

ALBERT CHITUMBA
and
THADIUS CHADENGA
and
DIVINE HOMES (PRIVATE) LIMITED
and
TENDAYI K CHADYIWA
and
MARITA M CHADYIWA

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 29 July 2020 and 23 January 2023

Court Application

Mr *H Muromba*, for the applicant
Mr *K Kachambwa*, for the first respondent

CHINAMORA J:

Background facts

I have before me an application for vindication and eviction of the first respondent and all those claiming title through him from the property known as, the subdivision of Stand 1 of Gletwyn, Township, measuring 540 square meters (“the property”). The applicant says that he purchased the property in issue from the second respondent through his daughter who he alleges signed the agreement on his behalf. The applicant further alleges that the first respondent who bought a subdivision of the remainder of his property built a perimeter fence which is encroaching onto his property hence this application to restore him of his possession of his property.

The application is vehemently opposed by the first respondent on a number of grounds, the bulk of which are not necessary to deal with at this stage. In fact, many allegations and counter allegations have been raised in this application. I propose to zero in on one critical and decisive issue that has been raised by the first respondent as I believe that it is dispositive of the dispute

between the parties. This concerns the *locus standi* of the applicant to bring this application, and I will now examine this preliminary point.

The applicant's *locus standi*

In both his notice of opposition and fairly detailed heads of argument, the first respondent submits that the applicant has no *locus standi*, in so far as he is a total stranger to the agreement through which the disputed property was acquired. The point which is being made is that the applicant did not sign the agreement of sale. Indeed, the applicant conceded this point but sought to take refuge in the purchaser's affidavit where she stated that despite her being cited as the purchaser in the agreement, the *merx* belonged to the applicant. Incidentally, the purchaser is the applicant's daughter. The agreement of sale which is filed of record as Annexure "A" confirms that the purchaser is Bernadette Tusso and not the Applicant. That these two are father and daughter is not in dispute.

Legal arguments on the point *in limine*

Let me begin by commending Counsel for the parties for filing detailed and instructive heads of argument on *locus standi*. They articulated the correct legal position that in order for one to have *locus standi* in any proceedings, they must demonstrate that they have a real and substantial interest in the matter before the court. In this respect, it is apposite to refer to *Allied Bank Limited v Dengu & Anor* SC 52-16 and the cases referred to in that judgment.

The applicant's counsel was adamant that the affidavit by the applicant's daughter, in which she had signed as purchaser, was sufficient to confer *locus standi* on the applicant. In support of this proposition, Counsel for the applicant has this to say in his heads of argument:

"Whilst the applicant may not have been party to the agreement of sale for the property in issue, the affidavit of Bernadette Tusso, a signatory to the agreement of sale clearly confirms without doubt that she entered into the agreement on behalf of the applicant, thereby giving the applicant a direct and substantial interest in the right which is the subject matter of these proceedings and outcome thereof".

On the second respondent's behalf, the counter argument stated among things the following:

"The applicant has no *locus standi* to bring the proceedings. The agreement of sale in respect of the 540m/2 in dispute was between the second respondent and Bernadette Tusso. The person who ought to have sued in terms of the agreement is the said Bernadette Tusso..."

Analysis of the case

Naturally, this court had to deal with these two diametrically contradictory views by the two Counsel. I thought it was elementary knowledge that parties who are bound by the terms in a contract are those who are signatories to that agreement. I am unable to phantom any meaningful argument to the contrary. The weight of legal authority clearly support this proposition. In this respect, the Supreme Court, in *TBIC (Pvt) Ltd and Anor v Mangenje and Ors* SC 13-18, (relying on Maja, *The Law of Contract in Zimbabwe*, at p27) reiterated the position as follows:

“The doctrine of privity of contract provides that contractual remedies are enforceable only by or against parties to a contract, and not third parties, since contracts only create personal rights. According to Lilienthal, privity of contract is the general proposition that an agreement between A and B cannot be sued upon by C even though C would be benefited by its performance. Lilienthal further posts that privity of contract is premised upon the principle that rights founded on contract belong to the person who has stipulated them and that even the most express agreement of contracting parties would not confer any right of action on the contract upon one who is not a party to it.”

Given the trite position of the law, it is strange to me that any argument could have been advanced in support of the applicant’s evidently fractured position. At any rate, the non variation clause in the agreement of sale completely seals the applicant’s case. Written agreements by their nature affect the personal rights of the signatories to such agreements. I am therefore satisfied that the applicant has no *locus standi* in this case.

Disposition

In the result, it is ordered that this matter be struck of the roll with costs.

Kantor & Immerman, applicant’s legal practitioners
Mtombeni, Mukwasha, Muzawazi & Associates, 1st respondent’s legal practitioners