REPORTABLE **(94)**

VERITAS
v
(1) ZIMBABWE ELECTORAL COMMISSION (2) MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS (3) ATTORNEY GENERAL OF ZIMBABWE

FIRINNE TRUST ALSO KNOWN AS VERITAS
v
(1) ZIMBABWE ELECTORAL COMMISSION (2) MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS (3) ATTORNEY GENERAL OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
GOWORA JA, GUVAVA JA & BHUNU JA
HARARE: MARCH 05, 2019 & JULY 17, 2020

T. R. Mafukidze with *D. Coltart*, for the appellant

T. M. Kanengoni, for the first respondent

K. Chimiti, for the second and third respondents

GOWORA JA:

BACKGROUND FACTS

[1] The first appellant, Firinne Trust, is a trust incorporated as such by deed of Trust under the laws of Zimbabwe and registered with the Registrar of Deeds. It trades as Veritas, which is the second appellant herein. The first respondent, is the Zimbabwe Electoral Commission, (ZEC),

established in terms of s 238 of the Constitution. Although it is established under the Constitution it carries out its mandate in terms of the Electoral Act [*Chapter 2:13*], the ("Act"). The second respondent, the ("Minister") is the government official assigned the administration of the Act. The third respondent, ("the Attorney-General"), is the legal adviser to the Government.

[2] On 19 December 2017, under Case No HC 11749/17, Veritas filed an application with the High Court in which it sought a declaratur and ancillary relief pertaining to sections of the Act. The premise of the application was that the specified sections of the Act imposed restrictions on conducting voter education by persons other than ZEC and political parties.

[3] In this application, Veritas, on its own behalf and on behalf of the public in general sought an order declaring ss 40C (1)(g), 40C(1)(h), 40C(2) and 40F of the Act as being *ultra vires* ss 56, 61 and 67 of the Constitution, the allegation being that the impugned sections infringe the right of the public in general, and that of Veritas in particular, to equality and non-discrimination, freedom of expression and their political rights including the right to a free and fair election and to make political choices freely.

[4] ZEC opposed the application raising several points *in limine* relating to the citation of the applicant in the matter and the form of the application which it contended was not in accordance with the requirements of the rules of court.

[5] In response, and under Case No HC 4391/18, Firinne Trust filed an application for leave to amend the citation of Veritas as applicant. It sought that the record be amended to reflect the

applicant as "Firinne Trust also known as Veritas". This application was also opposed by ZEC. The Minister and the Attorney-General filed their opposing papers out of time. Their failure to adhere to the rules was condoned at the hearing of the applications and they were given leave to participate in the proceedings.

[6] The matters were subsequently consolidated by consent and set down for hearing before the same judge. The learned judge in the court *a quo* was persuaded to find that the application was fatally defective in that it had been filed by a non-existent party. As a consequence, he refused the request for leave to amend the citation of the applicant, (Veritas) for the reason that there was no applicant before him. He also found that the form used by Veritas in the court application rendered the application itself fatally defective. Consequent thereto, he upheld the points *in limine* and dismissed both applications with costs. This appeal is against the dismissal of the applications.

THE APPEAL

[7] Although the learned judge did not delve into the merits of the dispute the notice of appeal filed sought to touch on the merits of the dispute. The court is grateful to counsel for accepting that the merits of the dispute are not in contention in this appeal. The appeal before us is as a result confined to the determination by the court of the points *in limine*.

[8] The grounds of appeal upon which the judgment is attacked are the following:

1. The court *a quo* erred in law in failing to hold that r 8C of the High Court Rules, 1971 permits a trust to sue and be sued in its trade name as if it were its proper name.

