A of being lodged as a suit under the said Act. The proceedings in this case are special. They involve matters pertaining to basic legal rights which are alleged to have been contravened by the respondents and of whose redress the petitioner is seeking from this court. There is
B a special procedure under our law through which such redress can be sought from this court. It is not by way of institution of a suit by presentation of a plaint. It is by way of application made by petition as the law provides under sections 4 and 5 of the Basic Rights and
C Duties Enforcement Act 1994. An application made by petition is not a suit. So, there lies the distinction.

I am of the considered view that fetching and stretching the word petition to mean a suit in this particular case will lead into unwarrantable
D importation of the requirement of submitting a prior notice of intention to sue the Government laid down under section 6(2) of the Government Proceedings Act 1967 as amended by Act Number 30 of 1994, into the Basic Rights and Duties Enforcement Act 1994, wherein such a
E requirement is not provided for upon lodging a petition to the High Court for redress in cases where one's constitutional right or legal right under any law has, or is being, or is likely to be, contravened. I find therefore that the first point of preliminary objection raised
F by the respondents was indeed misconceived.

On the second point of preliminary objection, I am of the opinion that the petitioner has *locus standi* in the matter. She is not petitioning on behalf of her husband, Clive Michael Jones. She is petitioning
G on her own behalf as a Tanzanian woman who is married to a non citizen for enforcement of her basic right in the High Court, relying on article 30(3) of the Constitution of the United Republic of Tanzania 1977. Quoting from paragraph 13 of her petition, she is praying
H among other things for, "a declaration that the Citizenship Act Number 6 and Immigration Act Number 7 both of 1995 are unconstitutional so far as they segregate women's rights to have their husbands stay in the country depending on them as women do in case they are foreigners".
I From the above quotation, it can be found that the second point of preliminary objection raised by the respondents that the petitioner

has no *locus standi* in the matter is as well misconceived. For these A
reasons, I hereby dismiss both points of preliminary objection with costs to be taxed in the main cause.

B

TANZANIA UNION OF INDUSTRIAL AND COMMERCIAL WORKERS (TUICO) at MBEYA CEMENT COMPANY LTD v. MBEYA CEMENT COMPANY LTD AND NATIONAL INSURANCE CORPORATION (T) LIMITED C

HIGH COURT OF TANZANIA AT DAR ES SALAAM D

(Massati, J.)

CIVIL CASE No. 315 OF 2000 E

Labour law – Suit instituted by a trade union branch of TUICO which is not a legal entity – Whether union branch has locus standi – Whether union branch can represent dead, retrenched or retired members. F

Contract law – Privity of Contract – Action is based on trust deed – Whether plaintiff can sue on trust deed to which he is not a party – Whether trust rules applicable. G

Arbitration – Parties agree to submit matter to arbitration – Whether court bound to refer matter to arbitration in case of dispute – Whether submission of a suit to arbitration can be taken and decided as a preliminary objection.

Civil Practice and Procedure – Written submissions – Annexures attached to written submissions – Whether documents constituting evidence of facts may be attached to written submissions. H

The plaintiff, a branch of TUICO trade union at Mbeya Cement Company Ltd filed a I
suit against the defendants jointly for, among other reliefs, a specific performance of

A a Trust Deed. The basis of the suit was the Trust Deed Rules and Regulations for Mbeya Cement Company Group Staff Endowment Assurance Scheme which was annexed to the plaint. Counsel for the defendants raised preliminary objections that the Plaintiff had no *locus standi* to institute the suit either for lack of legal status or
B based on the Trust Deed and that the suit was instituted prematurely since the matter was supposed to be referred to arbitration in the first instance. The preliminary objections were argued by way of written submissions.

