THE TRUSTEES FOR THE TIME
BEING OF THE DELTA TRUST

versus

AUTOWORLD HARARE (PRIVATE) LIMITED
For the liquidation of Autoworld Harare (Private) Limited
In terms of section 62 (1) (b) and/or (a) of the Companies and
Other Business Entities Act [Chapter 24:31]

and

PAZA BUSTER COMMODITY BROKERS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE 28 October 2021 and 31 March 2022

Application for liquidation

Adv F Girach, for the applicant
Adv T Mpofu with *Mr A Rubaya*, for the 1st and 2nd respondents

CHINAMORA J:

Introduction and background facts

The application before me is essentially for the placement of the 1st respondent, Autoworld Harare (Private) Limited (hereinafter interchangeably referred to as "Autoworld" or "1st respondent", firstly, under provisional liquidation and for the appointment of Mr David Alan Whatman as the provisional liquidator. On the return day, the applicant seeks confirmation of the provisional order winding and appointment of Mr Whatman as the liquidator. The deponent to the founding affidavit of the applicant is Daryl Eric Raine, who by his own admission is a beneficiary of the Delta Trust, as well as a director of the 1st respondent. Indeed, this is common cause. In that affidavit, he deposes that he is authorized by resolution of the applicant to sign the affidavit commencing the present proceedings, and attaches a copy of that resolution marked "Annexure A". This document appears on page 20 of the record and reads as follows:

"Extract from the minutes of a meeting of the trustees for the time being of the Delta Trust held at Harare on Thursday the 8th of October 2020

IT WAS RESOLVED THAT:

1. The trustees resolved to institute legal proceedings against Autoworld Harare (Private) Limited to seek to have the company placed in liquidation.
2. DARYL ERIC RAINE be and is authorized and empowered to make such oral and/or written representations for and on behalf of the trustees for the time being of the Delta Trust and such documents as may be necessary to institute those proceedings and carry them through to finality, and take such steps as he may consider necessary in connection with those proceedings.

CERTIFIED A TRUE EXTRACT

……
TRUSTEE – Maxwell Tauya
…….
TRUSTEE – Donald Mazwi Sibindi
For and on behalf of the trustees"

The respondents opposed the application and raised a number of preliminary objections contending that the application is an abuse of court process. In support of their position of who were the true trustees of the Delta Trust, the respondents attached a deed of trust (which appears on pages 106-130 of the record). The trustees of Delta Trust are shown as Clive William Bishop, George McGhie and Karl Delano Schoeman, while Sean Christopher Waller is indicated as the settlor. (See pages 116 of the record). Further, the respondents contend that they did not authorize the institution of the proceedings in *casu*. In fact, Mr Bishop deposed to an affidavit (on pages 183-4 of the record) denying involvement in the decision to file the liquidation application. Similarly, (on pages 185-186 of the record) Mr McGhie swore to an identical affidavit distancing himself from the resolution to bring this application. The extract of the minutes of a meeting to authorize Mr Raine to institute proceedings is signed by Mr Tauya and Mr Sibindi, who are indicated to be trustees of the Delta Trust. However, the applicant did not attach the deed of trust in order to show the person who were the trustees of the Delta Trust. Nevertheless, the respondents availed the 2008 trust deed on pages 119-130 of the record. It is noteworthy that the persons who appear as trustees in the 2003 trust deed are the ones who are trustees in that latter deed. This is relevant as will become evident when I fully address the points in *limine*. I will now proceed to examine the points in *limine* raised by the respondents.

The respondents' preliminary objections

The first point made is that ***the application is not authorized*.** In this regard, the respondents submit that the trust document show that there are three trustees, namely, Clive William Bishop, George McGhie and Karl Delano Schoeman, with Sean Christopher Waller (the deponent to the opposing affidavit) being the settler to the trust. In addition, the respondents state, there are named beneficiaries to the trust. Yet, so they argue, nether the trustees nor the beneficiaries passed a resolution authorizing litigation on behalf of the trust.

