

OLD MUTUAL ASSET MANAGEMENT (PVT) LTD  
versus  
F & R TRAVEL TOURS & CAR SALES

HIGH COURT OF ZIMBABWE  
GOWORA J  
HARARE 11 and 20 June 2007

### **Civil Trial**

*E Jori*, for the plaintiff  
*G C Chikumbirike*, for the defendant

GOWORA J: On 22 June 2005 the legal practitioners for the plaintiff instituted summons against the defendant wherein the plaintiff sought delivery of two Nissan motor vehicles, one a 2,4 litre double cab, the other being a 3 litre double cab. In para 2 of the declaration, there is no para 1, despite the heading on the summons and on the declaration itself, the plaintiff is stated as being Old Mutual Properties (Pvt) Ltd. The summons was served on the defendant who entered an appearance to defend the action. Various pleadings were then filed by the parties and the name of the plaintiff changed each time a pleading was filed. A lot of amendments were filed on behalf of the plaintiff and it is in fact safe to say that the pleadings filed on behalf of the plaintiff are a mess. Neither of the parties appeared to have been concerned to ensure that the plaintiff was not properly described in the pleadings being filed.

When the matter was called on 4 June 2007, Mr *Jori* indicated that he intended to file an amendment to the declaration. Mr *Chikumbirike* also indicated that an amendment to the defendant's plea would also be filed. It did not appear as if there would be opposition to either amendment. The matter resumed before me on 11 June 2007. Mr *Jori* then moved for the amendment filed by him on 4 June 2007. Mr *Chikumbirike* then indicated that before the court could make a ruling on the amendment, he wished to

raise a point *in limine*. After Mr *Chikumbirike* had made oral submissions and Mr *Jori* had done the same I requested that both counsel address the issue raised by filed written submission with authorities to augment their argument. I am indebted to both counsels for their assistance in that regard. I will deal now with the cause of complaint by Mr *Chikumbirike*.

Paragraph 2 of the Notice of Intention to Amend filed by the plaintiff on 4 June 2007 is to the following effect:

“By the deletion of ‘Properties’ after Old Mutual and substitution thereof with ‘Asset Managers’”.

The intent behind the application to amend is thus revealed for what it is, an application for substitution of the plaintiff.

I do not have before me an application for substitution and consequently cannot say why there is need for the plaintiff to be substituted. There is thus no explanation as to why the plaintiff was wrongly cited to begin with. In this case, what the plaintiff is seeking by the filing of the amendment, is not only change the citation of the plaintiff but the persona described in the summons and declaration. The summons herein cited the plaintiff as Old Mutual Asset Management (Pvt) Ltd. The declaration then described the plaintiff as Old Mutual Properties. A declaration where it differs from the contents of the summons is accepted as having amended the summons to the extent of the differences that appear *ex facie* the summons and the declaration. In this case, without an application to substitute Old Mutual Asset Management (Pvt) Ltd with Old Mutual Properties (Pvt) Ltd the plaintiff therefore remained as before. It is only now that there is an attempt to amend the pleadings properly and bring before the court the correct plaintiff.

It is trite that an amendment, even where it is intended to substitute a party, will be granted unless the application to amend is *mala fide* or would cause prejudice to the other side which cannot be cured by costs. The issue raised by Mr *Chikumbirike* is that of *locus standi*, that it must appear *ex facie* from the pleadings, i.e. the initiating summons who the plaintiff instituting the proceedings is. It is his contention that based on

*Stewart Scott Kennedy v Mazongororo Syringes (Pvt) Ltd*<sup>1</sup> the incorrect citation of the plaintiff herein renders the proceedings before me *null* and void. Where the plaintiff is incorrectly cited but is a persona that exists, the court, in the absence of prejudice to the other side or *mala fides* to do with the application would not be justified in denying the application, even where a new persona in the form of the plaintiff is introduced as a party to the proceedings. Where however the party named on the process was not in existence at the time that process was instituted, then such process is *null* and void. In *Stewart Scott Kennedy v Mazongororo Syringes (Pvt ) Ltd supra* GUBBAY CJ stated as follows<sup>2</sup> :

“But the crucial distinguishing feature is that the institution of the action in the name of Stewart Scott Kennedy was void *ab initio*. Without a plaintiff there can be no claim. A document which purports to be a summons requiring the defendant to comply with a claim of a non-existent person, is null and void as far as the institution of the claim is concerned. The plaintiff is the one who issues the challenge to litigation (see *Voet* 5.1.9 ) and must be a persona. If authority is needed for such an axiomatic statement it is to be found in *Kelly v Petersen* 1948 (4) SA 958 (A)”.

What was before the court in the Stewart Scott Kennedy case *supra* may be analogous to the present. Clearly there is some difficulty with the citation of the plaintiff which it is intended to cure. The plaintiff is not an individual and is of corporate status. The plaintiff as cited is a juristic person. The manner of it coming into being of such juristic person is by registration as such in terms of and in accordance with the laws of this country. Thus it is the certificate of incorporation which then confirms its existence as a corporate being or juristic person. It is then added to the register of companies to confirm its existence.

The registered entity would, in this instance, appear to be Old Mutual Asset Managers Zimbabwe Private Limited. As no formal application for an order of substitution has been filed I am in the dark as regards the status of the plaintiff as cited. Mr *Jori* has not committed himself as to what the

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<sup>1</sup> 1996 (2) ZLR 565

<sup>2</sup> At p572D

citation of the plaintiff in this entails. In the submissions filed by him he makes reference to a mis-description of a party to a litigation. If the contention is that the plaintiff was incorrectly cited and that an amendment would cure this, then the plaintiff has a misapprehension of the situation. The plaintiff *in casu*, who has instituted proceedings is non-existent. There is no such person and consequently, there is no person before the court in the guise of a plaintiff. It is therefore an action that is doomed from the beginning as there is no party before the court. The proceedings are invalid, and they cannot be validated by the act of substituting an existent person with one that does not exist. The proceedings are thus a nullity.

Both counsels have made representations in respect of the incorrect citation of the defendant in that it was not described as a registered company. In view of the finding that I have made on the question of the citation of the plaintiff, it is in my view unnecessary to deal with the defendant's citation. It would ultimately serve no purpose in this application.

In the premises the plaintiff's claim is dismissed with costs.

*Wintertons*, legal practitioners for the plaintiff

*Chikumbirike & Associates*, legal practitioners for the defendant