

SMOKE END MOTORS (PVT) LTD
Versus
TREAT AND COMPANY

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 5 March 2024 and 19 August 2024

Interlocutory application

S.T Muzorori for plaintiff
T. Nyahuma for defendant

CHILIMBE J

BACKGROUND

[1] In this interlocutory application, I address a preliminary point which arose during case management proceedings namely; -whether incorrect citation of defendant as “Treat and Company”, instead of its proper name “Treat and Company (Pvt) Ltd.”

[2] This point arose from the draft trial issues framed by the parties and filed of record following an unsuccessful attempt at settlement. The issues were listed as follows; -

1. Whether or not there is a Defendant in this matter
2. Whether or not there is a valid lease agreement
3. Whether or not the lease agreement was terminated on the 1st of July 2022
4. Whether or not Defendant is liable to pay Plaintiff and if so, in what amount

[3] A case management meeting was convened in terms of rule 18 of the High Court of Zimbabwe (Commercial Division) Rules SI 123-20 (“the Commercial Court Rules”) which provides thus; -

Power to make and give directions for disposal of suits

18. (1) A judge shall, within ten (10) working days after receipt of the record, on his or her own motion direct the registrar to cause the parties to the proceedings to appear before him or her, for the purposes of case management, in order that he or she may

make such order or give such directions in relation to any case management as well as any interim application which the parties may have filed or intend to file as the judge deems fit, in order to achieve the just, expeditious and economical disposal of the dispute.

[4] At the conclusion of the case management conference, I issued an order by consent directing the parties file written submissions addressing the issue of locus standi and causa. I was also persuaded, in taking this approach, partly by the view taken by this court in *Amos Makono & 32 Ors v Freda Rebecca Gold Mine* HH 400-18, per CHATUKUTA J (as she then was) where the learned Judge observed [at page 3] that; -

“It needs no saying that the question regarding the legal personality of a party cited in court proceedings is a point of law which a court can raise *mero motu* as transpired in *CT Bolts (Pvt) Ltd v Workers’ Committee (supra)*.”

[5] In the written submissions filed in support of this legal point, defendant raised two further issues on the causa as well as validity of the plaintiff’s claim. I agree with the defendant that the real issue to be determined relates to the effect of defendant’s citation. It is dispositive of the dispute and obviates the other two matters raised by defendant.¹

THE DISPUTE BETWEEN THE PARTIES

[6] Before me is a landlord and tenant dispute. Plaintiff entered into a written lease agreement with an entity identified therein as “Treat and Company”, on 1 November 2020. It is not in dispute that an entity named Treat and Company (Pvt) Ltd, the present objector, took occupation of the premises known as Shop Number 5, Rolf Valley Shopping Centre, in Rolf Valley, Harare at a monthly rental of US\$2,600.

[7] Plaintiff avers that defendant defaulted in rental payments for the period April to December 2021 accumulating arrears in the sum of US\$18,360. Plaintiff instituted present proceedings seeking a recovery of that amount as capital debt. Defendant resisted the claim.

THE CITATION OF DEFENDANT

[8] It is not in contention that defendant was incorrectly cited. That incorrect reference founded the preliminary point. Mr. *Nyahuma* for defendant raised a two-pronged argument. Firstly, he

¹ See *PG Industries (Zimbabwe) Ltd v Bvekerwa & Ors* 2016 (2) ZLR 14 (S)

argued that plaintiff had cited a non-existent party which rendered the proceedings a nullity. Secondly, counsel submitted that plaintiff's contention that its default amounted to a mere mis-citation was defeated by its failure to file an application for amendment of party.

[9] Mr. Nyahuma relied on a number of authorities including *Edmore Mapondera & 55 Ors v Freda Rebecca Gold Mine Holdings SC 81-22*, *Tinashe M. Zenda v Emirates Airlines & 2 Ors HH 775-15*, and *Fadzai John v Delta Beverages Limited SC 40-17* where GUVAVA JA said at page 5; -

“The respondent highlighted that it has been cited as “Delta Beverages Limited” as opposed to Delta Beverages (Private) Limited. Applicant concedes this point in his answering papers. In *Gariya Safaris (Pvt) Ltd v van Wyk* it was stated as follows: “A summons has legal force and effect when it is issued by the plaintiff against an existing legal or natural person. If there is no legal or natural person answering to the names written in the summons as being those of the defendant, the summons is null and void *ab initio*.” In this case the applicant cited a non-existent respondent. Thus in the same vein the application was a nullity”.

