SHELLY MAKWIRANZOU
versus
OLD MUTUAL LIMITED
and
RESERVE BANK OF ZIMBABWE
and
MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT
and
OLD MUTUAL UNIT TRUST MANAGEMENT COMPANY (PRIVATE) LIMITED
and
STANBIC BANK ZIMBABWE LIMITED N.O.
and
OLD MUTUAL UNIT FUNDS SCHEME

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 4, 27 July 2023 & 14 August 2024

Opposed Application – For an order *ad pecuniam sovendum* and alternative constitutional relief

Mr *T L Mapuranga*, for the applicant
Mr *T Magwaliba*, for the 1st, 4th & 6th respondents
Mr *L Uriri*, for the 2nd respondent
Mr *A Chagonda*, for the 5th respondent
Ms *O Zvedi*, for the 3rd respondent

MUSITHU J: The applicant, a retired accountant approached the court seeking the following relief against the respondents.

"IT IS ORDERED THAT

1. 1st Respondent, shall pay to the Applicant the sum of USD$72 232.87 plus interest at the same calculated at the rate of 5% per annum with effect from the 1st of November 2018, and alternatively
2. That the 1st Respondent shall pay the Applicant the sum of USD$72 232.87 or its equivalency in local currency calculated at the local exchange rate as defined by the Dutch auction system plus interest at the legal rate on the above amount calculated from the 1st of November 2018.
3. That the 1st Respondent shall pay costs of suit.

Alternatively

4. Exchange Control Directive Number RT120/2018 issued by the Reserve Bank in October 2018 is unconstitutional and invalid as it violates section 71 of the Constitution of Zimbabwe.

5. The Exchange Control Directive Number RT120/2018 is grossly unreasonable and ultra vires Section 35(1) of the Exchange Control Regulations, SI 109 of 1996 and is invalid.
6. Section 44B (3) and (4) of the Reserve Bank Act are unconstitutional and invalid as they violate Sections 71 and Section 56 of the 51 of the Constitution of Zimbabwe.
7. Section 44C of the Reserve Bank Act is unconstitutional and invalid as it violates section 71 of the Constitution.
8. Section 22 (1)(b), (d), 22(4)(a) and 23(1) and (2) of the Finance Act Number 2 Act of 2019 are unconstitutional and invalid as they violate Section 71 of the Constitution.
9. That consequently the 1st Respondent shall pay to the Applicant the sum of USD$72 232.87 or its equivalent in local currency calculated at the official exchange rate as defined by the Dutch auction system.
10. That the 1st Respondent shall pay costs of suit."

The applicant had initially cited the first to third respondents. The fourth to sixth respondents were latter joined to the proceedings in terms of an order of this court per MANYANGADZE J on 24 August 2022, under HC 2312/22. The application was opposed by the first, second, third and fifth respondents.

The Applicant's Case

During her working life, the applicant worked mostly for international organisations, earning her salary in the United States Dollar currency. In anticipation of her retirement, on 22 June 2010, the applicant made an application to the first respondent for an investment in a facility known as the Old Mutual Money Market Gross Fund. She was made to complete an internal application form for individual clients before her application was approved. A department of the first respondent, known as the Old Mutual Investment Group, accepted her investment under the Old Mutual Money Market Gross Fund with account number 207109. The applicant claims that her relationship with the first respondent was that of investor and client and not banker and client.

On 24 June 2010, the applicant made a cash deposit of US$10 000 into her Old Mutual Money Market Gross Fund. The funds were channelled into a Money Market Unit Trust Account Number 0222046923807, held by Old Mutual through Stanbic Bank. The applicant made further deposits into the investment account, but this time through the first respondent's account held with CABS. She made a cash deposit of US$40 000 on 31 January 2012 in the first respondent's CABS Account Number 20710902. A further deposit of US$30 000 was made into the same account on 27 September 2013. Yet another deposit of US$10 000 was also made into the same account on 15 January 2013. As of 1 October 2018, her investment account had a balance of 72 232.37 units with a market value of US$72 232. 87.

