The matter was on that date postponed to 15 February 2022 by consent. On 15 February 2012 the plaintiff's co-counsel Ms *Mabwe* applied for a postponement on the basis that the plaintiffs needed to deal with a notice to amend plea which was raised by counsels for and on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The proposed amendment raised two issues of law, firstly that the plaintiff has no *locus standi in judicio* by reason of its de-registration in terms of the then Companies Act [*Chapter 24:03*] and secondly that the *lis* brought by the plaintiff is *res judicata* by reason of this court's judgment in case No. HC 4998/08, judgment No. HH 785/20. The matter was postponed to 22 March 2022, the plaintiffs' counsel having indicated that the proposed amendment would be opposed.

On 22 March 2022, the matter was postponed to 25 March 2022. On 25 March 2022, the matter did not take off. There arose arguments about the legal representation of the plaintiffs and the withdrawal of the first issue listed for trial. I do not find a need to dwell on that aspect because the issue was resolved. I was also addressed on issues for trial generally. Again, I do not dwell on this. The significant point which I deal with concerned the amendment to the 1<sup>st</sup> and 2<sup>nd</sup> defendants' plea and in particular how it will be dealt with procedurally. The issue has resulted in the writing of the judgment because of disagreements which have arisen amongst the parties on how the trial shall progress. I ended up having to instruct that the record of proceedings should be transcribed because the plaintiffs' counsel had submitted that I made a specific directive regarding how the trial would progress.

The problem which has arisen, is that the plaintiffs take the position that at the hearing of 25 March 2022, I directed that on 19 May 2022 being the date to which I postponed the matter, the court would deal only with the one point *in limine* concerning the procedural propriety of the manner in which the 1<sup>st</sup> and 2<sup>nd</sup> defendants sought to raise their additional points *in limine* which I have referred to as the intention to amend the said defendants' plea(s). What happened is that on 25 February 2022, the plaintiffs filed a notice of intention to oppose the amendment to the plea. The plaintiffs followed that up with the filing of a substantive response and heads of argument on the issues raised by the defendants, mainly the competency of the defendants to raise the amended special plea and exception at this stage. The defendants, following submissions by Mr *Magwaliba* which the rest of the defendants adopted was to the effect that the defendants needed time to also place written arguments as done by the plaintiff. They requested that the matter should be postponed to allow the defendant time to file their submission as plaintiff had done. The matter was postponed to 19 May 2022 with a direction that the defendants should file their written submissions by 14 April 2022.

The trial did not commence on 19 May 2022. Further argument arose. Mr *Mpofu* for the plaintiffs stood up to argue on the plaintiffs' objection to the propriety of filing the notice of application to amend the special plea and exception. This is the matter for which a postponement had been granted to allow the defendants to prepare written arguments in answer to the plaintiff's written submissions. Mr *Magwaliba* for the 1<sup>st</sup> defendant addressed the court next. He submitted that since the pre-trial conference issues raised other objections *in limine*, the court ought to deal with the issue of competence to raise the new points *in limine* together with other points arising from the issues as were dilatory in nature. Mr *Magwaliba* submitted that it would not be in the interests of justice to deal with the points *in limine* piece meal. In

particular Mr *Magwaliba* submitted that it did not make sense for the court to be asked to deal only with the competence of the defendant to bring up the point *in limine* without dealing with the substance of the point *in limine*. Counsel's argument was that if the court were to decide only the competency of the defendants to bring the point of *limine* and end there, then if the objection failed, there would be a delay occasioned by the need to have applicant's counsel file argument in relation to the substance of the point *in limine*. Mr *Magwaliba* submitted therefore that the plaintiffs be directed or ordered to file their heads of argument on the substance of the point *in limine* since they had only addressed the propriety and/or competency of the defendants to raise the point.

Mr *Gama* for the first defendant associated himself with the submissions made by Mr *Magwaliba*. Counsel submitted that if the issues were dealt with piece meal, the court would end up rendering many judgements in the same matter for example so submitted counsel, there would be a judgment on whether or not it was competent for the defendants to raise the issues of the amendment to the plea and an exception at this stage. If the court rules in favour of the defendants that would constitute the first judgement. The court would then deal with the substance of the amendment sought and this would constitute the second judgment. Mr *Gama* referred to the jointly agreed pre-trial conference minutes. The issues are listed as:

**a. ISSUES FOR TRIAL**

- 1.1. The parties perceive the following to be the issues for trial:
  - i. Whether the trial in this matter should be stayed pending determination of the application filed by 1<sup>st</sup> and 2<sup>nd</sup> Defendant under HC 658/21, which application seeks the stay of the present proceedings pending the determination of the application in Case No. HC 5990/19 instituted by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant and the appeal filed by Plaintiffs to the Supreme Court under SC 543/20?
  - ii. Whether it is open to 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to raise special pleas which were not taken at the same time as the exception filed in the matter and if it is, whether there is any merit to those exceptions and special pleas.
  - iii. Whether the shares held by 3<sup>rd</sup> Plaintiff in 1<sup>st</sup> Plaintiff and those held by 1<sup>st</sup> Plaintiff in 2<sup>nd</sup> Plaintiff were transferred to 1<sup>st</sup> Defendant with sufficient and valid cause or were otherwise properly acquired by the 1<sup>st</sup> Defendant.
  - iv. Whether the registers of 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff accurately reflect the shareholders and directors in those companies and if not, whether cause for the rectification thereof exists in terms of section 118 of the Companies Act [*Chapter 24:03*].