Held: (i) It is now settled that a submission is a summary of arguments. It is not
C evidence and cannot be used to introduce evidence. In principle all annexures, except extracts of judicial decisions or textbooks, have been regarded as evidence of facts and, where there are such annexures to written submissions, they should be expunged from the submission and totally disregarded;

D (ii) The point that the suit was prematurely instituted because it was not referred to arbitration is a matter sought in the exercise of judicial discretion and cannot properly be taken and decided as a preliminary objection;

E (iii) Although the plaintiff union is capable of suing and being sued, it can only do so if the alleged wrongful acts were committed against it; it is for each of the individual employees to sue the defendants for their rights under the Trust Deed and Group Endowment Scheme;

F (iv) The trade union TUICO, let alone branch of it, has no *locus standi* to sue on behalf of employees or ex-employees of Mbeya Cement Company Ltd for breach of or enforcement of the Trust Deed and Group Staff Endowment Scheme.

Suit dismissed

G Cases referred to:

(1) *African Store Consumer Cooperative Society v. Said Lupinda*, Court of Appeal of Tanzania, Civil Appeal Number 16 of 1989 (unreported)

H (2) *John M. Byombalirwa v. Agency Maritime International (T) Ltd* [1983] T.L.R 1

(3) *Tarlock Singh Nayar v. Sterling General Insurance Company Ltd* [1966] EA 44

I (4) *Ballonzi v. Chama cha Mapinduzi* [1996] T.L.R 203

(5) *Merarji and Sons v. General Tyre E.A. Ltd* [1983] T.L.R 129 A

(6) *Christopher Gasper Rukizangabo and others v. Tanzania Harbours Authority*, High Court, Dar es Salaam Civil Case Number 209 of 1998 (unreported) B

(7) *VETA v. Ghana Building Contractors*, High Court, Dar es Salaam, Civil Case Number 198 of 1995 (unreported)

(8) *M. Rutakyamura v. Peter Joseph* [1996] T.L.R 49

(9) *Mukisa Biscuit Manufacturing Company Ltd v. East End Distributors Ltd* [1969] EA 696 C

(10) *Fort Hall Bakery Supply Company v. Fredrick Mukai Wangope* [1959] EA 474 D

(11) *National Distributors Limited v. National Union of Tanganyika Workers* [1971] HCD 12

(12) *National Union of General and Municipal Workers v. Gillan and others* [1945] 2 All ER 593 E

(13) *British Motor Trade Association v. Salvadori and others* [1949] 1 All ER 208

(14) *National Union of Clerical Commercial and Technical Employees v. Drapers Ltd* [1969] EA 63 F

(15) *Robbey v. W.M. Croshil and Company Ltd* (1915) LJ KB 856

Statuttory provisions referred to G

(1) Security of Employment Act 1964, Chapter 574 section 6(1)(a) – (h)

(2) Trade Unions Act 1998, section 51(1)

(3) Civil Procedure Code 1966, Order1, rule 5 and 10 and Order VII, rule 1, Second Schedule H

(4) Arbitration Ordinance, section 6

(5) Law of Contract Ordinance Chapter 433 sections 2(1)(d) and 10 I

(6) Trade Union Act (Uganda), sections 13(d) and 51(1)

A (7) Industrial Court of Tanzania Act 1967

Mr K.M. Nyangarika, for the Plaintiff

Dr Sinare and *Mr Mwandambo,* for the first Defendant

B *Mr Msemwa,* for the second and third Defendants

RULING

(20 April 2004)

C

Massati, J.: Through the services of Mr K.M. Nyangarika, learned counsel, the Plaintiff, a Branch of TUICO Trade Union at Mbeya
D Cement Company Ltd, the first defendant herein, has filed a suit against the defendants jointly for, among other reliefs, a specific performance of the Trust Deed, for orders for the first defendant to contribute/pay to the second defendant a total sum of TZS. 365 625 835-10; and for contributions in favour of retrenched, retired and
E dead members, and for general damages, interests and costs. The basis of the suit is the Trust Deed, Rules and Regulations for Mbeya Cement Company Group Staff Endowment Assurance Scheme which is annexed as part of the plaint. By leave of the court the plaintiff
F was allowed to amend his plaint on 13 September 2001. Indeed a new suit was filed on 26 October 2001 as ordered. In the new suit the third defendant PSRC was added.

