THE TRUSTEES OF THE MAKOMO E
CHIMANIMANI SHARE OWNERSHIP
COMMUNITY TRUST
versus
THE MINISTER OF LANDS AND RURAL
RESETTLEMENT
and
BORDER TIMBERS LIMITED
(Under Judicial Management)

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 7 June 2016 and 22 September 2016

Opposed Matter

L. Uriri, for the applicant
Ms *C. Garise-Nheta,* for the 1st respondent
S. Hashiti, for the 2nd respondent

MUNANGATI-MANONGWA J: The new Zimbabwean Constitution Amendment (20) Act, 2013 has ushered in some rights and freedoms which the previous Constitution did not provide. Individuals and entities have embraced the new Constitution eagerly and are approaching the courts seeking to assert these new rights. Such, characterizes this case.

THE FACTS

In this application the applicant seeks a declaration of aboriginal people's rights in land, including but not limited to the right of usufruct, in terms of ss 71 and 72 as read with s 85 of the Constitution of Zimbabwe. The applicant also seeks a declaration that their rights in terms of s 74 of the constitution not to be evicted from their homes or have their homes demolished without an order of court after considering all the relevant circumstances, have been violated. The applicant alleges that they represent people who prior to the colonial period enjoyed ownership and use of the territory that became known as "Tilbury Estate". This Estate together with Cambridge Estate and five other tenements situate in Chimanimani district were owned by the

second respondent before being compulsorily acquired by the government of Zimbabwe in 2005. Applicant alleges that the aboriginal people of Chimanimani have maintained a presence in the area through continuous occupation over hundreds of years and believe has rights to the land and territory of their ancestors which rights they seek to reassert. The applicant relates its claim to provisions of s 72 of the constitution which provides in s 72 (7) (c) that the compulsory acquisition of land for the resettlement of people in accordance with land reform must be conducted in such a manner as to ensure that the people of Zimbabwe are enabled to reassert their rights and regain ownership of their land. It is applicant's case that whilst ownership of agricultural land vests in the State, ordinary persons are not precluded from exercising their rights to habitation, use and the fruits of the land in question.

The application is opposed by both respondents. The first respondent's opposition is based on the fact that: whilst the land in issue was formerly owned by the second respondent there exists a Bilateral Investment Protection Promotion Agreement (BIPPA) that was entered into between the state and the Germany Republic. In terms of the aforesaid protection agreement, the state can only retake the land in exchange for prompt and adequate compensation. It further alleges that there is already a legal suit between the state and the second respondent whereby the state is bound to pay huge amounts of compensation if it does not return to the second respondent the land it formerly owned, which the state acquired through land redistribution. As the state does not have the resources to compensate the second respondent, it has resolved not to resettle anyone on that land until it has financial resources to meet its obligations. I hasten to add that at the hearing no submissions were made by the first respondent's representative, she being content to abide by the court's findings.

The second respondent has in its opposition raised several points *in limine,* sought that the application be dismissed on that basis, and further asked for an order for costs on a higher scale against the deponents to the applicant's affidavits *de bonis propriis* or their respective legal practitioners, each paying, the other to be absolved. The following were the points *in limine* raised:

a) Failure to seek leave of the High Court to sue or issue process
b) Fatal Misjoinder by failure to cite the judicial manager
c) Lack *of locus standi* on the part of the applicant

d) Absence of authority by the deponent of the founding affidavit
e) Coming to court with dirty hands for failure to comply with a Magisterial court order
f) Prescription
g) Material disputes of fact characterizing the application
h) Res judicata

I find it practical to deal with the points raised *in limine* in an order which makes practical legal sense in so far as the impact or repercussion of each point has on the proceedings. To demonstrate this point, failure to seek leave of court cannot precede the issues of *locus standi* and misjoinder. The court has to be certain from the onset that there indeed are parties or litigants before it, before it can consider the matter.

Lack of locus Standi and Absence of authority on the part of the Applicant

Going by the second respondent's opposing affidavit, Mr *Hashiti* for the second respondent submitted that the applicant had no *locus standi* to bring this application. He questioned the legality of the applicant representing the Ngorima people and various historical tribes and clans including the Chinyai and Gadyadza communities and the Marange Apostolic sect who were said to have been co-opted into the Masengedza Gadyadza community. All these people had been placed in a group referred as Chimanimani aborigines. Mr *Hashiti* argued that the applicant had not established a basis upon which it purports to represent these communities. He argued that whilst the law allows representative proceedings there is a manner in which that can be actuated.

