

LELOMA AFRICAN SAFARI (PVT) LTD  
T/A LELOMA HUNTING SAFARIS

versus

THE TRUSTEES FOR THE TIME BEING FOR  
GUDO COMMUNITY DEVELOPMENT TRUST

And

PARKS AND WILDLIFE MANAGEMENT AUTHORITY  
REGIONAL MANAGER MASVINGO

HIGH COURT OF ZIMBABWE  
ZISENGWE J  
MASVINGO, 7 MARCH & 19 JULY 2023

### **Opposed Application**

*C. Parenyi*, for the applicant  
*E. Chibudu*, for the 1<sup>st</sup> respondent

ZISENGWE J: The applicant, a duly registered company operating in the hunting and safari industry, seeks an order declaring the cancellation of the contract it entered into with the 1<sup>st</sup> respondent declared null and void. It claims that the cancellation of the contract which was communicated to it via a letter directed to it by the 1<sup>st</sup> respondent dated 20 May 2022 was unjustified and falls foul of express terms of the contract. It denies the allegations contained in that letter of it (i.e., applicant) having breached the terms of the contract. Further, the applicant avers that even if there was a breach on its part the 1<sup>st</sup> respondent failed to follow the procedure laid down in the agreement for its cancellation. In this regard, the applicant avers that the aggrieved party is required to give the offending party 90 days' notice to purge its default and a further 30 days' written notice of the intention to cancel the agreement.

The 1<sup>st</sup> respondents are collectively the trustees of an entity known as the Gudo Community Development Trust. In terms of its deed of trust, its professed purpose is to pursue and facilitate a development agenda through wildlife-based land use and promote environmental conservation and community development in three identified wards falling under Chief Gudo of Chiredzi District.

It would appear from the papers filed of record that the 1<sup>st</sup> respondent enjoys a hunting quota allocated to it by the 2<sup>nd</sup> respondent in the Save conservancy, which hunting quota was approved by the 2<sup>nd</sup> respondent.

The 2<sup>nd</sup> respondent on the other hand is the Regional Manager of the Masvingo Office of the Parks and Wildlife Management Authority. The latter is a Statutory body whose broad remit is the superintendence of wildlife matters in the country.

### **The background**

On 21 March 2021, the applicant and 1<sup>st</sup> respondent entered into what was referred to as a Hunting Operators Agreement (hereinafter referred to as "the contract"). The basic framework of which was the authorisation of the applicant by the 1<sup>st</sup> respondent to conduct hunting operations within the former's hunting quota.

The contract requires the applicant to pay the 1<sup>st</sup> respondent 40% of the trophy fees for each year's hunting trophy quota payable not later than the 31<sup>st</sup> of August of each hunting season. The applicant is further required to pay 20% of the duly rates to the 1<sup>st</sup> respondent account at the end of each hunt.

In a letter dated 20 May 2022, authored by one P Manjira who identified himself therein as the chairperson of the Gudo Community Development Trust, the 1<sup>st</sup> respondent cancelled the contract. The reasons cited for the termination of the contract were the alleged non-timeous payment of revenue, the failure to submit relevant hunting documents, and the failure to curb wildlife poaching activities which were said to be rife in the area in question. The cancellation was to take immediate effect.

Through a letter dated 26 May 2022, the applicant's legal practitioners wrote back denying any breach of the contract and insisting that it was up to date with its payments. It also denied all the other allegations and referred to the cancellation as nullity not only because of the

absence of evidence pertaining to the allegations of the breach but also for want of compliance with the contract's clauses relating to the procedure for cancellation.

The applicant subsequently approached this court seeking an order declaring the null and void as aforesaid. It seeks an order in the following terms;

***IT IS ORDERED THAT:***

1. *The agreement between the applicant and the 1<sup>st</sup> respondent dated 21 March 2021 be and is hereby declared valid and binding.*
2. *The purported cancellation of the agreement is hereby declared to be no force of effect.*
3. *The applicant shall remain vested with all rights which flow from the agreement mentioned above until such a time as the agreement is cancelled in terms of the law.*
4. *The 1<sup>st</sup> respondent shall pay costs of suit on an attorney and client scale.*

In opposing the application, the 1<sup>st</sup> respondent relied on the opposing affidavit deposed to by one Pfirai Manjira who as earlier stated, identified himself therein as the chairperson of the board of trustees of the 1<sup>st</sup> respondent. In the said affidavit the deponent questioned the appropriateness of the remedy sought stating as he did that a declaratory order is an ill-suited remedy in the circumstances.

On the merits, he insisted that the summary cancellation of the contract was justified given that the applicant had failed to honour the periodic payments for its hunting quota as it was contractually obliged to do, resulting in the accumulation of substantial arrears. Through the said deponent the 1<sup>st</sup> respondent therefore insisted that the applicant is in breach of a material term of the contract and accordingly not entitled to the relief it seeks.