- v. Whether or not 3<sup>rd</sup> Plaintiff compromised his rights to bring any claim(s) against 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

Mr *Gama* submitted that the rest of the issues therein stated as issues (iii)(iv) and (v) would be subject of another judgement. Counsel submitted that it was in the interests of justice to address all the points arising.

Mr *Ndlovu* for the third defendant submitted that the 3<sup>rd</sup> defendant would abide the courts direction on the matters which the court had dealt with.

For his part, Mr *Mpofu* submitted that he was not impressed by the positions taken by Messrs Magwaliba and *Gama*. Counsel submitted that the submissions made by his colleagues were a waste of time. He submitted that the court had issued a direction that the hearing of 25 March, 2022 was for the purpose of determining the Plaintiff objection to the manner in which the Plaintiffs intended to introduce their amendment and exception. The first and second defendants counsel disagreed that any directive had been given by the court. Mr *Mpofu* submitted that the court could not go back on its directive as it would not have jurisdiction to revisit its decision. In this respect two points would arise. The first point would be to determine whether the court gave a directive. The second point would depend on the first one in that if the court made a directive what would be the status of such directive in relation to whether the court is bound by it and may not change it in directing how the trial should progress. If the court did not make a directive then the question to address is whether the application by the first and second respondents has merit. If it has merit, then the appropriate directive to grant.

Since counsel could not agree on whether or not the court issued a directive. It was agreed that the Registrar should play the recording of the proceedings of 25 March, 2022 for counsel and parties to listen to the same. Counsel would still not agree on whether the court issued a directive after listening to the tapes. I caused the transcription of the proceedings of 25 March, 2022. From the transcript, what emerges is that the principal point made by Mr *Mpofu* was that the first and second respondents could not raise their points *in limine* outside of the trial because they did not comply with the requirements to have the special pleas set down and determined prior to the trial. As such, the respondents could not seek to have the special pleas argued outside the trial proceedings. The transcript shows that the court directed that the first and second respondents should file their responses to the point of law taken by the applicant objecting to the propriety of raising the special pleas in the manner in which they did it. The responses were to be filed by 14 May 2022. The matter was postponed to 19 May 2022.

There is no indication that the court directed or ordered that on the date to which the matter was postponed, only the objection by the applicant on the property of the manner in which the first and second respondents had raised the point *in limine* would be heard. The court did not give the directive as suggested by the plaintiffs' counsel. The arguments submitted on the *functus officio* status of the court on the point does not apply. The proceedings were terminated through a directive made that the first and second defendants should file their written responses to the point *in limine* taken by the applicants by 14 April 2022. The court must therefore determine whether or not the first and second defendants' application to direct that their points *in limine* be heard at the same time as the objection of the applicant should be granted.

The first and second respondents submitted that it was in the interests of justice for the court to avoid a piece-meal approach to dealing with the matter and to direct that trial issues (ii) and (v) should be heard at the same time as the issue raised by the plaintiffs. It was submitted that the court should direct the plaintiffs to respond to the merits of the point *in limine* raised by the plaintiffs. In other words, the first and second respondents submitted that unless the plaintiffs also addressed the merits of the point, it would mean that if the point is not upheld, the plaintiffs would again have to separately address the merits.

Issues (ii) and (v) which the first and second defendants desire that they be dealt with at the same time as the point of law raised by the plaintiffs have already been captured. Issue number (ii) especially is in two parts. The first part concerns the property of raising a special plea which was not taken at the same time as the exception which was initially taken. The second part depends on the answer to the first part, which is whether, if the special pleas can be raised subsequently the exceptions raised and special plea has merit.

The record shows the exception filed by the first and second defendants on 6 February 2019 as evidenced on page 61 of the consolidated index to pleadings. The plaintiffs responded to the exception by taking a preliminary point that the exception was taken in the wrong form. The plaintiffs also pleaded to the merits of the exception. It does not therefore appear that there is anything wrong or prejudicial to the plaintiffs to take an objection to the procedure adopted and also address the merits.

The view I take is that there should be no piece-meal hearing and judgements on the matter. The parties should not play a hide and seek game. Indeed, a party must not adopt a position where it splits its defences one after another. A party should not approach the matter by taking the position that it will first unleash a procedural objection, pray that it will succeed

and if it fails to then apply for time to address the merits of its objection to be argued on a separate hearing. In my view litigants must not adopt hide and seek tactics.

I am in agreement with first and second respondents that it would not be the interests of justice to split the defences to the proposed raising of the points of law into a procedural defence and if it fails get time to address the merits separately. I therefore consider that the interests of justice will be served by giving time to the plaintiffs to file a response on the merits of the proposed point *in limine* raised by the first and second defendants. Once the plaintiffs have availed themselves the opportunity to and addressed the merits the court will consider whether or not the point of law raised by the first and second respondents should be separately determined from other points *in limine* raised in issues (ii) and (v) of the joint pre-trial conference minute.

In the result, the following order is made.

- (i) The hearing be postponed to a date to be fixed by the Registrar in consultation with the parties' counsel.
- (ii) The Plaintiffs are granted leave to if so advised, respond to the merits of the first and second defendants intended application to raise points of law in regard to which the plaintiff only addressed an objection to the propriety of the procedure taken.
- (iii) The plaintiffs' response on the merits be filed within 7 days of the date of this order.
- (iv) The issue of wasted costs is held over for argument at the end of the trial.

*Gill Godlonton*, first respondent legal practitioner

*Gama and Parties*, first respondent 's legal practitioners

*Chambati & Matakata Attorneys*, second defendant's legal practitioners

*Mangezi Nleya and Partners*, third defendant's legal practitioners