ALBA CONSOLIDATED FUND (PRIVATE) LIMITED
and
LANGTON MAKONI
versus
AXIA OPERATIONS LIMITED
and
LEONORAH MUGARIRI
and
DETECTIVE CONSTABLEBLESSING HOVE
and
THE COMMISSIONER GENERAL POLICE

THE HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 8 November, 2021 & 7 March, 2022

Opposed Matter

F. Mahere, for the applicant
KT. Mutambo, for the 1st respondent

MANGOTA J: I heard this application on 8 November 2021. I delivered an *ex tempore* judgment in terms of which I granted the applicant's prayer.

On 18 November, 2021 the first respondent wrote requesting reasons for my decision. These are they:

The application is one for a declaratur and consequential relief. The applicant must, in an application for a declaratur, show that he has a direct and substantial, and not only financial, interest in the right which is the subject-matter of the inquiry. Absent that, his application cannot succeed.

Whether or not the applicant *in casu* showed that it has the requisite interest in the tobacco which is the subject-matter of this application depends, in a large measure, on the evidence which the parties placed before me. The evidence is that, on 26 January 2019, the first applicant, a legal entity, and the first respondent, which is also a legal entity, entered into an agreement of cession of rights in tobacco. In terms of the said agreement, the first applicant ceded its rights in respect

of 252 750.5 kilograms of tobacco to the first respondent. The cession constitutes the first applicant's first cause of action.

Following the cession, one Ray Munyaradzi Rambanapasi ("Rambanapasi") who was/is director of the first respondent allegedly stole three hundred and forty (340) bales of tobacco which is part of the quantity of tobacco which the third respondent, a detective in the Zimbabwe Republic Police, seized from the first applicant's premises, namely stand numbers 1252 and 1253, 24th Road, Light Industrial Area, Tynwald South, Harare on 24 May, 2019. The seizure of the tobacco followed the warrant of search and seizure which the court of the magistrate issued at the instance of the third respondent who applied for the same when she was investigating crimes of fraud and money-laundering which the State preferred against the first and second applicants against whose alleged conduct the first respondent complained to the police. The tobacco and other items which are not the subject of this application were, therefore, seized by the police. They were to be handled in terms of Part Vl of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]. They were, in short, to remain in the custody of the police pending the contemplated prosecution of the applicants during whose trial they would be produced as exhibits.

It is the assertion of the applicants that the first and third respondents connived between them and the third respondent allowed the first respondent's finance director, Rambanapasi, to take 340 bales of tobacco from the wherehouse where the tobacco was/is kept. The allegation constitutes the applicants' second cause of action. They, in short, move me to:

a) declare the agreement of cession which the first applicant and the first respondent signed on 26 June, 2019 to be null and void as well as to set the same aside – and
b) direct the first, second and third respondents, jointly and severally, the one delivering the others to be absolved, 340 bales of tobacco taken from stand numbers 1252 and 1253, 24th Road, Tynwald South, Harare within 48 hours of service upon them of the court order.

All the respondents filed notices of opposition to the application. However, apart from the second respondent who was/is self-acting, the third and fourth respondents who were legally represented did not file any heads. This was notwithstanding their receipt of the applicants' heads. Both of them are, therefore, out of court. This leaves only the first and the second respondents in the equation.

Papers which are filed of record reveal that the first applicant and the first respondent enjoyed a special relationship between them prior to the occasion that the same turned sour. The applicants spell out the legal entities' relationship in paragraphs 8 and 9 of the founding affidavit. According to the relationship, the first respondent entered into a trade facilitation and payment agreement with a company called Anametrics Holdings Limited. The agreement was for the facilitation of issuance of letters of credit by Anametrics in favour of the first respondent's international suppliers. The first applicant which, according to the agreement, was Anametrics' designated representative was responsible for issuance of letters of credit.

It was in the spirit of the agreement that the first respondent paid the sum of US$ 4 966 507.71 to the first applicant. It is this sum which the first respondent alleges that the first and the second applicants stole from it in a deceiptful manner. It is the same which propelled the first respondent to cause:

i) the arrest of the second applicant – and

ii) seizure of the applicants' tobacco, among other items.