2. The court *a quo* erred in law in failing to hold that the use of a name or trade name of a trust in litigation in place of the names of the trustees is for convenience and does not deprive the appellant of *locus standi* under ss 45(3) and 85 of the Constitution.
3. The court *a quo* erred in law and misdirected itself by refusing the amendment of the citation of the appellant in circumstances where a trade name had been properly used and the amendment was merely cosmetic.
4. The court *a quo* erred in law and misdirected itself by failing to hold that the use of Form 29B, with such alterations as circumstances require, is permitted under r 229C as read with r 4(2)C of the High Court Rules and in any event any departure from the rules should have been condoned under r 4C.
5. The court *a quo* erred in law in upholding preliminary points lacking substance raised by a party abiding in circumstances where the appellant, second respondent and third respondent wanted the merits determined.
6. The court *a quo* erred in law and misdirected itself in awarding costs on a legal practitioner and client scale against the appellant in a constitutional matter of huge public interest and importance without making any finding in law warranting the exercise of the learned judge's discretion in this regard.

DETERMINATION OF THE POINTS IN LIMINE BY THE COURT A QUO

[9] In deciding on the points *in limine* the court *a quo* made remarks to the following effect:

> "*In casu*, the applicant is cited herein in case HC 11749/17 as Veritas. It is thereafter described in the founding affidavit deposed to on its behalf by Valerie Anne Ingham-Thorpe, (paragraph 1 thereof), as a trust incorporated in Zimbabwe by a deed of trust and registered with the Deeds Registry as Firinne Trust but trading as Veritas. In my view, the applicant

having realized the folly of using the name Veritas alone(a Trust) as the applicant in case HC 11749/17 and having been jolted by points *in limine* raised by the first respondent, must have realized that its application was potentially fatally defective and to avoid the application being declared as such at the hearing of the matter sought to bring the second application in case HC 4391/18 seeking leave to amend the citation of the applicant in the matter HC 11749/17 by inserting the words FIRINNE TRUST also known as in front of the current citation of the applicant in the main matter such that the full citation of the applicant shall read as follows: FIRINNE TRUST also known as Veritas to ensure that both the registered name as well as the operating name of the Trust in whose name the application has been brought appears on all pleadings.

……

> Procedurally I agree with the counsel for the first respondent's observation because having noted that its application was potentially fatally defective the applicant need not have resorted to filing a new application dealing with points *in limine* raised in another application. I say so because in paragraph 10 the applicant said in her founding affidavit in case HC 4391/18 that-

"However, in its Opposing Affidavit, the First respondent raised a number of points *in limine* including one that the application could not be brought in the name of the Trust. The First Respondent subsequently altered this point in its heads of argument to say that the application should have been brought in the name of the registered trust rather than the trust's operating name."

ISSUES ON APPEAL

[10] The above remarks were made in relation to the application to amend the citation of Veritas, to replace the named applicant in the court *a quo* with a totally different party to the one appearing on the pleadings. It seems to me that the application was not one for amendment of the citation of the applicant but its substitution. I believe that the substance of the appeal addresses this particular finding of the court *a quo* and the first three grounds of appeal are pertinent in this regard. Can it be said that the court *a quo* erred in refusing the application to amend the citation of the appellant?

[11] The issues to decide are firstly, whether or not Veritas is a person. If it is not a person, can the citation be amended as prayed for by the appellants or does its status as a non-legal person render

the proceedings instituted under Case No HC 11749/17 in its name a nullity. Although not dispositive of the appeal in the instant case, the form in which the main application was brought to court was a contentious issue. It will also be considered as an issue in the appeal. The issue on costs is conceded.

ARGUMENTS ON APPEAL

[12] Mr *Mafukidze* made reference to r 8 of the Rules of the High Court 1971, and submitted that in terms of that rule a person carrying on business may sue or be sued in that name. He argued that an association includes a trust, and that as a consequence, a trust being an association is capable of mounting suit in its trade name. Having said this, he accepted that a trust was not a person in that it was not separate from its trustees. He conceded that the trust had no separate existence and that it was set up in terms of a constitution whether as a corporate entity or incorporated one. He suggested however, that our rules permit the amendment sought in the lower court.

