THE BENATAR CHILDREN'S TRUST
versus
ROBERT DANIEL BENATAR

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 12 and 18 January 2016 and 2 March 2017

Civil Trial

J. Wood, for the plaintiff
F. Siyakurima, for the defendant

CHITAKUNYE J: The plaintiff is a Trust formed in terms of an Addendum to a consent order entered into by the defendant and his ex-wife, Colleen Beatrice Benatar. The Addendum was subsequently made an order of this court.

It is pertinent to dispose of a point in *limine* raised by the defendant's counsel in his closing submissions. The point in *limine* raised was to the effect that the plaintiff had no *locus standi in judicio*. Counsel argued that as a Trust is not a legal persona but a legal institution *sui generis* it cannot sue or be sued in its name but in the name of the Trustees. Thus the Trustees must be cited in their representative capacity.

Counsel for the plaintiff contended that whilst it was true that a Trust is not a legal persona, the failure to cite in the names of the trustees is not fatal as the situation is amply provided for under Order 2 A of the High Court Rules, 1971.

The point in *limine* raised should not overly detain court as the position seems quite clear. The contention that a trust is not a corporate body and therefore cannot appear as a party is legally sound. Order 2 A of The High Court Rules provides some recipe in the following manner:

Rule 8 states that:

"Subject to this Order, associates may sue and be sued in the name of their association."

Rule 7 defines associates and association as follows:

'Associate' in relation to a Trust means a Trustee and in relation to an association other than a trust, means a member of the association.

'Association' includes (a) a trust; and (b) a partnership, a syndicate, ….. which is not a body corporate.

It is thus clear from rule 8 that a trustee may sue or be sued in the name of the trust.

Rule 8 A then provides clearly what happens when a trustee has not been cited in stating that:

> "(1) In any proceedings to which an association is a party, any other party may, by written notice to the association, require a statement of the names and places of residence of the persons who were the association's associates at the time the cause of action accrued.
> (2) A person who receives a notice in terms of sub-rule (1) shall, within five days after receiving it---
> (a) Furnish the party concerned with a written statement containing the required information ; and
> (b) File a copy of the written statement with the registrar -
> and the proceedings shall continue in the same manner, and the same consequences shall follow, as if the associates had been named in the summons or notice commencing the proceedings:
> Provided that the proceedings shall continue in the name of the association except where a writ of civil imprisonment is sought against an associate, in which event the associate shall be specifically named in the civil imprisonment proceedings."

Rule 8D then provides that:

> "This Order shall not be construed as affecting—
> (a) The entitlement of an associate to institute proceedings on behalf of his association or fellow associates; or
> (b) The liability or non-liability under any other law of associates for the conduct of their association or of their fellow associates."

It must be apparent that the rules do give leeway for associates to sue in the name of their association or trust as is the case here.

In *Gold Mining and Minerals Development Trust* v *Zimbabwe Miners Federation* 2006(1) ZLR 174 the summons had been issued in the name of the Trust as is the case here. At page 178A-C MAKARAU J (as she then was) had this to say:

> "As the law currently stands, a trust is not a legal person and therefore cannot be defamed. The trustees themselves retain the capacity to sue for damages for their injured fama collectively or individually.
> In casu, I accept that in terms of the rules of this court, trustees may issue out process in the name of the Trust. The permission granted by the rules to use the name of the association where associates sue or are sued is merely for convenience and does not change the legal status of the association. Rule 8D clearly provides that the provisions of the order should not be construed as affecting liability or the non-liability of the associations for the conduct of their association or associates."

In *WLSA & Others* v *Mandaza & Others* 2003(1) ZLR 500 (H) SMITH J whilst acknowledging that a trust is not a legal person and an action cannot be brought in the name of a trust but must be brought by a Trustee nevertheless granted the application instituted in the name of the trust.

In *casu*, the plaintiff is a trust and the action was brought by the Trustees in the name of the trust. As alluded to above, trustees can bring an action in the name of the trust. They may, however, be asked to disclose their names upon request in terms of r 8 A. Accordingly, the point in *limine* cannot be sustained and is hereby dismissed.