On 4 October 2018, the second respondent issued the Exchange Control Directive No RT 120 of 2018, which ordered the separation of accounts based on source of funds. Foreign currency realised from offshore or foreign currency cash deposits were now to be incorporated into Nostro Foreign Currency Accounts (Nostro FCAS), while all Real Time Gross Settlement (RTGS) or mobile money transfers and bond notes and coins were to be credited into an RTGS (FCA). The applicant contends that her investments by their nature, could not have been classified as an RTGS FCA. In any case, she further averred, her investment was not a foreign currency account, since she did not have a bank account with Old Mutual. Old Mutual was not a banking although it owned a bank called Central African Building Society (CABS). In short, the applicant's argument was that the Exchange Control Directive did not apply to investment accounts such as the one she held with the first respondent.

The applicant claims that on 31 October 2018, the first respondent sent her a consolidated transaction statement which showed that her investment was US$72 232.87. After that communication, on 30 November 2018, 31 December 2018, 31 January 2019 and 28 February 2019, the first respondent sent her statements showing that it held on her behalf, the sum of $72 461.44 without denoting the currency. On 31 March 2019, she received a consolidate transaction statement showing that the first respondent was holding RTGS 73 358.56 on her behalf. On 30 April 2019, she received yet another statement showing that $73 571.47 was being held in her account.

The applicant demands payment in the sum of US$72 232.87, insisting that her account was not affected by the said Exchange Control Directive. She also contends that the source of her funds was her income as an international civil servant. The source of funds ought to be classified under the Nostro FCA. In any case, until SI 33 of 2019 became law, the currency in force in the country was the regime of multiple currencies anchored by the US$. Further, the Exchange Control Directive did not have a retrospective effect, and it was wrong for the first respondent to treat the Exchange Control Directive as having the effect of converting US$ balances in an investment account into any other currency other than the US$ balance.

In response of 19 October 2020 to her letter of demand, the first respondent gave, as its reasons for denying liability in the sum of US$72 232.87, the following: the RBZ directive was only applicable to balances in a bank account at the time that it was issued. However, the introduction of the RTGS currency through SI 33 of 2019, led to the redenomination of all RTGS FCA balances into RTGS$ on a 1:1 exchange rate between the US$ and RTGS$.

Further, the introduction of SI 142 of 2019 on 24 June 2019, ended the multicurrency regime through the entrenchment of the Zimbabwean dollar as the sole currency. Therefore, the regulatory changes resulted in the redenomination of the applicant's investment account balances from US$ to ZWL$.

The applicant dismissed the first respondent's attempts to rely on the three instruments as being disingenuous and dishonest. This was because her funds were appropriated long before the said instruments came into force. The first respondent had appropriated real value, it was therefore obliged to compensate her with real value. The said instruments were therefore irrelevant to her matter. The applicant further averred that even assuming that SI 33 of 2019 were applicable, the value of her US$72 232 was dependant on the official exchange rate after the effective date. It was definitely not on a one is to one with the local currency.

The applicant further contended that in the event that the court found that the first respondent was bound by the Exchange Control Directive, SI 33 of 2019 and SI 142 of 2019, and that they all applied to her case, then her alternative argument was that the three instruments were unconstitutional and in breach of her right to equal protection of the law guaranteed by s 56(1) of the Constitution as well as her right to property guaranteed by s 71 of the Constitution.

The First Respondent's Case

The first respondent's opposing affidavit raised some preliminary points. The first was that there was no cause of action against it. This was because from a perusal of the applicant's form, she had a contractual relationship with a trust known as Old Mutual Unit Funds Scheme. That entity was a trust established in terms of a trust deed. In terms of that trust deed, an entity known as Old Mutual Unit Trust Management Company (Private) Limited was the management company while Stanbic Bank Zimbabwe Limited was the trustee. The applicant's investment was also *'subject to the relevant Trust Deed',* confirming that the applicant ought to have been aware of the two entities above. The relief sought against the first respondent was therefore not competent as that entity was not privy to the said investment transaction that formed the basis of the dispute.