[13] On the use of the appropriate form, his argument was that the form used was 29B as provided in the rules. He accepted the defect on the form used but submitted that the rules permit the court the discretion to condone a departure from such compliance.

[14] The court *a quo* dismissed both the application for an amendment and the main application with costs at a punitive scale. The appellant contends that there is a principle within this jurisdiction that in order not to unnecessarily discourage litigants from seeking to enforce their rights through the Constitution it is only in the extreme cases that courts should order costs against any litigant

raising violation of a constitutional right. He argued that the court *a quo* therefore misdirected itself when it ordered the appellants to pay the costs.

[15] On behalf of ZEC, Mr *Kanengoni* made the following submissions. He contended that ZEC wished to interrogate whether the jurisdiction of the High Court had been properly invoked by the appellants. To this end, any determination on the merits would have to be grounded on proper invocation. He argued that such invocation is premised on properly issued process. It was the considered view of ZEC that the manner in which the matter was brought before the court was in disregard of the rules. He added that it was within the discretion of the appellants to have withdrawn the application. Instead they chose to pursue it with the faults that everyone accepts bedevil the main application.

[16] As regards the form of the main application, he submitted that he did not accept the appellants' contention that the application had been brought in the correct form. He argued that the form used excluded fundamental elements upon which the application is founded and that those elements are material in that the respondent is not informed on what to do to show opposition to the application. The form did not give notice to the respondent, it did not provide the *dies induciae* in which opposition should be mounted and more particularly, it did not inform the respondents of their rights. He said that the rights and obligations of the respondents arise from these points. He said that the form in which the application was in rendered it a nullity and a discretion to condone cannot be exercised in the circumstances.

[17] As regards the citation of the applicant in the lower court he disagreed with counsel for the appellants that r 8C was applicable in this instance. He contended that a trust was not a person as envisaged in the rule and therefore the appellants could not have recourse to the rule and have the trust sue in the name of VERITAS. He suggested that there was of necessity a separation between r 8 and r 8C. He argued that r 8 incorporated the ability of the trustees to sue in the name of the Trust. In this case the name of the Trust is Firinne Trust. He contended that a trust cannot rely on r 8C to sue in a trade name.

[18] On the question of costs, his attitude was that the court *a quo* had confined itself to the preliminary issues. There was as a consequence, no determination on the substance. Given this scenario, he would not insist that the award of punitive costs remain.

Mr *Chimiti* on behalf of the Minister and the Attorney-General indicated that he would abide by the decision of the court.

THE NATURE OF A TRUST

[19] A very pertinent passage on trusts is found in the book Herbstein & Van Winsen, Civil Practice of the High Courts of South Africa by the learned authors Cilliers, Loots & Nel to the following effect:[1]

> "A trust is not a legal *persona*, but a legal institution *sui generis*. Therefore, it must be sued in the name of the trustee or trustees. However, when the trust itself has been cited, the courts have allowed the correction of the citation. Unless one of the trustees is authorized to act by the remaining trustee or trustees, all the trustees must be joined in suing, and all must be joined when an action is instituted against a trust. The trustee should be cited in their representative capacities."

[1] At p 182

Within this jurisdiction the issue of whether or not a trust is a person has received attention and there is a plethora of authority on the subject. In *Crundall Bros (Pvt) Ltd v Lazarus NO & Anor* 1990 (1) ZLR (H), at 298E the court stated:

> "I can see no reason why a trust should be regarded as a 'person' for the purposes of the Regulations, when it is not regarded as a 'person' for other purposes."

