OLD MUTUAL LIMITED
versus
TAWANDA KOROVEDZAI
and
JOSPHAT PEDZAI
and
T. CHIKAKA
and
D. CHIKOSHA
and
R. MADONDO
and
V. MAKOMVA
and
C. MALIJANI
and
G MATURA
and
J. MUTIGWA
and
C. MUTUKUDZI
and
L. SABAU
and
T. SAMUDZI
and
S. TAKABINGA
and
MWANDIAMBIRA
and
BONIFACE MAGARA
and
PATRICK KANDOWE

HIGH COURT OF ZIMBABWE
MAKONI and MWAYERA JJ
HARARE, 19 November 2015 and 29 June 2016

Appeal

S. Rudolf, for the appellant
J Mambara, for the respondents

MAKONI J: This is an appeal against a decision of the magistrate court whereby the court dismissed the point *in limine* raised by the appellant and went on to grant judgment in favour of the respondents on the merits.

The grounds of appeal are as follows:

"1. The Court *a quo* erred by dismissing the point *in limine* that the 1st Defendant should not have been cited as a party. The Old Mutual Staff Pension Fund should have been the 1st Defendant as it has a separate legal existence from Old Mutual Limited.

2. The Court a quo erred by holding that the Plaintiffs' benefits had not been calculated in accordance with the law.

3. The Court *a quo* erred by holding that Section 22 of the Pension and Provident Funds Regulations, 1991, S.I 323 of 1991 provides different meanings to "retirement" and "retrenchment" and that this is inconsistent with the meaning in the Old Mutual Staff Pension Fund Rules. The meaning given in the Rules is consistent with that in the Regulations.

4. The Court *a quo* erred by failing to recognize that the Old Mutual Staff Pension Fund Rules comply with the Regulations aforesaid with respect to the computation of benefits to a retrenched member".

The background to the matter is that all the respondents, save for eighth respondent G. Matura, were employed by the appellant in various capacities. The eighth respondent was not an employee of the appellant. They were retrenched on 30 June 2003. Whilst still in the employ of the appellant, the respondents were members of the Old Mutual Life Assurance Company Zimbabwe Limited Pension Fund (the Pension Fund). They contributed to a defined contribution scheme. On retrenchment, they were paid their accumulated benefits up to 31 December 2002 plus a bonus calculated at the rate of 50% for the period January 2003 to September 2003 when payment was effected. The payment was made by and from The Pension Fund. The respondents' claim in the court *a quo*, were that they should have been paid the bonus at the rate of 355% which was declared in February 2004 in respect of the year 2003. In the summons, the first respondent claimed a specific amount in the sum of ZW 25 094 383.27 plus interest at the prescribed from 1 January 2003 to date of payment. The other respondents prayed for payment of recalculated retrenchment benefits using the interest rate of 350% plus interest at the prescribed rate on the above amount from 1 January to the date of payment in full. The prayers were granted and the appellant filed the present appeal.

Point *in Limine*

The appellant's ground of appeal on this point is that the court *a quo* erred in dismissing the point *in limine* that the first respondent should not have been cited as a party and that instead the Pension Fund should have been cited.

The magistrate did not furnish reasons why he dismissed the point *in limine.* This, in itself, is a gross irregularity which will usually, result in the setting aside of the magistrate's decision on appeal or review. As was stated in S v *Ndebele* 1988 (2) ZLR 249 (H) at 254 E.

> "The need to do so (to keep a full and comprehensive records of all proceedings), is obvious. In the absence of such a record how is a review or appellate tribunal to assess the correctness and validity of any proceedings placed before it for adjudication."

Although the above was stated in a criminal matter the principle also apples to civil matters. The need to give reasons for one's decision cannot be over-emphasised.

Mr *Rudolf* submitted that in terms of s 6 (a) of the Pension and Provident Funds Act [*Chapter 24:09*], (The Act) the Pension Fund is a body corporate and can sue and be sued. The Pension Fund was created by a statute and not by the appellant. Citing the appellant was a mis-joinder as it has no interest in the matter. It will not be adversely affected by the order that the court will make.

On the other hand, Mr *Mambara,* submitted that if one has regards to the objectives of the Pension Fund, it would be clear that the Pension Fund was created by the appellant and it service its employees. The Board of Trustees is constituted of four Trustees appointed by the appellant, three elected by members and one by the Pensioners. It was submitted that there was therefore no mis-joinder.