G The first defendant employed the services of M/s Sinare, Shiyo and Mwandambo learned counsel. The second and third defendants engaged the services of M/s Msemwa and Company Advocates, learned counsel. In their written statements of defence, the defendants have raised some preliminary objections on points of law.

H The first defendant has raised the following objections:

(a) That the plaintiff has no *locus standi*

(b) That the plaint does not disclose any cause of action known in law
I against the first defendant.

A On the other hand, the second and third defendants have raised that:

(a) the plaintiff has no *locus standi* to sue the second and third defendants on the basis of the Trust Deed.

B (b) the suit has been prematurely preferred against the defendants before the matter was referred to arbitration as provided in section 12 of the NIC Master Policy.

On 9 September 2002, Luanda, J. ordered that the preliminary objections
C be argued by way of written submissions. Fortunately, all the parties have filed their submissions. In his submission the first defendant argues that as a trade union branch of TUICO it is not a legal entity, it is not empowered nor is it capable of instituting the suit. A decision
D of the Tanzania Court of Appeal of *African Store Consumer Cooperative Society v. Said Lupinda* (1) was cited. And, in case, it is found that the plaintiff has a locus standi, it cannot represent dead, retrenched or retired members since they have ceased to be members.

E On the second objection the first defendant submitted that the plaint does not disclose any cause of action against the first defendant. The decision of the Court of Appeal in *John M. Byombalirwa v. Agency Maritime International (T) Ltd* (2) T.L.R. 1 was cited to
F illustrate what a cause of action meant. It was submitted that since the cause of action was based on a Trust Deed of which the plaintiff could not sue on it, even if some of its members were paid out of the scheme in the past. Some passages from Sir P.C. Mogha **The**
G **Principles of Pleadings in India** (14 ed), were quoted to solidify counsel's arguments. On the premises, the first defendant prayed that the plaint be rejected and struck out or be dismissed for want of *locus standi.*

H On the other hand, Mr Msemwa, learned counsel for the second and third defendants submitted that since the plaintiff's cause of action was based on the Trust Deed, and since the Plaintiff was not a party to the Deed, it was not privy to the contract, and so had no
I *locus standi* to sue. A decision of *Tarlock Singh Nayar v. Sterling General Insurance Company Ltd* (3) was cited in support of an argument

that a stranger to a contract cannot sue on the contract. In his second objection, Mr Msemwa submitted that there is a clause in the NIC Master Policy and as the defendants are willing to submit to arbitration, the suit was instituted prematurely. It was therefore the learned counsel's humble prayers that either the suit be dismissed for want of jurisdiction or be stayed pending arbitration.

In reply, Mr Nyangarika learned counsel for the Plaintiff attacked the preliminary objections on the following grounds. He said the plaintiff has the necessary *locus standi* by virtue of the provisions of section 6(1)(a)-(h) of the Security of Employment Act Chapter 574, and paragraph 6.0 of the Voluntary Agreement between the plaintiff and the defendants, which was duly registered as an award by the Industrial Court on 18 August 2000. He attached a long list of documents to be part of his submission. He said claiming for members' benefits was part of the union's branch's functions as defined under section 6(1)(a)-(h) of Chapter 574. He said TUICO is a trade union, registered under the Trade Union Act Number 10 of 1998 and therefore it had legal capacity to commence the suit on behalf of its members. He submitted also that the Trust Deed was duly signed by the first defendant and the principal officers of TUICO. He said the question of the number of members who are dead or retrenched is a matter of evidence which has to be determined on a full trial not in a preliminary objection. He said since the Plaintiff is a party to the Trust Deed and the Voluntary Agreement duly registered it had the requisite *locus standi* to sue. To further clarify on the point of *locus standi*, the learned counsel cited the decision of this court in *Ballonzi v. Chama cha Mapinduzi* (4) and **Halsbury's Laws of England** (4 ed) paragraph 49 on page 52 that to establish *locus standi*, it was enough for a party to show that there is an interference with or a deprivation of a right of which the law takes cognizance.

