THE TRUSTEES COMMERCIAL FEDERATION
OF MANICALAND TRUST
versus
CITY OF MUTARE
and
MINISTER OF LOCAL GOVERNMENT
AND PUBLIC WORKS

HIGH COURT OF ZIMBABWE
CHAREWA J
MUTARE, 10 & 17 March 2022

Opposed Application- Leave to Amend

Mr *T L Mapuranga,* for the applicant
Mr *T G Mukwindidza,* for first respondent

CHAREWA J: This is an application for leave to amend the citation of the applicant in HC183/21.

Background

[1] On 15 September 2021 an application was filed by The Trustees Manicaland Commercial Federation Trust wherein it sought an order declaring;

a. First respondent's 2020 supplementary budget process and consequent budget to be flawed and in contravention of s 219 of the Urban Councils Act;
b. First respondent's budget process 2021 budget process and consequent budget to be flawed and in contravention of s 219 of the Urban Councils Act;
c. The consequent increases from those budget processes and budgets to be unaffordable to ratepayers given the Covid 19 induced economic turmoil;
d. And as a result, that the parties be ordered to negotiate and consult on revision of the same;
e. And to that end, that first respondent must comply with the advertisement requirements of s 219;
f. And costs on a legal practitioner and client scale.

[2] The application was supported by an affidavit sworn by one Phibion Ngorima professing to act under a resolution, more particularly, clause 1 and 3 thereof, made by the Trustees of Manicaland Commercial Federation Trust extracted from the minutes of a meeting of a trust of the same name held on the first of September 2021 to the effect that "Manicaland Commercial Federation Trust, has hereby decided to institute legal proceedings " against respondents and that "Phibion Ngorima of Manicaland Commercial Federation Trust, be and is hereby empowered to take such steps …..to carry into effect" the resolution.

[3] Paragraph 1 of the said Phibion Ngorima's founding affidavit swore that he is acting in terms of such resolution by such entity. However paragraph 2 of the affidavit then cited the registration number of the Commercial Federation of Manicaland Trust.

[4] Consequently, in its notice of opposition filed on 30 September 2021, first respondent raised the preliminary point that there was no applicant before the court given that applicant had not attached its own registered deed, but that of the Commercial Federation of Manicaland Trust which it could not rely on.

[5] On 28 October 2021, the applicant filed a notice of amendment in which it sought to substitute in its place, The Trustees Commercial Federation of Manicaland Trust.

[6] First respondent objected to such amendment on the grounds that applicant did not exist as a juristic person and therefore the proceedings were void *ab initio* and could not be amended. In any event, the amendment improperly sought to introduce an entirely new party to the proceedings by way of substitution. Further, the party intended to be substituted did not exist at the time the alleged cause of action arose.

[7] Instead of either withdrawing its application or making an application for leave to amend, applicant proceeded to file an answering affidavit on 10 November 2021. Thereafter it filed its heads of argument on 18 January 2022 persisting in its prayer in terms of the draft and proceeded to seek set down.

[8] On 25 January 2022, applicant then filed this application for leave to amend.

Leave to amend

[9] As correctly observed by first respondent, the resolution in support of the present application is a general resolution which does not specifically authorise the filing of this

application it having been issued on 23 November 2021, long before any contemplation of any application for leave to amend HC183/21.

[10] The application itself is headed "COURT APPLICATION FOR LEAVE TO AMMEND (sic) IN TERMS OF ORDER 41(4) OF THE HIGH COURT RULES, 2021. It goes without saying that there is no such thing as Order 41(4). As for Order 41 r 4, it has nothing to do with applications for amendment of pleadings.

[11] Paragraph 1 and 2 of the draft order reads:

> "1. The Application for leave to Amend in terms of order 41(4) is hereby granted.
> 2. The Applicant to effect the amendments as granted in terms of Rule 41(6) and (7)".

I have already commented about the reference to Order 41(4). Additionally, the draft order is, to say the least, confusing, if not meaningless.

[12] Paragraph 4 of the founding affidavit, in its ordinary meaning, suggests that what is sought to be amended is the citation, by substituting The Trustees of Commercial Federation of Manicaland Trust for The Trustees Manicaland Commercial Federation Trust.

[13] This inference is supported by paragraph 4 of the heads of argument wherein applicant argues that it has the locus to correct "an unintentional error by citing the Applicant".

[14] Given the nature of the application as defined in the founding affidavit for this application, and the relief sought per the draft order, it is not apparent therefore how amendment of the citation will assist the applicant given that no attempt is being made to amend the evidence in the main application as contained in the resolutions and sworn affidavits that these processes have been authorised by an entity other than the one sought to be substituted.

[15] It is trite that an application stands or falls by the papers filed of record. Applicant conceded that an application consists of a notice of application, a founding affidavit and a draft order. If the founding affidavit is predicated on the wrong or non-existent authority and the draft order does not seek a relief which addresses the cause of action, such application cannot surely succeed. It is a nullity which is not subject of amendment.

