DELTA BEVERAGES EMPLOYEES ASSOCIATION
versus
DELTA BEVERAGES (PVT) LTD

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 21 September 2018, 1 October 2018 and 6 February 2019

Court Application

E. Mubayiwa, for the applicant
Z.T Zvobgo, for the respondent

CHITAPI J: The applicant headed this application "court application to compel disclosure." The draft order reads:

It is ordered that

1. The respondent is hereby compelled to disclose the amount that was paid to it by Old Mutual Fund.
2. The applicant be and is hereby ordered to pay the amount to applicants.
3. The respondent pays costs of suit.

The background facts are that the applicant calls itself "an association of employees of the respondent". The respondent is a limited liability company incorporated in terms of the laws of Zimbabwe. The applicant's affidavit is deposed to by one Evaristo Manhembe who styles himself as Chairman of the applicant. The applicant raised what it coined as "the issue" in paragraphs 4 and 5 of the founding affidavit. For convenience I will restate the contents of the paragraphs aforesaid:

> "4. This is an application for an order compelling the respondent to disclose the amount paid to it upon the demutualization of Old Mutual, the manner in which same was invested and the status of such investment and the value thereof to date.
> 5. The basis of the application is that the respondent has refused and or neglected to disclose to the applicants the manner and or performance of the proceeds of the demutualization which was lawfully allotted to the applicants by Old Mutual when it demutualized in 1999."

The applicant deposed in paragraph 6 of the founding affidavit that "the applicants are employees of the respondent who were employed by the Delta Limited prior to 1999." The deponent to the founding affidavit made the following further averments;

a) That the Delta group then called Delta Limited demerged in the years 2001 – 2002 and was reincorporated with 7 companies, viz, Delta Beverages (Pvt) Ltd; OK (Pvt) Limited; Pelhams (Pvt) Ltd; Mega Pak (Pvt) Ltd, FH (Pvt) Ltd, Zimsun (Pvt) Ltd and Ouality Insurance (Pvt) Ltd.
b) That prior to 1999, the applicant members were contributing towards "Old Mutual." It is not clear what Old Mutual was. I assume as appears to be common cause that the contributions were made towards some insurance which would benefit the contributors. Contributions were deducted from contributors salaries by the employer and forwarded to Old Mutual.
c) That Old Mutual demutualized and in the process issued shares to "insured parties."
d) That the value of the shares "were supposed to be apportioned among applicant members and pensioners."

The applicant avers as follows in paragraph 12 of the founding affidavit;

"12. However, the respondent took these shares which belonged to the applicant members unilaterally and advised the applicants that they had used such proceeds to boost the value of the pension fund so that pensioners and applicant members got a letter pension upon retirement. I annex hereto as A, a copy of a memorandum dated 9 August, 1999 which is self-explanatory."

I will repeat the contents of the letter as follows hereunder;

" MEMORANDUM
To : Personnel Directors / Managers
From : Group Human Resources Director
Date : 9th August 1999
Subject : OLD MUTUAL DEMUTUALISATION AND THE DELTA PENSION FUND

It has come to my attention that some members of staff are enquiring whether the shares allotted to the Delta Pension Fund by Old Mutual as a result of the recent de-Mutualisation will be given to the members. I would like to clarify the situation as follows:-

1. The policy documents are in the name of the Delta Pension Fund and therefore the allocation of shares is to the Delta Pension Fund and not its members.

2. The allotment of shares to the Delta Pension Fund is just like any other yielding investment that the fund makes on an on-going basis.
3. The boost to the asset base is to be apportioned to pensioners and both categories of membership according to actuarial valuations.
4. The yields from such investments are used to boost the value of the fund so that the pensioners and members get a better pension upon retirements.
5. It is illegal in terms of the Pension and Provided Fund Statutory Regulations to encash any benefits such as the shares arising from Demutualisation while you are still a member. Statutory Instrument 323 of 1991 Part 111Section 10 (3) states that:-
   The rules of a pension fund or provident fund shall provide that a member of the fund shall not be permitted to withdraw from membership whilst he remains an employee of a participating employer unless –
   a. he becomes a member of another registered pension fund or provident fund established for the benefit of employees of that participating employer; or
   b. he attains retiring age.

   I hope this clarifies the position.