Mr Nyangarika, learned counsel admits that to maintain an action on contract a person must be privy to the contract, but submits that TUICO was privy to the Trust Deed and Voluntary Agreement which was endorsed by the Industrial Court. He distinguished the *African*

Store case cited by the first defendant because the said case dealt with an unregistered company whereas here, the plaintiff is registered under the Trade Union Act 1998 and the powers derived under the Security of Employment Act 1964. He therefore said it was not true that the Plaintiff was non existent in law. He invited this court to invoke the doctrine of estoppel because no such arguments were raised at the Industrial Court.

Mr Nyangarika further argued that under rule 2 of the rules of the Assurance Scheme, the rules were also binding on the members and trustees, and the Plaintiff is representative of the workers.

Mr Nyangarika learned counsel reminded the court of its powers under Order 1, rule 10 of the Civil Procedure Code to add or delete parties as may be necessary. He cited **Sarkar's Law of Civil Procedure** Volume1 (9 ed) to illustrate the principle behind this rule.

Mr Nyangarika submitted that the amended plaint disclosed a cause of action in terms of Order VII, rule 1 of the CPC. He said, according to **Sarkar**, it was not necessary that every legal ground of challenge should be stated in the plaint. He called in aid the decision of *Merarji Hirji And Sons v. General Tyre E.A. Ltd* (5) to demonstrate that a contract could be implied by conduct of the parties. So could the parties in the present case. He therefore prayed that the first defendant's preliminary objections be dismissed with costs.

With regard to the second and third defendants' preliminary objections Mr Nyangarika, learned counsel essentially repeated his arguments on *locus standi*. He went on to submit that the Insurance Master Policy came into play when the accrued benefits under the scheme are computed for payment, and this was only possible if the first defendant had remitted the premiums. He reminded the court that under Order 1, rules 5 and 10 of the Civil Procedure Code 1966 it was not necessary that all parties should be interested in the same relief, and that the court had power to add or strike out the names of the parties who are not necessary. He said therefore the second and third defendants were necessary parties and were properly joined.

He submitted as in his argument against the first Defendant's objection that the plaintiff had the necessary *locus standi*. He even called to his aid the unreported decision of this court in *Christopher Gasper Rukizangabo and others v. Tanzania Harbours Authority* (6) where it was held in questions of redundancies the employees were entitled to claim damages for breach of contract. He also distinguished the case of *Tarlock Singh Nayar* cited by Mr Msemwa, Learned Counsel. He also submitted that the suit was instituted maturely and that this court had granted leave to sue the third defendant as a necessary party on 9 October 2001. At the end of the day Mr Nyangarika submitted that these objections too, be dismissed with costs as they are devoid of merit. This marked the end of counsels' submissions.

Before I embark on the preliminary objections, I will, however, have to make a few pertinent observations regarding the contents of Mr Nyangarika's written submission. Mr Nyangarika learned counsel, has attached numerous annexures to his submissions. It is now settled, that a submission is a summary of arguments. It is not evidence and cannot be used to introduce evidence. In principle all annexures, except extracts of judicial decisions or textbooks, have been regarded as evidence of facts. Their annexure to submissions has been condemned by several decisions of this court. (See: *Veta v. Ghana Building Contractors* (7); *M. Rutakyamura v. Peter Joseph* (8).

Those decisions have held that where there are such annextures, they have to be expunged from the submission and totally disregarded. I will do the same in respect to the annexures attached to Mr Nyagarika's written submissions. All the documents annexed to his submissions are accordingly expunged; and shall be ignored.

Gathering from the submissions of counsel there are in the main, I think three distinct preliminary objections. First it is argued that the Plaintiff has no *locus standi* in the suit. Second, that no cause of action is disclosed against the defendants. Third, that the suit has been instituted prematurely, before referring the dispute to arbitration contrary to the Arbitration Ordinance, and the second schedule to the Civil Procedure Code, 1966. I will begin with the third objection.