Secondly, the respondents raise an objection **that there is no applicant before the court**. The basis of this point in *limine* is that, while the trust called Delta is said to have been established in 2008 by one Daryl Eric Raine, there was in existence another trust of the same name established by Mr Waller on 1 February 2003. The respondents asserted that 100% shares in Autoworld were held by trustees of the Delta Trust as of 20 October 2004 and that, when 51% of the shares were transferred to the 2nd respondent, 49% of the shares in Autoworld were owned by the Delta Trust established in 2003 by Mr Waller and not the one established by Mr Raine in 2008. The respondents ask the court to strike the matter from the roll with costs.

The third point in *limine* is that, **there are material disputes of fact which cannot be resolved on the papers** without hearing oral evidence. Accordingly, the respondents contend that the current proceedings should have been brought by way of action and not application. They point out that there is a dispute on who the trustees of the Delta Trust are, and when those trustees acquired shares in Autoworld. In addition, they refer to the dispute on which is the valid trust deed between the one established by Mr Waller in 2003 and Mr Raine's of 2008.

A further objection by the respondents is that **the applicant did not comply with the winding up rules**, in particular, Rule 5 (a) of the Companies (Winding Up) Rules, 1972, made in terms of section 303 (21) of the Companies and Other Business Entities Act. Therefore, the respondents argue, the failure to comply with the said rule invalidates the application, and they urge the court to dismiss it with costs.

Fifthly, the respondents argue that **there is a material non-disclosure and/or material falsehoods in the application** which was meant to mislead the court, and this undermines the validity of the proceedings. In this respect, they aver that the applicant deliberately did not inform the court that there was another Delta Trust which held shares in the first respondent in 2004. More

particularly, the respondents state that the applicant failed to disclose to the court that he was a beneficiary of the other trust (created by Mr Waller) which held shares in Autoworld. In addition, the applicant did not disclose how shares in the 2003 Delta Trust came to be owned by the trust that he established in 2008. For these non-disclosures, the respondents ask the court to dismiss the application with costs. Let me now deal with these preliminary points in turn.

That the application is not authorized

The argument of the respondents in this respect in essence is a challenge to the locus stand of the applicant to file an application in the name of the Delta Trust. In other words, the respondents' case is that, as a resolution was not passed by the trustees authorizing that the application in *casu*, then there is no application before the court. I notice that here is nothing placed before this court to dispute that the trustees of the Delta Trust are as shown on the document attached to the opposing papers (on pages 106-110 of the record). There is no serious denial of the respondents' assertion that Mr Bishop, Mr McGhie and Mr Schoeman are the trustees of the Delta Trust. In this connection, the simple rule of law is that what is not denied in affidavits must be taken to be admitted. (See *Fawcet Security Operations* v *Director of Customs & Excise*, 1993 (2) ZLR 121 (SC) and *DD Transport (Pvt) Ltd* v *Abbot*, 1988 (2) ZLR 92).While in the answering affidavit, the applicant alleges that the real trustees resigned, no resignation letters have been attached to the founding affidavit to verify this averment. That allegation seems to me to be a feeble, if not, timid attempt to wriggle out of an impossible position that the applicant finds himself in. A few facts will demonstrate the fallacy of the applicant's suggestion that the original trustees resigned. I observe that clause 7.1 of the deed of trust states that:

> "Any one of the trustees has ipso facto vacated office if:
> 7.1.1 …
> 7.1.2 …
> 7.1.3 …
> 7.1.4 he resigns office by notice in writing to the other trustees".
> **[My own emphasis]**

On the face of it, the resolution provided by the applicant describes Mr Tauya and Mr Sibindi as trustees. However, in the absence of a deed of trust supplied by the applicant, there is

nothing to demonstrate how Mr Tauya and Mr Sibindi became trustees of the Delta Trust. In this respect, clause 7.2 of the Delta Deed of Trust (on page 110 of the record) provides:

> "In the event of any trust having vacated his office as trustee for any of the reasons hereinbefore in clause 7.1 referred to, or on the death while still holding office as trustee, his position shall be filled by a unanimous decision of the remaining trustees".