Regards
Misheck Manyumwa
Cc: Mr H Gaitskell; Mr Svova"

In paragraphs 13 – 16, the applicant outlines what it calls the dispute. Again, I find it necessary to record verbatim the applicant's deposition verbatim

"13. The Dispute
However, contrary to these pronouncements there is nothing to show such boost and employees who are retiring and going on pension are not receiving anything.
14. To further compound applicants' woes, the performance of the new Delta Beverages Pension Fund, the supposed beneficiary of the proceeds of the demutualization had been shrouded in secrecy and the applicants are not appraised of its operations.
15.The new fund was supposed to be run by applicants' representatives and respondent's representatives but respondent has shut out the applicants from its management."

Before considering the opposing papers I must comment at the poor and atrocious standard of drawing pleadings exhibited in the founding affidavit. A founding affidavit makes up the applicants case and must set out facts which constitute and support the cause of action. It is a trite rule of pleadings in application procedure that the applicant's case will stand or fall on the founding affidavit. The rule has become elementary because it has been stated over and over again. A court exists to serve the people and as expressed in s 162 of the Constitution, "Judicial authority derives from the people of Zimbabwe and is vested in the Courts." As a judge is a servant of the people and despite the fact that the elementary rule aforesaid has been expressed several times, See the recent judgments of this court in *Misheck Tizirai* v *Chenjerai Hamandishe*

& Ors HH 793/15, where MATHONSI J cited the case *Mobile Zimbabwe (Pvt) Ltd* v *Travel Forum (Pvt) Ltd 1990* (1) ZLR 67 at 70; *Muchini* v *Adams* SC 47/13; *Hiltunen* v *Hiltunen* 2008 (2) ZLR 296 (H) at 301 B. *Magwiza* v *Ziumbe N.O & Anor* 2000 (2) ZLR 489 (s) at 492 D-F and the following other judgments, *Jess Watson and Anor* v *Specialised Castings (Pvt) Ltd* HH 174/17 per MAKONI J (as she then was) *Bramwell Bushu* v *Grain Marketing Board and 2 Ors* HH 326/17 (a judgment by myself), *Clever Mandizvidza N.O* v *Gregory Kadzura and Ors* HH 100/18 per ZHOU J, I again state the rule for the benefit of applicants counsel in this application as well as for the benefit of other intending litigants who decide to institute proceedings by way of application procedure. The courts will not tire to continue to restate themselves although they expect that when they lay out a rule, such rule should be followed. Where a rule has been stated, time and again and a litigant or his or her counsel is not advised to follows it, courts can only mark their displeasure, not by refraining from restating the rule but by doing so and in turn dismissing the application invariably with costs.

In the case of *Director of Hospital Services* v *Mistry* 1979 (1) SA 626 (A) at 635 in tin – 636, a judgedment of the learned DIEMONT JA, the following is stated;

> "When as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a judge will look to determine what the complaint is. As was pointed out by KRAUSE J in *Pountas Trustee* v *Lahamas* 1924 WLD 67 at 68' and as has been said in many other cases,
> 'an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because these are the facts which the respondent is called upon to either affirm or deny'
> Since it is clear that the applicant stands or falls by his position and the facts therein stated, it is not permissible to make out new grounds for the application in the replying difficult."

As regards what should be pleaded in the founding affidavit and the degree of particularity, the circumstances of each case will determine. However in *Titty Bar and Bottle Store (Pty) Ltd* v *ABC Garage (Pty) Ltd & Ors* 1974 (4) SA 362 (T) at 369 B the following which would be helpful to litigants and counsel to acquaint with is stated;

> "It lies, of course, in the discretion of the court in each particular case to decide whether the applicants' founding affidavit contains sufficient allegations for the establishment of his case. Courts do not normally countenance a mere skeleton of a case in the founding affidavit, which skeleton is then sought to be covered in flesh in the replying affidavit.
> This type of objection must be considered on the basis of an exception to the declaration or a combined summons. The relevant considerations are:

(a) the founding affidavit alone is taken into account
(b) the allegations in the founding affidavit must be accepted as established facts
(c) are these allegations if proved, sufficient to warrant a finding in favour of the applicant."

