THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 364/2019

In the matter between:

TUSK CONSTRUCTION SUPPORT SERVICES (PTY) LTD **FIRST APPELLANT**

JOINT EQUITY INVESTMENTS IN HOUSING (PTY) LTD **SECOND APPELLANT**

and

INDEPENDENT DEVELOPMENT TRUST **RESPONDENT**

Neutral citation: *Tusk Construction Support Services (Pty) Ltd and Another v Independent Development Trust* (Case no 364/2019) [2020] ZASCA 22 (25 March 2020)

Coram: PETSE DP, ZONDI, DLODLO and MBATHA JJA and GORVEN AJA

Heard: 26 February 2020

Delivered: 25 March 2020

Summary: Practice and procedure – citation of a trust as a party to legal proceedings does not render the summons a nullity simply because the trust lacks juristic personality – such summons capable of amendment to reflect the trustees as parties in their representative capacity.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mavundla J, sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside and in its place is substituted the following:

'1 The applicants are granted leave to amend their combined summons by substituting the names of the trustees for the time being in their representative capacity for the Independent Development Trust wherever the name 'Independent Development Trust' appears.

2 The costs occasioned by the respondent's opposition to the application for amendment shall be borne by the respondent.'

JUDGMENT

Petse DP (Zondi, Dlodlo and Mbatha JJA and Gorven AJA concurring)

[1] The facts of this appeal are uncontroversial. But the legal question for determination arising from those facts is remarkable. It is this: is a summons that cited a trust rather than the trust's trustees in their representative capacity a nullity that cannot be cured by way of an amendment substituting the trustees for the trust?

[2] The appellants, Tusk Construction Support Services (Pty) Ltd (Tusk Construction) and Joint Equity Investments in Housing (Pty) Ltd (Joint Equity Investments), who share a commonality of interests in this appeal, say that this

cannot be. For its part, the respondent, Independent Development Trust (IDT),[1] answers this question in the affirmative. In elaboration, IDT contends that because it lacks juristic personality the summons issued against it is a nullity and thus irredeemable. Hence, says IDT, one cannot breathe life to a summons that was stillborn. And that the only avenue open to Tusk Construction and Joint Equity Investments, if still minded to pursue their claim, is to withdraw their action and institute fresh proceedings citing IDT's trustees in their representative capacity. Determining the two divergent contentions is what confronts us in this appeal.

[3] This appeal has its origin in two interlocutory applications that were, for convenience, heard together and decided in a composite judgment of Mavundla J in the North Gauteng Division of the High Court, Pretoria (the High Court). In the main action Tusk Construction and Joint Equity Investments jointly sued IDT for payment of the total sum of about R2,5 million. The first of the two interlocutory applications was for leave to amend the summons. The second was for leave to consolidate the main action with another action instituted against the trustees of IDT in their representative capacity in which identical relief was claimed. In the latter action Tusk Construction was joined by Nurcha Management Services (Pty) Ltd and National Urban Reconstruction Housing Agency as co-plaintiffs. The latter action is not germane to this appeal. Thus, nothing more need be said about it.

[4] The main action to which this appeal relates was instituted on 16 May 2012. In this action the defendant was the IDT. It was described in the particulars of claim thus:

[1] The Independent Development Trust was registered in 1991 under Deed of Trust No 669/91. It was established by the government of the Republic of South Africa to, inter alia, enhance the standard of living of South Africans, especially of disadvantaged communities through the facilitation of equal opportunities through investment in socio-economic development including education and training and provision of basic services supportive of rapid human development and is subject to the strictures of the Public Finance Management Act 1 of 1999.

'The defendant is the INDEPENDENT DEVELOPMENT TRUST; (Registration Number 669/91) a Schedule 2 Public Entity in terms of the Public Finance Management Act 1 of 1999; as amended with its head office situated at Glenwood Office Park, Cnr Oberon and Sprite Streets, Faerie Glen, Pretoria.'

IDT admitted this averment in its plea.

