THE MESSENGER OF COURT (HARARE)
versus
TAVENHAVE-MACHINGAUTA LEGAL PRACTITIONERS

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 10 October 2012 and 9 January 2013

E.T. Moyo, for the applicant
J. Mudimu, for the respondent

MTSHIYA J: On 23 January 2012, the applicant issued summons against the respondent (first defendant in the main action) and Messrs Manase and Manase Legal Practitioners as the second defendant. The action was for:-

"(a) payment of USD 9 643-20 due and owing to the plaintiff

(b) Interest on the said amount at the prescribed rate calculated from the 21st of September 2011 to the date of full and final payment both dates inclusive.

(c) Costs of suit".

The background to the issuance of the summons was that in September 2009 Mr *Tavenhave,* who was then practising as a professional assistant under the second defendant, Manase and Manase Legal Practitioners, instructed the applicant (plaintiff in the main action) to execute on some warrants for the ejectment and execution against movable properties in respect of the following matters:-

1. Mervyn Susman *Trust* v *Ethanasia Court Residents*; and
2. *Ramson* (*Pvt*) *Ltd* v *Edgars* (*Pvt*) *Ltd*.

The applicant raised invoices amounting to a total of US$21 625-20 for his services. Initially a total amount of US$6 982-00 was paid, leaving a balance of US$14 643-20. In July 2011 the respondent made a further payment of US$5000-00 and thus reducing the balance outstanding to US$9 643-20 as at that date. That is the amount in the applicant's claim.

On 7 February 2012 the defendant (Tavenhave-Machingauta Legal Practitioners) entered an appearance to defend. On 8 February 2012 Messrs Manase and Manase Legal

Practitioners, who were cited as the second defendants in the main action, also entered an appearance to defend.

On 16 February 2012 the applicant filed a notice of withdrawal in respect of Manase and Manase Legal Practitioners. This also led to a formal withdrawal of their notice of appearance on 20 February 2012.

Mr *Moyo* for the applicant submitted that notwithstanding the fact that initial instructions were to Manase and Manase Legal Practitioners, the subsequent conduct of the respondent demands that it be estopped from denying liability. He submitted that Mr Tavenhave of the respondent had taken over the clients and represented to them that he was seized with the matters. That being the case, he went on, the respondent, in whom Mr *Tavenhave* is a senior partner, was properly cited. He (Mr *Tavenhave*) had indicated in correspondence that he was indeed still seized with the clients' matters. Furthermore, Mr *Moyo* argued, the respondent had made payments to the applicant and had never denied the debt. He dismissed the "defence" that the respondent was merely assisting the applicant to recover what was due to him.

Mr *Mudimu* for the respondent submitted that the applicant had cited a wrong party because in 2009 Mr *Tavenhave* had acted as an employee of Manase and Manase Legal Practitioners. He said the respondent had never at anytime assumed agency for the clients involved in the matter. He insisted that Mr *Tavenhave* had merely assisted the applicant in recovering his dues and had never accepted liability.

My initial reaction after reading the papers was that the applicant had cited a wrong respondent. However, after careful consideration of the matter and upon hearing arguments, I came to the conclusion that the respondent was properly cited. This is indeed so because of the respondent's own conduct.

It is clear to me that upon forming his own Legal Law firm on 1 February 2011, Mr *Tavenhave* took over the clients in question from Manase and Manase Legal Practitioners. That position was known to the applicant and the clients involved. That is why on 10 August 2011 the applicant addressed the following letter to Mr *Tavenhave:*-

> "RE: STATEMENT OF ACCOUNT AS AT 31ST JULY 2011
>
> Thank you very much for the US$5000-00 which was transferred and credited to the company's Stanbic account on 26th July 2011.
>
> We attach herewith our receipt A1712 for US$5000-00 and a copy of statement of account US$9 643-20 calculated as below:-

Per our letter 16th May 2011:-

Mervyn Susman Trust vs Enthanasia Court Residence	12 232-20 DR
Less: Paid 26/07/11	5 000-00 CR
	7 232-20 DR
Add: Ramson P/Ltd vs Edgars Stores (Cameroon Street)	2 411-00 DR
Amount now due	9 643-20 DR

We await to hear from you, how the remaining amount due will be settled.

Yours faithfully

FELIX TINAYENDA
ASSISTANT ACCOUNTANT
MESSENGER OF COURT – HARARE"

It will be noted that at the end of the letter the applicant still relies on the respondent to settle the outstanding amount. He does not call for further "assistance" from the respondent. He knows the respondent is liable and has admitted liability as evidenced by the part payment effected by the respondent on 26 July 2011. That was after the respondent came into existence on 1 February 2011.

The respondent itself confirmed that it was indeed seized with the matters. On 1 November 2011 the respondent addressed the following letter to the applicant:

"RE: MERYVN SUSMAN TRUST & RASEN HOLDINGS (PVT) LTD-BALANCE $9 643-00

Kindly be advised that our client is no longer resident in Zimbabwe and as such it is difficult to contact them, the last time they were in Zimbabwe was when they paid the US$5 000-00.
However they advised us through the email that they will be in the country on the 28th of November and promised to settle your account as they have already shown commitment by paying the initial deposit.

We heard that you are contemplating litigation, we urge you to wait until then so to avoid wastage of resources and time as our client is not denying liability.

We thank you in anticipation of your usual co-operation.

Yours faithfully

TAVENHAVE-MACHINGAUTA

LEGAL PRACTITIONERS" (my own underlining)

The above letter talks of our client and confirms that it was the respondent who was in communication with the clients - and not Manase and Manase Legal Practitioners. That removes any doubt as to who should have been cited in this matter. Both parties have correctly dealt with the law relating to partnerships and having identified where liability should lie, I see no point in revisiting that area of the law.

The respondent, *in casu*, has indeed conducted itself in a manner that does not assist it in its alleged defence. In short the respondent has, in my view, no plausible defence to the applicant's claim and therefore the applicant is entitled to summary judgment (See *Stationery Box* (*Pvt*) *Ltd* v *Natcon* (*Pvt*) *Ltd*, HH 64/10).

I therefore order as follows:-

IT IS ORDERED THAT:

1. Application for summary judgment be and is hereby granted.
2. The respondent shall pay the applicant the sum of USD9 643-20 together with interest thereon at the prescribed rate of 5% per annum calculated from 21 September 2011 to the date of full and final payment; and
3. The respondent shall pay costs of suit on an attorney and client scale.

Scanlen & Holderness, plaintiff's legal practitioners
Tavenhave-Machingauta, 1st defendant's legal practitioners