When I read the founding affidavit, I was left unsure as to what exactly the wrong which the applicant wants remedied was. In the first instance and as quoted in paras 4 and 5 of the founding affidavit, the applicant stated that the prayer was for an order of disclosure of the amount paid to the respondent by Old Mutual on demutualization and the manner and status of the investment. In other words, I read the applicant's prayer as one requiring that the respondent should render an account of proceeds of demutualization.

In paras 13 to 15, the tenor of the complaint shifts. The dispute is pleaded as that there is nothing to show any boost to the pension fund and that retirees going on pension fund are not receiving anything, The assumption then is that the applicant admits that the demutualization proceeds were released to the respondent. The applicant then in the same breath pleads that the performance of the pension fund has been shrouded in secrecy and the applicant has not been appraised of operations of the "new Delta Pension Fund" which fund is the supposed beneficiary of the proceeds of the demutualization." The applicant then complains that although the new pension fund should be run by representatives drawn from both the applicant and respondent, its representatives have been excluded from administration of the Pension Fund. The applicant then avers that it is an imperative that the proceeds of demutualization should not only be disclosed but that they be paid over to the applicants. Much as I tried to make head and tail of the complaint I could not make much sense out of the founding affidavit as it raised a lot of issues some of which were inconsistent with each other. It all boiled down to poor pleading by the applicant hence my having to dwell on the procedural rules governing application procedure.

It appeared to me that the way the founding affidavit was drawn lacked depth and precision. The law of evidence should be treated as a minefield that will explode in the face of an inexperienced pleader. Before preparing the founding affidavit, counsel or the applicant must take time to reflect on the cause of action and to then consider what the applicant must allege and prove to sustain the cause of action. It may be necessary to seek advice on evidence from counsel. It will be necessary to read and acquaint with both the substantive procedural law that apply in order to get relief. It is wrong to plead inconsistent or contradictory matter in the

founding affidavit. Rule 227 9 (b) of the High Court Rules 1971, is clear that affidavits should be divided into paragraphs and that each paragraph should wherever possible contain a separate allegation. I would add that the allegation must relate or speak to each other and there should be a flow and link between the preceding paragraph and the next one. It is very much like relating a journey. One cannot begin the journey in the middle or the end or get to the end and return to the middle or start point unless one is retracing or making a return journey.

In casu, I was left wondering whether the applicant wanted the respondent to render an account of the demutualisation proceeds or wanted to know how the proceeds had been managed since there was a reference to the respondent as the party to whom the demutualization shares were given or that the respondent "took" the shares which belonged to "applicant members". There was equally reference to the new Pension Fund whose administration was not transparent. A whole lot of other issues were raised by the applicant in regard to the cause of action convoluting it in the process.

When instituting proceedings by way of application procedure a party should be guided by not just rule 227 (4) which provides that the applicant or respondent or any person who can swear to the facts should depose to the affidavit, but should equally be guided mutatis mutandis by r 11 which deals with the contents of summons in application procedure. The applicant should for example fully describe himself, herself or itself and the capacity in which the applicant brings the application. If in a representative capacity, such capacity should be pleaded as well as the *locus standi* to sue in the capacity pleaded. What I mean here is that for example, the legal guardian of a minor will be required to plead the capacity aforesaid, the fact that the beneficiary is a minor, describe the minor in full and so forth. With respect to justic persons or entities, the capacity and authority of the deponent to the affidavit must be pleaded. Equally to be pleaded or averred should be the full description of the juristic person and the basis for its *locus standi* to sue or be sued. The cause of action, its nature, extent and the relief sought should be pleaded or set out in the founding affidavit. It must be appreciated that the civil rules must be read as a set of rules which have effect in relation to all proceedings in the High Court. What this means is that the rules provide a guide to be followed for the orderly presentation, prosecution and determination of all civil disputes be they instituted by action or application procedures. In *casu* the applicant simply deposed through someone calling himself the Chairman of the association

of the employees of the respondent. The nature of the association of the employees of the respondent. The nature of the association was not explained nor its functions and powers, whether it is *universitatis* or what. Such allegations must be pleaded in order for the court to be in the know as to the true identity and legal status of the applicant and the respondent alike. See *Morrison* v *Standard Building Society* 1932 AD 229. The Chairman stated that the facts he alluded to were within his knowledge. He did not state in what capacity other than being chairman he was suing. Was there as resolution and is he empowered to sue in any event. The dearth of information in regard to pleading the necessary averments made it difficult to properly appreciate the legal validity of the application even before I considered the opposing affidavit.