[20] This principle was confirmed by SMITH J in *WILSA & Ors v Mandaza & Ors* 2003(1) ZLR (H), at 505-6 wherein is stated the following:

> "Mr *Nherere* took the point, *in limine*, that WLSA, being a trust is not a corporate body and therefore cannot appear as a party. That contention is legally sound. In Commissioner for *Inland Revenue v MacNeillie's Estate* 1961(3) SA 833 (A) at 840F-H, Steyn CJ said:
>
> > "Like a deceased estate, a trust, if it is to be clothed with juristic personality, would be a persona or legal entity consisting of an aggregate of assets and liabilities. Neither our authorities nor our courts have recognized it as such a *persona* or entity. The Estate Duty Act, like the Income Tax Act, 31 of 1941, does not define 'person'. The Statutory definition in sec. 2(x) of the Interpretation Act, 33 of 1957, does not mention a trust or any category of persons which would include a trust. It is trite law that the assets and liabilities in a trust vest in the trustee. The introduction of another persona consisting of those assets and liabilities for the purposes of imposition and collection of a tax, when there is a trustee ready to hand, would be an extraordinary measure which would call for some adjustment, the nature of which is by no means obvious, and of which there is no trace in the Act, between the legal position of such a *persona* and of the trustee."

That statement of the law was confirmed in *Crundall Bros (Pvt) Ltd v Lazarus NO & Anor* 1991(2) ZLR 125(S) where at 128F, it was said:

> "A trust is not a person. The trustee is the person to be considered for the purposes of the Regulations"."

Herbstein & Van Winsen also states:[2]

> "The fact that one trustee has been authorized by the remaining trustees to institute action on behalf of the trust does not necessarily confer *locus standi* on that trustee. The trustees must act *nomine officii* and cannot act in their private capacities. Beneficiaries cannot act

[2] At p 183

> independently of trustees against someone other than the trustee in legal proceedings relating to trust property."[3]

[21] The passage quoted above is in sync with our law. In *Chiite & 7 Others v Trustees, Leonard Cheshire Homes Zimbabwe Central Trust* CCZ 10/17, MALABA CJ made the following observation regarding the citation of trustees:

> "A proper reading of the provisions of r 8A of the High Court Rules establishes that it is not a requirement for the names of the trustees to be listed when they bring an action on behalf of the Trust. The only place where the issue of the listing of the names of the trustees when an action has been instituted on behalf of the Trust is where a defendant to a suit by the Trustees has requested from the Trust the names and addresses of the individual trustees. This would be in line with r 8A of the High Court Rules, 1971."

[22] The contention by the appellants is that it is the trust that has brought this suit. That is incorrect. The suit has been brought by Veritas. The person who deposed to the founding affidavit is not a trustee, she is an administrator in the employ of the trading arm of the trust. Thus the party before the court is not the trust, it is an entity associated with the trust. I am not convinced that the rule that the appellants place reliance on is of any assistance to them.

DOES RULE 8C APPLY IN THE INSTANT PERMITTING THE AMENDMENT SOUGHT

[23] In order to bolster their argument that an amendment of the applicant in this instance would be in order, the appellants have referred the court to *Luxavia (Pty) Ltd v Gray Security Services (Pty) Ltd* 2001(4) SA 211. At p219, para 15-16, TIP AJ states:

> "There is also a category of cases in which substitution was refused because the initial plaintiff was not a legal *persona*. In *Van Heerden v Du Plessis* 1969(3) SA 298(O) an action for patrimonial damages had been instituted in the name of a person who was already deceased. An application to substitute the executor of the estate was held to be impermissible

[3] Herbstein & Van Winsen 5 ed pp182-183

> on the basis that the original summons was a nullity (at 304A-G). In reaching that conclusion, Smuts J placed some reliance on the approach taken in *Van Heerden v Braun & Summers*, to which I have referred above. *Van Heerden v Du Plessis* was applied in *Friends of the Sick Association v Commercial Properties (Pty) Ltd and Another* 1996(4) SA 154(D), where the plaintiff had been described in the summons as a voluntary association although it had ceased to be such upon its incorporation as a company not for gain several decades earlier. Refusing substitution, the Court held at 158A-B that the summons was a nullity and there was no need to even consider whether or not an amendment might cause prejudice."

