

GOLD MINING AND MINERALS
DEVELOPMENT TRUST
versus
ZIMBABWE MINERS FEDERATION

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE, 6 July and 15 December 2005 and 22 February 2006

Unopposed Application

MAKARAU J: The above matter came before me on the unopposed roll. I raised certain issues with the plaintiff's legal practitioners and requested for a supplementary affidavit and heads of argument to be filed in the matter. This has since been done.

The plaintiff is a trust, whose trustees at the time of the institution of the above action were given in the declaration. The nature of the trust and whether it is a non-profit making trust were not disclosed in the papers before me. I also overlooked directing the plaintiff to deal with this issue in its supplementary papers.

On 11 November 2003, a letter was written to Chief Executive Officer of the national Broadcasting Corporation. In the letter were certain words defamatory of the Cold Mining and Minerals Development Trust. The letter was read out on air by one of the national broadcasters. Incensed by the publication of the defamatory words, the plaintiff issued summons out of this court claiming damages in the sum of \$10 million.

The action was undefended.

When the matter was called up, I raised two issues with the plaintiff's legal practitioners. Firstly, I inquired as to who in particular had penned the offensive letter on behalf of the defendant. Secondly, I raised the legal issue of whether the plaintiff as a trust has a legal persona that can be defamed.

Regarding the first issue, it has been submitted in a supplementary affidavit that the offending letter was on the letterhead of the defendant but was not signed. It was further averred that since the letter was on the letterhead of the defendant, it clearly originated from that office. I am not persuaded that the unsigned letter on the defendant's letterhead constitutes sufficient evidence upon which the defendant can be held liable for the defamatory words in the letter. It is common cause that the defendant is a *universitatis*

with a corpus and a structure. For any valid acts to be performed by the defendant, it is trite that such acts must be by an authorized official of the defendant. An unsigned letter presents us with insurmountable challenges regarding authority and the binding nature of the act.

On the above basis alone I would dismiss the plaintiff's claim.

The second issue that I directed the plaintiff's legal practitioners to address me on has exercised my mind to some extent and even though I can dispose of the application for default judgment on the basis of insufficient evidence as detailed above, I wish to make brief remarks on the second issue. It is whether the plaintiff, as a trust can be defamed or whether the damages claimed are due to the trustees of the plaintiff whose names were given in the declaration.

In *Matebeleland Zambezi Water Development Trust v Zimbabwe Newspapers (1980) Ltd and Another*¹, MALABA J (as he then was), made passing reference to the plaintiff in that matter, a trust, as not seeking to sue the defendants in defamation. Without debating the issue as it was not before him, the learned judge referred to the defamation suit in the nature of restating the plaintiff's claim. These are his words at page 15:

"In the founding affidavit deposed to by the secretary to the board of Trustees, MZWT accused the respondent of injuring its reputation. It averred, however that it had no intention of bringing action for defamation against the respondents. It said it required the information in the possession of the defendants for the purposes of deciding whether or not to set up an independent investigation into the allegations of fraud and corruption contained in the articles they had published."

Thus, in my view, the above case, the only one I have managed to come across in this jurisdiction mentioning a trust and a possible defamation suit, cannot be used as authority for the position that a defamation suit is competent at the instance of a trust.

It is trite that at law, a trust is not a juristic person. The author Honore in *The South African Law of Trusts 3rd Ed* defines a trust in the first Chapter of his text. He gives the wide meaning of the term as:

¹ 2002(1) ZLR 12 (H)

“any legal arrangement by which one person is to administer property, whether as an officer holder or not, for another or for some impersonal object.”

The author then proceeds to refer to some cases in which the term was defined in this wide sense. In the narrow sense, “trust” exists when the creator of the trust hands over or is bound to hand over the control of an asset which, is to be administered by another for the benefit of some person other than the trustee or for some impersonal object.

It appears to me clearly that in either sense, the author views a “trust” as a legal relationship and not as a separate legal entity as a corporation or universitatis even though the trustees may together form a board akin to a board of a company or of a voluntary association.

The view by Professor Honore above was accepted by the South African Law Development Commission in its report on the review of the law of trusts of June 1987 as the correct position at law and as the position confirmed by the South African Appellate Division. In view of the accepted position that a trust is not a legal persona, the Commission desisted from recommending that a trust be clothed with legal personality by way of legislation.

Also commenting in the 1985 Modern Business Law, Dr D.S Ribbens, on the Topic “The Hague Convention on the law applicable to trusts and on their recognition” remarked that:

“In truth a trust is as much a legal person as a mere sum of money standing to the credit of a ledger account in some bank. To imagine otherwise is, in the opinion of this commentator, to rave with the mob about the unattired Royal’s magnificent attire. In essence a trust is a set of legal relationships. Viewed from the point of view of the relationship between the trust property and the trustees, it is a proprietary relationship; and viewed from the relationship between the cestui que trust or trust beneficiary and the trustee, it is a vertical fiduciary relationship”.

Again the authors Elliot and Banwell in their book, *The South African Notary* 5th Ed, at page 79 write that a trust is not a separate legal persona capable of rights and duties as an individual or legal persona. I must confess with respect that reference to the case the authors cite in support of this statement has not satisfied me that this case is actually

authority for the position. Despite this, I am in agreement with the authors on their statement that a trust is not a legal persona.

It is trite that defamation is the law that seeks to redress injury to personality. It therefore relates to persons with consciousness and feelings that can be outraged in the first place and in the second, it has been extended to apply to corporations and some non-profit organizations that have a reputation to protect. Thus trading corporations and *universitatis* such as universities have been held to possess such reputations that the law can protect.

The issue that falls for determination in this suit is whether the delict can be extended to such non-legal persons as trusts. I have searched and find no authority where the delict has been so extended. Plaintiff's legal practitioners have not referred me to any.

In my view, our law of trust has not sufficiently grown to recognize a limited separate personality of the trust even though some of them operate more or less on the same lines as a voluntary organization of incorporated company. In such cases, the trust has evolved a personality of sorts that appears separate from the personality of the trustees. An example of such is afforded by the Matebeleand Zambezi Water Trust that appeared before MALABA J in the case cited above. Such a trust is to be contrasted from a trust set up in terms of a will for instance which is clearly a set of relationships as described by Dr D.S Ribbens. There is therefore need for the law to develop and take into account the emergence of a new structure that is a trust that operates as if it is a *universitatis* or a body corporate.

As the law currently stands, a trust is not a legal person and therefore cannot be defamed. The trustees themselves retain the capacity to sue for damages for their injured *fama* collectively or individually.

In casu, I accept that in terms of the rules of this court, trustees may issue out process in the name of the trust.² 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 the order should not be construed as affecting the liability or the non-liability of the

² Order 2A rule 8 of the High Court Rules 1971.

associations for the conduct of their associations or associates. Thus the liability of the defendant is to be tested in terms of the accepted principles of the delict of defamation and the legal characterization of trusts.

In the result, I make the following order:

1. The plaintiff's claim is dismissed.
2. There shall be no order as to costs.

Chihambakwe Mutizwa & Associates, plaintiff's legal practitioners.