OS FAMILY TRUST
versus
EXODUS AND COMPANY (PRIVATE) LIMITED
and
COYANT INVESTMENTS (PRIVATE) LIMITED
and
THE SHERIFF OF THE HIGH COURT OF ZIMBABWE N.O.

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
MANZUNZU J
HARARE, 19 March 2025 & 9 April 2025

COURT APPLICATION – Preliminary Points

Adv. *T Magwaliba*, for the applicant
Adv. *E Mubaiwa*, for the 1st and 2nd respondents

MANZUNZU J

INTRODUCTION:

(1) This is a court application for a declaratory order brought in terms of s14 of the High Court Act, Chapter [7:06]. The relief sought is couched in the following terms;

"1. It is hereby declared that the applicant has paid the 1st respondent full purchase price for an undivided share of 0.39% of Coyant Investments (Private) Limited, translating to 0,39% of Stand 12923 in Madokero Estate coupled with an exclusive right of occupation of Flat 37C on the immovable property.

2. It is declared that applicant has paid the 1st respondent the full purchase price for an undivided share of 0.39% of Coyant Investments (Private) Limited, translating to 0,39% of Stand 12923 in Madokero Estate coupled with exclusive right of occupation of Flat 37D on the immovable property.

3. 1st and 2nd respondents are hereby ordered and directed to cooperate fully by signing all the relevant documents and doing everything necessary whenever required to effect transfer of the Shares to the Applicant in Coyant Investments (Private) Limited which shares represent exclusive right of occupation of Flat 37C and flat 37D of Madokero Estates, failing which the third respondent, or his lawfully authorized representative, is hereby directed, empowered and authorized to stand in the stead of the defaulting party and to do whatever may be required of such party in order to give effect to the transfer of the said shares.

4. 1st and 2nd respondents shall pay the applicant's costs on a legal practitioner and client scale."

(2) The 1st and 2nd respondents opposed the application and raised certain preliminary points, which if successful, prayed for the dismissal of the application with costs on a legal practitioner and client scale. Similarly, the applicant raised a preliminary point and prayed, in the event of its success, for the application to be treated as unopposed.

BACKGROUND:

(3)The applicant is a duly registered Trust. The 1st and 2nd respondents (the respondents) are companies registered in terms of the laws of Zimbabwe. The 3rd respondent is the Sheriff of Zimbabwe cited in his official capacity.

(4)The 2nd respondent is the investment vehicle of the 1st respondent in whose name is registered stand 12923 Madokero Estate in Harare.

(5)The 1st respondent sold to the applicant two by 0.39% undivided shares of 2nd respondent of stand 12923 in Madokero Estate (100 shares) representing ownership of flats 37C and 37D.

(6)In terms of the agreement, the 1st respondent would register a notarial deed of sectional title creating shares in respect of the said flats and the applicant would in terms of the said Notarial Deed be entitled to an exclusive right of occupation and registration of transfer of shares in the 2nd respondent.

(7)The applicant purchased 100 shares for the total amount of USD 60 000.00 payable in 120 monthly installments. The applicant paid certain amounts in US dollars towards the purchase price but fell into arrears.

(8) On 28 June 2024, the applicant paid an amount of ZWL22 000 Zimbabwean dollar to the 1st respondent, which amount it considered to be the last installment as a full and final payment in the performance of the agreement in respect of both flats.

(9) The respondents refused to effect transfer of shares to the applicant claiming material breaches of the agreement by the applicant, primarily, that the applicant failed to pay the full purchase price for the flats; consequence of which the respondents said they cancelled the agreement.

(10) Both the applicant and the respondents raised preliminary points which are subject of this judgment.

(11) The applicant said there was no valid notice of opposition.

(12) The respondents said there was no valid agreement upon which the applicant purports to found its cause of action and in any event the application has prescribed.

ISSUES FOR DETERMINATION:

(13) Whether or not the agreement between the parties is valid.
(14)Whether or not the claim has prescribed.
(15)Whether or not there is valid opposition.

WHETHER OR NOT THE AGREEMENT BETWEEN THE PARTIES IS VALID.

