THE TRUSTEES OF ROCK FOUNDATION

FAMILY TRUST

versus

THE REGISTRAR OF DEEDS

and

B. DHLAKAMA AND ASSOCIATES

and

CHAMPIONS INSURANCE

and

DR GIDEON GONO

and

CHENGETO DUBE

and

WEDZERAI MAKOTOSE

HIGH COURT OF ZIMBABWE

MAWADZE J

HARARE 17 August and 14 September 2012

**Urgent Chamber Application**

Mrs *R. Gasa*, for the Applicant

No appearance for 1st Respondent

Ms *B.K. Mupawaenda* for the 2nd Respondent

*M. Nkomo* for the 3rd Respondent

*E.I. Manikai*, for the 4th – 6th Respondents

MAWADZE J: This is an urgent chamber application in which the applicant seeks a provisional order in the following terms;-

“2. **INTERIM RELIEF**

2.1 Pending the final determination of the action in case No. HC 8403/12, the Applicant is granted the following relief;-

a) That the first, second, third, fourth, fifth and sixth Respondent be and are hereby

interdicted from signing or processing transfer papers to pass ownership of stand 75 Avondale Extension 2, measuring 1980 square metres from *Total*

*Communication Media (Pvt) Ltd* into the 3rd Respondent’s name.

b) The first Respondent be and is hereby ordered to place a caveat over the said property until the finalization of Case No. HC 8403/12.

c) That the first, second, third, fourth, fifth and sixth Respondent jointly and severally one paying for the other to be absolved pay the cost of suit on an attorney client scale.

The terms of the final order sought are couched as follows;-

1. **TERMS OF THE FINAL ORDER SOUGHT**
   1. That the first, second ,third, fourth, fifth and sixth Respondents show cause to this Honourable court why a final order should not be made in the following terms;-
2. That they are permanently and perpetually barred and interdicted from passing title or ownership of stand 75 of Avondale Extension 2 measuring 1980 square metres of No. 23 Broadlands Road, Mount Pleasant, Harare to the third Respondent.
3. That the first, second, third, fourth, fifth and sixth Respondents jointly and severally, the one paying the other to be absolved, pay the cost of suit on an attorney client scale.”

The Applicants are said to be the trustees of the Rock foundation Family Trust, a trust which is alleged to be duly incorporated in terms of the laws of Zimbabwe. I use the term alleged on account of the fact that the Respondents challenged the existence and the incorporation of the said Trust. The Applicant did not help matters by failing to attach such proof preferably in form of a Trust deed to the Applicant’s founding affidavit. I shall revert to this point later.

The first Respondent, the Registrar of Deeds is cited in the official capacity on account of the relief sought by the Applicant.

The second Respondent Dhlakama B. Attorneys is a law firm which has been appointed by the Respondents as the conveyancer of the immovable property in dispute.

The third Respondent Champions *Insurance Company (Pvt) Ltd* is said to have purchased the immovable property in issue from the fourth to sixth Respondents who are alleged to have misrepresented themselves as Directors of Total Communication Media (Pvt) Ltd.

The fourth, fifth and sixth Respondents are cited in the personal capacities. The fourth Respondent is the Governor of the *Reserve Bank of Zimbabwe*. The fifth Respondent and the sixth Respondent are employees of the Reserve Bank of Zimbabwe.

In view of the serious dispute of facts between the Applicant and the fourth to sixth Respondents it is useful for me to explain in brief the Applicant’s version of the background facts of the matter giving rise to the application on an urgent certificate. I should hasten to add that Applicant’s version of events is vehemently disputed by the fourth to sixth Respondents.

The Applicant’s version is as per the founding affidavit of one Dr Munyaradzi Kereke who claims to be the founder and trustee of the Applicant and that he had been endowed with the necessary authority to depose to the affidavit.

The Applicant’s version is that it purchased a company called *Total Communication* *Media (Pvt) Ltd* with its wholly owned asset being stand No. 75 Avondale Extension 2 measuring 1980 square metres (hereinafter the property) which was owned by Philip Chiyangwa and his two sons Bruce and Edmund Chiyangwa, in February 2010. In support of this allegation the Applicant attached Annexures A to G to the founding affidavit. It is also useful for me at this stage to itemize and comment at the Annexures, (not necessarily in their sequence)

Annexure ‘A’ is a deed of transfer No 3264/2007 relating to the property in issue dated 8th June 2007. It shows that the property in issue is registered in the name of a company called *Total Communication Media (Pvt) Ltd*. This fact is not in dispute.

