THE TRUSTEES OF THE LEONARD CHESHIRE
HOMES ZIMBABWE CENTRAL TRUST
versus
ROBERT CHIITE
and
TOGAREPI CHIMBARANGA
and
ARTMORE DEMBEZEKE
and
LEWIS GARABA
and
BARBRA KATONHA
and
RUDO MAPHOSA
and
JUNIOR MAVHIYAGUDO
and
MAJECHA TAPFUMANEYI

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 19 and 20 February, 13 March, 27, 29 and 30 May 2008, 24, 25 and 26 February, 11 March, 7 and 21 September, 28 and 29 October 2009, 15 and 16 February, 2 and 5 March, 6 and 7 April, 10 and 11 May, 2 September, and 15 December 2010.

Civil Trial

T Magwaliba, for the Plaintiff
D Metha, for the Defendants from 19 February 2008 to 11 March 2009.
Mr *Mapanzure,* for the Defendants from 21 September to 29 October 2009.
Defendants in person, from 15 February to 5 March 2010.
L Chimuriwo, for the Defendants from 6 April to 15 December 2010.

UCHENA J: The plaintiffs are trustees of the Leonard Cheshire Homes Trust, a trust established in terms of the trust laws of Zimbabwe. The Trust was established in 1981. The trustees, were appointed at different stages, as will be clarified in the judgment. The main objective of the trust as provided in clause 3 (i) (a) of the Deed of Trust is,

> (a) "To provide Homes with the necessary facilities and staff for the care of permanently disabled people, irrespective of race or creed. The Homes shall be a place of shelter physically and a place of encouragement spiritually, a place in which residents and staff can acquire a sense of belonging and of ownership by contributing in any way within their capabilities to its functioning and development, a place to share with others and from which to help others less

> fortunate; a place in which to gain confidence and develop independence and interests; a place of hopeful endeavor and not of passive disinterest. Persons admitted to the Homes must be able either to contribute to or benefit from the life of the Homes and must not suffer from infectious disease".

The 8 defendants are beneficiaries of the trust. They were admitted and housed at Masterson Cheshire Home situated at No 85 Baines Avenue in Harare. They have been residents of this home for considerable periods, most of them having been admitted into the home from the early to the late 1990s.

The trustees served them with notices requiring them to vacate the home by a date specified in the notices. They challenged the ejectment, leading to a protracted trial which raged on for close to three years. The defendants are permanently disabled, with varying degrees of disabilities. Some have difficulties in speaking because of their disabilities. Most of them are wheel chair bound. They have difficulties in moving about. Their wheel chairs enable them to move about, but that mobility needs the assistance of rumps to enable them to access buildings. During the trial we could only use courts in the ground floor and in the eastern part of the High Court, where they could access the court in their wheel chairs, through a particular door. Their trial could not be held in any other courtrooms. Whenever the user-friendly courts were not available the trial had to be postponed. Most of them are of negligible to limited financial means. Two of them seem to be of reasonable to substantial means. On several occasions the trial had to be postponed because they could not raise legal fees and their legal practitioners, had renounced agency. They at some stages of the trial had to represent themselves. The wheels of justice had to grind at their pace, to afford them a fair hearing.

The notices to vacate were preceded by the deterioration of relations between the trustees and the defendants. The relationship deteriorated, to the extent that the trustees abandoned most of their responsibilities at Masterson Home, and the defendants would on the other hand deny the plaintiffs access to the home. The situation became desperate leading the defendants to rent out parts of the home to raise funds for their own sustenance, and the payment of rates, water and electricity bills for the home. The Home's employees who should have been assisting the defendants were no longer available. The home was clearly not being run as was expected in terms of clause 3 (i) (a) of the Deed of Trust. The trustees had abandoned their responsibilities, and lost control, of the home, while the defendants had exceeded, the bounds of the terms on which they were admitted into the home.

