

1. IGNATIUS MUSEMWA HC 6031/15
2. THE MUVURI INVESTMENT TRUST HC 5626/15
3. BISMARCK C MUPUNDU HC 5248/15
4. FARAI MUSARURWA HC 5247/15
5. ADAAREWA HENRY MANDIBAYA HC 5625/15
6. SUSAN NETSAI MATURA HC 5627/15
7. MADENYA FAMILY TRUST HC 7215/15
8. WILLIAM H SAMANYANDWE HC 5222/15
9. GWINYAI FAMILY TRUST HC 5223/15
versus
ESTATE LATE MISCHECK TAPOMWA
and
SHINGIRAYI TAPOMWA
and
CB RICHARD ELLIS (PVT) LIMITED
and
DAWN PROPERTIES LIMITED

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 14 January 2015

Opposed Matter

F. A Rudolf, for the plaintiff
T. Mpofu, for the respondents

DUBE J: The defendants have excepted to the summons in this action. These applications were consolidated by consent of all the parties. All the plaintiffs' are represented by the same firm of legal practitioners. The facts of the plaintiffs' claims are based on the same set of circumstances. The legal issues raised by the exceptions and the relief sought is similar.

Central to these exceptions are agreements of sale entered separately with the various plaintiffs' for the sale of stands at Glen Lorne Township in the District of Salisbury. The agreements with the plaintiffs' were entered into by the first defendant represented by the second defendant. The third defendant received payments for the stands and was required to keep the money in trust for the first defendant. The third defendant was also to manage the project. The fourth defendant, another estate agent, took over the role of the third defendant. The plaintiffs' claim that after they bought the stands from the defendants, they paid for them in full. The plaintiffs' assert that there has not been any subdivision of the stands resulting in title not passing to them. The plaintiffs' have issued summons separately seeking that the four defendants be ordered to finalize the subdivision and transfer title of the stands to the plaintiffs', alternatively an order for reimbursement of the purchase price for each stand.

In response to the summons, the defendants excepted to the summons. The third and fourth defendants take issue with what they argue is a failure by the plaintiffs' to allege in their summons and declaration that the third and fourth defendants are parties to the contract on which the plaintiffs' sue. They contend that the allegations made by the plaintiffs' establish that the third and fourth defendants are at best agents and that there was no cause for joinder of these defendants to the proceedings. They assert further that the plaintiffs' claim for restitution can only be made pursuant to a claim for rescission of the agreement which claim has not been brought by the plaintiff. Further that any claim for restitution can only be made pursuant to a claim for rescission of the agreement which claim has not been brought by the plaintiffs'. The defendants maintained that any claim for specific performance and restitution can only lie against parties to the contract and not against an estate agent.

An additional point arose with respect to matters under HC5223/15, HC 5626/15 and HC 7215/15. The defendants assert that the plaintiffs' in those claims, who are trusts, have no *locus standi* to bring proceedings in their own names. The defendants submitted that it is only the trustees of those trusts that can sue in the name of the trust.

The court will deal first with the point related to *locus standi* of a trust to bring proceedings in its own name. The concept of a trust originated in English law over 900 years ago and continues to evolve. *Phillip H. Pettit in Equity and the Law of Trusts 5th ed p23* in defining a trust quotes *Underhill, The Law of Trusts and Trustees, 13th ed p1* where he defines a trust as follows,

“A trust is an equitable obligation binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property) either for the benefit of persons (who are called the beneficiaries or *cestuis que trust*) of whom he may himself be one, any one of whom may enforce the obligation or for a charitable purpose...”

Dr D. S Ribbens in 1985 *Modern Business Law* in a paper titled, ‘The Hague Convention on the law applicable to trusts and on their recognition’ states the following on trusts,

“In truth a trust is as much a legal person as a mere sum of money standing to the credit of a ledger account in some bank. To imagine otherwise is in the opinion of this commentator; to rave with the mob about the unattired Royal’s magnificent attire. In essence a trust is a set of legal relationships. Viewed from the point of view of a relationship between the trust property and the trustees, it is a proprietary relationship; viewed from the relationship between the *cestuique* trust or trust beneficiary and the trustee, it is a vertical fiduciary relationship”

What I gather from these definitions is that a trust is a legal relationship of parties which usually involve the founder, trustees and beneficiaries. The relationship is created by the founder who places assets under the control and administration of the trust for the benefit of named persons, thus beneficiaries. It is created by a trust deed.