It is certainly true that where the parties have agreed to submit to an arbitration process, this court has power under section 6 of the Arbitration Ordinance to stay proceedings; and to refer the matter in difference to an arbitrator under the Second Schedule to the Civil Procedure Code 1966. But this power is not exercised until the court is moved by a party to the proceeding, and it is in the discretion of the court to grant the same. It is to be done in the exercise of a judicial discretion of the court to grant the same. In *Mukisa Biscuit Manufacturing Company Ltd v. East End Distributors Ltd* (9) at page 701, Newbold P. (as he then was) defined what is a preliminary objection:

> A preliminary objection is in the nature of what used to be a demurrer, it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if *what is sought is the exercise of judicial discretion.* [emphasis supplied]

The point that the suit was prematurely instituted because it was not referred to arbitration is in my view a matter which is sought in the exercise of judicial discretion. It cannot therefore properly be taken and decided as a preliminary objection. I will accordingly reject the same and dismiss it.

The next objections i.e. on the *locus standi* of the plaintiff and whether the plaint discloses a cause of action may, I think conveniently be disposed of together as they are interrelated. The argument on the *locus standi* of the Plaintiff is two pronged. The first is that it is not a legal person, and therefore not capable of suing or being sued. In support of that the decision of the Court of Appeal in *African Store Consumer Cooperative Society v. Said Lupinda* (1) where the Court of Appeal quoted with approval a passage from *Fort Hall Bakery Supply Company v. Fredrick Mukai Wangope* (10) was cited. I have had the advantage of reading the two cases. With respect I agree with Mr Nyangarika that those two cases related to unregistered bodies of persons and are thus distinguishable from the present case, where the Plaintiff union is a registered body, under the Trade Union Act Number 10 of 1998. Under section 51(1) of the Act, it is provided:

> A registered trade union may sue, be sued and be prosecuted under its registered name.

Even before the enactment of the current Act the position was also the same under the repealed Trade Union Ordinance as illustrated in the decision of this court in *National Distributors Limited v. National Union of Tanganyika Workers* (11) HCD n. 12.

But to the question whether it can sue on behalf of its members, I will turn later. At this juncture it suffices, if I find as I hereby do that TUICO, as a registered trade union, on which assertion, I find no dispute, is a body that can legally sue or be sued on its own name. To me it matters little whether or not it is a branch.

The second prong on the question of the Plaintiff's *locus standi* is that since the action is based on the Trust Deed it cannot sue on it as it is not a party to it. Two cases were cited to marshall this argument; namely *John Byombalirwa v. Agency Marine International (Tanzania) Ltd* (2), which defines what a cause of action is; and *Tarlock Singh Nayar v. Sterling General Insurance Company Ltd* (3). I have also read the two decisions and I quite agree with what they hold and that they are the correct positions of the law.

In addition to the *Tarlock Singh Nayar* case I have also had the advantage of consulting **Chitty on Contracts – General Principles,(23 ed)** Volume I9 paragraph 978:

> The doctrine of privity means and means only that a stranger cannot acquire rights or incur obligations arising under the contract.

However according to the learned authors, there are exceptions, such as in trusts: At paragraph 984:

> It has long been established that where A makes a promise to B for the benefit of C, C enforce the promise, if B has constituted himself trustee for C ...

This equitable doctrine has, I think, found its way in section 2(1)(d) of the Law of Contract Ordinance Chapter 433 which reads:

> 2(1)(d) When, at the desire of the promises, the promisor or any other person has done or abstained from doing or does or abstains from doing something such act or abstinence or promise is called a consideration for the promise.

In terms of section 10 of the Contract Ordinance such agreements, in my view are enforceable at law.