In its answering affidavit, the applicant raised one preliminary objection calling to question the authority of Pfirai Manjira to depose to the opposing affidavit on behalf of the 1<sup>st</sup> respondent. The thrust of the argument being basically that given that the deponent's name does not appear on the 1<sup>st</sup> respondent's deed of trust as a trustee nor has he furnished the court with a resolution authorising him to litigate on behalf of the 1<sup>st</sup> respondent, he was virtually on a frolic of his own and lacks *locus standi* to litigate on behalf of the 1<sup>st</sup> respondent. The applicant,

therefore, implores the court to strike out the 1<sup>st</sup> respondent's opposing affidavit and deem the application to be unopposed with the consequence that the relief it seeks be granted.

This preliminary objection was inexplicably not addressed by the 1<sup>st</sup> respondent who neither filed a supplementary affidavit in rebuttal nor addressed the same through its heads of argument. The 1<sup>st</sup> respondent appeared content with only addressing the merits of the application.

The explanation proffered by Mr Chibudu who appeared on behalf of the 1<sup>st</sup> respondent was apparently that they did not receive the applicant's heads of argument. I expressed the view during the hearing that this application that this was a lame explanation given that the 1<sup>st</sup> respondent had proceeded to file its own heads of argument and subsequently to prepare for the hearing justifying an inference that it had indeed been served with not only the applicant's answering affidavit but also its heads of argument.

Be that as it may, it is common cause that Pfirai Manjra does not appear on the 1<sup>st</sup> respondent's deed of trust, a copy of which was attached to the applicant's answering affidavit nor did he produce a resolution authorising him to litigate on behalf of the 1<sup>st</sup> respondent. All he did was to introduce himself in that affidavit as the chairperson of the 1<sup>st</sup> respondent's board of Trustees.

The crisp question which falls for determination with regard to this preliminary point is whether Pfirai Manjra not being one of the trustees of the 1<sup>st</sup> respondent and not being favoured with a resolution authorising him to litigate on the latter's behalf can depose to an affidavit defending the suit against it. This question requires a brief interrogation of the broader question of who can institute a claim for or defend a claim brought against a trust.

#### **The position under the common law**

The position under the common law has been stated in countless cases. In *Herbstein & Van Winsen, Civil Practice of the High Courts of South Africa* by Cilliers, Loots & Nel at page 182 the following is said:

*“A trust is not a legal persona, but a legal institution sui generis. Therefore, it must be sued in the name of the trustee or trustees. However, when the trust itself has been cited, the courts have allowed the correction of the citation. Unless one of the trustees is authorised to act by the remaining trustee or trustees, all trustees must be joined in suing, and all must be joined when an action is instituted against a trust. The trustees should be cited in their representative capacities.”*

Impliedly, therefore, under the common law, only a trustee duly authorised thereto by the other trustee or trustees or all the trustees acting together would have *locus standi* to litigate in defence of a legal claim against the trust.

In this regard the applicant correctly referred to the Seminal work of A.M. Honore in the South Africa Law Trusts 3<sup>rd</sup> edition at page 313 where the following was stated:

*"The general principal is that in person who is de facto administering a trust as a 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. An action relating to trust affairs, for example for damage to trust property must be brought by the trustee in his capacity as such and not in his private capacity and that he was properly appointed by a given instrument, or order of court. The source of the authority of a trustee must be averred (e.g., will, deed inter vivos, appointment of an insolvent estate) ...."* (Emphasis mine)

See also *Ignatius Musemwa & Ors v Estate late Misheck Tapomwa & Ors* HH136-16; *Crundall Brothers (Pvt) Ltd v Lazarus N.O. & Anor* 1991 (2) ZLR 125 & *CIR McNeillie's Estate* 1961 (3) SA 840

In the *Ignatius Musemwa* case (supra) DUBE J (as she then was) referred to Honore Law of Trusts (*op cit*) at page 291 regarding the legal nature of trusts and their capacity to sue where the following is stated:

“17.1 Actions relating to trust affairs must be brought by the trustee in his official capacity as such and not in his private capacity

17.2 All the trustees should join in bringing the action

17.3 The trustee should aver capacity and that he has been properly appointed

17.4 The trustees are necessary parties

17.5 The trustees are not personally liable for debts of the trust

Needless to say, paragraph 17.3 finds particular relevance in the context of this dispute. It is imperative that the trustee who purports to act on behalf of a trust either in instituting or defending a claim against it must demonstrate that he or she was properly appointed.

### **The Position under the High Court Rules, 2021**

The High Court Rules, 2021 made significant inroads into the common law position with regard to the *locus standi* of trusts. First and perhaps most significant is that as a departure from the common law position Rule 11(2) now gives an association (which by definition includes a trust) the right to sue or be sued in its own name, it reads:

11. (1) ....

(2) A firm or association may sue or be sued in its name.

The definition of “association” appearing in rule 11(1) reads:

*“association” means any unincorporated body of persons, and includes a partnership, a syndicate, a club or any other association of persons”*

The above provision has been the subject of interpretation in a number of cases. See *Ignatious Musemwa & Ors v Gwinyai Family Trust (supra)*; *Women & Law in Southern Africa and Education Trust & Ors Dinah Mandaza (supra)*; *The Benatar Children’s Trust v Robert Daniel Benatar* HH 124-17 & *Gold Mining and Minerals Trust v Zimbabwe Miners Federation* 2006 (1) ZLR 174 at 178A-C.