The second preliminary point was that of misjoinder. It was averred that the first respondent was improperly cited for reasons given under the first preliminary point. The third point was that there was a fatal non-joinder. From a reading of the trust deed which bound the

parties, the trustee, Stanbic Bank Zimbabwe Limited ought to have been cited in terms of clause 17(b) of the Trust Deed.

As regards the merits, the first respondent denied having a contractual relationship with the applicant. Even assuming that it had been properly cited, the first respondent disputed any liability on the basis of the indemnity clauses that were found in the application form that the applicant signed. Those clauses effectively exempted it from liability.

It was further averred that the applicant used her money to purchase local investments units. That meant that the money lost its character as a 'foreign deposit'. The applicant was advised of this position by the Securities and Exchange Commission of Zimbabwe in a letter dated 15 April 2021. The applicant's investment was pooled together with other investments funds in the Stanbic Bank account where it was affected by regulations from the second respondent. The applicant did not entrust her money for safekeeping, as she correctly denied the existence of a banker customer relationship. There was no obligation to ring fence her investment or protect it from the vagaries of the economy.

The first respondent contended that bond notes were effectively introduced into the economy on 31 October 2016 through the Presidential Powers (Temporary Measures) Amendment of Reserve Bank of Zimbabwe Act and Issue of Bond Notes Regulations, 2016. The instrument was later incorporated into an Act of Parliament through the Reserve Bank of Zimbabwe Amendment Act, 2017, and it was deemed to have come into force on 31 October 2016. That legislation introduced bond notes and coins whose legality the applicant did not challenge. Such a claim would have prescribed at this stage. Prior to the Exchange Control Directive 120/18, the applicant's funds were already electronic balances which were now mixed with deposits in the form of bond notes and coins. At that stage, there was no longer any form of discrimination of accounts based on the source of funds. It also mattered not that the applicant had made a cash deposit. That deposit ceased to be cash and became an electronic balance. That electronic balance was further affected by various other unitholders who were paying their premiums in bond notes and coins.

According to the first respondent, the applicant's investment was regulated by the Collective Investment Scheme Act[1]. Such a scheme is an arrangement concerning property of any description whose purpose is to enable participants to participate in or receive profits or income through acquisition, holding, management or disposal of property. Subscribers pull

[1] [*Chapter 24:19*]

funds together collectively in the hope of receiving profit. That arrangement was then regulated by a Trust Deed, which was an agreement between the Trustee and the Management Company over the property of the scheme. In terms of s 11(2) of the Collective Investments Scheme Act, the provisions of the Trust Deed were binding on the management company, the Trustee and the applicant as a unitholder.

The first respondent further averred that the applicant's electronic balance was properly identified as an RTGS FCA because the source of funds was local and that the account into which the money was deposited did not discriminate between bond notes and coins and United States dollars. There was never an undertaking that the applicant's funds would always retain their United States dollar character. It was further averred that the promulgation of SI 33 of 2019 put to rest the confusion of the denomination of accounts because RTGS FCA was now RTGS balance whereas NOSTRO FCA was a United States dollar balance.

It was submitted that when the applicant made her last deposit in 2015, she purchased units. Her funds were utilised in a local transaction. She was now entitled to the value of the units and not what she deposited to participate in a collective investment scheme. The first respondent therefore denied that it appropriated the applicant's funds. The balance of her investments was affected by the Exchange Control Directive and later by SI 33 of 2019. The alleged constitutional violations were dismissed for lack of merit.

Second Respondent's Case

The second respondent denied that the applicant's funds came from outside Zimbabwe in the absence of proof to that effect. It was averred that the Exchange Control Directive had the effect of separating bank balances based on the source of income. It did not convert currencies. The second respondent denied that the separation of bank balances and the subsequent currency reforms amounted to appropriation of funds, and for that reason the applicant lacked the cause of action to sustain the relief sought. It was further averred that for as long as the money that was advanced to the first respondent constituted a debt as defined in the law, then such debt was affected by the provisions of SI 33 of 2019 as read with the Finance Act (2) of 2019. What would be determined by the official exchange rate were new obligations that arose after the effective date of SI 33 of 2019.