[5] In due course, the action was enrolled for trial on 17 October 2013. A few days preceding the trial, there was an unexpected new turn of events. For the first time, counsel for IDT took the point that the citation of IDT as a defendant was irregular and impermissible and that IDT's trustees should instead have been cited in their representative capacity. Consequently, the trial was adjourned with Tusk Construction and Joint Equity Investments ordered to pay the wasted costs occasioned by the adjournment.

[6] In order to meet the objection raised to IDT's legal standing, Tusk Construction and Joint Equity Investments delivered a notice under rule 28(1)[2] of the Uniform Rules of Court in terms of which they sought leave to amend the combined summons by substituting all references to IDT with a reference to its trustees for the time being in their representative capacity. To their chagrin, IDT (and by extension the trustees) baulked at this. IDT contended that the proposed amendment was manifestly doomed to failure because the action instituted against it was a nullity. Thus, contended IDT, it could not be cured by the proposed amendment. By now the battle lines had been drawn. It became necessary for Tusk Construction and Joint Equity Investments to bring a substantive application in pursuit of their quest to amend their combined summons in accordance with rule 28(4).[3]

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[2] Rule 28(1) reads:
'Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.'

[3] Rule 28(4) reads:
'If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.'
Compare: Rule 15 which empowers courts to grant a substitution of parties on substantive application. See further: D Harms *Civil Procedure in the Supreme Court* (2019) B-15.1; D E Van Loggerenberg and E Bertelsmann *Erasmus Superior Court Practice* (2015) D1-159.

[7] Whilst the application for leave to amend was pending (and which IDT opposed) the second action alluded to in para 3 above was instituted. As already indicated, this action was based on the same cause of action as the pending proceedings, although only Tusk Construction – but not Joint Equity Investments – and two other different entities featured in it.

[8] With two actions now pending, it appears that as a tactical manoeuvre a change of tack was called for. Tusk Construction and Joint Equity Investments brought an application in the High Court for the consolidation of the two actions. This was conditional upon its application for amendment being unsuccessful.

[9] On 29 May 2014 the two applications were heard together in the High Court by Mavundla J. The learned Judge dismissed both applications in a composite judgment delivered on the same day.

[10] Although the High Court did not furnish reasons for the dismissal of the application for leave to amend – an aspect to which I shall return – it is nevertheless possible to gain an insight into what motivated it to dismiss this application. As it is apparent from what it said in para 11 of its judgment, it approached the matter on the basis that:

'The application for amendment was refused principally because the court was of the view that there is merit in the contention that the action was a nullity, without deciding the issue. In this regard, the very fact that the first applicant proceeded to commence another action for substantially the same relief as in the first action, demonstrates that by implication it conceded the correctness, the strength and prospect of the defence of nullity raised by the trust. It is my considered view that the applicants in bringing the application for consolidation were trying to circumvent the need to withdraw the action and tender the costs. The applicants appreciated the impossibility of reviving a still born action by virtue of its nullity ab initio. To circumvent this difficulty they then brought the second action. I am of the view that, the action for consolidation was not brought *bona fide* but was vexatious. This conduct on the part of the applicants, in the total conspectus of this application should weigh heavily against the grant of

the consolidation and attracts the court's strongest opprobrium to be demonstrated by granting an attorney and client costs order.'

The appeal against the dismissal of the application for amendment in this Court is with the leave of the High Court.

[11] Before dealing with the contentions of the parties I consider that it would conduce to clarity if I deal first with the law relating to the status of a trust. There have been numerous decisions of our courts that grappled with the status of a trust. I shall, however, not cite them all in this judgment, still less analyse them. The concept of a trust has its origins in English law. It was analysed by this Court more than six decades ago in *Crookes NO and Another v Watson and Others* 1965 (1) SA 277 (A); [1965] 1 All SA 277 (A) at 297E where the position was stated by Van den Heever JA as follows:

'In his valuable monograph "*Trust en Stigting*" p. 25 Prof. W. M. R. Malherbe says:

"Watter reëls aangaande die trust geld by ons? Seker nie die van die Engelse trust nie. Met die resepsie van die Engelse terme *trust* en *trustee* het ons die Engelse trustreg nie oorgeneem nie. Reeds is 'n begin gemaak met die ontwikkeling van 'n eie trustreg, ooreenkomstig die grondbeginsels van ons eie regstelsel."