Despite my disquiet over the adequacy of the founding affidavit and its legal validity, I nonetheless considered the opposing affidavit. The respondent raised objections *in limine* which appear in para 3 of the opposing affidavit of its legal manager. I would comment that it was refreshing at least that the deponent to the opposing affidavit named herself, her position in the respondent, the capacity in which she was deposing to the opposing affidavit and her authority to represent the respondent. The applicant would be advised to take some lessons in drafting the applicant's affidavit from this. The respondent set out the objections as:

> "Objections *in limine*
> 3. I wish to raise the following objections to this application in limine.
> 3.1 The applicant has not established its existence at law or its locus standi;
> 3.2 The application does not disclose a cause of action.
> 3.3 Even if the above aspects were in order, which they are not, the matter should have been instituted by way of action proceedings, not as an application owing to disputes of fact;
> 3.3 In any event, the application ought to have been made to the Labour Court. The applicant or its members would not have exhausted domestic remedies and therefore cannot bring this matter to this forum."

It will be noted that I have already dealt with some of the objections like the one raised in 3.1. Interestingly when l considered the applicant's heads of argument in para 1, the background set out therein ought to have been made in the founding affidavit. A case cannot be pleaded or made out in the heads of argument. Heads of argument are intended to sequentially set out a party's arguments in a clear and concise manner. They must be structured in such a manner that the court can follow the arguments and the party's case with ease. Not infrequently, where heads of argument have been meticulously drawn, the court or judge will sometime pick and quote an extract from the heads thereby adopting the extract as part of the reasons for judgment. Heads of

argument like the replying affidavit do not supplement a deficient founding or opposing affidavit. The heads of argument do not form part of the depositions of the parties or the evidence. Rule 258 (1) (a) of the High Court Rules is clear that heads of argument are meant for counsel to outline submissions to be made and to list authorities to be relied upon. Despite the applicant's heads of argument purporting to tell part of the story, to the extent that averments made therein did not appear in the founding affidavit, they had to be and I ignored them.

Dealing with the objection *in limine* in a little more detail, the respondent's objection that the applicant's existence and *locus standi* was not established in the founding affidavit was well taken. I have already dealt with that point generally. The applicant in the answering affidavit invoked the provisions of Order 2A r 7. The order deals with proceeding against associations and kindred bodies. The order allows inter alia that associations can be sued in their names and defines an association to include a "Trust, partnership, syndicate, club or any other association of person which is not a body corporate." It is however wholly insufficient for the association to simply plead that it is an association without adding flesh to the skeleton. I have already dealt with that. The association or universities must be shown to exist and should be described and its purposes and powers to sue and/or be sued alleged or established. Rule 7 does not grant *locus standi*. All it does is to allow for such association to sue in its name just like a body corporate. It is a rule of convenience. The applicant quoted case No. HH 136/16. It is remiss of counsel to fail to cite the full case authority and only the citation. This is law school stuff.

The said case No. HH 136/16 is in fact the citation for the case *Ignatius Musemwa & 8 Others* v *Estate late Mishcek Tapomwa & 3 Others*, a judgment of my sister DUBE J. The learned judge dealt therein with the juristic nature of a trust and concluded that Order r 7 created *locus standi f*or a trust to sue as opposed to or in addition to the trustees. The learned judge quoted the case of *Gold Mining & Minerals Corporation* v *Zimbabwe & Miners Federation* HH 20/06 and agreed with this judgment. She observed and stated that r 7 and 8 permit a trust to sue and be sued in its name. Rule 7 and 8 do not provide that it is sufficient for an applicant to say I am a trust or other unincorporated body and leave it at that. Some flesh will be required to be alleged so that the court appreciates the nature and objects of the applicant among other things including the nature of the authority that whoever purports to represent that body relies upon to act for the body. To simply state that the deponent is the chairman of the body and that he brings the case in

that capacity hardly meets the legal criteria. The chairman like any other office holder must at least allege that he is authorised by the members who form the unincorporated body to represent them and if a resolution was reached to sue, then such fact must be stated. I therefore hold that the applicant failed to allege such facts as would sufficiently and on a balance of probabilities establish its legal existence, *locus standi* to sue and the *locus standi* of the deponent to the represent the applicant. Where the applicant is coy with facts which must be pleaded to establish the applicant's existence, powers, objectives and the purported representative fails to clothe himself or herself with the basis for his or her authority to represent the generality of the association's members, the court will not assume the facts and the application consequently fails and stands to be dismissed.

