NICHOLAS MUKARATI
versus
PIONEER AFRICA LIMITED
(now Known as Unifreight Africa Limited)
and
PIONEER COACHES (PVT) LTD
and
PRISCILLA MGAZI N.O.

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 19 July 2024 & 6 August 2024

Judgment on Preliminary Point-Improper Citation of a Party

A K Maguchu, for the applicant
T Mpofu, for the 1st respondent

MUSITHU J: This ruling is made pursuant to a preliminary objection raised by the first respondent's counsel at the commencement of oral submissions in the matter on 19 July 2024. The applicant approached this court for the registration of a Labour Officer's ruling that was made in his favour on 5 June 2023. The Labour Officer's ruling followed a complaint of non-payment of salaries made by the applicant against the first and second respondents. The first respondent opposed the application.

After hearing arguments on the preliminary point, I postponed the matter to 22 July 2024 for ruling and continuation of the hearing on the merits in case the preliminary point did not find favour with the court. As I was preparing to upload the ruling into the Integrated Electronic Case Management System in the morning of 22 July 2024, I discovered that the applicant's legal practitioners had uploaded a letter dated 18 July 2024, in which they brought to my attention the provisions of s 26(5) of the Companies and Other Business Entities Act[1] (the COBE). They submitted that the said provision had a bearing on the outcome of the matter, and they obviously expected me to consider it in my ruling. I deferred my ruling on the preliminary point to give the parties an opportunity to make further submissions on the point of law. I will deal with this issue latter in the ruling.

[1] [*Chapter 24:31*]

The Preliminary Objection

At the hearing of the matter, Mr *Mpofu* for the first respondent raised a preliminary point pertaining to the improper citation of the first respondent herein. In the heading to the application, the first respondent was cited as "PIONEER AFRICA LIMITED (*now Known as Unifreight Africa Limited).* In para 2 of the applicant's founding affidavit, the first respondent was introduced as Pioneer Corporation Africa Limited. The first respondent's objection was that there is no entity that answers to the appellation "Pioneer Africa Limited" or "Pioneer Corporation Africa Limited".

According to counsel, Pioneer Corporation Africa Limited underwent a name change to Unifreight Africa Limited. That change of name was confirmed by a certificate of change of name dated 1 December 2014, attached to the first respondent's opposing affidavit. Pioneer Corporation Africa Limited therefore ceased to exist some 10 years ago. Mr *Mpofu* further submitted that the failure to cite the proper entity was a fatal error that could not be remedied by the mere alteration of the name. According to Mr *Mpofu*, what made the applicant's position untenable was that at the time of deposing to the founding affidavit, the applicant was aware of the change of name, but he proceeded to cite a non-existent entity. Any correction of the anomaly would entail tempering with the founding affidavit. An affidavit could only be corrected through the filing of a supplementary affidavit.

Mr *Mpofu* further submitted that an application stands or falls on the founding affidavit. The improper citation of the applicant meant that there was an incompetent application before the court. The application therefore ought to be struck off the roll.

In response, Mr *Maguchu* for the applicant submitted that the preliminary objection was without merit. This was because the first respondent was aware that proceedings were being instituted against it, but it never complained about the improper citation of its name. It responded to the proceedings because it was aware that it was the entity being sued. Counsel further submitted that it was incorrect to argue that the party cited was non-existent. The first responded had merely changed its name but it still existed as a legal *persona* capable of being sued.

In advancing his argument Mr *Maguchu* cited the South Africa case of *Four Tower Investments (Pty) Ltd v Andre's Motors*[2] amongst other authorities. In that case, the plaintiff

[2] 2005 (3) SA 39 (N)

had been improperly cited as *Four Tower Investments (Pty) Ltd*, when it was at the material time a close corporation called *Four Tower Properties CC.* The court allowed an application to regularise the citation of the plaintiff, determining that the citation of the plaintiff was nothing more than a misdescription of its identity.