Generally, every person or entity which desires to bring a claim is at law required to have legal standing in order for it to do so. It is trite that a trust has no legal personality. The common law does not recognise a trust as having *locus standi* to sue in its own name. See *CIR v McNeillie’s Estate 1961(3) SA 840*, *Braun v Blann and Botha 1984(2) SA 850*, *CIR v Friedmann 1993(1)SA 353(A)*.

In *Women & Law in Southern Africa Research and Education Trust and Elizabeth Shongwe and Ors HH 202 /03*, the court discussed the nature of a trust and remarked that generally a trust does not have *locus standi* to sue and be sued in its own name. That if a trust is to be clothed with juristic personality, it would be a persona made up of assets and liabilities. The court cited with approval sentiments in *Commissioner for Inland Revenue v MacNeillie’s Estate 1961 (3) SA 833 (A) at p840* where the court remarked as follows;

“Like a deceased estate, a trust, if it is to be clothed with juristic personality, would be a persona or legal entity consisting of an aggregate of assets and liabilities. Neither our authorities nor our courts have recognised it as such a *persona* or entityIt is trite law that the assets and liabilities in a trust vest with the trustee”

The same views were cited with approval in *Crundall Brothers (Pvt) Ltd v Lazarus N.O & Anor 1991 (2) ZLR 125* where the court held that a trust is not a person and that a trustee is the person to be considered for the purposes of the regulations not in its name but in the name of the trustees.

Honore in The Law of Trusts (Juta & Co Ltd, Cape Town) states at p291 to 296 as follows on the nature of trusts and their capacity to sue,

- “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 trustees 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”

These observations go to show that a trust is not a natural person, does not have legal standing and has no legal standing to sue in its own name. The example of a deceased estate which comprises assets and liabilities being equated to a trust, best illustrates the nature of a trust. In order to sue, an estate has to be represented by an executor. The same should be said of a trust, which should be represented by its trustees in whom the trust’s assets and liabilities vest, when it sues or is being sued. These observations emphasize the requirement for trustees to bring proceedings and to be joined in actions where a trust sues or is being sued. It is evident that a trust does not at common law, have independent *locus standi*. Trusts do not have juristic personality and therefore cannot sue and be sued in their own names unless *locus standi* or juristic personality is conferred upon them by statute.

Trusts have been incorporated into our rules. Our rules make provision for trusts in Order 2A.

Order 2A Rule 7 and 8 provide as follows,

“7. Interpretation in order 2A

In this Order-

“Associate” in relation to –

- (a) A trust means a trustee;
- (b) An association other than a trust, means a member of the association;

8 Proceedings by or against associations

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

Order 2A was introduced by Statutory Instrument 192 of 1997. Order 2 rule 7 equates an associate with a trustee. A trust is included in the definition of an association trust. 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. Rule 8 provides that an associate may sue and be sued in the

name of the association. This means that a trustee can sue and be sued the name of the trust. Rule 8 also clothes a trust with power to sue and be sued in its own name.

These rules modify trust law to permit and create *locus standi* for a trust. The rules give a trust independent *locus standi* from its trustees. This position has been endorsed in our jurisdiction. See *Women & Law in Southern Africa Research and Education Trust and Elizabeth Shongwe and Ors (supra)*. In *Gold Mining and Minerals Corporation v Zimbabwe Miners Federation HH 20\06*, the court reviewed a number of legal authorities that support the proposition that a trust is merely a legal relationship and is not legally clothed with *locus standi* to bring proceedings in its own name. The court relied on and agreed on the sentiments of Dr Ribbens (*supra*) and other authorities for the proposition that a trust is not a legal *persona*. The court also observed that our rules clothe trustees with legal personality, entitling them to sue and be sued in the name of the trust.