[24] It seems to me that the above statement is not only apposite in this instance but it applies with equal force. The principle that the citation of a non-existent party results in a nullity was confirmed in *Gariya Safaris (Pvt) Ltd v van Wyk* 1996(2) ZLR 246(H). At 253C-254B, MALABA J (as he then was) said:

> "In this case, the person against whom the plaintiff thought it was proceeding as a defendant was non-existent at the time summons was issued. The proceedings and judgment that followed the summons were null and void. To try an action in which there is only one party is an exercise in futility. There were no two parties to give rise to the existence of a cause of action between them. There was nothing to be substituted by the respondent as a new judgment debtor. There was no old judgment debtor.
>
> This proposition is not without authority. In *van Heerden v du Plessis* 1969 (3) SA 298 (O) a summons was issued against a person who had already died. Application was made for an order of substitution of the executor testamentary for the deceased. The application, which was opposed, was refused on the ground that the summons was wholly invalid. In *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening) supr*a, the learned judge mentioned that cases in which the summons has been issued against a non-existent person are exceptions to the application of the general rule on the approach courts should adopt in deciding applications for orders of substitution. The learned judge at 369J- 370A had this to say:
>
> > "The correction of a mis-description of an applicant differs also from the cases where the courts have regarded a summons or notice of motion as *ab initio* invalid because the plaintiff or applicant was a non-existent person. "
>
> In *Fosa v Commercial properties (Pty) Ltd & Anor* [1996] 2 All SA 611 (D) the summons was issued in the name of anon-existent plaintiff. An application for substitution was refused by NILE-DUNER AJ on the ground that, the fact that the persona described in the summons did not exist at the date of issue of the summons, called into question the validity of the proceedings before him. The learned acting judge concluded at p 614 by saying:

> "There is, in my opinion no difference in principle between the situation in *van Heerden v du Plessis supra* and the present case. I accordingly take the view that the summons is a nullity and that I cannot by the process of substitution revive it to the date of its issue."

See also *Dawson(Bradford) Ltd & Ors v Dove & Anor* [1971]1 All ER 554(QB) where it was held that substituting the defendant for the deceased against whom summons had been issued after his death was not an act of substitution but of creation."

[25] The suit in this appeal has not been brought by the trust. If it had been brought by the trust, the remarks by the court in the case of *Chiite & Ors v Trustees, Leonard Cheshire Homes (supra)* would have been apposite. The arguments made by Mr *Mafukidze* might have been persuasive. In this instance his arguments are not apposite. *In casu*, the appellants have not argued that Veritas is a trust. The applicant as cited is a trade name. It is not a legal *persona*. It is not suggested that Veritas is an entity, like an association or a partnership. Veritas is a trade name which the trust makes use of when trading.

[26] Mr *Mafukidze* concedes that Veritas is not a *persona*. It is also not the trust. Despite these very fundamental legal obstacles it is still contended that the court *a quo* should have exercised its discretion in favour of the appellants and invoked r 8C and allowed the application to amend the citation. R 8C reads:

> ***8C. Proceedings by or against persons under their trade name***
> Subject to this Order, a person carrying on business in a name or style other than his own name may sue or be sued in that name or style as if it were the name of an association, and rules 8A and 8B shall apply, *mutatis mutandis*, to any such proceedings.

[27] Rule 8C, which Mr *Mafukidze* seeks reliance on makes reference to a person. Veritas is not a person. The trust, Firinne Trust, is also not a person. In moving the appeal Mr *Mafukidze* sought

reliance on the remarks by MATHONSI J, (as he then was) in *Nuvert Trading (Pvt) Ltd t/a Triple Tee Footwear v Hwange Colliery Company* HH 791/15 to the following effect:

> "Those cases are clearly distinguishable from the present case and reliance on them is completely misplaced. In both cases, there was no defendant at all and the court correctly found that no amendment could be made to a non-existent summons given that a summons is only valid if it has a defendant to answer to. In the present case it cannot be said by any stretch of the imagination that the defendant does not exist because there is an entity answering to that name. The only omission is the word "Limited" which is an expression speaking to its limited liability status than anything. The amendment sought relates to completeness of the name as opposed to introducing a new persona to a summons originally without a defendant."