Mr *Maguchu* further submitted that the court was required to make a distinction between a failure to describe a legal *persona* that existed and the citation of a non-existent party. In the present matter, counsel argued, there was merely a misdescription of an existing party. The first respondent had been cited by using a name that it was associated with. It was aware of an adverse decision against it and proceeded to file an appeal to the Labour Court under its correct name. Counsel urged the court to proceed on the basis of the record that was before it.

The Effect of the COBE

As already stated, the application of s 26(5) of the COBE was only raised on the eve of the handing down of my ruling on the preliminary point. The parties counsel made further submissions on the point of law. Section 26 of the COBE provides as follows:

> "26 Change of name
> (1)……..
> (5) The change of the name of a registered business entity shall not affect any right or obligation of the registered business entity, or render defective any legal proceedings by or against the entity, and any legal proceedings that might have been continued or commenced by or against it under its former name may be continued or commenced under its new name".

The words "registered business entity" are defined in s 2 of the COBE to mean a company, including a foreign company, registered or incorporated in terms of the COBE. The commencement date of the COBE is 13 February 2020. The COBE therefore became the new law long after the first respondent had changed its name in December 2014. The old Companies Act [*Chapter 24:03*] (the Act) was the applicable law at the time of the change of name. Section 25(4) of the old Act states as follows:

> "(4) The change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced by or against it by its former name may be continued or commenced under its new name."

Section 25(4) of the Act is worded pretty much the same as s 26(5) of the COBE save for the reference to 'business entity' in the COBE.

Mr *Maguchu* submitted that at the time that proceedings were instituted before the third respondent, the applicant was unaware of the first respondent's change of name. It was only

when the first respondent sought to challenge the decision of the third respondent that the applicant became aware. This is because in the Labour Court proceedings, the first respondent cited itself as Unifreight Africa Limited. Counsel further submitted that s 25(4) of the Act was conjoined with the word 'and'. The first part of the provision did not show whether it was dealing with proceedings that had commenced or were still to be commenced. The second part spoke to proceedings that had commenced.

Mr *Maguchu* further submitted that proceedings had commenced before the Labour Officer and what was being sought at this stage was the execution of the decision of the third respondent. He further submitted that any attempt to change parties at this stage would be futile as this court would simply say it could not alter the names of the parties as that would be tantamount to interfering with the decision of the third respondent.

In response, Mr *Mpofu* submitted that from an interpretation of s 25(4), a company's obligations that arose prior to its change of name were not affected by the subsequent change of name. A party was given the right to continue with proceedings even if there was a change of name. According to counsel, where a litigant was unaware of a company's change of name, but subsequently became aware, then they had to make an application for the substitution of the old name by the new name. It was further submitted that s 25(4) was a serving provision which was not intended to benefit a litigant that was unaware of the change of name but subsequently became aware. The provision was conjunctive and not disjunctive. The alleged first part of the provision was conjoined with the second party using the word 'and' instead of 'or'.

Mr *Mpofu* further submitted that the correct position of the law was that under no circumstances could legal proceedings be commenced or continued with under an old name especially when a litigant was aware of the change of name.

Analysis

The authorities that were cited by both counsels clearly make a distinction at common law between a mere misdescription of a party and the citation of a non-existent party. An alteration will be permitted in the first case, it being a case of an inaccurate description of a party that exists. Any application for regularisation will be declined in the latter case as that would be tantamount to endorsing the citation of a non-existent party. This court must therefore determine under which of the two categories above this case falls.

The first respondent, as already observed, underwent a change of name on 1 December 2014. From that date, it became known as Unifreight Africa Limited. The applicant was aware

of that change of name. This is because the heading of the application states that the first respondent is *"is now Known as Unifreight Africa Limited".* Mr *Maguchu* argued that the citation of the first respondent as Pioneer Africa Limited was a mere misdescription which should be overlooked because that entity was the same as Unifreight Africa Limited. Mr *Mpofu* on the other hand argued that the citation of the first respondent by reference to its old name could hardly be called a misdescription in the mould of the *Four Tower Properties* case, or the *Muzenda v Emirates Airlines & Others*[3], where the Emirates Airlines had been misdescribed as Arab Airlines. In that case, the court held that the misdescription of the airline was not fatal and it was remediable through an application to correct that anomaly.