Annexures E and G are CR14 forms which are alleged to relate to one company *Total Communication Media (Pvt) Ltd*. Annexure E is dated 7 May 2012 and it shows that Bruce and Edmund Chiyangwa resigned as Directors of Total Communication Media (Pvt) Ltd on 1 January 2008 and were replaced in the same capacity on the same date by the fifth and sixth Respondents.

The Applicant alleges that Annexure E (the CR 14) was forged by the fourth to sixth Respondents in order to facilitate the fraudulent sale of the property in issue. This is denied by the fourth to sixth Respondents. In fact the fourth to sixth Respondents question the logic of being cited in this dispute moreso in their personal capacities.

According to the Applicant Annexure G is the authentic CR 14 for the company *Total Communication Media (Pvt) Ltd*. This is dated 9 July 2012 and has its Directors listed as Munyaradzi Kereke and Paulos Sibanda appointed on 9 February 2010 the same date the erstwhile Directors fifth and sixth Respondents resigned. Annexure G is dismissed as incorrect by the fourth to sixth Respondents. There is therefore a material dispute of fact as to the correct CR 14 for the company *Total Communication Media (Pvt) Ltd*, the company which owns the property in dispute.

Annexure B, C, and D relate to the Applicant’s version as to how the Applicant purchased the company *Total Communication Media (Pvt) Ltd* and its assets. No agreement of sale is attached. Annexure B is an affidavit by Philip Chiyangwa dated 9 July in which he said he sold the entire shareholding in *Total Communication Media (Pvt) Ltd* to one Newton Madzika and surrendered the title deed of the property in issue to Newton Madzika. It is pertinent to note that Philip Chiyangwa’s affidavit is to the effect that *Total Communication Media (Pvt*) Ltd in its entirety was sold to Newton Madzika and not to the Applicant or Applicant’s Trustees. In Annexure “C” Phillip Chiyangwa in a note addressed to “whom it may concern” dated 9 February 2010, indicates that the Directors of *Total Communication Media ( Pvt) Ltd* being himself and his two sons Bruce and Edmund had resigned forthwith as ownership of the company had passed to new owners (who are not stated).

Annexure D is an affidavit by Newton Madzika dated 9 July 2012 in which he explains how on 9 February 2010 he was appointed as Dr Munyaradzi Kereke’s agent purportedly on behalf of the Applicant to negotiate and discharge the purchase by the Applicant of *Total Communication Media (Pvt) Ltd* which was being sold by Philip Chiyangwa. He said he paid the full purchase price and that as a consequence Chiyangwa and other Directors of T*otal Communication Media (Pvt) Ltd* resigned. He surrendered all documents to Dr Munyaradzi Kereke whom he describes as his principal and that Dr Munyaradzi Kereke took control of *Total Communication Media (Pvt) Ltd* and its wholly owned asset being the property in dispute.

The nexus between Dr Munyaradzi Kereke and Total Communication Media (Pvt) Ltd remain unclear from Newton Madzika’s affidavit, moreso in relation to the Applicant. Again I shall revert to this issue later.

Dr Munyaradzi Kereke in the founding affidavit stated that at the material time when all these transactions were executed he was still employed in the office of the fourth Respondent and that as a result he requested to put all company documents pertaining to *Total Communication* *Media (Pvt) Ltd* in fourth Respondent’s safe for security purposes and safekeeping. He said the fourth Respondent then requested to temporarily occupy the property in issue as it was vacant and Dr Munyaradzi Kereke agreed. Like the proverbial story of the camel which sought partial shelter in a man’s tent, Dr Munyaradzi Kereke said the fourth Respondent on 4 May 2012 in connivance with the fifth and sixth Respondents disposed of the property in dispute by selling it to the third Respondent. He said the fourth to sixth Respondent misrepresented themselves as Directors of *Total Communication Media (Pvt) Ltd* and unlawfully executed an Agreement of Sale with the third Respondent ( Annexure F)

As per Annexure F the said Agreement of Sale is between *Total Communication Media (Pvt)* *Ltd* duly represented by Chengeto Dube ( 5th Respondent) and Champions Insurance Company (Pvt) Ltd duly represented by Nathan Nomore Chikono as the buyer. It is dated 6 June 2012 and relates to the property in dispute held under Deed of transfer 3264/07 Annexure ‘A’.

Dr Munyaradzi Kereke stated that the fourth to sixth Respondents acted without his knowledge to his prejudice. As per his version Total Communication Media (Pvt) Ltd is owned by the Applicant and that the fifth and sixth Respondents are not Directors of this company.