The Main matter

On 18 August 2010 the defendant and his then wife, Colleen Beatrice Benatar, entered into a Consent paper for the dissolution of their marriage. That consent paper was incorporated into the decree of divorce granted to them on 21 October 2010. In terms of that order, and as per the consent paper signed by the two parties, the defendant was ordered to, *inter alia*, provide maintenance for the couple's three children. It would appear that some challenges were experienced in the fulfilment of the provisions of the consent paper. This is evident from the fact that in the following year the parties engaged in discussions that culminated in an agreement to amend the consent paper. In this light parties signed a Deed of Settlement and an Addendum to the Consent paper on 10 June 2011.

Clause 4 of that addendum provided for the formation of a trust in these terms:

> "A trust will be formed and the plaintiff agrees to pay the sum of USD3 000.00 per month into the trust whose trustees will be Messrs Matizanadzo & Warhurst, for a period of 5 years beginning 31 August 2011, which money will be used solely for the benefit of the 3 children of the marriage, for their education and medical aid requirements and such other purposes as may be deemed by the trustees to be in the best interests of any or all of the children. Thereafter, any balance shall be split between the children equally and the trust shall *pro tanto* cease."

In order to bring legal effect to the addendum clause 10 thereof states that:

> "Both parties consent to this Addendum being made an order of court, varying the original order of court granted in this matter and the consent paper appended thereto, at the instance of either party who shall proceed by way of a chamber application."

It is clear from the addendum that the defendant was expected to start paying the USD 3 000.00 from 31 August 2011. The chamber application for a court order was intended to make the addendum an order of court as had been agreed by the parties.

In furtherance of the provisions of clause 10, the ex-wife, herein after referred to as Colleen, through her legal practitioners, filed a chamber application on the 21 July 2011 to make the addendum an order of court.

It would appear defendant became aware of this application as on 7 September 2011 his legal practitioners wrote a letter to Colleen's legal practitioners stating, *inter alia*, that:

> "Our client has advised us that he personally told you that he was resiling from the Addendum he concluded with yours to amend the Consent Order. This was as a result of his reappraisal of the issues between the parties.
> It has however come to our notice that despite our client's instructions you have proceeded to file a Chamber Application with the Registrar of the High Court to have the amendment effected on an uncontested basis.
> We are therefore obliged to advise the Registrar that our client has withdrawn his consent and this matter should not be treated as uncontested, and in the circumstances we request you to withdraw your chamber Application."

On 15 September 2011, Colleen's legal practitioners responded to the above letter in these words:-

> "It is denied that your client advised us that he was resiling from the Addendum.
> In any event, your client signed the Addendum which constituted a clear and binding agreement between the parties.
> Our client does not agree to your client now attempting to resile from the Addendum regardless of his so-called unilateral re-appraisal of the issues between the parties and intends to hold your client to his obligations and if necessary, will institute proceedings for specific performance on the Agreement.
> Merely because your client has now changed his mind does not mean that the Addendum is not binding upon the parties.
> We submit therefore that the Chamber Application is properly before the High Court."

In this letter Colleen's legal practitioners confirm they will not withdraw the chamber application consequently if defendant wished to contest the application he had to act appropriately.

In pursuant of clause 4 of the Addendum Colleen instructed Messrs Matizanadzo and Warhurst to form the Trust. The trust was duly formed and registered with the Registrar of Deeds on 14 November 2011.

At the time of the registration of the Trust, the chamber application had not yet been granted due to some query that had been raised. Colleen's legal practitioners attended to the query and the court Order was eventually granted on 9 July 2013. What this entailed is that the Addendum defendant and Colleen had entered into was now a court order with the attendant requisites for compliance as soon as defendant became aware of it.

As at the time of the granting of the court order, the defendant had not been paying the USD 3 000-00 to the Trust, in terms of the Addendum. After the Addendum was made an

order of court the defendant still did not pay as required. It is in these circumstances that on 28 March 2014 the Trustees, in the name of the Trust, sued the defendant.