The second respondent also denied that the impugned instruments violated any constitutional provisions as alleged by the applicant. The right to equality did not apply to the

applicant's case. No property rights were also violated by the provisions of SI 33 of 2019. There was no appropriation of property to talk about. The relief sought by the applicant was not supported by the law and therefore incompetent.

Third Respondent's Case

According to the third respondent, the multi-currency regime introduced in 2009 had some shortcomings in serving the economy, addressing market distortions, liquidity and cash shortages, as well as maintaining public confidence. As part of the currency reforms to deal with the challenges, the Reserve Bank of Zimbabwe issued a monetary policy statement in October 2018 directed at banking institutions. Banks were directed to separate customer accounts holding United States dollars from accounts holding RTGS dollars. Banks were further directed to open 'Nostro' accounts into which United States dollars would be deposited. The non-United States dollar currency would remain in the customers' existing accounts. Thus, United States dollars bank deposits would be transferred to the newly created Nostro accounts.

The process of separating United States dollar currency from non-United States dollar currency was given some time so that bank customers would not suffer any prejudice. It was only after about four months that SI 33 of 2019 was introduced. That instrument gave a name to the non-United States dollar currency, which became the RTGS dollar. The currency was not a physical currency, but an electronic currency which could only be transferred through the Real Time Gross Settlement system of the Reserve Bank of Zimbabwe.

According to the third respondent, the Exchange Control Directive of 2018, directed separation of FCA Nostro accounts from RTGS FCA. The applicant's funds ought to have been moved into an FCA Nostro account, and if this was not done following the said directive, then it was not the third respondent's issue but the dealer's issue. After the separation of the accounts in October 2018 and the enactment of the Finance Act (No. 2), 2019, which incorporated SI 33 of 2019 and SI 142 of 2019, the Supreme Court in *Zambezi Gas (Private) Limited* v *N.R. Barber (Private) Limited*[2], stated that all balances and any form of indebtedness denominated in United States were deemed to be balances in Zimbabwean dollars as at the commencement date of the law.

It meant that balances held in an individual's account by an authorised dealer as of 4 October 2018, and were not moved into an FCA Nostro account following the Exchange

[2] SC 3/20 at p7-8

Control Directive remained balances in RTGS. That directive was not irrational and neither did it take away the applicant's rights.

The third respondent averred that the applicant's invitation for the court to set aside the Exchange Control Directive meant that the court was required to substitute its own policy in place of that of the executive. This would infringe upon the principle of separation of powers which was against the rule of law.

The third respondent denied that there was a conversion of United States dollars into local currency. It was not the intention of the instruments to take away the United States dollar savings. If it was indeed the case there would have been no need to direct the opening of Nostro accounts without charge as directed in October 2018, and the Exchange Control Directive of 2018. The provisions of the directive were therefore not inconsistent with s 71 of the Constitution of Zimbabwe. The third respondent also denied that the Finance Act (No. 2), 2019 was unconstitutional.

Fifth Respondent's Case

According to the fifth respondent after the applicant's application was accepted, she was afforded an opportunity to participate in the scheme operated by the fourth respondent as the management company. The fourth respondent would pool the resources together, in the form of investments by various unitholders. The fifth respondent was appointed as the trustee of the scheme to ensure that the interests of unit holders were protected. Participation in the scheme would entail the purchasing of unit trusts at a particular value. The money used to purchase the said unit trusts would be invested by the fourth respondent under the supervision of the fifth respondent to grow the value of the investment. This would in turn increase the value of the investment by the unit holder, being the unit trust.

