

THE TRUSTEES OF THE MUKONO FAMILY TRUST  
and  
MUKONITRONICS (PRIVATE) LIMITED  
versus  
KARPEG INVESTMENTS (PRIVATE) LIMITED T/A KADIR & SONS  
and  
AMANAT ELECTRICAL WHOLESALERS  
and  
BIG R MICA HARDWARE (PRIVATE) LIMITED  
and  
NATIONS HARDWARE (PRIVATE) LIMITED  
and  
SWIZ ELECTRICAL (PRIVATE) LIMITED  
and  
TAKE OUT POWER SUPPLIERS T/A NEXUS POWER  
and  
AE ELECTRICAL

HIGH COURT OF ZIMBABWE  
MUREMBA J  
HARARE, 2 October 2015 & 25 November 2015

**Opposed application-Exception**

*M Nkomo*, for plaintiffs  
*S Hashiti*, for 1<sup>st</sup> and 5<sup>th</sup> defendants

MUREMBA J: The plaintiffs issued summons against the defendants citing an infringement of intellectual property rights registered in the name of Mukono Family Trust under the Industrial Designs Act. The plaintiffs aver in their declaration that they are proprietors of a manufacturing enterprise called Mukonitronics (Private) Limited which, among other things, manufactures electrical components such as power inverters, fluorescent light fixtures, surge protectors, solar lights, etc.

The plaintiffs aver that on 31 July 2008 the first plaintiff registered a design in terms of the Industrial Designs Act [*Chapter* 26:02] and was issued with a certificate of registration. The plaintiffs aver that the defendants have infringed their exclusive rights which are protected in terms of s 15 of the Industrial Designs Act by either making or

importing or selling or offering for sale articles in respect of which the first plaintiff's design is registered. The plaintiffs want the defendants to be interdicted from reproducing, selling, exporting and dealing in their works without written authority from them. The plaintiffs also want to be paid damages arising out of the infringement by the defendants.

The first and fifth defendants filed an exception to the summons and declaration stating that they contain no cognizable cause of action. They averred that in terms of s 8 of the Industrial Designs Act upon which the first plaintiff's design could have been registered, only persons at law can register such. They averred that a trust is not a legal person and having no legal personality, cannot be a person who can seek and obtain registration of a design or any other trade mark or sign in terms of the Industrial Designs Act or any other Act. They submitted that the design in issue is registered in the name of the Mukono Family Trust and not in the names of the trustees. They averred that a trust is a fiduciary arrangement or relationship between the grantor, the trustee and the beneficiary which describes the trustee's collection of assets and liabilities with respect to certain property. They averred that any purported registration of the design in the name of Mukono Family Trust is therefore invalid and a nullity at law and is of no force and effect. The defendants averred that there is no basis upon which the plaintiffs can allege infringement of a right not properly registered. They averred that on that basis the plaintiff's claim must be dismissed.

In opposing the exception the plaintiff's counsel, Mr *Nkomo* argued that at law an exception is only available where there is a defect *ex facie* the pleadings; but in this case looking at the pleadings i.e. the summons and the declaration there is no apparent defect. He said that the cause of action is clearly spelt out as the infringement of intellectual property rights and the defendants actually acknowledge this cause of action in their exception. Mr *Nkomo* argued that there is therefore no basis for the excipients to aver that the pleadings do not disclose a cause of action.

Mr *Nkomo* also argued that the issue of the validity of the registration of the industrial design which the excipients are raising is a special defence which is not apparent from the declaration. He said that it should therefore have been taken by way of a plea in bar and not by way of an exception. Mr *Nkomo* highlighted the distinction between an exception and a special plea as set out in *Brown v Vlok* 1925 AD 56 which was quoted in *George v Lowe and Another* 1936 CPD 402 @ 406. It was said,

“Now a plea in bar is one which, apart from the merits, raises some special defence not apparent from the declaration-for in that case it would be taken by way of exception which either destroys or postpones the operation of the cause of action.”

Mr *Nkomo* argued that a special plea proceeds on the basis that the allegations in the plaintiff's declaration are correct but should nevertheless be disposed of for one reason or another that does not appear *ex facie* the pleadings. He argued that the defendants adopted the wrong procedure and as such the exception should be dismissed. He further said that the question of the validity of the registration is a defence on the merits.

Mr *Hashiti* maintained that the excipients adopted the correct procedure by excepting because the certificate of registration in issue was attached to the declaration and as such it was part of the declaration. He submitted that the defect therefore appears *ex-facie* the pleading.

Firstly, I will deal with the issue of procedure.

A claim can be excepted to on the grounds that it is vague and embarrassing that the defendant does not know what claim he has to answer or that it does not disclose a cause of action. Failure to disclose a cause of action means that either an essential element of the claim has been omitted or the cause of action raised is unacceptable at law.

An exception on the grounds that the plaintiff's claim does not disclose a cause of action can be upheld where a defendant admits the plaintiff's allegation but pleads that as a matter of law the plaintiff is not entitled to the relief claimed by him.