The defendants' main and arguable defence to the plaintiff's claim for their eviction was that they had been admitted into the home with a promise from the trustees that they would stay in the home for life or for as long as they wanted. During the trial a new defence arouse from the evidence of Mr Chikwanha who had been a trustee of Leonard Cheshire Homes since the early eighties. He while testifying revealed that he had been a trustee for more than the five years provided for in s 5 (c) of the Deed of Trust which provides as follows;

> "A trustee shall serve for a term of five years unless he sooner becomes unfit or unwilling to serve or is removed, In the event that for reasons, set out above, any trustee does not serve for a term of five years, then the Leonard Cheshire Homes Zimbabwe shall appoint a trustee by majority decision to serve the remainder of the term of the former trustee who left office under this section".

In the event of a trustee having served his five year term as Mr Chikwanha had done, the procedure laid down in s 5 (b) had to be followed in appointing another trustee. Section 5 (b) provides as follows;

> "Other than the founding trustee Athony Alven Uphill- Brown the remaining trustees shall be nominated and appointed by a majority decision of The Leonard Cheshire Homes Zimbabwe".

The point of law

The revelation of Mr Chikwanha's over staying as a trustee, attracted Mr *Metha*'s attention and he sought to cross-examine him on that issue. Mr *Magwaliba* objected on the ground that that defence had not been raised in the defendant's plea.. I overruled him holding that a point of law can be raised at any time during the proceedings and even on appeal. Mr *Metha* cross examined Mr Chikwanha and other wittiness's for the plaintiff on this issue revealing that not only Mr Chikwana had over stayed as a trustee. I assumed Mr *Magwaliba* had accepted my over ruling him as it is trite that a point of law can be raised at any time during the trial and can be raised by the court *mero motu*. I assumed wrongly as he raised the issue again in his closing address. The issue must therefore be addressed in detail.

Apart from Mr Chikwanha admitting in his evidence in chief that he had over stayed as a trustee this fact was unknown to the defendants. The defendants in their evidence said this was picked by their legal Practitioner when he read the Deed of Trust. In my view the over staying of trustees is a point of law which goes to the root of the case. Assuming, that all trustees of the plaintiff, had over stayed and they while thus incapacited resolved to evict the defendants their resolution would be invalid as they where at the time of making it not validly

appointed trustees. They may also have no *locus standi* in *judicio* to prosecute the claim for eviction. These being points of law which go to the root of the case in that the resolution to evict may be a nullity, and plaintiff's may have no locus standi to prosecute this case, I am satisfied that I was entitled to over rule Mr *Magwaliba*'s objection. I find support for my decision in the cases; of *Zambezi Proteins (Pvt) Ltd & Others v Minister Of Environment & Tourism & Anor* 1996 ZLR378 (HC) at p 391 B-C, *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (SC), *Nissan Zimbabwe (Pvt) Ltd v Hopitt (Pvt) Ltd* 1997 (1) ZLR 569 (SC), *Zesa v Bopoto* 1997 (1) ZLR 126 (SC) and *Barker McCormac (Pvt) Ltd v Goverment of Kenya* 1983 (1) ZLR 137 (HC).

In *Zambezi Proteins (Pvt) Ltd & Others v Minister Of Environment & Tourism & Anor* 1996 ZLR378 (HC) at p 391 B-C GARWE J (as he then was) said,

> "I accept that a point of law, which goes to the root of the matter may be raised at any time, even for the first time on appeal if its consideration involves no unfairness to the party against whom it is directed: *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S). But this is not the position in this matter."

He did not rely on that procedure because the point of law had been raised during argument. In this case it was raised during the cross examination of the plaintiff's first wittiness. Its being raised at that stage would not be unfair to the plaintiff which could re-examine its first wittiness on that issue and would lead its other wittiness's on it in chief.