Between 2010 and 2015, the applicant purchased various units in the Old Mutual Money Market Gross Fund. The applicant did not deposit funds into the accounts of the fourth, fifth and sixth respondents in a manner that created a banker-customer relationship. Rather, the applicant purchased unit trusts and became a unitholder, whose rights were regulated by the Trust Deed. The investment account reflected the monetary value of the unit trusts that were held by the unit holder and increased and decreased when the value of the said unit trust increased or decreased.

Due to legislative intervention, the value of the applicant's investment was converted from United States dollar into local currency. The basis for this was because the purchase of unit trusts by the applicant amounted to utilisation of her salary in United States dollars. As such, the source of funds for the investment was from a local investment account, which qualified for classification as RTGS for purposes of the law. The conversion of the applicant's investment to local currency occurred because of legislative intervention and not because of any fault, error or omission on the part of the fifth respondent. The legislative interventions did not affect the applicant only as they were of general application.

The applicant's investment fell under the ambit of s 22(1)(d) of the Finance Act (No. 2) Act of 2019. This was because the applicant purchased units in the scheme which units qualified as assets that had a monetary value when redeemed. The fifth respondent denied that the applicant was entitled to payment of US$ 72 232.87 both in terms of the law and in terms of the Trust Deed. The value of her investment was converted to local currency by operation of law.

The Answering Affidavit

The applicant insisted that she entered into a contract with the first respondent. The application form that she completed referred to the first respondent. The entity referred to as the Old Mutual Unit Trust Investment was not a corporate person. She was never informed that she was dealing with a separate legal entity known by that name. The applicant also claimed that she was never given a copy of the trust deed. It was the first time that her attention had been brought to the entity known as the Old Mutual Unit Trust Management Company (Private) Limited. While accepting that the form she completed referred to the 'relevant trust deed', the applicant argued that this did not mean that the party she contracted with was the trust.

The applicant also averred that in any case, s 35 of the Collective Investment Schemes Act imposed a duty of disclosure on the respondents. Several material facts were not disclosed to her. In addition, she claimed that she was not provided with the prospectus, advertisements or other documents setting out the material facts of the investment.

The applicant further averred that the introduction of bond notes through SI 133 of 2016 did not have the retrospective effect of converting deposits that she had made in 2015 and before into bond notes. The applicant denied having any electronic balances on 23 March 2017 and on 3 October 2018. She had United States dollar balances which were unlawfully

converted into RTGS balances upon a misreading of the Exchange Control Directive. The applicant insisted that her account should have remained as a Nostro FCA investment. The Finance Act No. 2 of 2019 preserved the legitimacy of Nostro FCAs in s 23(4)(a).

The Submissions

At the commencement of the oral submissions, Mrs *Zvedi* appearing for the third respondent rose to seek a postponement of the matter on the grounds that Mr *Jaricha* who was seized with the matter had abruptly left employment and her office was still in the process of reallocating matters. She had become aware of the set down of the matter at short notice and had no time to prepare for the hearing. Mr *Mapuranga* for the applicant submitted that the third respondent's participation was only relevant for purposes of the alternative relief sought by the applicant. The applicant had since decided to abandon the alternative relief in light of the decision of the Supreme Court in *CABS* v *Stone & 3 Ors*[3]. Mr *Magwaliba* for the first, fourth and sixth respondents, Mr *Uriri* for the second respondent and Mr *Chagonda* for the fifth respondent all concurred that the third respondent's participation was unnecessary once the alternative relief was abandoned.

I adjourned the matter for 10 minutes to allow Ms *Zvedi* time to reconsider the third respondent's position in view of the decision made by the applicant's counsel to abandon the alternative relief. At the resumption of the hearing, Ms *Zvedi* agreed that the abandonment of the applicant's alternative relief, which relief directly affected the third respondent rendered the third respondent's further participation in the proceedings unnecessary. The court agreed with counsel's observation because the main relief was primarily against the first respondent.