With that observation I agree.'[4]

[12] In his judgment in *Braun v Blann & Botha NNO and Another* 1984 (2) SA 850 (A); [1984] 2 All SA 197 (A) Joubert JA said the following at 859D-G:

'The trust of English law forms an integral part of all common law legal systems, including American law. In its strictly technical sense the trust is a legal institution *sui generis*. In South Africa, which has a civil law legal system, the trust was introduced in practice during the 19th century by usage without the intervention of the Legislature but the English law of trusts with its dichotomy of legal and equitable ownership (or "dual ownership" according to the American law of trusts) was not received into our law. Our Courts have evolved and are still in the process of evolving our own law of trusts by adapting the trust idea to the principles of our own law.

[4] 'What rules of trust are applicable with us? Certainly not that of the English trust. With the reception of the English terms *trust* and *trustee*, we did not take over the English trust law. Already a start has been made in developing our own trust law, in accordance with the principles of our own legal system.'

See *Crooks NO and Another v Watson and Others* 1956 (1) SA 277 (A) at 297E-F and Coertze [Coertze in his doctoral thesis *Die Trust in die Romeins-Hollandse Reg* (1948) at 133]:
"Die wasdom en ontwikkeling van die Treuhandidee in ons reg het plaasgevind onder die invloed van die Engelse reg. Die Engelse terme *trust* en *trustee* is adopter maar nie die Engelse trustreg nie. 'n Eie trustreg is deur ons regspraktyg en deur ons Howe ontwikkel; maar dis nog ver van voltooi."'

[13] In *Commissioner for Inland Revenue v Friedman and Others NNO* 1993 (1) SA 353 (A); [1993] 1 All SA 306 (A); 55 SATC 39(A) the same learned Judge of Appeal said (at 370 E-I):
'Is a trust a legal persona? According to the Anglo-American law of trusts a trust has no legal personality. P W Duff *Personality in Roman Private Law* Cambridge University Press (1938) at 206:
"Maitland showed [Collected Papers vol 3 (1911) 321-404)] that by vesting property in trustees, rather than in corporations or associations, English lawyers evaded many questions that have caused difficulty abroad."
See R W Ryan in his unpublished Cambridge doctoral thesis entitled "The Reception of the Trust in the Civil Law" (1959) at 11: "A trust is certainly not a legal person". The position is the same in our law of trusts. See *Commissioner for Inland Revenue v MacNeillie's Estate*1961 (3) SA 833 (A) at 840G-H: "Neither our authorities nor our Courts have recognised it as a *persona* or entity. It is trite law that the assets and liabilities in a trust vest in the trustee." Consult also *Braun v Blann and Botha NNO and Another* 1984 (2) SA 850 (A) at 859E-H:
"In its strictly technical sense the trust is a legal institution s*ui generis* . . .The trustee is the owner of the trust property for purposes of administration of the trust but *qua* trustee he has no beneficial interest therein."
It is clear therefore that a trust is not an incorporated company. Nor is a trust a body of persons unincorporate whose common funds are the collective property of all its members. There is also no basis for a submission that because the statutory definition of "person" in s 1 of the 1962 Act was extended to include a deceased estate, it should by analogy be further extended to include a trust. The conclusion is inescapable that a trust is not a "person" within the meaning of that word in the 1962 Act.'

[14] This principle was restated by Nugent JA in *Lupacchini NO and Another v Minister of Safety and Security* 2010 (6) SA 457 (SCA); [2011] 2 All SA 138 (SCA) who said (para 1):

'A trust that is established by a trust deed is not a legal person – it is a legal relationship of a special kind that is described by the authors of *Honoré's South African Law of Trusts* as "a legal institution in which a person, the trustee, subject to public supervision, holds or administers property separately from his or her own, for the benefit of another person or persons or for the furtherance of a charitable or other purpose". In *Land and Agricultural Bank of South Africa v Parker* Cameron JA elaborated:

"[A trust] is an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees, and must be administered by them – and it is only through the trustees, specified as in the trust instrument, that the trust can act . . . .