In *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (SC), the Supreme Court held that, it was proper to raise a point of law, which went to the root of the matter, at any time, even for the first time on appeal, if its consideration involved no unfairness to the party against whom it was directed. If the order was void *ab initio*, it was void at all times and for all purposes and the question of its validity could be raised at any time. The appellant's willful disobedience to an unlawful order gave the respondent no right to dismiss him. KORSHA JA at p 157 A-C said,

> "Provided it is not one which is required by a definitive law to be specially pleaded, a point of law, which goes to the root of the matter, may be raised at any time, even for the first time on appeal, if its consideration involves no unfairness to the party against whom it is directed: *Morobane v Bateman* 1918 AD 460; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23D-G.
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> If the order was void *ab initio* it was void at all times and for all purposes. It does not matter when and by whom the issue of its validity is raised; nothing can depend on it. As Lord Denning MR so exquisitely put it in *MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169 at 1172I:

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad ... And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

In this case the issue of the validity of the plaintiff's resolution to evict the defendants arose in circumstances which could not cause unfairness to the plaintiff. It would have been wrong for the court to ignore the legal issue and pursue the trial on the pleaded issues. I was satisfied that no definitive law requires the issue of the validity of the plaintiff's resolution to be specially pleaded.

In *Nissan Zimbabwe (Pvt) Ltd v Hopitt (Pvt) Ltd* 1997 (1) ZLR 569 (SC), at 572 C-E KORSHA JA again dealing with the issue of the raising of a point of law at any stage of a trial said;

> "See also *Cole v Govt of the Union of South Africa* 1910 AD 263 per INNES J at pp 272-3, cited with approval by JANSEN JA in *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23D-H. And I most respectfully agree with the observation of Jansen JA at p 24B of the report that -
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> > "If for example, the parties were to overlook a question of law arising from the facts agreed upon, a question fundamental to the issues they have discussed and stated, the court could hardly be bound to ignore the fundamental problem and only decide the secondary and dependent issues actually mentioned in the special case. This would be a fruitless exercise, divorced from reality, and may lead to a wrong decision."

In this case as already said the raising of the issue of the validity of the trustees' appointments was crucial to the determination of this case. Proceeding without resolving the validity of the plaintiff's resolution would have been a "fruitless exercise divorced from reality", and would "lead to a wrong decision.

Proceeding without dealing with this issue would have been the adoption of a supine approach referred to in Barker McCormac (Pvt) Ltd (supra). If the defendants' counsel had not raised the issue this was an appropriate case for the court to raise it *mero motu.*

In *Zesa v Bopoto* 1997 (1) ZLR 126 (SC) at p 127 KORSAH JA, said;

> "Failure to comply with the provisions of the Regulations amounts to an irregularity which is a point of law that can be raised at any time. It seems that to raise a point of law for the first time on appeal:
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> > "... it is sufficient to show that the point of law which is the subject of appeal has been brought before the judge's mind. Whether this, is effected by argument or observation of the advocate, or whether the judge's own mind originated the point, makes no difference, so long as the point was before his mind in the case under appeal":
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> per AVORY J in *Kimpson v Markham* [1921] 2 KB 157 at 16 1"

In this case failure to comply with the terms of trusteeship by the plaintiff's trustees is a point of law which must be resolved, before going into the merits of the dispute between the parties.

Validity, of the resolution, to evict and plaintiff's locus standi.

As already stated the Deed of Trust provides for five year terms of office for its trustees. If a trustee exceeds his term of office he can not make valid decisions for the trust. It is common cause, that Mr Chikwanha who was a trustee and chairman for many years, had exceeded his mandate in two respects for the periods he was the trust's chairman. Section 7 (a) of the Deed of trust provides as follows;

> (a) "The Board of Trustees shall at their first meeting elect a Chairperson who shall hold office for one calendar year. At the end of that first calendar year from the date of creation of the Trust and at the end of each calendar year thereafter, the Board of Trustees shall at the first meeting in that year similarly elect a Chairperson for that year".

In terms of s 7 (c) of the Deed of Trust the decision of the trustees shall be by simple majority, and where there is an equal number of Trustees, the Chairman of the Board of Trustees shall have a casting vote.

This means Mr Chikwanha could where there was a simple majority have cast one invalid vote but where there was equality of numbers, he cast two invalid votes. This has to be considered through out the period the eviction of the defendants was discussed and resolved.

The first decision requiring the defendants to leave the Home was made at the meeting of 30 November 1999, were it was recorded that;

> "The Trustees were unanimously agreed that it was essential that the Home be closed to enable it to make a fresh beginning".