The Preliminary Points

Mr *Magwaliba* submitted that the application was invalid because it conjoined with an application for constitutional relief with relief sought on the basis of a non-constitutional cause of action. Although the constitutional relief was not being persisted with, what was important was that the application before the court was filed in that form. The validity of an application was determined as at the date of its filing. It therefore remained invalid. Constitutional matters were not supposed to be combined with non-constitutional matters. The claim before as presently worded, was one for non-constitutional relief, which was combined with some

[3] SC 15/21

constitutional relief. That made the application fatally defective, and it ought to be struck off the roll.

The second preliminary point raised by Mr *Magwaliba* was that there was no cause of action in the matter. When the application was initially filed, the fourth, fifth and sixth respondents were not cited as parties. These parties were only joined to the proceedings following an order for joinder granted on 24 August 2022. After their joinder, the applicant had not filed a supplementary affidavit to her founding affidavit. There were no additional averments upon which an order could be made against the fourth, fifth and sixth respondents. The draft order was premised on the original averments that excluded these additional parties. There were no facts or evidence upon which the fourth to sixth respondents could be found liable.

The first respondent had no contract with the applicant. The contract was concluded between the applicant and a trust created by the fourth and fifth respondent as the manager. It was therefore necessary for the applicants to pursue the correct respondents, but it chose not to supplement its affidavit. The first respondent had raised the issue of the non-joinder of these interested parties, and the applicant had in her heads of argument accepted that there was no cause of action against the first respondent. The court was urged to dismiss the application with costs on the higher scale as against the three additional parties because it was unprecedented for a party to be brought to court with no direct claim against them.

In his submissions, Mr *Uriri* for the second respondent submitted that he had received a call from the applicant's legal practitioners advising that they were not seeking any relief against the second and third respondents. No substantive relief was being sought against the second respondent, which had hardly been mentioned in the founding affidavit. Costs were therefore being sought against the applicant on the ordinary scale.

Ms *Zvedi* submitted that in the event that the preliminary points were upheld, costs were sought against the applicant on the ordinary scale.

Mr *Chagonda* for the fifth respondent associated himself with the submissions made on the second preliminary point by Mr *Magwaliba*. No relief had been sought against the fifth respondent in the papers. Counsel moved for the dismissal of the application with costs on the punitive scale.

In response, Mr *Mapuranga* submitted that the fourth to sixth respondents were not entitled to any costs because they had not filed any opposing papers. The applicant was entitled

to get a default judgment against them. Mr *Mapuranga* tendered wasted costs to the second and third respondents on the ordinary scale since the relief sought against them had been abandoned.

Mr *Mapuranga* submitted that the preliminary points raised on behalf of the remaining respondents were without merit and ought to be dismissed. He submitted that it was not correct that one could not raise both constitutional and non-constitutional issues in the same application. He also submitted that the alleged amendment to the applicant's founding affidavit was not necessary. The fourth to sixth respondents were supposed to file opposing papers as if the relief sought was against them. This was because para 3 of the draft order for joinder placed them in the same position as the first respondent. The case as pleaded against the first respondent also applied to the said respondents. He applied to amend paragraphs 1, 2 and 3 of the draft order to incorporate the fourth, fifth and sixth respondents.

In his response, Mr *Magwaliba* submitted that in the cases of *Mudzuri & Anor* v *Minister of Justice*[4] and *Zimrights* v *Parliament of Zimbabwe*[5], it was found to be an affront to precise pleading to combine non constitutional and constitutional claims in the same application. Counsel also submitted that an affidavit could not be amended by the mere joinder of the parties. The affidavit had to be supplemented.

The Analysis

The first preliminary point was that the application was defective as it combined constitutional and non-constitutional issues. The heading of the application indeed suggests that it is one for an order *"ad pecuniam solvendum and such other alternative constitutional relief".* The constitutional reliefs were sought in the alternative, and these were abandoned at the commencement of oral submissions with the applicant's counsel citing the decision in *CABS* v *Stone & 3 Ors.* Counsel was not clear on what aspect of that decision prompted him to abandon the alternative relief that spoke to the alleged constitutional infringements. In the *CABS* matter, the court said the following:

> "[38] A number of other issues however, call for comment.
> The manner in which the respondents presented and argued their case before the court *a quo* left a lot to be desired. It is clear that due care and diligence were not exercised, nor was proper consideration given to the relevant procedural and substantive law. As correctly stated by Mr *Madhuku* for the Minister, an application under s 85 of the Constitution should not be raised as

[4] 2016 (2) ZLR 45 at p43
[5] CCZ 20/22

> an alternative cause of action. In addition to that, the propriety of combining an ordinary application with a s 85 (1) constitutional application on the basis of the same founding papers may also be open to question. Section 85 (1) is a fundamental provision of the Constitution and an application under it, being *sui generis*, should ideally be made specifically and separately as such.[6]

While the above views were expressed in the context of a s 85 (1) constitutional application, they apply with equal force to the present matter. The circumstances under which this court can deal with constitutional matters are set out in the constitution. Section 175(4) states that:

> "If a constitutional matter arises in any proceedings before a court, the person presiding over that court may and, if so requested by any party to the proceedings, must refer the matter to the Constitutional Court unless he or she considers the request is merely frivolous or vexatious."

So, where a constitutional issue arises in non-constitutional litigation, the court may, *mero motu* or at the invitation of a party to the proceedings, refer that constitutional issue to the Constitutional Court for determination unless the court deems the request to be frivolous or vexatious.

Section 171(1)(c) of the Constitution bestows on the High Court the jurisdiction to decide constitutional matters except those that the Constitutional Court may decide. The High Court may therefore make an order on the constitutional invalidity of a law, but such an order has no force unless it is confirmed by the Constitutional Court as required by s 175(1) of the Constitution. From a reading of the law, the High Court can only deal with a constitutional matter and render a determination thereon in terms of s 171(1)(c) of the Constitution as read with s 175 (1) thereon. Where a constitutional issue arises in the context of proceedings that are already pending before the High Court, then the court must refer such issue for determination by the Constitutional Court as provided in s 175(4) of the Constitution as read together with r 108 of the High Court rules and r 24 of the Constitutional Court rules.

The decision to combine a constitutional and a non-constitutional matter in the same proceedings would be clearly wrong. The question that would immediately arise is in terms of which section of the Constitution would the constitutional question have been raised. Since it is being raised in the course of hearing a non-constitutional matter by way of alternative relief, in terms of which section of the Constitution would the High Court progress the matter? What however makes the present application unique is that the constitutional questions were abandoned before counsel's submissions. Costs were tendered to the parties that were affected

[6] At p 17 of the judgment

by the constitutional reliefs sought. Mr *Magwaliba* submitted that the defect that afflicted the application must be considered from the time that the application was filed. While I find the submission persuasive, in my view the court can still proceed to deal with the main relief following the abandonment of the alternative relief that raised the constitutional matters. The application was primarily for an order *"ad pecuniam solvendem"*. The court is not constrained to deal with the application in the main following the abandonment of the constitutional matters. For that reason, the court dismisses the first preliminary point.

The second preliminary point is whether a cause of action was established against the remaining respondents following the abandonment of the claims against the second and third respondents. As stated earlier, the fourth to sixth respondents were joined to the proceedings by an order of this court in HC 2312/22, a year after the present application was filed on 26 August 2021. Paragraph 2 of that order states that:

> "2. Pursuant to this order, the fourth to sixth respondents now referred to in Case HC 4212/21 as fourth to sixth respondents parties must file if necessary, their stated position to the applicant's case within 10 days from the date of this order after which the applicant will file an answering affidavit and heads of argument within 10 days."

Mr *Mapuranga* submitted that the wording of para 2 did not oblige the applicant to do anything further other than anticipate opposing papers from the fourth to sixth respondents. I do not find that submission persuasive. At the time that the application was filed no relief was sought against the fourth to sixth respondents because they had not been cited as parties. Paragraphs 1 to 3 of the draft order were specific to the first respondent. The fourth to sixth respondent could not respond to an application that did not plead any case against them. They had nothing to respond to. Following their joinder, the applicant did not need the court to tell her how to deal with parties that had been joined as respondents. She simply had to amend her papers in order to plead a case against the joined respondents. Mr *Mapuranga's* attempt to apply for the amend the applicant's draft order in order to incorporate the fourth to sixth respondents would not make the applicant's case any better. It is the founding affidavit that sets out the cause of action and not the draft order.