It follows that a provision requiring that a specified minimum number of trustees must hold office is a capacity-defining condition. It lays down a prerequisite that must be fulfilled before the trust estate can be bound. When fewer trustees than the number specified are in office, the trust suffers from an incapacity that precludes action on its behalf."'

[15] It should by now be self-evident from the analysis of the decisions referred to in the preceding paragraphs that whilst a trust lacks legal personality it is nevertheless a legal entity *sui generis* (see, for example, *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA); [2004] 4 All SA 596 (SCA) para 10; *Standard Bank of South Africa Ltd v Swanepoel NO* [2015] ZASCA 71; 2015 (5) SA 77 (SCA); para 8).

[16] It is trite that in legal proceedings by or against a trust the trustees must be cited in their representative capacity and not in their private capacity. (See *Goolam Ally Family Trust t/a Textile, Curtaining and Trimming v Textile, Curtaining and Trimming (Pty) Ltd* 1989 (4) SA 985 (C) at 988 D-E; *Mariola and Others v Kaye-Eddie NO and Others* 1995 (2) SA 728 (W); [1995] 3 All SA 287 (W) at 731 C-F; *Van der Westhuizen v Van Sandwyk* 1996 (2) SA 490 (W);

Rosner v Lydia Swanepoel Trust 1998 (2) SA 123 (W) at 126H). Nonetheless, instances in which the trust was cited as such in legal proceedings are not unknown (see, in this regard, *Rosner v Lydia Swanepoel Trust* already referred to in this para at 127I; *BOE Bank Ltd (formerly NBS Boland Bank Ltd) v Trustee, Knox Property Trust* [1999] 1 All SA 425 (D); *First National Bank of South Africa Ltd v Strachan Family Trust* [2000] 3 All SA 379 (T)). And this practice has happened with more frequency lately.

[17] The time is now opportune to immediately turn focus to what is at the core of this appeal. It will be recalled that what lies at the heart of this case is the question whether the summons issued against IDT as such is a nullity by reason only that the trust was cited as a defendant instead of the trustees in their representative capacity. On this score, as already indicated, the contentions of the parties are diametrically opposed.

[18] But first, a word needs to be said in relation to the well-entrenched approach that courts are enjoined to adopt in matters of this kind. Stated in general terms it is that in the absence of any prejudice to the other party, which cannot be compensated by a costs order or some other suitable order such as a postponement, an application for amendment, unless it is brought in bad faith, should ordinarily be granted (see, for example, *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C); [1994] 1 All SA 1 (C) at 369F-370B; *Rosner v Lydia Swanepoel Trust* at 127D-H; *Imperial Bank Ltd v Barnard NO and Others* (349/12) [2013] ZASCA 42; 2013 (5) SA 612 (SCA) (para 8 and the authorities therein cited)).

[19] It bears emphasising that the fact that the amendment sought might lead to the defeat of the opposing party is not the sort of prejudice that is contemplated. Where the parties can be put back in the same position as they were when the pleading which is sought to be amended was initially filed the amendment should

be granted (see *Moolman v Estate Moolman* 1927 CPD 27 at 29). It is not without significance that initially IDT resisted the claim on an acceptance that there was no dispute as to the identity of the true defendant. In opposing summary judgment, Mr Hlanganani Mtshali, who described himself as a legal advisor employed by IDT, confirmed under oath that he was 'duly authorised to oppose the ... application for summary judgment.' In making this categorical averment the inference is inescapable that Mr Mtshali did so at the behest of IDT's trustees. Moreover, the affidavit filed on behalf of IDT, opposing summary judgment, comprehensively set out the basis upon which the claim was being resisted. Yet not a single word was said about IDT's lack of legal personality.

[20] Even more telling is the fact that the pre-trial minute signed by the parties' legal representatives on 10 September 2013 explicitly recorded that: 'Defendant did not record any prejudice save to point out that the matter may not, in view of the Defendant's recent amendment to its plea, be ripe for hearing'. There was, at that stage, no allusion to nor complaint about the fact that the status of IDT as a defendant was called into question.