[16] In this case, given that trite position, the question arises whether there is any application before the court to grant leave for its amendment. I must answer in the negative for the following reasons:

a. It is common cause that the applicant in the main application does not exist as a legal person, hence this application for amendment.
b. Yet that non-existent entity has generated a resolution authorising the institution of litigation. There is no application or supplementary affidavit correcting that situation.
c. The founding affidavit of Phibion Ngorima remains predicated on that resolution issued by a non-existent entity. And that affidavit still claims that he is acting in the stead of that non-existent entity. No supplementary affidavit has been filed to correct that position.

[17] There is a plethora of case law on amendment of pleadings which principles I summarise as follows:

a. There is a difference between the correction of a mis-description and a situation where summons or notice of motion is void *ab initio* because a litigant does not exist as a legal person. *In casu*, what is sought is not the correction of a mis-description as envisioned in *Nuvert Trading (Pvt) Ltd t/a Triple Tee Footwear* v *Hwange Colliery Company*[1] but a substitution of a different entity by another.
b. The second principle is that if a party did not exist as at the time of commencement of litigation, such process is null and void.[2] It is common cause that Manicaland Commercial Federation Trust does not exist. It did not exist on 15 September 2021 and could therefore not have commenced any litigation or passed any resolutions or granted anyone any authority to act on its behalf.
c. This leads to the third principle that a non-existent applicant/plaintiff cannot validly institute legal proceedings.[3] The consequence is that the application filed on 15 September 2021 was not valid.

[1] HH791/15
[2] See Gariya Safaris (Pvt) Ltd v Van Wyk 1996 (2) ZLR @ 253C-254B99
[3] See also Fosa v Commercial Properties (Pty) Ltd & Anor [1996] 2 All SA 611D

d. The follow-on principle is that if a party does not exist it cannot be substituted.[4] *Ergo*, the current application for leave to amend HC183/21 to substitute The Trustees Commercial Federation of Manicaland Trust for The Trustees Manicaland Commercial Federation Trust is not sustainable.

e. The final principle distilled from case law is that one cannot amend a nullity. As stated by Korsah JA in *Jensen* v *Acavelos*[5] , an incurably bad application cannot be amended. This conclusion draws from the time worn principle in *McFoy* v *United Africa Co. Ltd*.[6] On the merits therefore, this application cannot succeed. The authorities relied on by applicant are inapplicable, they being concerned with correction of a mis-description, rather than a situation where a litigant is not a legal person.

[18] The issue of *locus standi* is then subsumed within these principles: a party cannot have *locus standi* to amend pleadings which are a nullity. Further and in any event, I do agree with first respondent that applicant's deponent, not having authority from the entity called Manicaland Commercial Federation Trust to amend that entity's pleadings, cannot lawfully do so on the authority of a different and separagraphte entity.

[19] In passing, it is apparent from the authorities I have cited above, that there is no difference in procedure between applications and actions when seeking amendments of pleadings. It seems to me that r 41 in general has already been interpreted as applying equally to actions and applications. However, first respondent is correct that r 41(1) does not entitle an application to amend a sworn statement. Given that I have already found that no attempt is being made to amend anything other than the citation, this issue should therefore not detain the court.

[20] Consequently, I find that this application is without merit and should be dismissed. And in view of the finding that HC183/21 is a nullity which cannot be amended I find it unnecessary to delve into its merits.

Costs

[4] JDM Agro-Consult (Pvt) Ltd v Editor, The Herald & Anor 2007 (2) ZLR 71
[5] 1993 (1) ZLR 216(S)
[6] [1961] 3 All ER1169 (PC)

[21] Applicant had sought costs in the cause. However, in the main application applicant had sought costs on the higher scale. first respondent also sought costs either *debonis propriis* or on the higher scale on the basis that applicant ought to have realised the fatal error in the main application and withdrawn that application and tendered wasted costs before filing an appropriate application. It is first respondent's view that this application was frivolous and vexatious litigation which caused it inconvenience. More so, given that applicant had spawned two applications from the original main application in HC183/21, all of which had the effect of disturbing its operations and caused it to incur unnecessary legal costs. It is first respondent's submission that the court must express its displeasure by ordering punitive costs.

[22] I am inclined to agree with first respondent. The applicant's conduct or that of its legal practitioners in fact caused unnecessary loss of funds paid by the very members of the public whose interests it purports to protect through legal costs incurred by first respondent. Once it was pointed out that the applicant in HC183/21 was a non-existent entity, the reasonable approach was to seek withdrawal by consent with no order as to costs or with a tender of costs. To persist with the application and belatedly seek amendment in the face of settled law that proceedings instituted by a non-existent entity are null and void was avoidable folly. In the same way that HC256/21 was withdrawn with a tender for wasted costs, the current and the main application ought to have been similarly withdrawn. Persisting with them was ill advised in the circumstances, and merits an award of costs on the higher scale. I am loth to grant costs *debonis* as applicant was, since October 2021, aware of the challenges with its main application, was represented in court and ought, from the exchanges, to have given appropriate instructions to its legal practitioners. However, costs on the scale of legal practitioner and client are, in my view, merited.

DISPOSITION

Accordingly, it is ordered that

1. The application is dismissed
2. The applicant shall pay first respondent's costs on the scale of legal practitioner and client.

Messrs Matsika Legal Practitioners, applicant's legal practitioners
Messrs Bere Brothers, first respondent's legal practitioners