The first respondent had, in its notice of opposition, warned the applicant about the folly of not citing these interested parties. At the commencement of the oral submissions, the applicant's counsel did not indicate that no claims were being made against the fourth to sixth respondents and therefore they could be excused. Counsel submitted that the applicant was entitled to a default judgment against these respondents because they did not oppose the

application as directed by the court. The said respondents could surely not respond to an application in which no claims were made against them. I agree with both Mr *Magwaliba* for the fourth and sixth respondents, and Mr *Chagonda* for the fifth respondent that clearly no relief was sought against these parties. The order by MANYANGADZE J shows that their joinder was at the instance of the applicant. They should not have been dragged into these proceedings if no claim was being made against them.

As regards the first respondent, it was submitted that there was no contractual *nexus* between the applicant and the first respondent. Paragraph 1 of the application form that the applicant completed showed that her application was *"subject to the relevant Trust Deeds"*. At the time of completing the form a diligent applicant would surely have enquired about these *"relevant Trust Deeds"*, before appending their signature to the application form. The relevant Trust Deed makes it clear that the fourth respondent was the manager of the trust, and the fifth respondent was a trustee. In the answering affidavit, the applicant persisted with her claim against the first respondent arguing that she was never made aware of the existence of the trust deed, and the participation of the fourth and fifth respondents in the scheme. The opportunity to interrogate the existence of the trust deed, and the role of the fourth to sixth respondents was presented to her through the first respondent's preliminary point. One would assume that it was for that reason that the application for joinder was made.

Clause 17 (b) of the Trust Deed states as follows:

> "(b) All proceedings which may be instituted by or against the Trust shall be instituted by or against the Trustee in its capacity as such, and the Trustee shall have the power and be capable of instituting, prosecuting, intervening in or defending any legal proceedings of whatsoever nature relating to or concerning the Trust or its affairs and as a prerequisite to such action, to require the Management Company to indemnify it against all costs and expenses thereby incurred."

It is not clear to me how the applicant remained adamant that her claim was properly made against the first respondent in the face of all the information that was placed at her disposal in the notice of opposition. In terms of clause 6 of the application form, the applicant made the following undertaking:

> "…. I / we agree not to hold Old Mutual Trust Management Company of Zimbabwe (Pvt) Ltd responsible for any loss in value of our investment…."

The applicant cannot therefore genuinely claim not to have been aware of the existence of the fourth respondent. At any rate, there was no need to seek the joinder of the fourth to sixth respondent if she was completely certain that her claim against the first respondent was

sustainable and meritorious. It is for the foregoing reasons that the court determines that there is merit in the first, fourth, fifth and sixth respondent's preliminary point on the absence of a cause of action against them. The applicant's claim was poorly pleaded. She had a second bite of the cherry to regularise her claim when she sought the joinder of the relevant parties, but she inexplicably spurned it.

Costs

The general rule is that costs follow the event. Counsels for the first, fourth to sixth respondents urged the court to dismiss the application with costs on the legal practitioner and client scale. Counsels for the second and third respondents had already accepted a tender of costs on the ordinary scale following the abandonment of the relief sought against the two respondents. In the exercise of its discretion, the court finds it befitting to dismiss the application with costs on the ordinary scale.

Disposition

Resultantly it is ordered that:

1. The application be and is hereby dismissed.
2. The applicant shall bear the respondents' costs of suit on the ordinary scale.

Tendai Biti Law, applicant's legal practitioners
Mawere Sibanda Commercial Lawyers, first, fourth and sixth respondents' legal practitioners
Mlotshwa & Maguwudze, second respondent's legal practitioners
Civil Division of the Attorney General's Office, third respondent's legal practitioners