MAFIRAMBUDZI FAMILY TRUST

versus

LIBERTY MADZINGIRA

and

PANNAH NHIWATIWA

and

THE REGISTRAR OF DEEDS N.O

and

THE SHERIFF

HIGH COURT OF ZIMBABWE

TAKUVA J

HARARE, 28 May 2014

**Opposed application**

*Ms B Machanzi*,for the applicant

*C Chinyama*, for the respondent

 TAKUVA J: This is an opposed application. Shortly after hearing argument, I issued the following order;

1. The first and second respondents sign all necessary documents to effect transfer of Stand 1396, Cosmos Westgate Township to applicant.
2. In the event that first and second respondents do not comply with (1) above, fourth respondent be and is hereby authorised to sign necessary documents to effect transfer of Stand 1396, Cosmos Westgate Township to applicant.
3. Third respondent be and is hereby directed to transfer Stand 1396, Cosmos Westgate Township to applicant.
4. First and second respondents to pay costs of suit on a higher scale.

This order was issued on 12 December 2013.

 Subsequently, on 14 February 2014, Mr *Chinyama* requested for reasons. These are they:-

 The facts of this matter are in the main common cause. They are as follows:

 The first and second respondents who reside in California USA granted one Jimias Madzingira of no 29 Churchhill Avenue Alexandra Park Harare power of attorney to act for them in any lawful way with respect to the following subjects;

1. real property transaction.
2. banking and other institution transactions, and
3. tax matters.

Further, the first and second respondents granted their agent the following “special instructions: The real property transaction is related to property No 1396, Cosmos Street Westgate Bluff Hill, Harare, Zimbabwe.”

Acting on this power, Jimias Madzingira entered into an agreement of sale with applicant in respect of Stand 1396, Cosmos Westgate Township, Harare, belonging to first and second respondents on 30 October 2012. The applicant, a duly registered Family Trust had been a tenant on the subject property since 2003 in terms of a lease agreement between Brian Mafirambudzi and the first and second respondents.

The lease was facilitated by respondents’ own agents namely Property Hopes Real Estate to whom applicant had always paid rentals for onward transmission to the respondents. Applicant was informed by these estate agents that the property was for sale in 2011. Negotiations ensued, culminating in an agreement of sale – see Annexure A on pp 5-8 of the record. In terms of this agreement, the first and second respondents sold the property to applicant for US$ 95 000-00 payable on or before 7 November 2012. Applicant paid the full purchase price into the first and second respondents’ nominated agents account by August 2012. Despite giving applicant vacant occupation, first and second respondents have failed or refused to pass transfer to the applicant prompting applicant to make this application.

The first and second respondents opposed the application through their agent Jimias Madzingira who filed their opposing affidavit. In that affidavit, it is conceded that indeed the property was sold to the applicant. It is further conceded that the applicant was represented in those “negotiations for the sale of property” by Brian Mafirambudzi. The respondents averred however that there was in fact no agreement of sale concluded between the parties because Mafirambudzi did not sign the agreement of sale – see execution clause of the agreement on p 8 of the record. Further it was conceded that applicant paid at least US$ 73 500-00 to the parties’ joint estate agents Property Hopes Real Estate.

Respondents also contended that they cancelled the agreement of sale on 13 December 2012 and served a notice to this effect on the estate agent. Respondents prayed for the dismissal of applicant’s case with costs on a higher scale.

Applicant then filed an answering affidavit in which it insisted *inter alia* that there was a valid agreement of sale between the parties and that it paid the purchase price in full as evidenced by the receipts attached and marked Annexure A.

Both parties then filed heads of argument. For the first time respondents raised in their heads of argument the issue of Mafirambudzi’s *locus standi*. The issue was raised in the following fashion,

“There is nothing in the whole application to show that the deponent to the purported applicant’s founding affidavit is clothed with authority to represent the applicant. He does not state either in his founding or answering affidavit the source of that authority nor does he attach a copy of resolution reached by applicant’s trustees clothing him with the necessary authority to represent the applicant. See the case of *Madzivire and Ors* v *Zvarivadza and Ors* 2006 (1) ZLR 514. Consequently what is before the court is a nullity which must be dismissed with costs at attorney – client scale.” (my emphasis)

 Reliance was then placed on Lord Denning’s remarks in *MacFoy* v *United Africa Co. Ltd* (1961) 5 ALLER 1169 (PC) at 1172 namely that;

“If an act is void, then it is a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, although it is sometimes convenient to have the court declare it to be so. 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.”