This was preceded by a general discussion where it was "stressed that there were residents at Masterson who should move on as they had obviously been adequately rehabilitated. It was agreed that it was necessary to have each resident assessed medically and a planned rehabilitation program installed".

The Trustees, who, attended this meeting, where Messers Chikwanha (Chairman), G Mills, C. Gomwe, A Hungwe. and C. Dengedza. As they unanimously agreed on the closure of the Home, there was no need for Mr Chikwanha to use his then invalid casting vote. I say his vote and casting vote was invalid because according to Exhibit 3 minutes of the Trustees

meeting held on 10 March 1983, Mr Chikwanha was already a Trustee. Assuming his term started at that meeting it must have expired by 10 March 1988. He could therefore without being re-elected, not have been a validly appointed trustee or chairman by 10 March 1999. Mr Chikwanha conceded the invalidity of his holding office after his five year term.

Mr G Mills' tenure was not properly ventilated. Under cross examination Mr Chikwanha said he does not know when it was suggested he had been a trustee since1980. The onus to prove the validity of his participation in 1999 was on the plaintiff. I therefore hold that he too can not be said to have validly participated in the decision made on 10 March 1999.

Mr C Gomwe according to the minutes of 12 March 1998, became a Trustee from 12 March 1998. Subject to the validity of his appointment he was therefore within his term when the decision to close the Home was made on 10 March 1999.

Mr A Hungwe in his evidence told the court that he became a trustee in 1998, and that his five year term expired in 2002. His evidence on this aspect was not challenged. He was therefore a validly appointed trustee when the decision to close the home was made on 10 March 1999.

Mr Chikwanha told the court that Mr Dengedza had not over stayed when the meeting of 10 March 1999 was held. The defendants did not lead any evidence to contradict Mr Chikwanha's evidence. I am therefore satisfied he was entitled to act as a trustee at that meeting.

The fact that there were three Trustees still within their five year terms at this meeting means the decision arrived at by that meeting is valid. In terms of clause 5 (a) of the Deed of Trust the Trust shall consist of not less than two and not more than six trustees. The fact that more than two validly appointed trustees decided on some of the defendant's moving on at that meeting settles the issue of the validity of that decision.

There-after other trustees were appointed from time to time leading to Messers C Gomwe, B Chikwanha, G Mills, C Muzondo, A Hungwe and W Choto attending the meeting of 26/7/ 2004 which authorised the eviction of the defendants and the institution of this litigation. It is common cause, that Messers Gomwe, Chikwanha, Mills and Hungwe had over stayed as trustees. Mr Choto testified and told the court that he was appointed as a trustee in 2004. The minutes of the meeting of 26 July 2004 indicates that he was appointed a trustee at that meeting. He was therefore appointed by Messers C Gomwe B Chikwanha, G Mills and A Hungwe, whose terms of office had expired. He also told the court that Mr Muzondo told him

that he had been a trustee for three years, when he was appointed a trustee. That evidence was not contradicted by the defendants. Mr Muzondo was not called to testify for the plaintiff. Mr Choto's evidence on the statement made to him by Mr Muzondo is therefore hear say. In terms of s 27 (1) of the Civil Evidence Act [*Cap 8:01],* such first hand hearsay evidence is admissible subject to its satisfying the requirements of s 27 (4) of the Act. Section 27 (1) and (4) provides as follows;

> **27** (1) "Subject to this section evidence of a statement made by any person, whether orally or in writing or other wise, shall be admissible in civil proceedings as evidence of any fact mentioned or disclosed in the statement, if direct oral evidence by that person of that fact would be admissible in those proceedings.
> (2)----
> (3) -----
> (4) In estimating the weight, if any, to be given to evidence of a statement that has been admitted in terms of subsection (1), the court shall have regard to all the circumstances affecting its accuracy or otherwise and, in particular, to—
> (*a*) whether or not the statement was made at a time when the facts contained in it were or may reasonably be supposed to have been fresh in the mind of the person who made the statement; and
> (*b*) whether or not the person who made the statement had any incentive, or might have been affected by the circumstances, to conceal or misrepresent any fact."