(16) This point was raised for the first time in the heads of argument by the respondents. There is no explanation why it was not raised earlier in the pleadings so as to allow the applicant the opportunity to respond in the answering affidavit and written heads thereby dispensing with the need for the applicant to file supplementary heads on the point.

(17) The respondents argued that the agreement sought to be enforced is actually invalid and non-existent. This is because at common law a trust is not a person, rather, a trust is simply an aggregate of assets and liabilities and it, not being a person, has no contractual capacity, which is rather vested in the trustees. The respondents relied on the authorities of – *Crundal Brothers* v *Lazarus* 1990 (2) ZLR 290 (S) at 298B; *Musemwa & Ors* v *Estate Late Tapombwa & Pondent & Others* HH-136-16; *Gold*

Mining and Minerals Development Trust v *Zimbabwe Miners Federation* HH-24-06 and *Greenberg* v *Greenberg's Estate* 1955 (3) SA 361 (AD).

(18) The respondents further argued that the principle derived from case law is that, a trust cannot in its own name and stead be a party to a contract or acquire rights or obligations enforceable at law and has no legal personality or capacity to contract. The court's attention was drawn to *Trustees of The Mukono Family Trust & Anor* v *Karpeg Investments (Private) Limited T/A Kadir & Sons & Ors* HH 30-18 (upheld in Trustees of the Mukono Family Trust *& Anor* v *Karpeg Investments (Private) Limited & Ors* SC-45-21) where the court stated:

> *"As a matter of law therefore a trust not being a juristic person or legal persona cannot own property corporeal or incorporeal neither can it have property registered in its name … The point was forcefully made that designs registered in the name of a trust make the registration a legal nullity – Crundall Bros Private Limited v Lazarus N.O and Anor 1990 (1) RLR 290 H at 298 E and F. In the circumstances plaintiffs' non rebuttal can well be understood. The legal point made on behalf of defendant is beyond reproach. It follows therefore that the registration of the designs which are the basis of plaintiff's claim is a nullity and confers no rights on plaintiffs against any alleged infringement of the alleged rights by defendant."*

(19) An argument in the written heads by the respondents, which is incidental to the above, that the applicant cannot purport to enforce an agreement which was cancelled, was not further argued at the hearing. I take it that the point was abandoned as it does not advance the point of invalidity of the agreement.

(20) The applicant expressed the respondents' argument in support of the invalidity of the agreement as dishonest and disingenuous. This is because the respondents have all along treated the agreement as valid when they signed it and received the purchase price, when they purported to cancel the agreement, when they took no steps to apply for an order declaring the agreement invalid and raised the issue of invalidity for the first time in the heads of argument. The 1st respondent cannot adopt two mutually inconsistent positions, it was decried.

(21) The applicant further bemoaned that the respondents were raising a defence based on their wrong doing. This is despite their failure to challenge the present legal

proceedings as a nullity on the basis that a trust is not a legal persona and has *no locus standi.*

(22) The applicant argued that it is a legally settled position of the law that a trust has the legal capacity to sue and be sued in its own name. see *R Chiite & Ors v Trustees of Leonard Cheshire Homes Central Trust* CCZ10/17; *Veritas & Ors v ZEC & Ors* SC103/20.

ANALYSIS

(23)The basis upon which the respondents say the agreement is invalid is on account that a Trust has no contractual capacity. I did not hear the respondents say a Trust cannot sue or be sued, otherwise they would have challenged the *locus standi in judicio* of the applicant to bring these proceedings.

(24) Rule 11 clarifies the position of the law in Zimbabwe as regards the right to sue or be sued by a Trust. It states;

> "***11. Proceedings by or against firms and associations***
> *(1) In this rule— "associate" in relation to—*
> *(2) (a) a trust, means a trustee;*
>
> *(b) an association other than a trust, means a member of the association;*
> *"association" means any unincorporated body of persons, and includes a partnership, a syndicate, a club or any other association of persons;*
> *"firm" means a business including a business carried on by a body corporate, carried on by the sole proprietor under a name other than his or her own;*
> *"plaintiff" and "defendant" include applicant and respondent; "sue" and "sued" are used in relation to actions and applications;*
> *"summons" includes a combined summons.*
> *(2) A firm or an association may sue or be sued in its name.*
> *(3) A plaintiff suing a firm or association needs not allege the names of the proprietor or associates. If he or she does, any error of omission or inclusion shall not afford a defence to the association.*
> *(4) Subrule (3) shall apply with the necessary changes to a plaintiff suing a firm."*

