

JAYESH SHAH
versus
AIR ZIMBABWE CORPORATION

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE 29 June and 1 July 2010

Exception

Plaintiff in person
L Uriri, for the excipient/defendant

KUDYA J: On 23 June 2008 the plaintiff issued summons out of this court against the defendant. After the plaintiff furnished it with the further particulars it requested, the defendant, *inter alia*, excepted to the summons and declaration on 3 October 2008. The basis of the exception was that the defendant had ceased to exist both at the time the cause of action arose and at the institution of proceedings.

The cause of action arose on 2 September 2007 when the plaintiff was a fare paying passenger in an Air Zimbabwe aircraft en route from Singapore to Harare. The summons commencing action was served at the head office of Air Zimbabwe (Pvt) Ltd. In his replication filed by his erstwhile legal practitioners Scanlen and Holderness, the plaintiff averred that the exception was frivolous and ill conceived and persisted with his assertion that the defendant was in existence.

It was directed at the pre-trial conference held on 29 May 2009 that the parties were to file heads of argument on the exception which was to be argued and disposed of at the commencement of trial. However, on 26 May 2009 the plaintiff had filed a Notice of Amendment in which he of his own accord amended some aspects of his declaration. This document was not dealt with at the pre-trial conference. On 7 July 2009 the plaintiff through his erstwhile legal practitioners filed a notice of amendment. He indicated his intention to apply at the commencement of trial to amend his summons and declaration by the addition of “**and/or Air Zimbabwe (Private) Limited**’ after **Air Zimbabwe Corporation** wherever it appears”. On 24 July 2009 the excipient filed heads of argument and the plaintiff did so on 12 August 2009. It is noteworthy that Messrs Scanlen and Holderness renounced agency on 17

December 2009; and Messrs Muringi Kamdefwere who took over from them also renounced agency on 24 June 2010. In argument before me, the plaintiff relied on the heads of argument filed on his behalf by his initial legal practitioners.

The issue raised by the exception is whether or not at the time the cause of action arose and at the time that summons was issued the defendant was in existence. Mr *Uriri* for the excipient contended that the defendant ceased to exist on 23 March 2000. The plaintiff, on the other hand contended that the excipient still exists. It is necessary that I provide a historical overview of the Air Zimbabwe Corporation in order to place the issue in its proper context.

There was during the Federation of Rhodesia and Nyasaland a statutory body called the Central African Airways Corporation, which had the powers to sue and be sued. On 1 September 1967 the Minister of Transport and Power, acting in terms of s 9 (1) of the Transport Services (Railways and Airways) (Transition) Act, No 15/1967, in the Transport Services (Airways) (Establishment of New Corporation) Notice, RGN 439/1967 dissolved and replaced it by a corporation of the same name. The name of the corporation was changed to the Air Rhodesia Corporation on 11 October 1968 by the Air Rhodesia Corporation Act No 32/1968. During the Zimbabwe Rhodesia era it was renamed the Air Zimbabwe Rhodesia Corporation. After independence, it was renamed the Air Zimbabwe Corporation by the Amendment of Laws Order, SI 236/1980.

On 8 May 1998 the Air Zimbabwe Corporation (Repeal) Act No. 4 of 1998 (The Repeal Act) was brought into operation by General Notice No 195/1998 which was published in the Government Gazette of that day. The purpose of the Repeal Act, as set out in the preamble, was “to provide for the dissolution of Air Zimbabwe Corporation and the transfer of its functions, assets, liabilities and staff to a company formed for the purpose; to provide for the repeal of the Air Zimbabwe Corporation Act [*Chapter 13:02*]; and to provide for matters connected with or incidental to the foregoing.”

Section 3 of the Repeal Act mandated the Minister of Transport and Energy to secure the formation of a company limited by shares in terms of the Companies Act [*Cap 24:03*] to succeed the Corporation. If such a company was in existence before the commencement of the Act, the Minister was empowered to notify the Corporation and direct the company to become the successor to the Corporation. The company he nominated as the successor company, Air Zimbabwe (Private) Limited, was already in existence by the time the Repeal Act was published. It had been incorporated on 20 November 1997.

Section 5 (1) of the Repeal Act directed the Minister to fix a date for the transfer of all assets and liabilities of the Corporation to the successor company. He duly transferred the assets and liabilities of the Corporation on 23 March 2000 through General Notice No 120A/2000. The Corporation staff, bonds, hypothecations, deeds, contracts, licences, permits, causes of action and proceedings were in terms of subss (2) to (8) of s 5 deemed to have been transferred to the successor company on the transfer date.