There is no doubt that Mr Muzondo made the statement to Mr Choto on a memorable occasion which must have triggered the event into his memory. He was telling a person close to him of when he had joined the trust. There was then no pending litigation or reason why he would have wanted to conceal or misrepresent facts. I would therefore accept, that Mr Choto and Mr Muzondo were, subject to the validity of their appointments, still within their five year terms of office.

Mr *Chimuriwo* for the defendants relying on the cases of *Osman v Jhavany* 1939 Ad 351 @ 358-9, Exparte Kemp's Executor (1940) WLD 26, *Macfog v United Africa Co. Ltd* 1961 (3) ALL ER 1169 @, 1172, raised the issue of the validity of the appointment of these trustees by persons who were no longer validly holding office as trustees. He argued that those who held office invalidly could not make valid decisions therefore the two were not validly appointed. In Osman's case (supra) TINDALL J A @ p 358 said;

> "The first ground on which the exception was supported by Mr Shaw on behalf of the defendants, is that there is an implication in clause 11 of the trust deed that the rest of the trustees, though their authority in other respects has ceased, have the power to convene a general meeting to elect trustees afresh. The language of the trust deed is not capable of such a construction"

In this case the language of the deed of trust is clear on a trustee's term of office. It is limited to a period of five years. One can not therefore continue to be a trustee when his term of office comes to an end. Mr *Chimuriwo* therefore argued that the trustees whose terms of office had expired could not validly appoint new trustees.

In Exparte Kemp's Executor (*supra*) it was held that;

> "for there can be no obligation where there is no person with a right to enforce it"

In Macfog (*supra*) it was held that,

> "if an act is void then it is in law a nullity. It is not only bad but incurably bad-----.You cannot place something on nothing and expect it to stay there. It will collapse."

Mr *Chimuriwo*'s submissions may be valid if all the trustees who sat at the meetings, which, appointed Messers Choto and Muzondo's terms of office had expired. It is common cause that Messers C Gomwe, B Chikwanha, G Mills, and A Hungwe's terms of office had exceeded the five year limit. They could not have validly appointed, Mr Choto on 26 July 2004.

Section 5 (b) of the Deed of Trustee provides that a trustee shall "be nominated and appointed by a majority decision of The Leonard Cheshire Homes Zimbabwe".

The trustees were therefore given the power of assumption referred to by Honore & Cameroon- Honores' South African Law of Trusts 1992 at p 131, where the learned authors said;

> "It is common practice for the founder of a trust to give the trustees the power of assuming additional trustees to act with them. A power of this sort is called a power of assumption. Assumption is that species of appointment which results from nomination by one or more of the existing trustees together with the other requirements, including acceptance by the appointee."

It is important to note that assumption can only be exercised by existing trustees of a trust. It can not be exercised by a former trustee whose term of office has expired.

The lawful quorum of the trust is two trustees. Mr Muzondo, sitting alone, could therefore not have validly appointed Mr Choto. One trustee can not validly sit and make decisions on his own, because the minimum number of trustees required by the deed of trust is two. Similarly Mr Muzondo could not on his own, have authorised the institution of litigation to evict the defendants. Even in a case where one trustee, of the two appoints a new trustee, or makes a decision, his decision can not prevail as it can not constitute a majority decision

required by s 5 (b) of the Deed of Trust. The Deed provides that were there is equality of numbers the chairmen can exercise his casting vote. The chairman at this meeting was Dr Hungwe whose term of office had expired. I am therefore satisfied that Mr Choto was not validly appointed a trustee of the plaintiff. There is also no evidence of how and when Mr Muzondo was appointed a trustee of the plaintiff. Mr Choto told the court that he was appointed three years before him. That does not reveal the names of the trustees who appointed him to enable this court to determine whether or not his appointers still lawfully held the offices of trustee, and therefore whether Mr Muzondo was validly appointed. This could easily have been established by calling Mr Muzondo, as the plaintiff's wittiness, or by producing minutes, of the meeting at which he was appointed.