[21] In support of his contention that the summons in this case was not a nullity, counsel for the appellants cited *Rosner v Lydia Swanepoel Trust*.[5] There the respondent, being a trust, sued in its name and did not cite the trustees in their representative capacity. The defendant's argument that the summons was a nullity and thus could not be amended was resoundingly rejected by the court on the ground that what obtained was a case of misdescription. Goldstein J had this to say (at 128D-E):

'In *casu* the situation is quite different. The trust exists as a discrete legal institution. Indeed, cases in the name of a trust are not unknown, the *Goolam Ally Family Trust* case being an example (cf 987D-E). Had the citation remained unchanged and unnoticed, the effect of any judgment granted in the proceedings would be no different from what it will be now that the amendment has been granted. Any amount to be payable by or to the trustees will remain

[5] Referred to in para 17 above.

payable out of or into the same fund as it would otherwise have been. In these circumstances nothing of the substance has changed and all that the amendment does is to give linguistic effect to the legal rule that a trust lacks legal personality.'

[22] In *Imperial Bank Ltd v Barnard and Others* (referred to in para 18 above) Mpati P writing for the unanimous court, albeit in a different context, had no difficulty in confirming the decision of the court a quo which had allowed an amendment of a summons to substitute a close corporation (under liquidation) for its liquidators who had instituted action in their representative capacity whose citation was not sanctioned by s 386(4)*(a)* of the Companies Act 61 of 1973. Similarly, as in this case, the defendant in *Imperial Bank* had contended that the plaintiffs' attempt to substitute the liquidators with the close corporation (in liquidation) amounted to the introduction of a new plaintiff and that the corporation's claim had by then become prescribed. In rejecting this argument this Court held that the amendment granted by the court a quo did not have the effect of substituting the plaintiff, but merely corrected the misnomer in the particulars of claim. And that the claim sought to be enforced in the original summons and particulars of claim remained the same after the amendment. Consequently the appeal against the grant of the amendment was dismissed. Pretty much the same situation obtains in this appeal. What the proposed amendment sought to achieve was purely the substitution of the trustees in their representative capacity for IDT. The claim and everything else relating thereto remained the same.

[23] In this regard the remarks of McCall J in *BOE Bank*[6] are particularly apposite. The learned Judge said (at 436f-g):

'It may well be that it would have been more correct to describe the principal debtor as the named Trustees, in their capacity as Trustees of the Trust or as the Trustees for the time being of the Trust. Certainly, as appears from *Rosner*'s case (*supra*), where there is litigation against a trust, the trustees in their representative capacity and not the trust, as such, ought to be cited.

[6] Para 17 above.

That however, is not the end of the matter because it is clear that, notwithstanding the requirement of the provisions of section 6 of Act 50 of 1956 that the identity of the creditor, the surety and the principal debtor must be capable of ascertainment by reference to the provisions of the Deed of Trust, extrinsic evidence, other than the evidence of the parties as to their negotiations and consensus may be led in order to identify one of those parties.'

[24] The principle to which McCall J referred in *BOE Bank* has been confirmed by this Court in several cases (see, for example, *Sapirstein and Others v Anglo African Shipping Co (SA) Ltd* 1978 (4) SA 1 (A); [1978] 4 All SA 474 (A) at 12B-E; *Kohlberg v Burnett NO and Others* 1986 (3) SA 12 (A); [1986] 2 All SA 283 (A) at 25F-26B).

[25] In *Hyde Construction CC v The Deuchar Family Trust and Another* [2014] ZAWCHC 118; 2015 (5) SA 388 (WCC) the full court of the Western Cape Division of the High Court was called upon to determine, amongst other things, whether the Deuchar Family Trust which had sued in its own name was properly before the court as a litigant. After analysing several judgments of our courts dealing with the legal standing of a trust, Rogers J, writing for a unanimous court, had this to say (para 47):

'[T]he applicant was cited as the Deuchar Family Trust. Of course, a trust is not a juristic entity. Whether it is procedurally acceptable to cite a trust by name as a litigant, and whether in that regard rule 14 is applicable to trusts (as to which, see *Cupido v Kings Lodge Hotel* 1999 (4) SA 257 (E) at 265B-C), need not be decided, because no objection was ever taken in the court *a quo* or for that matter on appeal to this mode of citation. One commonly refers to a trust by name even though it is not a juristic entity. Given the legal character of a trust, the citation of a trust by name in litigation must, I think, be understood as a reference to the trustees for the time being of the trust, whoever they may be.'