Mr *Hashiti* further argued that the applicant lacked authority to represent the purported aborigines in that they had to show that the classes of people they purport to represent had authorized them to act in their stead, and identify with them and share a common cause. He argued that there was no proof that the Marange sect people associated with them and shared common cause.

The authority of the deponent of the founding affidavit Phineas Zamani Ngorima also came under scrutiny. Mr *Hashiti* argued that the deponent had not established that he had

authority to engage in the proceedings. He submitted that there was an attempt to file a resolution of the trustees through the answering affidavit. To that end an application stands or falls on its founding affidavit, this affidavit was therefore not before the court. Further the extract of the minutes only allowed the deponent to represent the Trust in the case with the government and not the second respondent. Further there is no evidence placed before the court on whether the deed of Trust allows the trust to sue and be sued.

In response, Mr *Uriri* for the applicant submitted that the applicant had established the trustees' authority and basis to sue as borne by the founding affidavit. Reference was made to the following statement in the applicant's affidavit:

> "The Applicants are the trustees of the Makomo E Chimanimani Share Ownership Community Trust which trust was set up to further the interests of the aboriginal people of the Chimanimani area falling under the Ngorima Chieftaincy consisting of the Jiho Clan; and the Muusha Chieftaincy comprising the Nyaruwa Clan, Chinyani Clan and Gadyadza Clan.
>
> This application is therefore for and on behalf of the indigenous people of Chimanimani on and about the five tenements previously owned by 1st respondent".

Mr *Uriri* further pointed to the averment in the founding affidavit that the Marange Apostolic sect migrant families had been co-opted into the Masengedzero-Gadyadza community which aspect was not challenged. He further argued that apart from the above quoted clear averment, this is a constitutional application which is based on the constitution in terms of s 85 (1). He argued that whether it is brought under s 85 (1) (a), (c) or (d) the applicant still has *locus standi* to bring the application. Of note this section provides as follows:

> **"85 Enforcement of fundamental human rights and freedoms**
>
> (1) Any of the following persons, namely—
> (*a*) any person acting in their own interests;
> (*b*) any person acting on behalf of another person who cannot act for themselves;
> (*c*) any person acting as a member, or in the interests, of a group or class of persons;
> (*d*) any person acting in the public interest;
> (*e*) any association acting in the interests of its members;
> is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation."

I find merit in Mr *Uriri*'s argument that the Trustees had *locus standi* in bringing this application. It is clearly established that the objective of the creation of the trust was to further

the interests of the aboriginal people of the Chimanimani area falling under the Ngorima Chieftaincy consisting of the Jiho Clan; and the Muusha Chieftaincy comprising the Nyaruwa Clan, Chinyani Clan and Gadyadza Clan. If that is the position it will not make legal sense to say that the Trust is unable to do that which it was created to achieve. The application seeks to protect the aboriginal people of Chimanimani's constitutional rights in terms of ss 71, 72 (7) (c) and 74 and this certainly falls within the objectives of the trust. Whether that is achieved or not is besides the point, but certainly the application is within the mandate of the trustees.

I further identify with Mr *Uriri*'s argument on the applicant's *locus standi* as arising from s 85 of the Constitution. The Constitution has widened the group of persons who can take action where there are allegations of infringement of constitutional rights or a threat thereto. The provisions of section 85 are very clear, anyone can literary and practically take action "in their own interest, on behalf of another person who cannot act for themselves, in the public interest, etc." as long as the issue pertains to constitutional rights. The case at hand is of such nature, hence apart from the applicant's *locus standi* arising from the Trust's objectives it also emanates from a right conferred by the constitution. Suffice to say that Order 2A rules 7 and 8 of the High Court Rules (1971) allow Trustees to sue and be sued in the name of the Trust.