[28] A reading of that statement makes it clear that there must be a party to proceedings, viz, there must be a *persona* in one form or another. In my view the authority does not assist the position taken by the appellants. What it does is to reinforce the argument adopted by ZEC, to the effect that if the applicant is not a *persona,* one cannot apply to have that applicant substituted. The citation of a non-existent entity renders the proceedings a nullity. I am fortified in these remarks by the dicta in *J D M Agro-consult (Pvt) Ltd v Editor, The Herald & Anor* 2007 (2) ZLR 71 (H), at 75A-E to the following effect:

> "What is now before me is a point in *limine* dealing with the question of the citation of the parties. It is a legal issue, in that the defendants aver that the summons is bad at law, in that no defendant has been brought before the court. They allege that the proceedings are a nullity as a result, and no application launched by the plaintiff to amend the summons or substitute the defendants can cure the defect, as the summons is a nullity.
>
> It is pertinent to state from the outset that the application to amend the summons by altering the name of the second defendant, which was granted at the pre-trial conference was without effect. 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. Its 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. Without that process it is non-existent. The entity sued by the plaintiff as the second defendant 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. The amendment to the second defendant's name therefore was of no force and effect as the summons itself was a nullity. In *Gariya Safaris (Pvt) Ltd* v *Van Wyk*[4], this court stated:

> "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 in the summons as being those of the defendant, the summons is *null* and *void ab initio*"."

[29] The appellants concede that Veritas is not a person. The rule that they seek to rely on in having the citation amended speaks of "any person". Once it is conceded that Veritas is not a legal *persona* no reliance can be sought in the rule. The appellants are out of court. There is as a consequence no applicant in the main application.

[30] ZEC has argued that the application is a nullity and that as a result there is nothing to amend. I am constrained to accept that contention. It is trite that proceedings which are a nullity cannot be amended. This was confirmed in *Jensen v Acavalos* 1993(1) ZLR 216(S), where KORSAH JA, stated at 220C-D:

> "With this view I most respectfully agree: for if the notice of appeal is incurably bad, then, to borrow the words of LORD DENNING in *McFoy v United Africa Co Ltd* [1961] 3 All ER 1169(PC) at 11721, 'every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse'."

[31] Those remarks apply with equal force in this appeal. There was no applicant before the court *a quo*. The citation of a non-existent party cannot be amended. The proceedings themselves are a nullity. The application for amendment must as a result fail. The court *a quo* was correct in this regard.

THE FORM OF THE APPLICATION

[4] 1996 (2) ZLR 246 (H)

[32] I turn now to the form used in the main application before the court a quo.

Veritas mounted a court application in terms of Order 32. The rule pertaining to the form that such application should take is r 230, and it provides as follows:

> **C. COURT APPLICATIONS**
> ***230. Form of court application***
> A court application shall be in Form No. 29 and shall be supported by one or more affidavits setting out the facts upon which the applicant relies.
>
> Provided that, where a court application is not to be served on any person, it shall be in Form No. 29B with appropriate modifications.

The court *a quo* found that, in addition to the lack of proper citation of the applicant, the application was itself defective for want of the proper form. To that end the court concluded that there was in fact no application before it.

[33] The appellants accept that the notice is not in the correct form. They contend however, that the notice was in fact according to Form 29B and that this form was permissible in terms of r 230. There is no doubt that the form used is not what is provided for in peremptory terms by r 230. The rule requires that a court application be in Form 29. It is only when the application is not to served on any other party that the rule permits reliance on Form 29B. The application in contention was served on three respondents. It therefore did not fall within the genre of applications provided for in the proviso to the rule. A notice in an application serves many purposes. The notice informs the respondent of the steps he is required to take if he intends to oppose the application. It also places upon a respondent the onus to file and serve his or her papers within a given period and most importantly gives the address for service of the applicant. The court and the registrar are also informed by the notice of the requirements placed upon the respondent to such suit. This is why the rule is peremptory.