I fully endorse that observation. To the extent that it can be said to be a departure from existing authority, it is appropriate that our law of trusts, as it has been evolving over the years, is developed along these lines.

[26] At the hearing of this appeal counsel for IDT was asked as to what would have happened if the belated point relating to IDT's status as a defendant had not been raised. And whether in those circumstances it would have been open to IDT to impugn the validity of the ensuing judgment purely because IDT lacked legal personality. Understandably so, counsel did not embrace such a proposition. The reason therefor is not far to seek. It is so because where a trust has been cited in its name (in line with the burgeoning trend mentioned earlier) such citation is generally understood as a reference to the trustees. This is, however, not to say that a trust as such is possessed of legal personality. It does not, but remains 'a legal institution sui generis.'[7] Consequently, a trust's citation as such in legal proceedings does no more than take cognisance of its existence as a legal institution sui generis.

[27] Counsel for IDT, however, had another string to his bow. He submitted that to allow the amendment sought would occasion IDT substantial prejudice. This was so, continued the argument, because IDT would be deprived of its right to raise prescription to the claim sought to be enforced by Tusk Construction and Joint Equity Investments, which would otherwise be available to it.

[28] In considering a similar argument, this Court in *Imperial Bank* – referred to in para 18 above – with reference to two of its previous decisions[8] said:

'...a plaintiff is not precluded by prescription from amending his or her claim, "provided the debt which is claimed in the amendment is the same or substantially the same debt as originally claimed, and provided, of course, that prescription of the debt originally claimed has been duly interrupted."'[9] (Citations omitted.) This is precisely what obtains in this case.

[29] In the middle of para 9 of the judgment, the court continued:

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[7] See *Braun* in para 13 above at 859E-H.
[8] *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A); [1978] 2 All SA 1 (A) at 474A; *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 15J-16D.
[9] Para 8.

'[T]hus, when faced with an opposed application for an amendment to a summons the fundamental question a court should consider is "whether or not the service of the summons in the previous action on the respondent interrupted the running of prescription of the applicant's rights against the respondent". And in considering whether or not prescription was interrupted by service of the previous summons the right sought to be enforced by means of the amendment must be the same or substantially the same right as originally sought to be enforced, "(f)or the substance rather than the form of the previous process must be considered in determining whether or not it interrupted prescription".' (Citations omitted.)

[30] In this case, as already indicated, all that Tusk Construction and Joint Equity Investments sought to remedy was to insert the proper citation of a defendant, in this instance by citing the IDT's trustees in their representative capacity. Nothing more and nothing less. Accordingly, had the amendment been granted, the right sought to be enforced would have remained exactly the same. Faced with this insurmountable hurdle, counsel for IDT was constrained to accept that, as the notice of amendment was filed before the period of prescription had run its course, prescription would not have availed IDT.

[31] In these circumstances it follows that the conclusion of the High Court was erroneous. It therefore falls to be set aside given that the amendment sought ought to have been granted. This conclusion inevitably calls for a reconsideration of the question of costs associated with the application for amendment. The general rule is that an applicant for an amendment essentially seeks an indulgence. This entails that such applicant must ordinarily bear all costs occasioned by the application barring instances where the opposition was unreasonable.

[32] It was submitted on behalf of Tusk Construction and Joint Equity Investments that IDT's opposition was grossly unreasonable and verging on vexatiousness. Not the slightest attempt was made in IDT's heads of argument to counter this submission. In all the circumstances I am satisfied that there is merit

in the submission that the costs occasioned by the amendment must be for IDT's account both in this Court and the High Court.