Mr *Uriri* contended that the excipient was not in existence in fact and in law both at the time the cause of action allegedly arose and at the time the proceedings were launched. The plaintiff grounded his contention that the excipient was in existence on the failure by the President to repeal the Air Zimbabwe Corporation Act in terms of s 11 of the Repeal Act. Section 11 reads:

“When the President is satisfied that the assets and liabilities of the Corporation have been transferred to the successor company and that nothing remains to be done under this Act, he shall, by statutory instrument, repeal the Air Zimbabwe Corporation Act [*Cap 13:02*].

The factual position is that in terms of s 5 of the Repeal Act as read with General Notice 120A of 2000, the excipient was divested of all substance. In my view it ceased to operate on 23 March 2000. The legal position that existed after 23 March 2000 was that the excipient existed in form only, or as was aptly stated by the plaintiff in his written heads, “Air Zimbabwe Corporation does exist albeit as a shell”.

On 23 March 2000, Air Zimbabwe Corporation ceased to hold any utility value. It could not transact any business. It did not have a board. It did not have employees. It did not have assets. It could not commit acts of commission or omission. It could not execute contracts or commit delicts. It did not have offices to operate from. When the alleged cause of action arose on 2 September 2007 and when the summons was issued on 18 June 2008, the excipient, was neither dead nor alive. It was in a state of comatose. The obvious issue that presents itself is whether in that state it could sue or be sued. The answer, in my view is found in s 5 (6) of the Repeal Act. It reads:

“Any cause of action or proceeding which existed or was pending by or against the Corporation immediately before the transfer date may be enforced or continued, as the case may be, by or against the successor company on or after the date of transfer in the same way that it might have been enforced or continued by or against the Corporation had this Act not been passed.”

In my view this subsection irrevocably divested the excipient of any power to sue or to be sued after the transfer date. Thus the shell that remained by virtue of section 11 of the Repeal Act could not possibly be seized with the power to sue or be sued. That right was lost forever on 23 March 2000.

It seems to me that the averment in the exception that the plaintiff sued the wrong party was properly taken.

The plaintiff sought to cure the dangers posed by the exception by making an application to amend his summons commencing action and declaration by adding the words after the defendant's name 'and/or Air Zimbabwe (Pvt) Ltd'. He relied on the provisions of Order 20 r 132, which is predicated on the absence of prejudice to the party against whom the amendment is sought. Mr *Uriri* contended that the application to amend summons and declaration in the manner proposed by the plaintiff was a disguised application firstly for joinder, and secondly for substitution. He submitted on the authority of *Gariya Safaris (Pvt) Ltd v Van Wyk* 1996 (2) ZLR 246 (H) at 252G-255F that the summons in the present case was a nullity and as such it could not be rectified by either substitution or joinder.

In my view, the amendment sought is a novelty in this jurisdiction as it combines the conjunctive "and" and the disjunctive "or". Such an amendment is vague and embarrassing and would have to be struck out. It does not fulfill the requirements for a joinder which are contemplated by Order 13 Rule 85 of the rules of court. The plaintiff failed to demonstrate both some common question of law or fact and some entitlement to the relief claimed that arises from transactions performed by both the defendant and Air Zimbabwe (Pvt) Ltd. I agree with Mr *Uriri* that the plaintiff sought the substitution of Air Zimbabwe (Pvt) Ltd for the defendant under the guise of an application to amend his summons and declaration. The cases cited in the *Gariya* case, *supra*, of *Van Heerden v du Plessis* 1969 (3) SA 298 (O); *Fosa v Commercial Properties (Pty) Ltd & Anor* (1996) 2 All SA 611 (D); *Dawson (Bradford) Ltd & Ors v Dove & Anor* [1971] 1 All ER 554 (QB) and *Lazard Brothers & Co v Midrand Bank Ltd* [1933] AC 289 make the point that a summons which is invalid cannot be rectified by an amendment. See also *Stewart Scott Kennedy v Mazongororo Syringes (Private) Limited* 1996 (2) ZLR 565 (SC).

The application for amendment must fail on the basis that the summons issued against the defendant was invalid. In view of the conclusions that I have reached in regards to the exception and the application to amend the summons and declaration, it is not necessary for

me to determine the validity of the amendment made *mero motu* by the plaintiff on 26 May 2009.

It is accordingly ordered that:

1. The defendant's exception be and is hereby upheld.
2. The application to amend the plaintiff's summons be and is hereby dismissed.
3. The plaintiff's claim against the defendant be and is hereby dismissed with costs

Mutumbwa, Mugabe & Associates, the defendant's legal practitioners