The first applicant and the first respondent, it has already been observed, are fictitious persons. They could not, as such, speak to, or negotiate with, each other. They could not, in other words, create the relationship which they enjoyed before they fell out with each other. They were only able to speak to, or negotiate with, each other through the medium of such natural persons as the second applicant and/or Rambanapasi respectively. It is for the mentioned reason, if for no other, that the first respondent is able to connect the second applicant to the first applicant in a clear and unambiguous manner. It, for instance, makes the following respective statements in paragraphs 7.1.1, 11, 14 and 26 of its opposing affidavit:

> "7.1.1- It was the first applicant who approached the first respondent through one Chris Hokonya and second applicant and made representations to first respondent that the first applicant's holding company, Anametrics Holding Limited, ran a fund registered by the second applicant as first applicant and had a capacity to arrange for documentary letters of credit for the first respondent's suppliers most of which were based in South Africa.
> 11. …The amount of US$ 4 996 507 was paid to first applicant's bank accounts and was converted for personal use by first and second applicant *(sic).*
> 14. …first applicant and second applicant deliberately converted first respondent's funds meant for securing documentary letters of credit for purposes not agreed upon.
> 26. Apart from the deponent's word, which word should be taken with doubt due to his heavy involvement in the loss suffered by the first respondent….."

It is, in view of the above-stated matters, disingenuous for the first respondent to allege that the second applicant whom it dealt with in the past does not have the authority of the first applicant to depose to the founding and answering affidavits for, and on behalf of, the first applicant. It is also disquieting for the first applicant to suggest, as it is doing, that Rambanapasi whom it dealt with in the past does not have the authority of the first respondent to depose to the opposing affidavit for, and on behalf of, the first respondent.

There was, in my view, no need for the first applicant and/or the first respondent to challenge the authority of either deponent to sue or to defend the suit. The first applicant and the first respondent detained my mind on a dead issue when they raised unnecessary *in limine* matters which related to the authority of the second applicant to depose to the first applicant's affidavits and that of Rambanapasi to depose to the opposing affidavit of the first respondent. They should, as responsible litigants, have accepted that each deponent had the authority of the legal entity whom he represented to sue or to defend the suit. Both were quick to raise a preliminary issue where none was in existence. They should have taken heed of the *dictum* which the court was pleased to enunciate in *African Banking Corporation t/a Banc ABC* v *PWC Motors (Pvt) Ltd,* HH 123/13 which states, in clear and categorical terms, that production of a company resolution is not a necessity in all cases especially where, as *in casu*, the parties have had prior dealings between them. They should, on the strength of the case, have realized that all what I am required to do is to satisfy myself that the evidence which has been placed before me shows that it is the first applicant and/or the first respondent who is litigating and not some unauthorized person. This is a *fortiori* the case where each deponent stated that he had the authority of the first applicant or the first respondent to represent the one or the other.

As matters stand currently, I am satisfied that it is the first applicant which is suing the first respondent which is defending the suit. I am also satisfied that Langton Makoni whose name appears on the face of the application is the same person as Tauya Langton Makoni whose name appears in the resolution which the first applicant attached to its application. I am further satisfied that he has the authority of the first applicant to depose to the founding and answering affidavits of the first applicant. That he is one and the same person is evident from a reading of some paragraphs of the first respondent's notice of opposition as corroborated by the opposing affidavit of the second respondent who was/is an employee of the first applicant. The reality of the matter

is that neither the second applicant nor Rambanapasi is on a frolic of his own. Both of them, it is evident, are about the business of their respective legal entities.

Nothing turns on whether or not the second applicant lacks the *locus* to cite himself as a party to the application. His joinder or non-joinder has no effect at all on the outcome of the application. It does not prejudice the first respondent in its defence at all. The position of the law is, at any rate, clear on the joinder or non-joinder of any party to any proceedings. Sub-rule (11) of Rule 32 of the High Court Rules, 2021 which is relevant to the issue at hand states that:

> "(11) No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may , in any cause or matter, determine the issues or questions in dispute in so far as they affect the rights and interests of the persons who are parties to the cause or matter".

The dispute which is before me relates to the relationship which then existed between the first applicant as measured against the conduct of the first respondent. These are the parties whose rights and interests I am called upon to determine. The rule confers upon me the discretion to determine such. It does not, in the exercise of my discretion, compel me to look at the rights and interest of the second applicant. His citation as a party to the proceedings which are before me cannot, therefore, render the application fatal. His citation is akin to what may be referred to as a matter of nuisance value which should not detain the mind of any serious litigant let alone that of the court. It has no effect at all on the determination of the first applicant's issues *vis-à-vis* the conduct of the first respondent. The *in limine* matter which the first respondent raised on the second applicant's *locus* is therefore devoid of merit. By the same token, the *in limine* matter which the first applicant raised in its answering affidavit in respect of Rambanapsi's authority to depose to the opposing affidavit also lacks merit and cannot therefore stand. Both *in limine* matters were a complete waste of energy, effort and time by the first applicant and the first respondent.