Having determined that the applicant's existence, power *locus standi* and that of its chairman has not been established, it appears to me that it becomes academic to deal with the objections regarding the plea that the application does not disclose a cause of action. However, if as understand the expression "cause of action" as meaning all facts necessary for the plaintiff or applicant to prove or establish before relief is granted in his or her favour, then, to the extent that I have made a finding that the founding affidavit is barren in its lack of material averments to establish the applicant's legal existence, *locus standi* and that of the deponent to the founding affidavit to represent it, no cause of action is thus disclosed on the applicant's papers to that extent. See *Abraham & Sons* v *SA Railways & Harbours* 1933 CAD 626 cited with approval in the two cases decided together, *Jeniffer Broker and Staley Price* v *Nyamudhanda* SC 5/18.

The other ground of objection that the proceeding should have been brought by way of action because of material disputes of fact would not have succeeded because there are really no disputes of fact which the court would have been unable to resolve given that the relief sought was simply one of rendering an account or a disclosure. The applicant would only have been required to establish its existence, powers in relation to its entitlement to seek the order it applied for and the respondent's obligation and basis thereof to provide the information sought. The applicant's undoing must be attributed to the ineptitude of learned counsel for the applicant to properly articulate and plead the applicant's case.

The prescription defence is as already indicated academic. The only point that I wish to make is that given the authority of the Supreme Court decision in *Jeniffer Nam Brooker (supra)*

wherein it was determined that prescription be a triable issue raised by special plea and not exception, there is more that the respondent who bears the onus to prove prescription would have to contend with.

The last objection that the jurisdiction of this court is ousted by s 89 of the Labour Act would not be without argument because the original jurisdiction of the High Court over all civil and criminal matters as given in s 171 of the Constitution is absolute and only subject in s 171 (20 to an Act of Parliament providing for the exercise of the jurisdiction but such Act may not take away the High Court original jurisdiction in whole or part. At best therefore the High Court will have concurrent or overlapping jurisdiction with the Labour Court. It may in practice be that the High Court may decline to hear a labour matter as a court of first instance for the reason that the Labour Court has now been subordinated to the High Court by virtue of the provisions of Constitutional Amendment No. 1 to the 2013 Constitution. Being a subordinate court, the High Court exercises review and supervisory powers over the Labour Court in terms of s 171 (1) (b) of the constitution. In such an instance the High Court would rather decline to exercise its jurisdiction in favour of the Labour Act, opting instead to exercise its review and supervisory powers instead of being the court of first instance. (Compare my obiter views in *Aswell Nyanzara* v *Mbada Diamonds* HH 63/16 on ouster of jurisdiction of the High Court in labour matters.)

In passing I should record that before hearing arguments on the application, the parties intimated that they would attempt to settle the dispute and I gave them time to do so only for counsel to return and report that their instructions were to argue the matter. It is of course the right of the parties to insist on the matter being argued and a decision given by the court on the arguments. There are however some matters of which the present case is an example where the courts would expect that parties properly directed by counsel would not fail to reach agreement at least if not on all issues of dispute but on some of them. If one considers the Labour Act, [*Chapter 28:01*] it is anchored on achieving and ensuring social justice at the work place. Why a dispute concerning the performance of a pension fund, its assets and accruals cannot be determined at the shop floor level or even through arbitration struck me as an unfortunate incidence of muscle flexing by employer and employee to the detriment of their relationship and the concept of the promotion of social justice at the workplace. Unfortunately, once parties insist

on the litigation route the court's hands are tied and a determination is made on the facts and evidence presented before the court. In this process there is no draw or mutual settlement and one of the parties is adjudged a winner.

The sentiments I have expressed above being an aside, I must give my determination which is to the following effect.

"The application be and it is hereby dismissed with costs."

Nyangani Law Chambers, applicant's legal practitioners
Dube, Manikai & Hwacha, respondent's legal practitioners