 On the merits, the respondents in their heads submitted that there was no valid agreement between the parties in that the written agreement was not signed by the applicant’s representative. The argument is put thus;

“6.1 Pursuant to that power of attorney, Jimias Madzingira nominated and appointed Property Hopes Real Estate (Pvt) Ltd as an agency for the first and second respondents represented by Madzingira concluding a written agreement which the applicant did not sign.”

 Further it was submitted in the same heads that the applicant was in breach of the terms of the written agreement. The argument was couched in the following manner;

“4. The applicant has breached the terms of the alleged agreement by failing to pay the whole amount due to the first and second respondent resulting in the first and second respondents cancelling the purported agreement and counter suing for an order confirming cancellation --------------.

9. The applicant has breached the terms of this agreement which he did not sign by failing to pay the purchase price. See clause 2 of the agreement which says that, “the purchaser shall pay the full purchase price of US$95 000-00 to Property Hopes Real Estate by the 30th of October 2012 and to be released to the seller within seven days of signing of the agreement of sale but not later than 7 November 2012 less Estate agent commission and capital gains tax.”

During the hearing, Mr *Chinyama* indicated to the court that he was “dropping, the second point and concentrating on the first point *in limine*.” In my view this climb down was inevitable for it could not sensibly be contended on one hand that there was no agreement and on the other that there was breach of the agreement. In any case, the respondents’ representative signed that agreement and surely on that basis they are bound by its terms.

 As regards the question of *locus standi*, Ms *Machanzi* for the applicant submitted that both respondents failed to raise the issue in their notice of opposition. If they had raised that issue, the applicant would have replied. In any case, so the argument went, the deponent has the requisite authority by virtue of the trust deed which is registered. The deponent is a trustee who is authorised to depose to the affidavit.

In my view, the sole issue for determination is whether a trustee of a registered trust has authority to act on behalf of such trust.

 Mr *Chinyama*’s contention was that such a trustee requires the authority of other trustees to so act. He relied on the *Madzivire* case (*supra*) in support of this proposition. In *Madzivire* (*supra*) it was held per CHEDA JA (as he then was) 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 authorised 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 a person is the managing director of the company does not clothe him with the authority to sue on behalf of the company in the absence of any resolution authorising him to do so. The general rule is that directors of a company can only act validly when assembled at a board meeting. An exception to this rule is where a company has only one director who can perform all judicial acts without holding a full meeting.” at p 516 B – C.

The court also referred to s 9 of the Companies Act [*Cap 24:03*] which reads as follows;

“A company shall have the capacity and powers of a natural person of full capacity in so far, as a body corporate is capable of excising such powers.”

 In my view, this case is distinguishable in that it deals with companies which are separate legal persona, while in *casu* we are dealing with a trust. According to the law of persons, a trust is not a separate legal personae, while in *casu* we are dealing with a trust. According to the law of persons, a trust is not a separate legal persona. See *Crundall Bros Pvt Ltd* v *Lazarus NO &Anor* 1990 (1) ZLR 290 (HC). For this reason it follows naturally that principles applicable to corporate bodies do not necessarily apply to trusts. See *Gold Mining Minerals Development Trust* v *Zimbabwe Miners Federation* 2006 (1) ZLR 174 (H) where MAKARAU J (as she then was) held that;

“A trust, in the wide sense, is any legal arrangement by which one person is to administer property whether as an officer holder or not, for another or for some impersonal object. In the narrow sense, a “trust” exists when the creator of the trust hands over or is bound to hand over the control of an asset which is to be administered by another for the benefit of some person other than the trustee or for some impersonal object. It is a legal relations hip, not a separate legal entity such as a corporation or universitas, even though the trustees may together form a board akin to a board of a company or of a voluntary association. Our law of trusts has not sufficiently grown to recognise a limited separate personality of a trust, even though some trusts operate more or less on the same lines as a voluntary organisation or incorporated company. In such cases, the trust has evolved a personality of sorts that appears separate from the personality of the trustees. A trust is not a legal person and therefore cannot be defamed, although the trustees themselves retain the capacity to sue for damages for their injured fama collectively or individually.” (my emphasis).