Annexures F, G and H which the first applicant attached to its founding papers answer to the issue of material non-disclosure which the first respondent complaints of in paragraph 7 of its notice of opposition. These respectively appear at pages 23, 25 and 26 of the record. They allege that the applicants swindled the first respondent of its money. The applicants cannot, under the observed set of circumstances, be said not to have made material non-disclosure. They, if anything, disclosed everything which created the first applicant's dispute with the first respondent. They could not, in my view, have done any better than the annexures which they attached to the

application. The contents of those remain *in sync* with the Latin maxim: *res ipso loquitor* which loosely translated means the thing speaks for itself. The preliminary issue which the first respondent raised on material non-disclosure is therefore of no moment. It is devoid of merit.

The matters which I dealt with in the foregoing paragraphs compel me to pose the question of whether or not the preliminary issues which each party raised served any purpose at all let alone a useful one. A second question which flows from the first is , if the *in limine* matters which have been raised serve no purpose, as was the case *in casu*, the question which begs the answer is why did the parties raise them. Put differently, the same question would read: why do litigants raise preliminary matters which do not add value to the case of either of them.

It seems to me that it has become fashionable for litigants who know that they have nothing to say either in the prosecution of their cases or in defence of themselves to raise frivolous and vexatious *in limine* matters. They do so in the vein hope that the real issue(s) which the court is called upon to decide may disappear altogether or will, in some way or other, cloud the mind of the court to a point where it would refrain from dealing with the real issues which it must determine. This unwholesome conduct by litigants must stop forthwith. It serves no useful purpose other than to drag the court and the party who is a victim of the merry-go-round vexatious preliminary matter(s) into an unfathomed circuitous reasoning which leads to nowhere. Time is now at hand for the court to express its utmost displeasure in respect of this unpalatable conduct by ordering costs against litigants who continue to abuse the procedure of raising *in limine* matters where none are called for. Costs will, in future, be visited upon legal practitioners who refuse to assess the propriety or otherwise of the objections which they raise for, and on behalf of, those whom they represent. It is, after all, the legal practitioner and not the litigant whom he represents, who more often than not raises these *in limine* matters.

Whilst it is the right of the litigants or the latter's legal practitioners to raise preliminary issues, the legal practitioner who raises such should objectively assess the appropriateness or otherwise of the preliminary point(s) which he intends to raise. Where, from an objective perspective, he remains of the view that the *in limine* matter(s) which he seeks to raise is/are better not raised than raised, his adoption of the latter course of action remains his better option than otherwise. Legal practitioners are accordingly exhorted to bear in mind that to be forewarned is to be forearmed.

They are forewarned that they should not cry foul when the court proceeds to censure them for their unwholesome conduct where they continue to remain unbridled.

Whether or not the agreement of cession should remain undisturbed depends, in a large measure, upon the capacity of the cedent to cede as measured against that of the cessionary to receive the ceded right. Cession is a particular method of transferring a right. The transfer is effected by means of agreement. The agreement consists of a concurrence between the cedent's *animus transferendi* of the right and the cessionary's corresponding *animus acquirendi*: *Hippo Quaries* (*TVL) (Pty) Ltd* v *Eardley*, 1992 (1) SA 867 (A) at 873 E-F. A cession that is intended to transfer immediately a right that is not (yet) an asset in the estate of the *c*edent is ineffective. This is so irrespective of whether the cedent mistakenly thinks that he has a right, or fraudulently purports to cede the right to some other person *: FNB* v *Lynn*, 1996 (2) SA 339 (A).

A thread which runs through the above-cited case authorities is that the cedent should have a right in the thing which he is ceding. It is that right which he cedes. He cedes by way of an agreement which he enters into with the cessionary. It follows that, where the cedent does not have the right which he wants to cede, he cannot cede what he does not have. The statement is *in sync* with what the court enunciated in *Mushave* v *Standard Bank of South Africa Ltd*, 1998 (1) ZLR 436 which developed the principle in the following words:

> "…..no one can give what he does not have and no one can transfer any right greater than he himself possesses…Therefore, where a person is not the owner and possesses no mandate to do so purports to transfer property, such transfer is a nullity…"(emphasis added). See also Silberberge & Schoeman, *The Law of Property*, 2nd edition, page 72.