In terms of the amended declaration the plaintiff alleged, *inter alia*, that the defendant, in breach of his obligations in terms of the Addendum which was subsequently made an order of court, and despite repeated demand, has refused or neglected to pay any sum whatsoever into plaintiff trust.

In the circumstances the plaintiff seeks an order for the payment of:

(a) the sum of USD3 000-00 per month with effect from 31 August 2011;
(b) Interest on the said sum calculated at the prescribed rate from 31 August 2011 to the date of payment in full; and
(c) Costs of suit.

The defendant's defence in terms of his plea was to the effect that:

The Trust (Plaintiff) was formed not pursuant to an order of court but on the basis of an agreement between the parties and that Colleen Beatrice Benatar, contrary to the intention of the parties, unilaterally formed the trust without the defendant's involvement despite the defendant being obliged to fund the trust;

He could not have been in breach of the court order as the Trust was formed before the court order:

To date the defendant has not yet been served with the court order to justify a cause of action:

The defendant has been providing for the beneficiaries and so the trust is superfluous.

At a pre-trial conference held on 30 July 2015 the sole issue identified for trial was:

Whether or not Defendant owes Plaintiff the sum of US$3 000.00 per month commencing on 31 August 2011.

On the trial date the plaintiff led evidence from two witnesses, namely Mr Edwin Mark Warhurst (a Trustee) and Colleen Beatrice Benatar, the defendant's ex-wife. The defendant thereafter gave evidence and called the three children of the marriage as witnesses.

From the evidence adduced some aspects are common cause. The parties virtually confirmed the sequence of events as outlined above. It was common cause that the defendant and Colleen entered into an agreement titled 'Addendum to Consent paper on 10 June 2011. The intention was to amend the terms of the consent paper to their divorce decree.

Negotiations in respect of the addendum took about 5 days before parties reached agreement and signed the document.

It was common cause that thereafter Colleen, through her legal practitioners, filed a chamber application for the addendum to be made an order of court on 21 July 2011 in terms of clause 10 of the Addendum.

On 7 September 2011 the defendant through his legal practitioners indicated to Colleen's legal practitioners that the defendant had resiled from the addendum and so they should withdraw the chamber application. To this Colleen's legal practitioners said they would not withdraw but would press on. The defendant thereafter did not take any further action to oppose the chamber application.

It is further common cause that Colleen proceeded to instruct her legal practitioners, who were also the Trustees nominated by her and the defendant in terms of the Addendum, to prepare the Deed of Trust in line with clause 4 of the addendum. This was done and the Deed of Trust was registered with the Registrar of Deeds on 14 November 2011.

It was agreed that the defendant did not participate in the formation of the trust as he had purported to resile and was thus unlikely to cooperate in the formation of the trust.

After the formation of the Trust communication continued between the parties' legal practitioners which should have shown clearly that a Trust had been formed in terms of the Addendum and that the defendant was now required to pay the USD3 000-00 to that Trust. Despite this exchange of communication the defendant did not pay the sum indicated in the Addendum.

The chamber application by Colleen was granted on 9 July 2013 hence from that day there was a court order issued out of this court making the terms of the Addendum a court order. The court order was however not served on the defendant.

It was however common cause that the defendant became aware of the formation of the Trust and later the court order despite the lack of personal service.

In his summary of evidence the defendant stated that he became aware of the court order in 2014. However, in his viva voce evidence in court he stated that he became aware of the court order in 2013 at the Magistrates Court when Colleen had dragged him to court for failure to pay maintenance for the children.

Despite becoming aware of both the Trust and the Court order, which order had the effect of making the Addendum an order of Court, the defendant did not comply with its dictates. The reason he advanced for not so complying was that he had not been served with the court order.

As most of the facts are common cause the major task is to assess the defences raised by the defendant.

The defendant's defences exhibit a desire to avoid the obligations he agreed to in terms of the addendum.