 A.M. Honore in *The South African Law of Trusts* 3rd ed at p 313 while dealing with “*locus standi*” in matters relating to trusts states that:

“The general principle is that a person who is *defacto* 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 ………………. 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 ……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. The source of the authority of a trustee must be averred (e.g. will, deed inter vivos, appointment to an insolvent estate)…” (my emphasis)

 In casu, the trustee’s source of authority is the duly registered Trust Deed MA 718/2010. In his founding affidavit he averred as follows;

“1. I am a trustee of the applicant and am duly authorised to depose to this affidavit on applicant’s behalf in that capacity.

2. The applicant is Mafirambudzi Family Trust, a trust duly registered MA 718/2010 whose address for service is care of its legal practitioners of record……………….

6. I represented the applicant in an agreement of sale entered into between applicant and 1st and 2nd respondents on the 30th of December 2012.”

 In terms of that agreement of sale, the purchaser is indeed described as “The Mafirambudzi Family Trust represented by Brian Mafirambudzi of No 1396 Cosmos street Westgate, Harare.” This is the property that was the subject of the agreement. The first and second respondents were happy to enter into an agreement of sale with Brian Mafirambudzi as a representative of the Trust. Further, the first and the second respondents did not challenge Mr Mafirambudzi’s authority when they duly received the purchase price. They failed to challenge this status in their pleadings. The matter was only raised during the hearing when they argued that this was a legal issue which could be raised at any stage. Assuming that the trustee’s authority was a requirement, in my view this is a case where it would not have been necessary to produce such authority. The reason is simply that the prior dealings as outlined above between the trustee and the first and second respondents provided sufficient evidence that when the trustee instituted these proceedings he was acting on the authority of the applicant. Proof in the form of an affidavit is not necessary in every case as each case must be considered on its own merits and the court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf. See *Mall (Cape) (Pvt) Ltd* v *Merino Ko-Operasie Bpk* 1957 (2) SA 347 (C) and *Air Zimbabwe Corporation & Ors* v *Zimra* 2003(2) ZLR (H).

 In *casu*, I do not think that it is proper for the first and second respondents to enter into an agreement of sale with a trustee in his capacity as such, receive and spent US$95 000-00 belonging to the trust and when asked to pass transfer, turn around and challenge the trustee’s *locus standi* to institute proceedings.

 Also in terms of Order 2A r 8 of the High Court Rules 1971, a trustee is entitled to issue out process in the name of the trust. The rule states:

 “In this order -

 “associate,” in relation to –

1. a trust means a trustee;
2. an association other than a trust, means a member of the association;

“association” includes –

1. a trust; and
2. a partnership, a syndicate, a club or any other association of persons which is not a body corporate.

8. Proceedings by or against associations

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

 There is no provision that a trustee must be authorised by a “Board Resolution” before he so acts. Indeed the “other” trustees may join in if they are in existence and willing to do so but misjoinder or non-joinder of such trustees does not defeat the cause of action or matter. See Rules 87 and 91 of this court’s rules.

 The first and second respondents also submitted in their heads of argument that the applicant was in breach of the agreement of sale in that it failed to pay the purchase price in full.

 As regards this alleged breach of the agreement, the first and second respondents raised this issue in both the notice of opposition and the heads of argument. In the notice of opposition it was contented that the total payments as shown by receipts on Annexure B add up to US$ 73 500-00 and not US$95 000-00 which is the purchase price. See para 7.1. In para 9 of the heads of argument, the first and second respondents claimed that the applicant breached clause 2 of the agreement by failing to pay the full purchase price forcing the first and second respondents to cancel the agreement by notice.

 In its answering affidavit, the applicant averred that the attached receipts add up to US$95 000-00 and not US$73 500-00. Upon adding up the figures the court came up with a total figure of US$95 000-00. There was therefore, no proven breach by the applicant since quite clearly there is a miscalculation by the first and second respondents.

 For these reasons, I granted the order referred to earlier in this judgment.

*Messrs C. Mpame and Associates*, applicant’s legal practitioners

*Messrs Chinyama and Partners*, 1st and 2nd respondents’ legal practitioners