The trust's business was being conducted in contravention of the provisions of the Deed of trust, to an extent, that it would be dangerous to assume that Mr Muzondo was properly appointed. Many trustees conducted the business of the trust when their terms of office had expired. The trust, at one point had eight trustees, instead of the maximum of six. The various chairmen of the trust exceeded their one year terms. There is a real danger that the defendant's eviction and this litigation were authorised by persons who were not entitled to make decisions for the trust, as many trustees whose terms had expired participated at the meeting of 26 July 2004. The lack of clarity on Mr Muzondo's appointment, and his having been the only one, who if he was validly appointed, had been within his term of office when Mr Choto was appointed, invalidates the decision to evict made by those who purported, to be the trust's trustees on 26 July 2004.

Mr *Magwaliba* submitted that the court should uphold the decision of the trustees, in spite of the above mentioned irregularities in their holding office as trustees, as a trust must not fail for want of trustees. He urged the court to interpret the Deed of Trust purposively in order to give it meaning rather than defeating, its objectives. He referred to the case of *Holness v Petermaritsburg* CC 1975 (2) SA 713, at p 719 G to H where SHEARER J said;

> "Clearly one would expect the administrators to be given notice of expropriation as they are the persons who would decide whether to contest its validity, to decide on the claim for compensation and generally to order the affairs of the trust. If they die the trust does not fail for want of administrators or administrator. The court will appoint new administrators and thus recognise the continuation of the trust and the endorsement remains unaltered. If no new administrators have been appointed the local authority may apply for the appointment of new administrators just as it may for the appointment of a curator of an "owner" of unsound mind"

Mr *Magwaliba* thus submitted that the court in furtherance of the continuation of a trust is at common law given a wide discretion to appoint a trustee or additional trustees. I agree that the provisions of a trust must be interpreted purposively to give effect to the objectives of the trust. That however must be done, without disregarding some provisions of the trust instrument. The purpose for which the trust was created is gleaned from the whole scheme of the Deed of trust. Therefore the purposive construction must be in agreement with all the provisions of the Deed of trust. Mr *Magwaliba* sought to persuade the court not to strictly interpret the Deed of trust's provisions on the trustees' terms of office, arguing that that is why the court has jurisdiction to appoint trustees. He referred to the cases of Exparte Mier 1940 SR 40, *Bonsma NO v Meaker NO* 1973 (4) SA 526 (R0, Exparte Davenport & Mills 1962 SR 585, where the court appointed trustees. He also referred to Honore & Cameroon-Honores' South African Law of Trusts 1992. The learned authors, at p 140 say;

> "It is a fundamental principle of trust law that a trust will not be allowed to fail for want of a trustee. Hence the court has a wide jurisdiction and indeed a duty to appoint trustees when there are none and when necessary to appoint additional and substitute trustees. The jurisdiction is given in order that the objects of the trust may be fulfilled. The jurisdiction is derived from the common law, not from the terms of the trust instrument. Hence it may be exercised in a sense contrary to that of the trust instrument, as when the court removes a trustee in whom the founder has confidence, or appoints more trustees than the founder prescribed."

In our law the common law position has been altered by ss, 7 and 9 of the Companies and Associations Trustees Act [Cap *24:04]*, here-in after called the Act, which provides for the appointment of trustees by the High Court on the application by petition of persons there mentioned. Sections 7 and 9 of the Act provides as follows;

> "(**7)** As often as by death, unsoundness of mind, resignation, failure to elect, absence from Zimbabwe or other cause, the trustees or any of them of any such company or the office-bearers or other trustees of any association, or of any association which under section *five* is placed under this Act, become incapable of acting in the execution of the trusts for such company or association, it shall be lawful for any person who is a member of or interested in such company or association to apply by petition to the High Court for such order as he conceives himself entitled to, and he may by affidavit give such evidence in support of such petition as he thinks fit, and may serve notice of such petition upon such person or persons as he may think it needful or expedient to serve with such notice:
>
> Provided that upon or before the hearing of such petition the court in which it is pending may order service of notice of such petition upon any person or persons whom the court thinks fit, and may order such notice to be published in the *Gazette*.
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> .