[34] In *Zimbabwe Open University v Madzombwe* 2009 (1) ZLR 101 (H), HLATSHWAYO J, (as he then was) held as follows:

> "In Form 29, the applicant gives notice to the respondents that he or she intends to apply to the High Court for an order in terms of the annexed draft and that the accompanying affidavit/s and documents shall be used in support of the application. It goes on to inform the respondent, if he so wishes, to file papers in opposition in a specified manner and within a specified limit of time, failing which the respondent is warned that the application would be dealt with as an unopposed application. In Form 29B, an application is made for an order in terms of an annexed draft on grounds that are set out in summary on the basis of the application and affidavits and documents are tendered in support of the application.
>
> …..
>
> Now, the format adopted by the applicant does not contain the plethora of procedural rights that the respondent is alerted to in Form 29, nor is the summary of the grounds of the application required in Form 29B."

The application was therefore held to be fatally defective.

[35] The application in this appeal was brought before the court on the basis of a form which reads as follows:

> "Application be and is hereby made for an order in terms of the draft annexed hereto.
> The accompanying affidavit(s) and document will be used in support of the application."

This application was served on the respondents. It is not an application provided for in Form 29B. Contrary to the requirements of Form 29, which are peremptory, there was no attempt to give notice to the respondents of what was required of them to oppose the application. The form excludes those fundamental elements upon which an application is founded, which are material for purposes of giving notice to a respondent of his rights as regards the application. It did not state the *dies induciae* operating against the respondent for purposes of mounting any opposition. There was not even an attempt to include a summary of the basis upon which the application was being

mounted on the face of the application. In this case, in the absence of a notice in the proper form the court may be left in doubt as to whether or not a respondent has opposed the application within the prescribed period and served the application at the proper address. In this instance the appellants have not stated why the application did not contain the proper form by way of notice. I hold that the application is as a result fatally defective.

THE QUESTION OF COSTS

[36] The court *a quo* ordered the appellants to pay punitive costs. The respondents have conceded that there is no legal justification for such an award. I must agree. The award of costs on the punitive scale cannot stand and the appeal against the award of costs at that scale must succeed. The appeal succeeds on that sole ground.

DISPOSITION

[37] Once the lack of status of Veritas was raised the appellants should have exercised caution and, as found by the learned judge, in the court *a quo,* withdrawn the application. Instead there was a dogged insistence on proceeding with the papers in the form that they were in. Wiser counsel should have prevailed. I note in passing that the application to amend the citation was properly done in terms of Form 29. As argued by Mr *Kanengoni,* the jurisdiction of the court must be invoked properly and lawfully. It cannot be lawfully invoked at the instance of a non-existent party. The court *a quo* was correct in exercising its discretion in favour of the respondents and upholding the points *in limine.* The order of costs on the higher scale however, must be set aside.

Accordingly, an order will issue as follows:

IT IS ORDERED THAT:

1. The appeal partially succeeds to the extent set out in paragraph 2 below.
2. Paragraph 2 of the order of the court *a quo* is set aside and in its place is substituted the following:
   "The applicants shall pay the respondents' costs on the ordinary scale of costs, *viz* as between party and party."
3. For the avoidance of doubt the appeal against the points *in limine* is dismissed.
4. The appellants are ordered to pay the costs of this appeal, jointly and severally, the one paying, the other to be absolved.

GUVAVA JA I agree

BHUNU JA I agree

Mtetwa & Nyambirai, *appellant's legal practitioners*

Messrs Nyika, Kanengoni & Partners, *1st respondent's legal practitioners*

Civil Division of the Attorney General's Office, *2nd & 3rd respondent's legal practitioners*