On whether the deponent had authority to aver to the affidavit, Mr *Uriri* submitted that the deposition to the statement that "I am a trustee of Makomo e Chimanimani Share Ownership Community Trust and am duly authorized by the applicant to depose to this affidavit on behalf of the applicants" is sufficient. There is no legal requirement to attach resolutions to prove authority. I agree with Mr *Uriri*. That statement in itself established the deponent's authority; in any case the applicants went on to then produce a resolution. It is worth noting that in *Willoughby's Investments (Private) Limited* v *Peruke Investments (Private) Ltd & Anor* HH 178/14 ZHOU J in dealing with the issue of authority made a finding that a deponent is qualified to swear to an affidavit as long as he or she has knowledge of the facts and can swear to those facts. He does not need authority to do that and this is provided in Order 32 r 227 (4) of the High Court Rules. It is the institution of the proceedings and the prosecution thereof which must be authorized. Further, the fact that the resolution of the Trustees dated 26th July 2015 did not mention the second respondent is neither here nor there because as already stated the averment referring to authority is sufficient and also, the resolution clearly states as follows:

> "That the Chairman of the Trust Acting Chief Ngorima be appointed as our formal representative in our case with the government in the High Court or Supreme Court or Constitutional Court for the protection of our rights as indigenous people of Chimanimani.
>
> Acting Chief Pheneas Ngorima is therefore hereby mandated and authorized to sign and execute on behalf of the Trust all necessary documents……and to present our case to court as may be necessary for the protection of our rights."

There was no need to specifically mention the second respondent, the person to act on behalf of the trust is to present the case as may be necessary and to me that includes citing the necessary parties and the second respondent was cited as an interested party to enable the realization of the protection of the beneficiaries' rights,

Finally on this point, I could not agree with Mr *Uriri* better. A trust has no personality apart from the trustees. It expresses itself through trustees. See *Crundal Bros (Pvt) Ltd* v *Lazarus NO & Anor* 1990 (1) ZLR 290 at 298 E. See also *Nyasha Puza Siyabora Zhou And 4 Ors* v *The Trustee Of Tomorrow Today Yesterday Trust & Anor* HC 402/15 at p 4 of the cyclostyled judgment MATHONSI J stated as follows:

> "In any event, it is trite that a trust is not a juristic person. See Honore's *South African Law of Trusts*, ed 5 at p 49. Clearly therefore it being composed of natural persons and not having corporate personality, it cannot appear as a party to an action."

I find Mr *Hashiti*'s argument that there is no mention whether the deed allows the trust to sue or be sued to be rather ridiculous. Apart from my immediate sentiments on how a Trust expresses itself, the averment by the trustee coupled with the resolution and the objects of the Trust as gleaned from what is before the court proves beyond doubt that the applicant is properly before the court. Given all the above I find that the applicant has *locus standi* and the deponent to the founding affidavit had requisite authority, in that regard the combined points *in limine* on that aspect are dismissed as having no merit.

Misjoinder: failure to cite the judicial manager

The applicant being rightly positioned it begs issue whether the second respondent is properly before the court. Is there a second respondent? Is that second respondent properly cited lest the court proceeds when there is no party before it.

Mr *Hashiti* called the failure to cite the judicial manager a "fatal misjoinder." He submitted that the judicial manager is the substantive representative of the company. Applicant

proceeded against a company suffering disability and exempt by operation of law from suit. That in itself was fatal and the application should be dismissed on that basis. The company itself cannot be sued but can through the judicial manager.

Unfortunately Mr *Uriri* must have missed addressing the court on this aspect but I have had recourse to the applicant's answering affidavit which addressed this point. The applicant averred therein that there is no obligation to join a judicial manager separately from the company itself just as one is not compelled to join a company's directors in the absence of a personal claim against them. Consequently, applicant argued, citation of the second respondent as a party is enough for the purposes of the present application. I agree with the assertion that citation of the second respondent is enough moreso when couched as follows: "Border Timbers Limited (Under Judicial Management)." This citation is appropriate, the company's legal status is mentioned and where such is the status, it is trite that the person to spring into action is the judicial manager. He needs not be cited, it follows by virtue of the disability which the company is under (which the citation has pointed to) and by virtue of the position he occupies that it is his duty to act whether to defend proceedings or to accede thereto. The purported fatal misjoinder is therefore nonexistent hence that point *in limine* is dismissed.