This is disputed by the fourth to sixth Respondents.

As per the founding affidavit Dr Munyaradzi Kereke said when he discovered the purported sale between the third Respondent and *Total Communication Media (Pvt) Ltd*, the Applicant wrote to the first Respondent on 9 July 2012 advising the first Respondent of the dispute (see Annexure H). The Applicant also learnt that the second Respondent had been appointed conveyancer of the property in dispute and approached the second Respondent who promised verbally to shelve the transfer of the property in dispute to the third Respondent. This is disputed by the second Respondent.

On 27 July 2012 the Applicant issued summons out of this court in case No. HC 8403/12 seeking nullification of the purported sale between the third Respondent and the fourth to sixth Respondents, eviction of the third Respondent from the disputed property or alternatively payment of US$550 000 being the market value of the property in dispute – see Annexure “I”. The Respondents have since entered an appearance to defend and requested further particulars. At the time of the hearing the Applicant had not provided the further particulars to enable the Respondents (defendants in main matter) to plead.

It is the Applicant’s contention that the urgency of the matter and the relief sought arises from the fact that despite the respondents’ clear knowledge of the Applicant’s interest in the property in dispute and the alleged undertaking made by the second Respondent to stay lodging of transfer papers, the Respondents have instead proceeded to lodge transfer papers with the first Respondent. It is common cause however that as at the date of this application the transfer of the property in dispute had not been effected and the property is still registered in the name of *Total Communication Media (Pvt) Ltd.* It is upon that basis that the Applicant is seeking a provisional order to stay the transfer of the property in dispute into the third Respondent’s name until finalization of the case HC 8403/12. It is also common cause that the third Respondent through also an urgent chamber application in HC 8824/12 has sought an order to compel the Applicant to maintain what the Applicant terms the “status quo” until the dispute between the parties in HC8403/12 has been resolved. It is the Applicant’s view therefore that the Respondents are acting in bad faith by seeking to lodge papers to obtain transfer of the property into the third Respondent’s name before the dispute in HC 8403/12 has been resolved.

The Applicant contends that the irreparable harm the Applicant would suffer is that if the transfer is effected the balance of convenience would favour the third Respondent in dealing with the dispute over the property and that no other remedy is available. This is however disputed by the Respondents who countered that the Applicant suffers no irreparable harm because if the sale of the property in dispute is nullified as prayed for by the Applicant no prejudice would arise. In any case the Respondents contend that there is an alternative remedy available to the Applicant in the main matter HC 8403/12 which is payment of US$550 000 being the market value of the property in dispute, as per Applicant’s prayer.

At the onset of the proceedings all the Respondents other than the first Respondent raised a number of points in *limine* for determination by the court before this matter could be heard on the merits. I now deal with the preliminary points raised by the Respondents (excluding the first Respondent). The points in *limine* are summarized as follows;-

1. Whether the Applicant is properly cited in these proceedings
2. Whether Munyaradzi Kereke had authority to depose to the founding affidavit on behalf of the Applicant.
3. Whether the Applicant herein has locus *standi in judicio* to institute these proceedings.
4. Whether this matter meets the requirements of urgency.

I now deal with the points in *limine seritiam*.

Whether the Applicant is properly cited in the proceedings

It is common cause that the Applicants in this matter are the Trustees of Rockfoundation Family Trust. It can also be inferred from the founding affidavit that there is more than one Trustee (see paragraph 1(b). It was submitted by the Respondents that a Trust is generally not regarded as a legal persona in the same vein as an incorporated company but is established on the basis of its constitution and that a Trust for purposes of citation has been described as *sui generis.* In *casu* it was contended that the Applicant is properly cited and reference was made in particular by Mr Manikai to writings of the esteemed author Francis du Toit in the *South Africa* *Trust law, Principles and Practice 2nd Edition* at page 101 in which the learned author had this to say on the citation of a Trust;-

“ The trust for the purposes of citation, has been described as *suigeneris.* Trust litigation

frequently proceeds in the names of the trustees. Because trustees engage in litigation in their official capacity they must be cited as such in legal proceedings. Where there are co-trustees, all trustees must be so cited. However, where less than the full complement of co trustees has been properly authorized to engage in litigation, failure to cite all the trustees will not result in a non suit.”

I am not persuaded that the Applicant in this case is improperly cited. Order 2A of the High Court Rules 1971 deals in specific terms with proceedings by or against association etc, specifically Rule 8 which provides as follows;-

“8 Proceedings by or against associations

Subject to this order, associates can sue and be sued in the name of their association.”