I agree entirely with the sentiments expressed in these judgments. I also come to the conclusion that a trust is merely a legal relationship and is not at common law a legal *persona*. Rules 7 and 8 permit a trust to sue and be sued in its own name. What is provided for in the rules is contrary to accepted legal principles governing the law on *locus standi*. The rules create an absurdity in the law which our courts have no choice but to embrace. Perhaps it is time that the Rules Committee and the Law Development Commission reconsidered the position as provided in the rules. The point fails.

The second point raised relates to the claim against the third and fourth defendants. This court was asked to determine the role played by the third and fourth defendants and decide whether they are liable in contract for their actions. In *The Law of Agency in South Africa 2nd ed*, the authors *J E De Villiers and J C MacIntosh* describe an agent as,

“...a person who has been authorised to act for and on behalf of another (called the principal) in contracting legal relations with third parties; the agent represents the principal and creates, alters or discharges legal obligations of a contractual nature between the latter and third parties”

Put simply, an agent is a person who is authorised to act on behalf of another, being his principal. The concept of agency is based on the common law principle “*qui facit per alium, facit per se*” which translates to mean that, “*he who acts through another, acts personally*”. This concept is no different from the vicarious liability concept which makes another party liable for the acts and omissions of another. The law of agency regulates a situation where an agent deals with a third party and performs an act on behalf of a principal. Where one tasks another to sell his property on his behalf, an agency is created.

The facts without doubt disclose that the third and fourth defendants were agents of the first and second defendants and facilitated the sales of the stands to the plaintiffs'. They were to hold the purchase price of the stands for the first defendant. They were not party to the contact of sale and remained purely agents of the first defendant.

The subject regarding the liability of an agent to a third party in a contract is trite. The position was dealt with in *Lens Agencies (Pvt) Ltd v Knight Frank Beverly and Anor* 1997 (2) ZLR 167(SC) where the court remarked as follows:

“In my view, however, the privity of contract is clearly between the landlord and tenant. The estate agent holds the deposit on behalf of his principal, the landlord, and is accountable to him alone. It is the landlord who is accountable to the tenant. The landlord does not claim interest on the deposit from the estate agent. Nor do I think it has been shown that he has a duty to do so, and then to account to the tenant if that were the position the whole structure of the tripartite relationship would be affected.”

Ami Zimbabwe (Pvt) Ltd v Casalee Holdings (Pvt) Ltd 1997 (2) ZLR 77 (SC) is authority for the proposition that he who does an act through an agent does it himself. See also *Maketo and Anor v Wood and Ors* 1994 (1) ZLR 102 (HC). In *Nordis Construction (Pvt) Ltd v Theron, Burke and Isaac* 1972 (2) SA 535 (D) @ 540 where the court held that an agent can only be accountable in his personal capacity where he has purported to represent a non-existent principal or where has pledged responsibility for his actions.

The law is clear that where an agent executes a mandate on behalf of a known principal, he carries out the mandate on behalf of the principal and binds his principal. An agent who has actual or apparent authority is not liable for acts committed during the course of his employment. The principal remains accountable to the third party. The agent becomes liable only in instances where he has no authority to act and or has not disclosed his principal or the principal is unidentified.

The principle laid down in the *Lens Agencies* case (*supra*) is equally applicable here. The position of a seller of a property who entrusts an estate agent with the responsibility to sell a property and keep the proceeds in trust is no different from that of a landlord who entrusts an estate agent to hold a deposit for rentals paid in respect of a leased property. The agent holds the money in trust for his principal and is accountable to him alone. The agent in both scenarios remains purely an agent.