In the present case, I have looked at the Trust Deed and Regulations for Mbeya Cement Company Group Staff Endowment Assurance Scheme, which is Annexture A of the original plaint, and is in the list of documents to be relied upon by the plaintiff in their Amended Plaint. I have no doubt that the Plaintiffs were not parties to the Trust Deed, which is between *Mbeya Cement Company Ltd* as the employer and

1. The Chairman, Mbeya Cement Company Ltd.
2. General Manager, Mbeya Cement Company Ltd as the trustees.

Going by the illustration given in **Chitty on Contracts**; and section 2(1)(d) the beneficiaries who are employees of the first defendant (C) and trustees as B where the first defendant (Employer) is A, the employees can enforce the promise against A, since C has expressly constituted themselves as trustees for the employees. On the premises I would reject the argument that TUICO could not sue merely because it is a third party. I find and hold that as beneficiaries of the Trust Deed and Group Staff Endowment Scheme the employees could sue to enforce the provisions of the Trust Deed. I will therefore reject the decisions cited by learned counsel for the defendants as being of little relevance to the situation at hand.

Having so held, the next question is, could TUICO sue on behalf of the employees as presented in the present case? To that question, I will now turn.

As I held a registered trade union is capable of suing and being sued on its own name. In *National Union of General and Municipal Workers v. Gillan and others* (12), it was held that a trade union duly registered under the Act, was a lawful body entitled to sue in actions affecting its functions and business as a trade union, in tort. This was followed in *British Motor Trade Association v. Salvadory and others* (13). The two cases were quoted with approval and followed in an Ugandan case of *National Union of Clerical Commercial and Technical Employees v. Drapers Ltd* (14) where Sheridan, J. had occasion to comment on section 13(d) of the Uganda, Trade Union Act, which is in *parimeteria* with section 51(1) of the Trade Union Act Number 10 of 1998; The head note reads:

> **Held:** (i) In principle a Trade Union may sue in its own name for wrongful acts against itself;
>
> (ii) The plaintiff Union had no cause of action on behalf of the employees whether members of the Union or otherwise.

I think, I entirely agree with the above holding, which in effect, is that although the plaintiff union is capable of suing and being sued, it can only do so if the alleged wrongful acts were committed against it. It is for each of the individual employees to sue the defendants for their rights under the Trust Deed and Group Staff Endownment Scheme.

Mr Nyangarika learned counsel referred to the provisions of section 61(a)-(h), of the Security of Employment Act 1964. With due respect I do not see any provision there which expressly empowers a trade union to represent its members in court in a case like the present one. The powers of a trade union to negotiate and sign a voluntary agreement is governed by the Tanzania Industrial Court Act 1967 as amended. It is therefore quite true that as a result of negotiations a Voluntary Agreement may have been reached and the same registered as an award by the Industrial Court. But the fact that the award was registered by the Industrial Court does not give the Trade Union *locus standi* or the right to sue on behalf of its members to enforce

the award. I quite agree with Sheridan J., in the *National Union of Clericals v. Drapers Ltd* that the Trade Union cannot take it upon itself to enforce, an award. On page 66, the learned judge observed:

> In *Robbey v. W.M. Croshil and Company Ltd* (15) It was held that a workman's trade union is entitled to assist him in taking proceedings under the Workman's Compensation Act, 1906, but it may not take proceedings in his name...
>
> This does not detract from the union's right to represent its members in negotiations and in the Industrial Court.

For the foregoing reason, I will hold and find that the Trade Union (TUICO) has (let alone as a branch) no *locus standi* to sue on behalf of employees or ex employees of Mbeya Cement Company Ltd for breach of or enforcement of the Trust Deed and Group Staff Endowment Scheme. The suit is accordingly dismissed with costs.

KEVIN HAULE *v.* REPUBLIC

COURT OF APPEAL OF TANZANIA
AT MBEYA

(Ramadhani, Nsekela and Msoffe, JJ.A.)

CRIMINAL APPEAL No. 44 OF 2004

(From the decision of the High Court of Tanzania at Mbinga, Manento, J., dated 6 November 2003, in Criminal Sessions Case No. 41 of 2002)

Criminal Law – Murder – Defence of provocation – Killing occurring in a quarrel following rude and abusive utterances by the deceased – Whether the accused may be convicted of murder – Section 202 of the Penal Code Chapter 16.