The issue before the court has been traversed by the courts in this jurisdiction on diverse occasions. In *Masuku* v *Delta Beverages*[4] the court held that proceedings against a non-existent entity were void *ab initio* and consequently a nullity. The court further held that where an entity is not cited accurately through some error or omission, but it is referred to with sufficient clarity, then that citation would not be considered defective. In *Fadzai John v Delta Beverages Limited*[5] GUVAVA JA said:

> "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*2 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"[6] (underlining for emphasis).

In *Amos Makono & 32 Others v Freda Rebecca Gold Mine,*[7] the respondent raised a preliminary objection following its citation as *"Freda Rebecca Gold Mine"* instead of *"Freda Rebecca Mine Limited"*. It argued that the misdescription made the application fatally defective. The applicant on the other hand argued that the miscitation was not fatal, and it should be overlooked by the court. CHATUKUTA J reaffirmed the position of the law as follows:

> "In *Marange Resources (Private) Limited* v *Core Mining & Minerals (Private) Limited (in liquidation) & Ors* (*supra)*, which again is similar to the present matter, the appellant had wrongly cited the first respondent as "Core Mining and Minerals (Pvt) Ltd" instead of "Core Mining and Mineral Resources (Pty) Ltd". The omission of the word "Resources" and the use of "Pvt" as opposed to "Pty" was found to have altered the legal personality of the respondent.

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[3] HH 775/15
[4] 2012 (2) Z LR 112 (H)
[5] SC 40/17
[6] At page 5 of the judgment
[7] HH 400/18

> The simple question is therefore whether there is a legal or natural person answering to the name Freda Rebecca Mine. There is no such legal person. There is however a legal person called "Freda Rebecca Mine Limited". The omission of the word "Limited" altered the legal identity of the proper respondent. The applicants therefore cited a non-existent respondent.
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> 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.
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> The respondent prayed for dismissal of the application with costs. As the application is a nullity there is nothing for the court to dismiss" [8](Underlining for emphasis).

In *Mapondera & 55 Ors* v *Freda Rebecca Gold Mine Holdings Ltd*[9], the court held that where an existing entity is inadvertently misdescribed in judicial proceedings, it is permissible to apply for correction of the anomaly in good faith provided there is no irreparable prejudice to the other party.

Taking a cue from the foregoing authorities, I agree with Mr *Mpofu's* submission that at common law, the improper citation of the first respondent would not be construed a misdescription which can be regularised through a correction. The entity known as Pioneer Africa Limited would have ceased to exist on 1 December 2014 after it underwent a name change.

Having expounded the common law position, the next stage of the enquiry is to interrogate the effect of s 25(4) of the old Companies Act on the common law position. As already stated, the said section was only brought to the attention of the court on the eve of the handing down of the ruling. Counsels hold divergent views on the correct interpretation to be accorded to 25(4) of the Act. The principles of interpretation of legal instruments are a well-trodden path. In *Zambezi Gas (Private) Limited* v *N.R. Barber (Private) Limited*[10], the court had this to say:

> "It is the duty of a court to interpret statutes. Where the language used in a statute is clear and unambiguous, the words ought to be given the ordinary grammatical meaning. However, where the language used is ambiguous and lacks clarity, the court will need to interpret it and give it meaning."