[10] Ms Muzorori for the plaintiff took the position that the discrepancy in citing defendant was of minimal effect. According to counsel, “*Pleadings are not statutes that require purposive or teleological interpretation.*” In that regard, the error could be corrected to no significant prejudice to defendant.

THE LAW

[11] The legal position regarding wrong citation of a party is well-settled. At the heart of it is a simple formula. Do the summons identify the necessary contestants whose conflicting interests constitute the controversy born of a causa? This court articulated that position with clarity in *Gariya Safaris (Pvt) Ltd v Van Wyk* 1996 (2) ZLR 246 (H), per MALABA J (as he then was), where he held that at page 252; -

“In cases where orders of substitution were granted, there were, at least, existing parties with causes between them. The court had parties before it whether one of them was the wrong person to be a party or not. In other words, there was in each of the cases a legal persona or a natural person to be substituted. The proceedings were valid.

The question was whether or not the court should exercise its discretion to order the substitution of one person for another as a party to the action”². [Underlined for emphasis].

[12] This reasoning was followed in a number of decisions including those referred to by Mr. Nyahuma. In *Tinashe M. Zenda v Emirates Airlines & 2 Ors* (supra), MATANDA-MOYO J held as follows at page 2; -

“The law with regards to proper citation of persons is trite. Where a misdescription involves the citation of a non-existent persona, such pleadings are a nullity *abinitio*. Such person lacks legal personality and cannot therefore sue or be sued.”

[13] Similarly, in *Amos Makono & 32 Ors v Freda Rebecca Gold Mine* (supra), this court reviewed the abundancy of legal guidance³ on the consequences of defective citation of a party in a summons or other legal process. CHATUKUTA J after adopting the same view taken in *Gariya Safaris* that the question ultimately devolved to whether an existing legal persona had been cited, concluded by observing [at page 4], that; -

“By virtue of the *stare decisis* doctrine, this court is bound by the plethora of Supreme Court cases on the issue including *Fadzai John v Delta Beverages*. The present application therefore suffers the same fate as in those cases. In the result, the preliminary point is upheld.

[14] Defendant argued that the entity cited by plaintiff was not a legal persona. The averment was not disputed by plaintiff. Had plaintiff argued that indeed, there existed somewhere out there, a legal entity named “Treat and Company”, the matter could have taken a different turn. But the fact that Treat and Company was a non-existent legal phenomenon renders the proceedings fatally defective on the basis that no party was cited as defendant.

DISPOSITION

² Whilst the court was dealing with an application for substitution, the matters traversed in that decision are squarely applicable to the question to be determined herein.

³ *Masuka v Delta Beverages* HB 2012 (1) ZLR 112, *Masukume v Treston Enterprise (Pvt) Ltd* HH 416/15, *Nuvert Trading (Pvt) Ltd v Hwange Colliery* HH 791/15, *CT Bolts (Pvt) Ltd v Workers’ Committee* 2012 (1) ZLR 363 (S), *Marange Resources (Private) Limited v Core Mining & Minerals (Private) Limited (in liquidation) & Ors* SC 37/16 and *Stewart Scott Kennedy v Mazongororo Syringes (Pvt) Ltd* 1996 (2) ZLR 565 (S.)

[15] Having so concluded, the point of law raised disposes of the matter and defendant is entitled to the order sought. Accordingly, it is hereby ordered that; -

1. The preliminary point raised by defendant challenging the validity of the proceedings on the basis of citation of a non-existent defendant be and is hereby upheld.
2. The matter be and is hereby struck off with costs to be borne by plaintiff.

Nenjy Nyamapfene Legal Practice- plaintiff's legal practitioners
Nyahuma's Law Chambers-defendant's legal practitioners.

[CHILIMBE J__19/8/24]