The second change ushered in by the rules is a natural and logical extension of the first, namely that now that a trust is vested with *locus standi* to sue or be sued in its own name means it is no longer necessary, strictly speaking, to cite each of the trustees in a suit in which it is a party. Subrules 7 and 8 of Rule 11 set out the situation that obtains where an association is sued. The said provisions read

*" (7) A plaintiff suing a firm or association and alleging in the summons or notice that any persons was at the relevant date the proprietor or an associate, shall notify such person accordingly by serving the process upon such person. "*

*(8) Any person served with a notice in terms of subrule (7) shall be deemed to be a party to the proceedings, with the rights and duties of a defendant.*

It is instructive to note that in terms of subrule (1) of Rule 11, “associate” in relation to a trust means a trustee.

The above provisions when construed in context, therefore, imply that where a trust is sued and any one of the trustees is named and notified by being served with the process, he (i.e., trustee) automatically acquires the rights and duties, (i.e., *locus standi*) of a defendant.

It, therefore, means a person who is not an associate (i.e., trustee in the context of a trust) cannot be clothed with such *locus standi*.

In summation therefore, whereas under the common law, a trustee would need the authorization of the trustees to institute or defend an action against a trust, under rule 11 any associate (i.e., trustee) can institute an action on behalf of the trust or defend an action brought against the trust. The shift in the approach in my view has been occasioned by the fact that whereas under the common law a trust not being a legal person lacks the *locus standi* to institute or defend an action in its name - which action could only be instituted or defended by the all the individual trustees or by one of their number duly authorised by an instrument to that effect, under rule 11 (2), a trust can now sue or be sued in its name and if the opposite party requires the full names and residential address of each trustee, he or she can invoke the provisions of subrules (5) and (6) of rule 11 of the High Court rules, 2021 which empowers such a party to demand such details. See *Chiite & 7 Ors v Trustees, Leonard Chesire Homes Zimbabwe Central Trust CCZ 10/17 & Veritas v Zimbabwe Electoral Commission & Ors*, Firine Trust also known as *Veritas v Zimbabwe Electoral Commission & Ors SC 103/20*.

#### **Application of the above principles to the facts**

The applicant appears to have elected to go by the common law route by citing the trustees collectively, as opposed to the trust in its own name. This however does not detract from the overall outcome of this issue because whichever way one looks at it (Whether under the common law or in terms of the High Court Rules, 2021) one thing is clear, namely that Pfirayi Manjira the deponent to the 1<sup>st</sup> respondent's opposing affidavit, not being one of the 1<sup>st</sup> respondent's trustees cannot purport litigate on its behalf.

Reliance was purportedly made to the assertion that the said Pfirayi Manjira is the "chairperson of the board of trustees". However, no instrument was furnished demonstrating his appointment to that position. Most significantly, for one to hold the position of "Chairperson" within the Trust in question, one must in terms of Clause 5.8 of the Deed of Trust be a trustee therein, it reads:

*5.8 The trustees may appoint from amongst their number a chairperson and vice chairperson. When chairing a meeting of the trustees, the chairperson a vice shall have a casting vote, in addition, is a deliberative vote.*

The deed of trust lists eight trustees and Pfirai Manjra's name is conspicuous by its absence. He therefore cannot be its chairperson.

Finally, Clause 6.8 of the 1<sup>st</sup> respondent's deed of trust specifically provides that the authority to sue or be sued vests with the trustees. This is in keeping with the common law position that only trustees can institute or defend actions on behalf of the trust.

Ultimately, therefore, not being one of the trustees of the 1<sup>st</sup> respondent, Prirayi Manjira lacked *locus standi* to litigate on its behalf. Accordingly, his opposing affidavit carries no legal significance in the context of this dispute. The applicant's preliminary point is meritorious and stands to be upheld with the concomitant result that the application will be deemed unopposed.

### **Costs**

The applicant seeks an order of costs on the punitive scale. I however find no justification for such an order. The opposition to the application was neither frivolous nor vexatious nor did it amount to an abuse of court process. Therefore, costs will be awarded on the party and party scale.

Accordingly, the following order is hereby made:

### **IT IS ORDERED THAT:**

1. The point in *limine* raised by the applicant regarding the *locus standi* of one Pfirayi Manjira to depose to the 1<sup>st</sup> respondent's opposing affidavit is hereby upheld with the result that:
  - (a) The 1<sup>st</sup> respondent's opposing affidavit is hereby expunged from the record
  - (b) The application is hereby deemed unopposed
  - (c) The application succeeds
2. The agreement between the applicant and 1<sup>st</sup> respondent dated 2021 be and is hereby declared valid and binding.
3. The purported cancellation of the agreement is hereby declared to be of no force or effect.
4. The applicant shall remain vested with all the rights which flow from the agreement mentioned in (2) and (3) above until such a time as the agreement is cancelled in terms of the law.
5. The 1<sup>st</sup> respondent to meet the applicant's costs of suit.



*Chirorwe & Partners*, applicants' legal practitioner  
*Manyika Law Chambers*, 1<sup>st</sup> respondents' legal practitioner