The defendant's contention that he should not be found liable because the Trust was unilaterally formed by his ex-wife without his participation is without much credence. It is pertinent to note that the Addendum that defendant and his Colleen entered into did not state who was to form the Trust. This left the question of who was to be the settlor open. Ideally both the defendant and Colleen should have participated in its formation but there was nothing prohibiting only one of them from initiating the formation of the Trust especially where, as in this case, defendant was intent on resiling from the agreement. It was evident that he would not cooperate even if approached. It was in that scenario that Colleen found herself having to act unilaterally as the settlor in a bid to ensure that a Trust is formed for purposes of fulfilling the intentions of the parties to the Addendum.

The evidence from Mr Warhurst and Colleen clearly showed that they decided to proceed without the defendant as the defendant was intent on resiling from an agreement they deemed binding without just cause. At that juncture the defendant's only reason for seeking to resile was that he had reappraised the issues between the parties.

Mr Warhurst confirmed that despite informing the defendant's legal practitioners that they were not withdrawing the chamber application the defendant did not see it fit to oppose the application by filing the necessary court papers hence the chamber application was granted without any opposition.

It was apparent from the defendant's evidence that when the chamber application was filed with court, he became aware of the fact that Colleen was proceeding with implementing the provisions of the addendum despite defendant's desire to resile.

The letter by his legal practitioners dated 7 September 2011 and the response by Colleen's legal practitioner confirmed that the process would not stop.

Despite this knowledge the defendant did not deem it necessary to take appropriate steps to stop or oppose the process. As things stood then he knew that the chamber application had been filed to make the addendum part of the court order.

I am of the view that upon realising that Colleen had opted to implement the addendum rather than cancel or accept the defendant's position, the defendant ought to have taken appropriate steps to oppose the chamber application. Once the chamber application was

granted it meant that the Addendum had become an order of court and the defendant was obliged to comply with it.

The defendant's other defence was to the effect that the court order was not served on him hence he cannot be said to have failed to comply with the court order. That defence is again without merit. Whilst the defendant tried in vain to portray a picture of someone who did not know about the court order, he found himself having to admit that he was indeed aware of the existence of the court order.

The defendant confirmed in his summary of evidence that he became aware of the court order in 2014, and later in his evidence he contradicted himself when he said that he became aware of the court order in 2013. Irrespective of when he became aware of the court order the bottom line is that he was expected to start complying with the order from that date. This he did not do.

It may also be noted that despite becoming aware of the court order in 2013 he took no action to have the court order set aside and that order stands to date.

That order states that:

> "The attached Addendum to Consent Paper signed on 10 June 2011 be and is hereby made an order of the court."

By virtue of this order the defendant was obliged to comply with the terms contained in the Addendum which included paying US$3 000-00 per month to the Trust.

The legal position is very clear that once the defendant became aware of the order against him he was bound to act as though he had been duly served. His insistence on being personally served would not help him at all.

In Herbstein and van Winsen, *The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa*, 5th edition, p 1103 the esteemed author stated that:

> "When a person has information, which there are no reasonable grounds to disbelieve, to the effect that an order of court has been granted against him, such a person is bound to act as if that order had been duly served."

(In *re Corimbatore (McCarthy Respondent*) 18 NLR 179; *Meikle v South African Trade Protection Society* 1904 TS 94; *Burgers* v *Fraser* 1907 TS 318 at 320; *Jayiya* v *MEC for Welfare, Eastern Cape* 2004 (2) SA 611(SCA) at 621.

The defendant seemed to also allege that the court order was obtained despite his having resiled from the addendum and so, by implication, it is invalid because he had resiled

from the addendum. In the same way it should not be a basis for this action. Unfortunately it is not for the defendant to decide on which court order to obey or not obey.

In *Whata* v *Whata* 1994(2) ZLR 277 (S) court held that:

> "Generally a person may not refuse to obey an order of court merely because it was wrongly made. To do so would be seriously detrimental to the standing and authority of the court. The correct approach is for the person to obey the invalid order and thereafter seek redress by way of appeal or review."