Because of the provisions of clauses 7.1 and 7.2 of the deed for Delta Trust, it was imperative for the applicant to explain how the aforesaid gentlemen became trustees. I have looked at the trust document that the applicant alleges is the authentic deed of trust for Delta Trust (on pages 119-130 of the record) and, I must confess, it creates more doubt on the status of Messrs Tauya and Sibindi as trustees. They also do not appear in that 2008 deed of trust. Significantly, that deed has a provision similar in wording to clause 7.2 of the 2003 Delta Trust deed (which appears as clause 8.2 on page 122-123 of the record), which reads:

> "In the event of the removal from office as trustee for any of the reasons referred to in clause 8.1, or on the death of either or any of them still holding office as trustee, Fiona Jane Burmeister (born on 29th June 1961) shall be appointed as a trustee in the place of the trustee who has vacated office".

That provision, in my view, made it critical for the applicant to explain how Messrs Tauya and Sibindi ended up trustees of the Delta Trust, whichever deed is considered. The gap in information is not helpful as it leads to the conclusion that their appointment as trustees was not in compliance with either of the two trust documents.

The Supreme Court has had occasion to deal with a similar situation. In *Moroney v Moroney* SC 24-13, it was appositely noted as follows:

> "…the respondent failed to truthfully and adequately explain the circumstances of how various amounts that the respondent claimed came from Helena Limited found their way into the Standard Charted Isle of Man account. The court ought to have disbelieved him…"

The wisdom of the Supreme Court was followed in *Farai Matsika and Anor v Moses Chingwena and Ors* HH 573-20.

The subject on the *locus standi* of trusts is not new to our courts as it has confronted us in numerous cases. For example, see *Crundal Brothers (Pvt) Ltd v Lazarus NO and Anor* 1991 (2) ZLR 125, *Veritas v ZEC and Ors* SC103-20 and *Benatar Children's Trust v Benatar* HH.124-17.

In light of the applicant's failure to challenge, firstly, that the deed of trust provided via the opposing affidavit is the only valid deed of the Delta Trust and, secondly, to show that the authority to institute the proceedings before me, there is in fact no application before the court. I believe that I am correct in concluding that where a party cited has not been authorized the party does not exist before the court. In this regard, 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"

In light of the facts of this case and the law I have referred to, I come to the conclusion that the application before me was not authorized by the trustees of the Delta Trust. Counsel for the application argued that, if I uphold this point in *limine* I am obliged to make a finding that the resolution is a nullity. My view is that I need not necessarily make such a finding. If the proper trustees did not authorize the institution of these proceedings it means that the applicant is not properly before the court, which effectively is the same as saying there is no party before the court. The observations of MALABA J (as he then was) in *Gariya Safaris (Pvt) Ltd v van Wyk supra* are apposite. In fact, no pronouncement of nullity is require when something is void ab initio. (See *Folly Cornishe & Anor* v *Topwamwa NO & Ors* SC 26-14, per GARWE JA (as he then was) and *Manning* v *Manning* 1986 (2) ZLR 1 (SC) at 3G-4A, per Mc NALLY JA. That being the case, I uphold the point in *limine* on absence of authority to bring this application.

I will observe in parenthesis that, had it become necessary to do so, I would have dismissed this application based on material disputes of fact which cannot be resolved on the papers without resort to hearing of viva voce evidence. The issue of which of the two trust deeds is the authentic one is one which features prominently in all the affidavits before this court. I need only refer to paragraph 25 of the answering affidavit (on page 204 of the record), which attempts to gloss over the disputes of fact as "self-created", while accepting the trustees in Annexure "A" as the correct trustees. As I have already noted, the trustees are the same in the two documents. However, I have pronounced myself on the first preliminary point.

Conclusion

As I have resolved the matter before me on the basis of the first preliminary point, namely, lack of authority to institute proceedings. I find it unnecessary to deal with the other points in *limine*. There is simply no application before the court. I now have to consider the issue of costs. Generally, costs follow the result. I do not propose to depart from this general rule. The respondents have asked for costs on the ordinary scale in the event they are successful and I uphold the first preliminary point. The applicant should have realized from the onset that he did not have the authority to institute proceedings in the name of the Delta Trust without a resolution signed by the rightful trustees. I therefore have no reason to deny them the costs that they have asked for.

Disposition

The application is struck off the roll with costs on the ordinary scale.

Honey & Blanckenberg applicant's legal practitioners
Rubaya & Chatambudza, 1st and 2nd respondents' legal practitioners