There has been no allegation that the two defendants acted for a non-existent principal or without authority. The principal in this case is known. It has also not been alleged that the third and fourth defendants were parties to the contracts of sale. The acts performed by the

estate agents were done for and in the name of the principal. Essentially, the acts performed by the agents were done by the principal. The third and fourth defendants sold the stands on behalf of the first defendant and on its authority. The agents held the money in trust for the first defendant. The estate agents were only accountable to the seller whilst the seller was accountable to the buyers. The third and fourth defendants are not parties to the agreement of sale entered into. No privity of contract exists between the estate agents and the plaintiffs' but between the seller and the buyers. In the absence of any non - disclosure of the principal and any pledge by the agents taking responsibility for their actions, the agents cannot be held accountable for their actions in their personal capacities. The agents are not accountable to the plaintiffs' for acts committed during the acts of their employment. The third and fourth defendants remain essentially agents and cannot be held accountable for the acts of their principal. No cause of action has been established against the third and fourth defendants.

The defendants have excepted to the plaintiffs' order for specific performance and reimbursement of the purchase price of the stands against all the defendants. The plaintiffs' sue in contract. The remedy of specific performance is one claimable in contract only and for breach of contract. The remedy of specific performance is an order of court that compels another party to perform a specific act in satisfaction of its part of the contract and in effect perform the contract. The claim for specific performance can only be brought against a defendant who was a party to the contract and who can legally perform the acts complained against. The remedy is awarded when an order for damages is not an adequate remedy. Specific performance is a remedy based on equity.

An analysis of the facts reveals no basis for an order for specific performance against third and fourth defendants. Firstly, the summons does not contain any allegation that the two estate agents were parties to the real estate contract or that the agents breached their duties in any manner. In any claim that is brought against an agent or estate agent, it has to be shown that the agent was not a mere agent and that the real estate agent breached his duties in terms of the contract. There is an averment that the fourth defendant took over the role of the third defendant. No basis has been shown for joining the fourth defendant to these proceedings as there is no complaint in the summons against him. Above all, there is no allegation that the fourth and third defendants were parties to the contract. The court has already found that the third and fourth defendants were not parties to the real estate contract which is the subject of these proceedings and hence the remedy of specific performance is not available to the plaintiffs'.

The court has also considered that the order sought entails transfer of property rights. A claim for transfer of title can only be brought against a party who has title to the property. *See Takafuma v Takafuma 1994 (2) ZLR 103 (S)*. This approach is based on the principle of “*nemo dat quod non habet*”. The principle translates to mean that no-one can transfer a better right than he himself possesses. No allegations have been made to the effect that the third and fourth defendants hold title in the stands in issue, are able to perform the contract or that they are obliged to tender transfer of title to the plaintiff. Title can only be conveyed in terms of s 2 of the Deeds Registries Act and by the holder of such title. To this end, the third and fourth defendants cannot legally oblige to the claim for transfer.

These claims for specific performance or reimbursement based on breach of contract cannot succeed against a real estate agent unless it can be shown that the estate agent was a party to the real estate contract and that the estate agent breached his duties under the contract. Reimbursement of monies paid and specific performance can only be demanded against a party to a contract. The rationale of ordering reimbursement is to replace parties to the position they would have been in had the contract been performed. This cannot be required of the third and fourth defendants who are not parties to the contract that forms the subject of the dispute. Where a real estate agent acts only to facilitate a contract for a named principal, he cannot be liable for breach of that contract. An agent may not be held accountable to a third party for acts that he committed within the scope of his authority, for as long as he disclosed that he acted as an agent and disclosed his principal. The defendants acted on behalf of a known principal and are not liable for acts committed during the agency and on behalf of the principal.

The summons does not disclose a valid claim against the estate agents. No proper basis has been shown for the joinder of the third and fourth defendants to this claim. The defendants are entitled to the order sought.

In the result it is ordered as follows:

The third and fourth defendant's exception is upheld.

The plaintiffs' claims against the third and fourth defendants are hereby dismissed.

The plaintiffs' are jointly and severally, the one paying the other to be absolved, to pay the third and fourth defendant's costs.

Scanlen & Holderness, plaintiffs' legal practitioners
Gill Godlton & Gerrans, defendants' legal practitioners