[8] At page 4 of the judgment. See also *Marange Resources (Private) Limited* v *Core Mining & Minerals (Private) Limited (in liquidation) & Ors* SC 37/16
[9] SC 81/22 at p 11
[10] SC 3/20 at p7-8

In the same judgment, the court also made cited the case of *Chihava and Others* v *The Provincial Magistrate Francis Mapfumo N.O and Another*[11] where the Constitutional Court made the following apposite remarks:

> "The starting point in relation to the interpretation of statutes generally would be what is termed 'the golden rule' of statutory interpretation. This rule is authoritatively stated thus in the case of *Coopers and Lybrand & Others* v *Bryant* 1995 (3) SA 761 (A) at 767:
>
> > 'According to the "golden rule" of interpretation, the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or *inconsistency with the rest of the instrument*.'" (the underlining is for emphasis)

Thus, the *starting* point in interpreting statutes is to ascribe to the words used their ordinary grammatical meaning. It is only in cases of ambiguity or lack of clarity that resort should be had to other cannons of interpretation. From a consideration of the ordinary grammatical meaning of the words used in s25(4) of the Act, what comes out clearly is that the change of name of a company does not affect legal proceedings that may have been commenced or continued under the former name of the company. However, the same law goes on to state that such proceedings *"may be continued or commenced under the new name".* (Underlining for emphasis)

The court's view is that the word '*may*' does not necessarily confer on the applicant a choice to proceed with litigation under the old name. The discretion it confers is for the applicant to continue or commence proceedings but when he or she does so, those proceedings would have to be continued or commenced under the new name. It is clear from a reading of s 25(4) that the legislature was alive to the fact that the company under the new name is still the company it was under its previous name. The company is not formed again under the new name at the time it is issued with a new certificate. The company would have been formed when it was first registered. Technically, the company would not have ceased to exist when it assumed a new identity.

As already highlighted above, under the common law, the authorities made a distinction between a mere misdescription of a party that existed and the citation of a non-existent party. An application for the regularisation of a party would be readily allowed in the case of a misdescription of that party but declined in the case of the citation of a non-existent party. In my view s 25(4) has not altered the common law position in that if the applicant wishes to

[11] 2015 (2) ZLR 31 (CC) at pp 35H-37B

continue or commence proceedings against the first respondent, then it must cite it using its new name.

The next issue is whether the proceedings should be allowed to continue in their present form without an alteration in the name of the first respondent. During the first hearing, the court enquired from the applicant's counsel whether the proceedings could continue in their current form. He argued that there was nothing irregular in the way the first respondent was cited. I did not find that submission persuasive. If that line of argument were accepted, it would mean that for purposes of enforcement of any order that the court may give, the applicant would still have to proceed against the first respondent using its former name.

Having abandoned its former name, the applicant would need to be certain that the first respondent's former name has not been assumed by another different entity. In any event it would not make legal sense to continue or commence proceedings under the former name with full knowledge, as is the case herein, that the first respondent is no longer known by that former name. At some point, the applicant would still need to substitute the new name for the former in order enforce any order of the court under the new name by which the entity is now known. I have already indicated that from my reading of the law, the legislature did not give the applicant the choice to continue or commence proceedings under the old name.

While making his submissions on the point, Mr *Maguchu* sought the leave of the court to make an application to substitute the name of the respondent with its new name. Mr *Mpofu,* correctly so in my view, objected on the basis that the applicant's counsel had earlier submitted that there was no need for the substitution of names and the matter could proceed in its current form. The applicant's counsel could not therefore, make an about turn during his address, and seek to make the very application that he had earlier jettisoned as inessential.

In conclusion, the court determines that the application is not properly before the court, because the first respondent is not properly cited. Therefore, the application must be struck of the roll.

As regards costs of suit, Mr *Mpofu,* had generously abandoned any claim for costs against the applicant if the preliminary point was upheld, and so shall it be.

Resultantly it is ordered that: -

1. The preliminary point taken on the improper citation of the first respondent is upheld, and the application is hereby struck off the roll.

2. Each party shall bear its own costs of suit.

Maguchu & Muchada Business Attorneys, legal practitioners for the applicant
Caleb Mucheche & Partners Law Chambers, legal practitioners for the 1st respondent