[33] Accordingly, the costs occasioned by IDT's opposition to the amendment sought should be for its account. None of the bases upon which the application for amendment was opposed had a realistic prospect of succeeding. This is particularly so given that all that the desired amendment sought to achieve was to rectify a misdescription of the trust to the extent that it had to be represented by its trustees in legal proceedings. It must be emphasised that we no longer live in the Justinian era when, if a mistake was made by a litigant, a claim or defence would be forfeited. That courts have to eschew undue formalism was aptly explained by Wessels J more than a century ago in *Whitaker v Roos and Bateman* 1911 TPD 1092 at 1102-3 in these terms:

'The object of the Court is to do justice between the parties. It is not a game we are playing in which, if some mistake is made, the forfeit is claimed...[W]e all know...that mistakes are made in pleadings, and it would be a grave injustice, if for a slip of the pen, or error of judgment...litigants are to be mulcted in heavy costs...Therefore the Court will not look to technicalities, but will see what the real position is between the parties.'

This principle has been applied consistently ever since.

[34] It remains to address one final aspect relating to the absence of reasons in support of the High Court's decision to dismiss the application for amendment.

[35] Earlier, I mentioned that despite the fact that the amendment sought was opposed, the High Court did not furnish its reasons as to why the application had to fail. The importance of giving reasons for court decisions has been underscored in various decisions of this Court. And the failure to do so was described as unacceptable in *Botes and Another v Nedbank Ltd* 1983 (3) SA 22 (A); [1983] 2 All SA 153 (A). There, this Court went on to say that 'where the matter is opposed and the issues have been argued, litigants are entitled to be informed of the

reasons for the Judge's decision'. And that 'a reasoned judgment may well discourage an appeal by the loser'.

[36] In his article published in (1998) 115 The *South African Law Journal* at 116-28, the former Chief Justice M M Corbett explained the rationale for this salutary practice in these terms:

'In addition, should the matter be taken on appeal, the Court of appeal has a similar interest in knowing why the Judge who heard the matter made the order which he did. But there are broader considerations as well. In my view, it is in the interests of the open and proper administration of justice that the courts state publicly the reasons for their decisions. Whether or not members of the general public are interested in a particular case – and quite often they are – a statement of reasons gives some assurance that the court gave due consideration to the matter and did not act arbitrarily. This is important in the maintenance of public confidence in the administration of justice.'[10]

[37] In similar vein the former Chief Justice of the High Court of Australia, the Rt Hon Harry Gibbs, writing in The *Australian Law Journal* (vol 67A 1993) said the following:

'The citizens of a modern democracy – at any rate in Australia – are not prepared to accept a decision simply because it has been pronounced, but rather are inclined to question and criticise any exercise of authority, judicial or otherwise. In such a society it is of particular importance that the parties to litigation – and the public – should be convinced that justice has been done, or at least that an honest, careful and conscientious effort has been made to do justice, in any particular case, and the delivery of reasons is part of the process which has that end in view.'[11]

That the High Court determined a hotly contested legal question in this case on the basis of assumptions without a reasoned judgment must be deprecated.

[38] In the result the following order is made:

1 The appeal is upheld with costs.

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[10] M M Corbett 'Writing a judgment: address at the first orientation course for new judges' (1998) 115 SALJ, 116 at 117.

[11] H Gibbs 'Judgment writing' (1993) 67A Australian Journal 494 at 494.

2 The order of the court a quo is set aside and in its place is substituted the following:

‘1 The applicants are granted leave to amend their combined summons by substituting the names of the trustees for the time being in their representative capacity for the Independent Development Trust wherever the name ‘Independent Development Trust’ appears.

2 The costs occasioned by the respondent’s opposition to the application for amendment shall be borne by the respondent.’

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X M PETSE

DEPUTY PRESIDENT

Appearances

For appellant:	B C Stoop SC
Instructed by:	Coetzer & Partners, Pretoria
	Honey Attorneys, Bloemfontein
For respondent:	K Tsatsawane SC
Instructed by:	Gildenhuys Malatji Inc., Pretoria
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