In Herbstein and van Winsen, *The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa* (*supra*) at 1098 the author restated that same position and quoted with approval from *Bezuidenhout* v *Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 229 wherein it was stated that:-

> "An order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong."

See also *Culverwell* v *Beira* 1992 (4) SA 490(W) at 494A-C) and
Capital Radio (Pvt) Ltd v *Minister of Information & Others* (3): in re Ndhlovu 2000 (2) ZLR 289 (H)

In *casu* the defendant did not seek to have the order set aside but chose to simply ignore that order. He continued on his path of non-compliance with what he had agreed to in the addendum and the order of court. From the addendum that he had signed he knew that the court order required him to pay USD3 000-00 to a Trust. He also knew that such a trust had been formed as was evident from his evidence. The defendant clearly knew that he was not complying with the terms of an Addendum which he had entered into and which had now been given the authority of a court order. The defendant's contention that he did not meet his obligations because he was not served with the court order is thus without merit.

The defendant's other defence was to the effect that he had discharged his obligations by meeting all the beneficiaries' medical and educational requirements. Unfortunately he seemed to mistake his obligations. In terms of the addendum his obligations included paying USD3 000-00 per month to the Trust for 5 years from 31 August 2011. This he did not do. There was no alternative to that obligation. It's either he paid the sum or he did not.

It may also be noted that despite claiming to have done a lot for the children the defendant was unable to produce documentary support of his assertions. The trust on the other hand was able to tender evidence of the money sourced by Colleen that came into the trust and was disbursed to meet the needs of the children as requested by Colleen. The

numerous documentary exhibits bear testimony to this. These were obligations that should have been met from money paid into the trust by the defendant.

The children that defendant called as witnesses could not help his cause at all. The issue was not whether the defendant had provided for the children but whether he had met his obligations that had been agreed upon and later made an order of court. In fact it may be noted that whilst claiming not to have made any claim to the trust, the children conceded that their mother provided for them in their educational and medical needs. The mother, Colleen, stated in her evidence she paid for them from money from the trust. It is true she said she borrowed in order to fund the trust, but she did so with the belief that defendant would come to his senses and pay up and so she would be able to pay back to whoever she had borrowed from.

The defendant also sought to allege impropriety on the part of the Trustees in forming the Trust and registering it without his participation. He also sought to say that he had resiled from the addendum and so he was not liable. This would have been sound had he approached court challenging those processes or seeking the setting aside of the court order. In as far as he sought to use such allegations to avoid his obligations in terms of the court order, this could not be sustained. I have already alluded to the fact that where a person believes that a judgment or court order is invalid the proper approach is to have that order set aside and not to simply ignore the order.

The defendant mentioned for the first time during his evidence in court that he signed the Addendum under duress hence it should not be held to be valid. But surely this was never part of his pleadings. In fact the only reason he gave in the pleadings as earlier on alluded to, was that he had reappraised the issues between the parties as a result of which he wished to resile from the addendum. This new defence served to confirm the despair within the defendant's camp.

I am of the view that the defendant's defence is without merit. The plaintiff on the other hand proved on a balance of probabilities that the defendant was obliged to pay US$ 3 000-00 per month to the plaintiff but has not done so. The parties had agreed on the effective date of the payment as 31 August 2011 and that should stand irrespective of the fact that the Trust was formed later and the court order was only issued on 9 July 2013. The defendant was aware of the obligations and the fact that once they were made an order of court he would be obliged to pay as agreed.

I am of the view that plaintiff is entitled to judgment in terms of the summons save that the sum of US$ 1 705-00 be deducted from the total claimed, this having been paid by defendant to Colleen which Colleen transferred to the trust.

Accordingly it is hereby ordered that the defendant pay:

1. The sum of US$3 000-00 per month with effect from the 31 August 2011;
2. Interest on the said sum calculated at the prescribed rate from the 31 August 2011 to the date of payment in full;
3. Costs of suit.

Matizanadzo & Warhurst, plaintiff's legal practitioners
Sawyer and Mkushi, defendant's legal practitioners