That the first applicant has a right to the tobacco which is the subject - matter of this application requires little, if any, debate. If it does not, the first respondent would not have wasted its time and effort entering into an agreement of cession with it. The very act of the first respondent entering into the agreement of cession with it confirms the first applicant's right to the tobacco. Because the first applicant has a right to the tobacco, only it and it alone, could enter into a valid contract of cession with the first respondent. As a fictitious person, which it is, it should have passed a resolution authorizing any of its directors to negotiate, conclude and sign the contract of cession on its behalf. By the same token, the first respondent, which is also a fictitious person,

should have passed a resolution authorizing one of its directors to negotiate, conclude and sign the contract of cession on its behalf.

Resolutions of directors of the first applicant and the first respondent were a *sine qua non* aspect of the validity of the contract of cession. Absent those, the contract cannot remain valid. It is a nullity which cannot be resurrected from its dead state. Hahlo brings out the importance of the directors' resolutions when he states in his *South African Company Law through cases*. 6th edition, page 343 that:

> "The powers of the company vest in the directors as a board, and not as individuals. Directors exercise their powers by passing resolutions at board meetings; of which proper notice must be given to all directors and at which a quorum must be present".

The agreement of cession which the parties placed before me shows that the second respondent negotiated and signed the same for, and on behalf of, the first applicant. The first applicant describes the second respondent as its employee who, as such, did not have the authority to enter into the contact of cession with the first respondent. The second respondent's statement is to an equal effect. She states, in para 1 of her opposing affidavit, that she is an employee of the first applicant. Her statement which leads to the negotiation and signing of the agreement of cession is very revealing. She states in paragraphs 8, 11 and 14 of her notice of opposition as follows:

> "8…..all my conduct in respect of these allegations were occasioned by compulsion of the law…the police made it clear that I had to comply with the various warrants and directives.
>
> 11. I had been granted permission by one of the applicant's directors, a certain DENIS SEAH who advised me that I should sign the cession agreement due to the fact that the second applicant was on the run and could not give first applicant any meaningful direction(s).
>
> 14. It is only after my consultations with DENIS SEAH that I signed the cession agreement at the behest of the first applicant who had been abandoned by the second applicant".

The second respondent does not assert that she had the authority of the first applicant to negotiate let alone sign the contract of cession. She, in fact, alleges coercion by the police and instruction by a director of the first applicant as the reason for her signing the contract. She could not give to the first respondent a right which she herself did not hold. Her act of ceding to the first respondent a right which she did not have was not only void. It was, in the words of Lord Denning,

incurably bad: *MacFoy* v *United Africa Co. Ltd* (1961) 3 All E R 1169 (PC) at 1172. As an employee of the first applicant, she had had no right to the tobacco. She could not, therefore, transfer a right which she did not have. She no doubt did not have the authority of the first applicant to cede anything to anyone.

The purported cession which, as is known, was induced by coercion and instruction from a single director of the first applicant is no cession at all. This a *fortiori* the case given the position that neither the first applicant nor the first respondent passed a resolution to negotiate, conclude and/or sign the contract of cession.

The contract of cession stands on no leg. Neither signatory to it had the authority of the legal entity whom he/she represented to negotiate let alone sign the same for, and on behalf of, the legal entity whom he/she purported to represent. The agreement cannot therefore stand. This makes the first applicant's first prayer not to be without merit.

The first applicant's second prayer is contained in paragraphs 28 and 32 of its founding affidavit. These respectively appear at pages 9 and 11 of the record. It states, in the first of the two paragraphs, that Rambanapasi took 340 bales of tobacco from the warehouse where the tobacco was being kept. The bales of tobacco, it asserts, have not been recovered. The tobacco, it insists, was in police custody when the bales were taken. It repeats its sentiments in paragraph 32 wherein it accuses the third respondent whom it alleges was the custodian of the tobacco after she (third respondent) seized the same in terms of the warrant of search and seizure which she applied for from the court of the magistrate. The third respondent, it asserts, remains accountable for the bales of tobacco which the first respondent allegedly took pursuant to the agreement of cession. The first, second and third respondents, it insists, should return the bales of tobacco which were unlawfully removed from the warehouse where the third respondent kept the tobacco she seized from stand numbers 1252 and 1253 , 24th Road, Light Industrial Area, Tynwald South, Harare.