Herbstein & van Winsen *The Civil Practice of the High Courts of South Africa* 5<sup>th</sup> Ed @ p 599-600 say the essential difference between a special plea and an exception is that in an exception, the excipient is confined to the four corners of the pleadings. New facts may not be introduced to make such a determination on whether or not the pleading is excipiable. *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 754; *CF First National Banking South Africa v Perry NO* [2001] 3 All SA 331 (A) at 334. The facts set out in the plaintiff's declaration must be accepted as correct unless they are palpably false. *Voget and Others v Kleynhans* 2003 (2) SA 148 (C) at para 9 *Marney v Watson* 1978 (4) SA 140 (C) at 44. The defect complained of should appear *ex facie* the pleading. Special pleas are however established by the introduction of fresh facts from outside the circumference of the pleading and these facts have to be established by evidence. So facts have to be placed before the court in order to show that there is a defect.

In the present matter I do agree with the Mr *Nkomo* that the defect that the first and fifth respondents are complaining of is not apparent from the declaration. Just by reading the declaration one cannot tell that there is a defect. The plaintiffs make an averment that the first

plaintiff registered a design in terms of the Industrial Designs Act. The certificate of registration is even attached. The plaintiffs further aver that there has been an infringement of that registered design. On the face of it there is absolutely nothing wrong with this declaration. The cause of action is clearly spelt out as an infringement of the registered design. So there is nothing to except about the claim. However, when the defendants then say the registration is a nullity because it does not comply with the provisions of the Industrial Designs Act, it then becomes imperative for one to then look at the Industrial Designs Act and see what it says about registration of designs. This act of having to look at the Industrial Designs Act constitutes the introduction of fresh facts that are outside the circumference of the declaration. In view of the foregoing I conclude that indeed the excipients adopted the wrong procedure. Such a complaint is one that should be raised by way of a special plea and for this reason the exception should be dismissed.

Be that as it may, I am of the view that even if the wrong procedure was adopted by the excipients, I might as well deal with the issue of whether or not the registration of the design in the name of the trust is a nullity at law. Mr *Hashiti* argued that in terms of s 8 of the Industrial Designs Act an application to register a design can only be made by a legal *persona* and Mukoni Family Trust not being a legal *persona* could not have competently registered a design. He made reference to the famous case of *MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169 at 1172I wherein Lord Denning MR said,

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad.....And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

Mr *Hashiti* further argued that a trust not being a legal *persona* cannot own any property. He cited a *plethora* of cases in a bid to show that a trust is not legal *persona*, a fact which the plaintiff's counsel Mr *Nkomo* did not dispute. Mr *Hashiti* referred to *WLSA & Ors v Mandaza & Ors* 2003 (1) ZLR 500 (H); *Crundall Brothers (Pvt) Ltd v Lazarus N.O. & Anor* 1990 (1) ZLR 290 (H) at 298 E-F; *Gold Mining & Miners Development Trust v Zimbabwe Miners Federation* 2006 (1) ZLR 174. These authorities state that a trust is not a juristic person, but a legal relationship or arrangement by which one person administers property for another or for some impersonal object.

However, what is pertinent to note is that none of these authorities which Mr *Hashiti* cited says that a trust cannot own property. Of interest is the case of *Mafirambudzi Family Trust v Madzingira & Ors* HH 338/14 that Mr *Hashiti* referred to while arguing the point that

trustees exist to pursue the interest of a trust. In that case, Mafirambudzi Family Trust sued the respondents for the transfer of an immovable property namely a house which it had bought from the first and second respondents. The applicant being a trust had paid the purchase price but the first and second respondents had refused to pass transfer of the property. After hearing the matter the court ordered the first and second respondents to effect transfer of the property to the applicant, Mafirambudzi Family Trust. This case shows that a trust can own property. However, since a trust is not a *juristic* person it has no corporate personality. It does not have a separate existence from that of the trustees. *Thempson Muzvagwandoga & Anor v Mai-Kai Real Estate Development Trust* HH 114/15. Its property is therefore vested in the trustees as individuals.

In arguing that the registration of the design is a nullity, the thrust of Mr *Hashiti's* argument hinges on the definition of the word 'person' which is used in section 8 of the Industrial Designs Act. Section 8 of the Industrial Designs Act reads as follows,

“8. Persons to apply for registration

- (1) An application for the registration of a design may be made by any of the following persons÷
- (a) a person claiming to be the proprietor of the design; or
  - (b) an assignee;
- and may be made by that person either alone or jointly with any other person.”

As a starting point I would like to agree with the submissions made by Mr *Nkomo* that there is no law which prohibits the registration of designs in the name of a trust. As already stated, a trust has no separate existence from the trustees and as such the property of the trust is vested in the trustees as individuals. It is the trustees who have a mandate to manage the property of the trust. This therefore means that it is the trustees who apply for the registration of designs in favour of the trust in terms of s 8 of the industrial designs Act, and a trustee being a natural person is qualified to apply in terms of s 8 (1) (a). In terms of s 8 (1) (b), a trustee can assign another person to make such an application. I therefore do not see how the registration of the design in the name of Mukono Family Trust falls foul of the Industrial Designs Act. After all, by operation of law ownership of the property vests in the individual trustees notwithstanding registration in the name of the trust. I conclude therefore that the registration is not a nullity.

**Accordingly, the exception is dismissed with costs.**

*Donsa-Nkomo & Mutangi*, plaintiff's legal practitioner  
*Costa & Madzonga*, 1<sup>st</sup> and 5<sup>th</sup> defendant's legal practitioners