(25) A trust is included in the definition of an association. An associate may either be a natural person or a corporate entity like a company. A trustee on the other hand is a natural person. An associate may sue and be sued in the name of the association. This means that a trustee can sue and be sued in the name of the trust. Rule 11 (2) clothes a trust with power to sue and be sued in its own name

(26) The question then is, if a trust can sue and be sued, can it not enter into contracts, what will it be suing for? The court in *Nashe Family Trust* v *Charles Chiwara and Others* HH 476/18 dealt with the question:

> *"Does the locus standi however equate to contractual capacity?" The court remarked; "Mr Mubaiwa, asserted that whilst he accepted that a trust does have locus standi to sue and be sued, this did not equate to contractual capacity. In the Musemwa case which was a consolidation of many cases, trusts were recognised as being able to enter into contracts relating to acquisition of immovable property. It would be absurd to cloth a trust with locus standi to sue and be sued and then aver that it has no contractual capacity."* (emphasis is mine).

(27) The argument by the respondents that the Rules of this court cannot amend the common law position on the *locus standi* of a Trust has no merit. the Supreme Court decision in *Sharadkumah Patel & Anor* v *The Cosm Trust & Ors, SC 163/21* held that the High Court rules had modified the common law in order to create *locus standi* for a trust.

(28) In my considered view, it will be absurd for a Trust to have *locus standi* and yet lack contractual capacity. It only stands to reason that an entity which can sue or be sued means it is a legal persona with the capacity to run affairs in its own name and can enter into agreements.

(29)The preliminary point attacking the contractual capacity of the applicant and the validity of the contract must fail.

WHETHER OR NOT THE CLAIM HAS PRESCRIBED:

(30) The respondents allege that the claim has prescribed because the application is built on the allegation that the applicant extinguished its obligations in May 2019 and immediately acquired the right to take transfer. The right to effect transfer is said to have lapsed in three years, that is, in April 2022.

(31) In terms of the Prescription Act [Chapter 8:11] the period of prescription shall be three years and prescription shall commence to run as soon as a debt is due. Section 16 (3) of the Prescription Act provides that the running of prescription can only commence upon the creditor becoming aware of the debtor's identity and all factors surrounding the claim.

(32) In *Chiwawa* v *Mtzuris & Ors* 2009 (1) ZLR 72 it was held that:

> *"The period stipulated in the Act for the extinction of debts is peremptory. It cannot be waived. It is neither fixed in the discretion of the court nor can the court extend the period for good cause shown. Like the sword of Democles, it falls on all uncollected debts and falls on a predetermined date."*

In *Chirinda* v *Van der Merwe & Anor HH* 51/13 the court stated as follows:

> *"It is therefore trite that prescription runs from the date that a debt becomes due. A debt becomes due when the creditor becomes aware of the identity of the debtor and the facts giving rise to the cause of action. The cause of action in any action or claim is the entire set of facts which give rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim."*

(33)The applicant argued that the transfer of shares to the purchaser (Applicant) will be delayed pending preparation and approval of survey diagrams by Land Surveyor for the undivided share scheme and registration of the said Notarial Deed. It was never a term of the agreement that transfer would be effected upon payment of the purchase price. The respondents' defence of prescription relies on an allegation that was not contemplated in the contract between the parties.

(34) In *Nguluwe & Anor* v *Dewa (Nee Nguluwe) & Ors* HH-387-23 the court held that a claim for a declarator prescribes.

(35)The onus is upon the respondents to prove when prescription began to run**.** There is no evidence of when the alleged prescription began to run**.** It is an evidentiary burden which the respondents have failed to discharge. The preliminary point raised by the respondents ought to be dismissed.

WHETHER OR NOT THERE IS VALID OPPOSITION.