Mr *Mambara* further submitted that the appellant and its associate companies operate as an economic unit to the extent that the Principal Officer of the Pension Fund is appointed by the appellant. The law is not clear of how such entities should be treated. He relied on *Deputy Sheriff Harare* v *Trinpac Investments (Pvt) Ltd & Anor* HH 121/11 for his proposition.

Section 6 (a) of the Act provides:

> "a fund shall, under the name by which it is so registered, become a body corporate, capable of suing and being sued in its corporate name and of doing all such things as may be necessary or incidental to the exercise of its powers or the performance of its functions in terms of its rules".

Section 6 (b) of the Act goes on to provide that all assets, rights, labilities and obligations pertaining to the business of the pension fund shall be deemed to be those of the fund to the exclusion of any person.

The learned authors Herbstein and Van Winsen *The Civil Practice of the High Courts and The Supreme Court of Appeal of South Africa* 5th ed at p 177 state the following regarding bodies incorporate under statutes:

> "If an association is a body incorporated by law either directly, by means of a special Act of Parliament or indirectly, by means of a general Act, it is a separate legal entity and actions must be brought for or against it in its corporate name as if it were an ordinary person".

They went further to explain that in associations which owe their existence to or are governed by special Acts, the relevant Act must be looked to in order to determine the status of the body and the way in which it should be brought before the court.

In casu, it is not in dispute that the Pension Fund is a body incorporated by law by means of a special Act. See s 6 (a) of the Act. Any actions or applications for or against it must be brought to court in its corporate name.

Mr *Mambira* sought to argue that that is the cardinal principle of company law as enunciated in *Salomon* v *Salomon and Co Ltd* [1897] AC 22 (HL) but there are exceptions to the principle. He relied on *Deputy Sheriff Harare supra* where Patel J (as he then was) stated the following:

> "The cardinal principle of company law, as enunciated in *Salomon* v *Salomon and Co Ltd* (1897) AC 22 (HL) and *Dadoo Ltd and Others* v *Krugersdorp Municipal Council* 1920 AD 530 at 550, is that a company is a separate entity distinct from its members. Nevertheless, there are well established exceptions to the principle grounded in policy considerations. As was held in *US* v *Milwaukee Refrigerator Transit Co.* (1905) 42 Fed 247 @ 255.
>
> > '… when the notion of a legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will regard the corporation as an association'"

In casu, the respondents have not established a basis for departing from the cardinal rule of company law. They did not establish that the entity is being used to defeat public convenience, justify wrong, protect fraud or defend crime.

In any event, there is need to distinguish between bodies incorporated in terms of a general Act of Parliament such as the Companies Act [*Chapter 24:03*.] and bodies such as the Pension Fund which are incorporated in terms of a special Act. The objective, mandate, and operations of such a body are to be found in the four corners of the statute. These include how the body is to be brought to court.

Has there been a mis-joinder of the appellant. In Herbstein & Van Winsen *supra* at p 240 the following is stated:

> "The test to determine whether there is a misjoinder is whether or not the party has a direct and substantial interest in the subject matter of the action, i.e. legal interest in the subject matter of the litigation which might by the judgment of the court"

See also B*urdock Investments (Pvt) Ltd* v *Time Bank of Zimbabwe Ltd & Ors* 2003 (2) ZLR 437 H at 442 D-E.

It is clear from the record that whatever judgment this court will make will not affect the appellant. It is not obligated to do the recalculations as claimed by the respondents. In terms of s 6 (b) those are the liabilities and responsibilities of the Pension Fund. There was therefore a misjoinder of the appellant.

The trial magistrate therefore erred in dismissing the point *in limine.*

In view of the above finding I have no choice but to uphold the point *in limine.* Since I have upheld the point *in limine*, it will not be necessary to deal with the appeal on the merits.

In the result, I make the following order.

1) The appeal is upheld
2) The order of the court *a quo* be and is hereby set aside and substituted with the following:
   (i) The plaintiff's claim is hereby dismissed with costs.
3) The respondents to pay the appellant's costs

MWAYER J agrees …….

Scanlen & Holderness, appellant's legal practitioners
J. Mambara & Partners, 1st respondent's legal practitioners
Civil Division of the Attorney General's Office, 2nd respondent's legal practitioners