

UMGUZA COMMUNITY SHARE OWNERSHIP TRUST**Versus****OBERT MPOFU
RICHARD MOYO
MOSES SIPHUMA
JONATHAN SIBANDA
REMIGIOUS OMBANI
SEVERELY SIBANDA-MTHOMBENI
SHARON NCUBE
DAVID MOYO
PAUL MASINA
KHOLWANI MBAMBO
VETHI TSHUMA
SHINGIRAYI MAJAWA
FUTURE MHLANGA
UMGUZA RURAL DISTRICT COUNCIL****IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 31 MAY & 7 JUNE 2018****Urgent Chamber Application**

D. Dube for the applicant
B. Sengweni for 1st, 2nd, 6th, 11th, & 12th respondents
S. Chamunorwa for 14th respondent

MAKONESE J: It is an established principle that a Trust is not capable of holding property in its name. It is not in dispute that the trustees hold the property of the Trust on its behalf. In this matter the applicant has chosen to clothe itself with power to represent the Trust. The deponent to the founding affidavit states that he is the chairperson of the Umuza Share Ownership Trust. He further avers that in that capacity he is in charge of all affairs of the Trust. The deponent is not authorized to institute proceedings on behalf of the Trust.

The applicant has brought before this court an urgent application for a *mandament van spolie*, seeking an interim order in the following terms:

“Interim relief

1. The Sheriff of the High Court of Zimbabwe or assistant in Bulawayo be and is hereby directed to take all steps and measures as are legally necessary to cover from the respondents and/or their agents and all those claiming through them the Toyota Hilux single cab registration number ADI 8492, PVC casing, twelve drilling rods, drum compressor, spare wheel, UD truck, five hydraulic pipes, borehole pump and restore the applicant and all those claiming through it into its peaceful and undisturbed possession, control and use of the aforesaid property and in so doing this order shall be his/her warrant.
2. Respondents and their agents and anyone claiming through them are hereby ordered not to interfere with applicant’s use, possession and control of the Toyota Hilux single cab registration number 8492, PVC casing, twelve drilling rods, drum compressor, spare wheel, UD truck, five hydraulic pipes, borehole pump.
3. In the event that the respondents or their agents or those claiming through them failing, neglecting or refusing to comply with this order the Member-In-Charge, Sauerstown Police Station or any of his details or Army Police or Peace Officers in Zimbabwe, be and is hereby ordered to arrest and detain the respondents and as such/or any person aiding the respondents and take them to any court of competent jurisdiction on charges of contempt of court of any such charges for prosecution according to the law ...”

The respondents have raised certain points *in limine*, which is upheld would dispose of this matter. The first point taken is that the matter is not urgent. The facts giving rise to this application for spoliation are set out in paragraphs 17-20 of the founding affidavit. The deponent does not state precisely when the acts complained of took place, save to say that, “a few weeks ago,” a group of unnamed “thugs” numbering about twenty attempted to stop the operations of the applicant.

It is apparent that upon the discovery of the alleged wrongful act, the applicant did not immediately approach the court for relief. The applicant avers that a report was lodged with the police. The deponent does not indicate when such report was made. The legal practitioner who prepared the certificate of urgency does not appear to have addressed his mind to what was alleged to be urgent about the matter. On the facts as set out in the founding affidavit the applicant has not shown that it treated the matter as urgent soon as the facts of the matter became known. See *Kuvarega vs Registrar General & Anor* 1998 (1) ZLR 188 (H).

The court in the exercise of its inherent discretion is not inclined to treat the matter as urgent. This is so because the applicant has not itself treated the matter as urgent. The respondents further allege that the application suffers from a fatal defect in that the applicant is not capable of holding property in its name. In terms of clause 2.5 of the Deed of Trust of the Umguza Community Share Ownership Trust, (the Deed of Trust), it is provided that the Founding Trustees of the Trust hold and administer the Trust Assets in trust upon the terms and condition as set out in the Deed of Trust. The correct view, it would seem is that the Trust acts through the trustees who have the right to institute or defend legal proceedings on behalf of the Trust. The applicant has been wrongly cited as an applicant, and to that end the application suffers a still birth. A trust is not a separate *legal persona*. It acts through the agency of the trustees as provided for in the Deed of Trust. See *Crundall Bros (Pvt) Ltd vs Lazarus NO & Anor* 1990 (1) ZLR 290 (HC); *Gold Mining & Minerals Development Trust vs Zimbabwe Miners' Federation* 2006 (1) ZLR 174 (H).

I should point out and remind legal practitioners to have regard to the provisions of Order 2A, Rule 8 of the High Court Rules, 1971, which provides as follows:

“Subject to this order, associates may sue and be sued in the name of their association.”

An “association” is defined by the Rules to include a trust, or a partnership, a syndicate, a club or any other association of persons which is not a body corporate. The permission granted by the rules to use the name of the association where associates sue or are sued is merely for convenience and does not change the legal status of the association. Rule 8D clearly provides that the provisions of this order should not be construed as affecting the liability or non-liability of the associations for the conduct of their associations or associates. I am satisfied that it ought to be viewed as trite law that a trust is not a juristic person. See also *WLSA & Ors vs Mandaza & Ors* 2003 (1) ZLR 500 (H).

The third and last point *in limine* taken by the respondents in this matter is that the deponent is not authorized to institute proceedings on behalf of the Trust. It is not the prerogative of one person to decide on matters involving the trust. In terms of clause 6 of the

Deed of Trust, the management and control of the trust rests in the trustees. It is further provided in the Deed of Trust that decisions of the trustees shall be taken by the majority vote of the trustees. To the extent that the respondent believes that he is in control of the Trust and that he can proceed without the resolution of the Trustees, the application is not properly before the court.

For the foregoing reasons, there is merit in the points in limine that have been raised on behalf of the respondents. The application is not properly before the court. In the circumstances I would uphold the preliminary points and make the following order.

“The application be and is hereby dismissed with costs,”

Mathonsi Ncube Law Chambers, applicant’s legal practitioners
Sengweni Legal Practice, 1st, 2nd, 6th, 11th & 12th respondents’ legal practitioners
Calderwood, Bryce Hendrie & Partners, 14th respondent’s legal practitioners