(36) The applicant raises a preliminary point that the deponent has not been duly authorized to represent the company as there is no board resolution. This was raised in the answering affidavit thus;

> *There is no valid notice of opposition before the court. The deponent has no authority to act on behalf of the 1st and 2nd Respondents. Deponent is on a frolic of his own otherwise he would have attached a board resolution as required by law. No valid opposition can be filed on behalf of a company without proper authority tendered in the form of a board resolution."*

(37) In his salutation to the opposing affidavit, the deponent had this to say; "I, the undersigned Progress Mambo, in my capacity as the Chief Executive Officer of the 1st respondent and director of the 2nd respondent and as such duly authorized do hereby make oath and state that the facts I depose to herein are within my personal knowledge and unless stated otherwise true and correct in every material respect."

(38) Mr Magwaliba argued that the applicant having challenged the authority of the deponent, the respondents did not produce the necessary resolution. He urged the court to strike off the opposition and treat the application as unopposed.

(39) In the *Madzivire & Ors* v *Zvarivadza & Ors* 2006 (1) ZLR 514 (S) the court held that a company is a separate legal person from its directors and cannot be represented in a legal dispute by a person who is not authorized to do so, the court stated:

> *"It is clear from the above that a company, being a separate legal person from its directors, cannot be represented in a legal suit by a person who has not been authorized to do so. This is a well-established legal principle, which the courts cannot ignore. It does not depend on the pleadings by either party. The fact that the first appellant is the managing director of the fourth appellant does not clothe him with the authority to sue on behalf of the company in the absence of any resolution authorizing him to do so."*

(40)The Supreme Court stated that a party can show they have been authorized to represent the organization when it has been challenged, in *Dube* v *Premier Service Medical Aid and Another* SC 73/19 in para 38 of the cyclostyled judgment it was held that:

> *"The above remarks are clear and unequivocal. A person who represents a legal entity, when challenged, must show that he is duly authorized to represent the entity. His mere claim that by virtue of his position he holds in such an entity he is duly authorized to represent the entity is not sufficient. He must produce a resolution of the board of that entity which confirms that the board is indeed aware of the proceedings and that it has given such a person the authority to act in the stead of the entity. I stress that the need to produce such authority is only necessary in those cases where the authority of the deponent is put in issue. This represents the current status of the law in this country."*

(41) The case of *Beach Consultancy (Private) Limited* v *Obert Makonya & Anor* HH 696/21 puts it succinctly that the reason for insistence on the company being aware of the proceedings is to confirm that it is indeed the company that has taken the decision to participate in the court case and that it is not an unauthorized person who is dragging it to court without its knowledge.

(42) It is therefore trite that where the authority of the deponent is challenged, the deponent has a duty to produce evidence of his authority which ordinarily is a board resolution. The position one holds in the company is not sufficient.

(43) *In casu*, the deponent relied on his position in the respondents as conferring authority. That is insufficient. The respondents had ample time to produce a resolution of the board if they wished to do so. This is from 3 July 2024, when the answering affidavit was served on the respondents' legal practitioners through to when the

hearing of this matter commenced on 19 March 2025. There was no explanation as to why such proof was not filed. There was no attempt to produce any proof at the hearing.

(44) Mr *Mubaiwa*,on the other hand argued that the absence of the resolution of the board cannot nullify the opposing papers. He pointed that the court has in some instances granted opportunity for the production of a resolution. He referred to two matters without full citation which I did not find helpful. In any event no application for the court's indulgence or condonation were advanced. There was also no explanation why the respondents' written heads did not address this issue. The issue was casually taken by the respondents.

(45) Case law has shown that a litigant must produce proof of authorization when challenged. Hence the respondents ought to have produced the board resolution once the challenge was made. This they failed to do. Therefore, the preliminary point has merit and ought to be upheld.

DISPOSITION

1. The preliminary points raised by the respondent's vis-a-vis the validity of the agreement and prescription be and are hereby dismissed.
2. The preliminary point raised by the applicant that the opposing papers are invalid is hereby upheld.
3. The opposing papers be and are hereby struck off the record.
4. This application shall proceed as unopposed and is referred to be set on the unopposed roll.
5. Costs shall be in the main cause.

Scalen and Holderness, Applicant's Legal Practitioners
Sawyer and Mkushi, Respondent's Legal Practitioner