In terms of Rule 7(a) an associate in relation to a trust means a trustee and an association is defined as to include a trust. In essence therefore this means that trustees may institute proceedings in the name of their trust. My finding therefore is that the Applicant is properly cited. While it may be prudent to cite the trustees by name especially in urgent applications where recourse may not be readily available as provided for in Rule 8A of the High Court Rules, failure to do so is not fatal to the proceedings. The objection in this regard lacks merit and is therefore dismissed.

Whether Munyaradzi Kereke has authority to depose to the founding affidavit.

As per the founding affidavit the deponent’s opening remarks are as follows;-

“I, Munyaradzi Kereke do hereby make oath and state that I am the founder and trustee of Rockfoundation Family Trust, in my capacity as such, I am authorized to depose to this affidavit.”

It is trite law that a trustee who litigates on behalf of a trust does not do so in his personal or private capacity see South African Trust law supra at page 101 para 6.9. As already pointed out the Applicant *in casu* did not attach the relevant Deed of Trust. A number of issues arise from this omission which are not cured by the introductory remarks in the founding affidavit. By failing to attach the Deed of Trust the legal nature of the Applicant has not been established. It remains unclear therefore as to how the Trust was established, its aims or objections, who the trustees are and how the trustees exercise their powers, moreso as one may assume the Trust has a separate existence from the trustees. The deponent to the founding affidavit would therefore have been able to refer to the specific provisions of the Deed of trust which cloth him with authority to represent an Applicant.

No meaningful submissions were made by Mrs Gasa for the Applicant on why the Trust deed was not attached if it exists. I am therefore satisfied that Munyaradzi Kereke has not demonstrated on the papers filed of record that he has the power and authority to depose to the founding affidavit on behalf of the Applicant and to represent the interests of other trustees. I therefore find merit in this preliminary point raised.

Whether the Applicant has *locus standi* in *jucidio* to institute these proceedings

It is common cause that the property in dispute for which provisional relief is sought is owned by a company called *Total Communication Media (Pvt) Ltd*. It would therefore logically follow that it is only this company which would have authority to bring these proceedings. The Applicant has not shown the basis upon which it has instituted proceedings on behalf of the company.

It is trite law that a company is a separate legal persona and is endowed with powers not to only protect its property but to institute legal proceedings. It is not clear as to what rights and interests the Applicant has in *Total Communication Media (Pvt) Ltd*. *Total Communication* *Media (Pvt) Ltd* has not been joined in these proceedings.

In order to be granted the relief sought the Applicant would have to establish at least a *prima facie* right in its own name to the property in dispute see *Watson v Gilson Enterprises* (*Pvt) Ltd & others* 1997 (2) ZLR 318 (H), *Mudzengi & Others v Hungwe & anor* 2001 (2) ZLR 179 (H). In the absence of such a prima facie right one may not even proceed to deal with the other requirements for an interlocutory interdict which includes a reasonable apprehension of irreparable harm, the balance of convenience in favour of the Applicant and the absence of any adequate alternative remedy.

All the documents filed by the Applicant to which I have made reference to in much detail do not at all show that the Applicant has a direct and substantial interest on the property in dispute. The property in issue is owned by *Total Media Communication (Pvt) Ltd* and the Applicant did not even provide proof of shareholding in that company except the two conflicting CR 14 forms. It is for these reasons that this point *in limine* is upheld.

I am satisfied that the two preliminary points I have upheld, namely that it had not be shown that Munyaradzi Kereke has authority to depose to the founding affidavit and that the Applicant has no locus *standi in judicio* to institute these proceedings, are dispositive of this application. It is unnecessary therefore in my view to discuss the other point raised *in limine* which relates as to whether this matter meets the requirements of urgency.

In the result it is found that Munyaradzi Kereke had no authority to depose to the founding affidavit and that the Applicant has no *locus standi* in *judicio* to institute this urgent chamber application.

I find no good cause to make an order of costs against the Applicant in view of the findings I have made especially in relation to the unclear legal nature of the Trust.

*Gasa Nyamadzawo & Associates*, The Applicant’s legal practitioners

*B. Dhlakama & Associates*, The Respondent’s legal practitioners

*Donsa – Nkomo & Mutangi* legal practice, 3rd Respondent’s legal practitioners

*Dube, Manikai & Hwacha*, 4th, 5th & 6th Respondent’s legal practitioners.