

TINASHE M ZENDA
versus
EMIRATES AIRLINES
and
SANDRA MOOSA
and
CHALLENGE TRAVEL (PRIVATE) LIMITED
t/a PHILEAS FOGG

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 24 September 2015

Civil Trial

Ms *BT Munjere*, for the plaintiff
F Girach, for the first defendant
2nd defendant in person
Ms *S Njerere*, for the third party

MATANDA-MOYO J: The first defendant filed a notice of withdrawal against the third party by agreement, with each party bearing its own costs. Accordingly the claim is withdrawn.

The first defendant raised a point *in limine* that the summons is a nullity and that there is therefore no case for the first defendant to answer. The first defendant submitted that the plaintiff described the first defendant as follows;

“1st defendant is Emirates Airlines, an Arabian Airline, whose offices are in Zimbabwe at office number F8, 1st Floor, 29 Mazoe Street, Harare.”

In its plea to the summons the first defendant denied that it is an Arabian Airline. It even provided its correct name “Emirates” and that it is registered in the United Arab Emirates and in Zimbabwe.

The first defendant urged the court to dismiss the claim as a nullity as the plaintiff had failed to regularise her papers to reflect the correct name of the first defendant.

The plaintiff objected to the point *in limine* on the basis that he used the first defendant's trade name. Plaintiff urged this court to find the summons valid regard being had to r 8 C of this court's rules. A company can be referred to by its registered name. I am of the view that the law is clear. When a company is incorporated it acquires a legal entity in its own right. It becomes a legal person by that name under which it is incorporated. The parties herein agreed that the first defendant's proper name is Emirates. The parties also agreed that first respondent is registered in the United Arab Emirates and in Zimbabwe.

The law with regards to proper citation of persons is trite. Where a misdescription involves the citation of a non-existent persona, such pleadings are a nullity *ab initio*. Such person lacks legal personality and cannot therefore sue or be sued. See *Friends of the Sick Association v Commercial Properties (Pvt) Ltd and Another* 1996 (4) SA 154, *Van Heerden v Du Plessis* 1969 (3) SA 298. First defendant also referred me to the case of *JDM Agro-Consult and Marketing (Pvt) Ltd v Editor, The Herald and Another* 2007 (2) ZLR 71 (H) where the judge at 75 B-E said;

“The party named as the second defendant did not exist at the time that the summons was issued and served. The correct appellation for the publisher and owner of the newspaper is Zimbabwe Newspapers (1980) Limited. That is a registered company, duly incorporated under the laws of this country. It's coming into being is due to the process by which it was incorporated as such. It is then, after its incorporation that it becomes a juristic person, capable of suing and being sued in its own right. ----- The entity sued by plaintiff ... is the Herald Newspaper. It is not a registered company and does not exist in any other form. Consequently the plaintiff issued summons against a non-existent being...”

See also *Gaviya Safaris (Pvt) Ltd v Van Wyk* 1996 (2) ZLR 246 at p 252 and *Steward Scott Kennedy v Mazongororo Suriages (Pvt) Ltd* 1996 (2) ZLR 655 (S).

I am of the view that the description of a party to a suit does not immutably determine the nature and identity of a party. The law reports are full with instances where the correct description of a party was allowed, in the absence of prejudice to the other party involved. This would be done after an application to amend. The plaintiff herein was not diligent. After being advised of the wrong citation of first defendant, all she had to do was apply for amendment. I would have granted such amendment as I am of the view that there was no prejudice to first defendant. However the court can only do so upon asking. The court cannot *mero motu* grant orders not sought. Without such amendment, the first defendant remains wrongly cited. See *ZFC Ltd v Taylor* 1999 (1) ZLR 308 and Order 20 r 132 and 134 of this

court's rules, *Commercial Union Assurance Company Limited v Waymark NO 1995 (2) SA 72*.

The plaintiff argued that in terms of r 8 C of the High Court Rules a person carrying on a business in a name or style other than his own name may sue or be sued in that name. The Plaintiff produced a receipt by the second defendant which put the name of the airline as "Emirates Airlines". Whilst I agree that the citation of a company by its trade name is not fatal to the proceedings, it must be clear on the face of the summons that the company is so cited in its trade name. Herein, plaintiff purported to sue first defendant by its registered name.

In the result I order as follows;

- 1) The summons is a nullity and the claim therein cannot stand.
- 2) The plaintiff is ordered to pay cost of suit.

Hungwe & Partners, plaintiff's legal practitioners
CDA Finlason & Associates, 1st defendant's legal practitioners
Honey & Blanckenberg, 3rd party's legal practitioners