

CMED (PVT) LIMITED
versus
SAMSON BANDE & 29 OTHERS
and
SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 19 December 2016 & 3 February 2017

Urgent Application

T K Hove, for the applicant
Respondent in person

FOROMA J: This is an application filed as an Urgent Chamber Application by the applicant. The relief sought by the applicant in the provisional order is as follow:

Terms of Final Order Sought

That you show cause to the Honourable Court why a final order should not be granted in the following terms.

1. The order granted by the Honourable Mr Justice CHIWESHE JP in case No. HC 7853/16 be and is hereby set aside.
2. The writ of Execution issued pursuant to the Order in HC 7853/16 be and is hereby cancelled.
3. The second respondent be interdicted from attaching, removing and sale in execution the applicant's property pending finalization of this application.
4. The second respondent be interdicted from attaching removing and sale in execution the applicant's property pending finalization of this application.
5. The first respondent pays costs of suit on Attorney Client scale.

Interim Relief Granted

Pending determination of this matter that the applicant is granted the following relief:

1. The Writ of Execution issued pursuant to the Order in Case No. HC 7853/16 be and is hereby cancelled.
2. The second respondent be interdicted from attaching removing and sale in execution the applicants property pending finalization of this application.

It is important to note that the interim relief sought to be granted in paras 2 and 3 is exactly the same as par 2 and 3 of the final order sought.

At the hearing of this application the applicant was represented by Mr *T.K. Hove* of T.K. Hove and Partners whilst Samson Bande and 29 Others cited as the first respondent was purportedly represented by Samson Bande. Samson Bande and 29 Others is represented as a single party. It is not clear whether they are an association or a universitas. It should be observed though that the official heading of the writ of execution on p 61 cited Samson Bande as the first applicant and nine other individuals are listed as the second to the tenth applicants and 20 others. There is no explanation by the applicant *in casu* as to who are the 29 other individuals (if they are) who constitute the first respondent. It cannot be assumed in favour of the applicant that the 29 others are a co-operative association etc if it is a group of individuals and who constitutes the said group of people. When a party is cited in an action or application it is obligatory to identify correctly and accurately the party so cited to enable the court to not only exercise its jurisdiction over the party concerned but to ensure that the party is bound by a judgement of the court.

In the case of *Indium Investments v King & Saivan* SC 40/15 GOWORA JA (with CHIDYUSIKU CJ, GWAUNZA JA, HLATSHWAYO JA and MAVHANGIRA A.J.A agreeing) referring to the case of *Hundah v Mutauro* 1993 (2) ZLR 401 observed that for a party who has a real interest in a matter in dispute before a court to be bound by a judgment of the court such a party should be cited. It's presumed that once cited the party should also be served with the process in which they are cited. The learned judge of appeal quoted from the said judgment the following at p 404 E – G where the court stated:

“We have drawn attention to this point previously on a number of occasions (See e.g. *Munemo v Muswera* 1987 (1) ZLR 20 (S) at 21 G – H often in conjunction with the other important point that the local authority should be cited in proceedings of this kind since it has real interest in the property in dispute (See e.g. *Ncube v Mkandla* S – 123/89. If it indicates in writing before hand that it is happy to accept whatever the court decides, well and good. But otherwise it should be

cited only to ensure that it is bound by whatever judgment is given. Such order does not bind it if it was not a party.”

It is generally accepted that a party cited should correctly be identified if a natural or existing person. In the case of *Masuku v Delta Beverages* HB 172/12 CHEDA J quoted MALABA J (as he then was) in the case of *Gariya Safaris Ltd v Van Wylc* 1996 (2) ZLR 246 H as having said-

“A summons has legal force and effect when it is issued by the plaintiff against an existing or natural person. If there is no legal or natural person answering to the names written in the summons as being those of the defendant the summons is null and void.”

The position is not any different where the process is an application – See Herbstein & Van W vol 1 p 145. CHEDA J sought to distinguish the case of *Gariya Safaris* by relying on WESSELS J’s reasoning in the case of *Van Vauuren Baum and Summers* 1910 TPD 955. He proceeded to reason thus:

“*In casu* the entity against whom applicant has sued is said to be non-existent. The argument is grounded on the fact that the citation omitted the full description of the respondent. The crucial question that irresistibly begs an answer is, identification of the respondent? Respondent is a well-known blue chip company whose fleet of cars are all over our national and domestic roads and its commercial advertisements need no introduction. In other words Delta Beverages is known here and beyond. To me applicant may have technically erred in her description but has described respondent with sufficient clarity to an extent of eliminating any mistake either legal or factual or respondent’s identity.”

It is important to note that CHEDA J’s judgment was handed down on 2 August 2012 long after the amendment of the High Court Rules 1971 to allow the citing of persons in their trade name or style - see r 8 C of the High Court Rules 1971 introduced by S.I 192/1997. It is clear that the silent premise in the learned judge’s reasoning above is not a desire to distinguish the general rule in MALABA J’s judgment in the *Gariya Safaris* case in 1996 shortly before the amendment introducing r 8 C afore said.

In casu the applicant cited first respondent as Samson Banda & 29 others. In the founding affidavit applicant did not list or describe the persons it referred to as the first respondent at all. It is therefore not certain whether the first respondent as cited is the name of an association or other group of people by whatever description. The first respondent so called has interchangeably been referred to in the singular as well as in the plural in this application. In the urgent chamber application (p 3 of the papers) despite the official heading referring to *Samson Bande and 29 Others* as the first respondent in para 1 and 2 of the same document the party is referred to as

respondents. In the certificate of urgency the first respondent in the official heading is referred to as first respondent yet in paras 3 and 6 it is referred to as first respondents.

In its founding affidavit Oliver Chirongoma who deposed to the founding affidavit on applicant's behalf in para 4 describes the respondent thus – the respondent is Samson Bande and 29 Others (*sic*) whose address for service is 90 Broadwell Lodge Number 6 Corner S Muzenda/Kwame Nkrumah Avenue Harare. It is worth noting that the first respondent has now metamorphosed from the first respondent(s) into the respondent.

It should be noted that the urgent chamber application filed by applicant is filed under case No. HC 12609/16 with case No. HC 7853/16 as a cross reference making it obligatory to properly cite the parties in the new case number. The first respondent's identity is as confusing as it is confused.

It is clear that the first respondent has not properly been cited. The application has not disclosed who else if any apart from the second respondent and the applicant is a party to the urgent chamber application.

The provisional order if granted can only be binding on the second respondent. Such order cannot bind Samson Bande as he is not a party as an individual. The Arbitral Award whose execution is sought to be cancelled in the provisional order refers to the sum of \$733 403-09 and \$16 193-81 in respect of pension contribution refunds and pension arrears respectively. These sums of money refer to a joint claim of the claimants in the arbitral award. Without each of the claimants' individual claim being specified any order the court could grant would be a *brutum fulmen* because the employees are not named in this urgent application.

While it is true that one Samsom Bande attended the hearing of the urgent chamber application purportedly on behalf of the 29 others he did not have power of attorney to represent first respondent or his co-employees whoever they were as these were not served with the urgent chamber application. In the circumstances the application before me was aborted at its inception. The improper citation of the respondents is clearly fatal to the application.

Although the second respondent was in default at the time the matter was heard before me the applicant did not move for an order against the second respondent in default.

In the circumstances the application is hereby dismissed.

T K Hove & Partners, applicant's legal practitioners