The first respondent's response to the allegations of the first applicant is a bald denial. It denies that Rambanapasi took 340 bales of tobacco. It challenges the first applicant to prove the allegation that he took 340 bales of tobacco from the warehouse. The second respondent made no comment on the issue of the 340 bales of tobacco. The third respondent under whose custody the tobacco remains as seized by her on or about 24th May 2019 denies that 340 bales of tobacco were stolen from the warehouse. Both respondents place the *onus* of proving that the bales of tobacco

were stolen from the warehouse upon the first applicant. They, in the process, move for what is normally referred to as material disputes of fact which, as is known, cannot be resolved on the papers.

The question which begs the answer is : does a material dispute of fact exist in this application and, if it does, the second question which flows from the first is whether or not the application cannot, on a robust and common-sense approach, be resolved on the papers which are before me. I remain satisfied that there are no material disputes of fact in so far as the issue of the 340 bales of tobacco is concerned.

Material dispute of fact was defined by Hebstein and van Winsen in *The Civil Practice of the High Court of South Africa*, 5th edition, Volume 1, page 296 in the following words:

> "…the respondent denies material allegations made by the deponent on the applicant's behalf and produces positive evidence to the contrary" (emphasis added).

The long and short of the statement of the learned authors is that, once an allegation of impropriety has been made against the respondent, the *onus* shifts onto the latter to produce positive evidence which rebuts the allegation of the applicant. The respondent does not rebut the allegation by making a bare denial as the respondents *in casu* are doing. He rebuts the allegation by producing positive evidence which points to the contrary of the allegation of the applicant. Reference is made in this regard to *Van Niekerk* v *Van Niekerk & Ors*, 1999(1) ZLR 421 at 428-429 wherein *Sandura JA citing da Mata* v *Otto NO,* 1972 (3) SA 858 (A) at 882 F-H and *Room Hire Co (Pvt) Ltd* v *Jeppe Street Pensions (Pvt) Ltd*, 1949 (3) SA 1155 (T) remarked that:

> "…as to the question of whether or not a real dispute of fact has arisen, it is important to bear in mind that, if a respondent intends disputing a material fact deposed to on oath by the applicant in his founding affidavit or in any other affidavit filed by him, it is not sufficient for a respondent to resort to bare denials of the applicant's material averments, as if he were filing a plea to a plaintiff's particulars of claim in a trial action. The respondent's affidavit must, at least, disclose that there are material issues in which there is a bona fide dispute of fact capable of being properly decided after viva voce evidence has been heard".

The respondents, it is observed, did not produce positive evidence to the contrary. All what they did was to deny the allegation. They persisted on the point that the first applicant bore the burden of proving the theft of the bales of tobacco. They, in the process, missed the point much to

their embarrassment. They failed to realize that they bore the burden of proving what they were stating in their respective notices of opposition. The tobacco is, after all, in the custody not of the first applicant. It is in the custody of the third respondent. Proof of the where-abouts of the 340 bales of tobacco would, under the observed set of circumstances, have been as easy as night follows day.

The issue of the stolen 340 bags of tobacco should not be considered in isolation. It should be considered in light of the vein effort of the first respondent to enter into an invalid agreement of cession with the first applicant's employee whom it knew had no capacity to cede any right in the tobacco to it. The said effort of the first respondent evinces its intention to acquire rights in the tobacco to which the first applicant had/has rights. The effort of the first respondent as read with the four applications which the third respondent filed in quick succession with the court of the magistrate whom she moved to allow her to dispose of the tobacco which she had seized and was under her custody points to the probability that the first and third respondents connived between them to steal the bales of tobacco. The first applicant's statement is, in fact, to an equal effect.

The first applicant mentions 340 bales of tobacco as having been stolen from the warehouse. It did not mention more or less bales than the cited figure. It did not do so as it has no reason to lie against the first, second or third respondent. Neither of the three respondents suggests that the first applicant is lying against it or her. The probabilities of this matter is that the first applicant mentioned the figure which it knew was/is the number of bales of tobacco which the respondents stole from the warehouse where the tobacco remains kept. The first applicant, the probabilities show, told the truth of what the respondents did to its bales of tobacco. Its motion which is to the effect that they return the bales of tobacco to the place from where they were taken is, therefore, not without merit.

The applicant proved its case on a balance of probabilities. The application is, therefore, granted as prayed.

Mhishi, Nkomo legal practice, for first and second applicant's legal practitioners
Lunga Attorneys, first respondent legal practitioner
Civil Division of the Attorney General's Office, third and fourth respondent's legal practitioners