Having concluded that the parties are competent litigants clothed with the necessary *locus standi,* the next important question is whether they are properly standing before the court. Can they be heard? Have the parties complied with the etiquette so required by the courts when coming before it. This leads to the next point raised *in limine* by the second respondent;

Failure to seek leave of the High Court to sue or issue process

Mr *Hashiti* argued on behalf of the second respondent that the second respondent being under judicial management, the applicant should have sought leave of court before dragging the second respondent to court. It is common cause that the second respondent is under a legal disability which fact the applicants even acknowledge in their founding affidavit when they state that this respondent is under judicial management. There is a specific order of this court granted by MAKONI J to the following effect:

> "All actions and applications and the execution of all writs, summons and other processes against the applicant shall be stayed and not proceeded with without leave of this court".

The second respondent made sure that it provided a copy of the order to the applicant when it filed its opposing affidavit. Despite this, applicant took no heed and in their answering affidavit applicant seem defiant. Mr *Uriri* for the applicant argued that the provision relates to winding up of a company and not to judicial management. I do not think that this was the forum to advance such an argument because there is an order already which prescribes the route to be followed in bringing the second respondent to court. That order remains extant and binding. That applicant brought proceedings against the second respondent without obtaining leave of court is fatal. That action is in total defiance of a specific order which is clearly peremptory and that cannot be condoned. Deliberately disregarding a valid court order is an unforgivable legal sin which no amount of pleading can purge, it has fatal consequences, it spells doom to the application. Court orders are meant to be respected and especially so when leave to proceed against a party has to be sought. The essence of such orders where entities are placed under judicial management is to seek to protect the assets, interests and rights of a party during the period when it is trying to recover and is under a legal disability. It is meant to ensure that only appropriate proceedings are allowed, those which will not render the judicial management process abortive or helpless. Thus when so ordered, leave must be sought as such process is important to filter the claims or proceedings which the court considers appropriate to be brought against an entity suffering a legal disability as *in casu*.

In the result the point *in limine* is upheld and the application is dismissed.

I am quiet alive to the fact that the second respondent had raised a number of points *in limine* among them prescription, res judicata, material disputes of fact and so on. I have decided not to delve into them as the application failed the preliminary hurdle of satisfying the court that the parties were properly before it and hence having a right to be heard. To then proceed to determine the rest of the points would in essence be a futile exercise given the decision already arrived at.

As for costs, the second respondent applied for costs on a higher scale *de bonis propriis* as against the deponents of applicant's affidavits and or the legal practitioners concerned. Mr *Hashiti* argued that the second respondent has been dragged to court on numerous occasions by

persons purporting to act in one form or the other. He even cited a matter HC 6156/14 in which a matter raised under HC 4857/13 was dismissed for want of prosecution. Suffice to state that the parties in that matter involved one Dennies Mwanditani as applicant and Border Timbers Limited, Heinric h von Pezold and The Messenger of Court Chipinge and others. He further referred to court orders from the Magistrates Court. As Mr *Uriri* correctly pointed out, none of these cases involved the applicant hence the applicant cannot be penalized for litigation which he was not party to. Mr *Uriri* argued that these proceedings were not entirely frivolous and vexatious neither were they brought to court without hope for relief hence the order for costs sought by the applicant is not competent. He further submitted that applicant had brought a fundamental issue in terms of the constitution and need not be censured for that. I agree with Mr *Uriri.*

In my view the current constitution bestores more rights to the people some of which are quite fundamental in nature as compared to the previous constitution. The relief the applicants were seeking relates to land, no doubt a very important resource, moreso when traced down heritage lines dating back a hundred years. This being a constitutional issue of considerable importance to applicant, I am of the view that approaching court was not vexatious. However what militates against the applicant is the fact that in seeking to prosecute their perceived rights they failed to follow proper procedure which was to obtain the necessary leave before dragging the second respondent to court. The deponents to the affidavits would not be privy to the route to be followed. It was incumbent upon their legal practitioners to advise and act accordingly they being the experts trained in the intricacies of the law. To then order the deponents to the applicant's affidavits to pay costs on a higher scale and *de bonis propriis* would be an injustice. Sight should not be lost that the court has also dismissed the points raised by the second respondent on *locus standi* and absence of authority. Due regard being made to the aforegoing the following order is made:

1. The application be and is hereby dismissed.
2. The applicant shall pay 60% of the 2nd Respondent's costs on an attorney client scale
3. The applicant's lawyers shall not recover any fees for this application

Hussein, Ranchhod & Co, applicant's legal practitioners
Civil Division of the Attorney General's Office, 1st respondent's legal practitioners
Wintertons, 2nd respondent's legal practitioners