> **(9)** If in any case it happens that any immovable property has been granted or transferred to any unincorporated society or body established for religious, charitable or educational purposes by the name borne by such society or body, and not through the instrumentality or intervention of office-bearers or other trustees acting for and representing such society or body, it shall be lawful for any person who is a member of, or interested in, such society or body, to apply by petition in manner and form as in section *seven* mentioned for the appointment of trustees for such society or body; and the court to which such petition is presented, proceeding in manner and form as in sections *seven* and *eight* mentioned, may if satisfied that the appointment of trustees to act for and represent such society or body is expedient, appoint such trustees; and section *eight* shall in substance apply to the
> appointment of such trustees, and to the power of providing how new trustees shall be afterwards appointed, and to all other matters in section *eight* contained."

Sections 7 and 9 provide for the appointment of trustees by the High Court to ensure the continuation in existence of a trust. It is the trust, that the law is interested in sustaining, and not decisions of trustees whose terms of office have expired or trustees appointed by persons who had no mandate to act for the trust. Section 7 covers the trustees' inability to act because of, "death, unsoundness of mind, resignation, failure to elect, absence from Zimbabwe or other cause". In this case, other causes would cover the trustees' exceeding their terms of office, and, failure to elect would cover the trustees who had exceeded their terms of offices' failure to validly appoint new trustees.

In this case the objectives of the trust and the manner in which trustees must hold office are clear. It is also clear that the trustees exceeded their terms of office. This court cannot therefore in order to give effect to the objectives of the trust interpret the Deed of trust in a manner inconsistent with the limitation of the trustees' terms of office. The objective of the trust is for it to be managed, in favour of disabled people, by people holding office in compliance with its provisions. That is consistent with the law which gives the court authority to appoint trustees to enable a trust's existence to continue if there are no trustees or those holding office, are doing so contrary to the provisions of the Deed of trust. It is therefore my view that the court can not disregard the trustees' failure to comply with the terms of their appointment in order to keep the trust in existence. The court, would if there are no lawfully appointed trustees, on application by interested parties, appoint new trustees who would, continue to uphold the objectives of the trust, and decide the way forward, on the eviction of the defendants. I can not uphold invalid decisions made by trustees who no longer had the mandate to manage the affairs of the trust. Failure to uphold the trustees' decision of 26 July 2004 does not bring the existence of the trust to an end. It merely invalidates a decision made

by persons who were no longer the trust's trustees, and those who had been improperly appointed by persons who were no longer the trust's trustees.

On the issue of locus standi, according to Honore & Cameroon- Honores' South African Law of Trusts 1992, the general principle is that, "a person who is de facto administering a trust as trustee has locus standi in any matter relating to the trust; so has a person who claims to be the rightful trustee and seeks confirmation of his status". See p 290 of Honore & Cameroon. This tends to show that the plaintiff might have had locus standi to institute these proceedings. However at p 291 the learned authors say;

> "A trustee bringing an action or application should aver his capacity, and that he was properly appointed by a given instrument, or order of court".

In view of most of the plaintiffs' trustees having conceded that they had exceeded their terms of office, and others having been appointed by those who had by lapse of time lost their mandate to appoint new trustees for the trust, it is inconceivable how these (trustees), can aver their capacity, and that they were properly appointed in terms of the Deed of trust. The law requires the trustee to bring the action in his capacity as a trustee and not in his private capacity. It seems to me that once one loses his capacity as a trustee, he may also lose his locus standi. The general rule, referred to above, may if the facts, reveal lack of capacity, yield to the need for a trustee to aver his capacity and the propriety of his appointment. As this point has not been argued by the parties I will not make a definitive finding on it.

In the result I find that the decision made by the plaintiffs on 26 July 2004 to evict the defendants is invalid. The plaintiff's case is therefore dismissed with costs.

Magwaliba & Kwirira, plaintiff's legal practitioners
Maja And Associates, defendant's legal practitioners.