

SAM CHAPANDUKA

versus

TRUSTEES FOR THE TIME BEING OF ROYALE HOUSING PROJECT

HIGH COURT OF ZIMBABWE

TSANGA & MAXWELL JJ

HARARE, 30 June & 24 August 2022

S Kuchena, for the appellant

MM Ndebele, for the respondent

TSANGA J: In the court below, the respondent being the plaintiff, (herein referred to as the Trust), issued summons seeking the release by the defendant, the appellant herein, of 66 x 75 mm gate valves; 9 x 75mm fire hydrants and 2 x 160 mm gate valves. These were said to have been received by the appellant on behalf of the Trust for onward delivery to Mutare. Alternatively, the Trust had sought as payment of damages, the sum of US\$7 174.00 or its RTGS equivalent, together with interest at the prescribed rate as well as legal costs on a higher scale. In the appellant's plea to the claim, he had stated that the Trust had only two trustees being him and his wife and that as such one Trustee could not suspend another. He had also denied receiving the items on behalf of the Trust, stating that he had only received them as their lawful agent. The matter had been referred to trial on appellant's liability for the claim; and the requisite *locus standi* of the respondent to institute the proceedings.

The court below found that there was indeed a contract or agreement between the appellant and the Trust to deliver goods on behalf of the Trust but that what was not clear were the terms of that agreement and the actual quantities and items that he received and kept in trust awaiting delivery to Mutare.

On *locus standi* the court found that the Trust had produced an extract of the board minutes of Royale Housing Project Trust held on 22nd January 2020 which reflected the resolution that Jesina Murahwa or Cleopas Murahwa were to represent the Trust in litigation against the appellant. The court accepted the resolution. The court also accepted documentation showing that the appellant had been suspended from the Trust which the court said meant that the representation of the Trust by Justina Murahwa was in order in that she had the right and *locus standi* to sue the defendant since he was expelled and was no longer part of the Trust.

In addition, the court below found that it was not in dispute that the appellant had indeed received goods as he himself had acknowledged at the pre-trial conference receiving fifty-one 75 mm gate valves which he said he had delivered to Mutare. On liability for the items sought the court found that from the evidence on record insufficient evidence had been adduced by the respondent's witnesses to satisfy the court that all items had been received. The court therefore ordered the appellant to release those gate valves he had acknowledged receiving at the pre-trial conference.

The appellant appeals on the following grounds

1. The learned magistrate erred and misdirected herself both at law and in fact in holding that one Trustee of the respondent (plaintiff in the court a quo) had the relevant *locus standi* to bring an action in the name of the plaintiff in the absence of consent of the other trustee.
2. Whether or not the magistrate erred at fact or on law in relying on what purported to be a copy of an extract from an extra ordinary board meeting of the respondent (plaintiff in the lower court) which does not appear anywhere in the minutes of the board meeting of Royale Housing Trust held on the 22nd of January 2020.
3. Whether or not the court misdirected itself in finding for the respondent (plaintiff in the court a quo).
4. Whether or not the court a quo exercised its discretion judiciously in awarding costs to the respondent (plaintiff in the court a quo).
5. Further, the court misdirected itself in granting an order for specific performance when no valid and lawful contract was ever proved to have been in existence between the parties, its terms thereof, and performance by the plaintiff.
6. Further, the court erred in ordering the defendant to release goods which he received and holds in his official capacity as a Trustee without impinging or invalidating his position as a trustee.

The appellant seeks that his appeal succeeds with costs on a higher scale and that the whole judgment of the court a quo be set aside and in its place be substituted with a dismissal of the plaintiff's claim with costs on a higher scale.

The submissions

In essence, the appellant argued that the Trustee could not have brought an action on behalf of beneficiaries in the absence of a resolution and that the Respondent could not have been both a plaintiff and a defendant in the court below. In the minutes of the board from which the resolution had been said to emanate there was no such resolution. The respondent was also said to have failed to prove any of the issues it had alleged and therefore that the court ought to have found that there was ever such an agreement between the parties.

The respondent, on the other hand, emphasised that the issues had been curtailed at the pre-trial conference to the amount of goods collected and whether he had delivered the goods and that the question of whether or not the appellant was a Trustee was never for determination. Whether his suspension was valid was also said to not have been for determination. The appellant was said to be concentrating on whether or not he is still a Trustee and not whether the respondent Trust has the ability to bring the action.

Relying on the Trust Deed, the respondent argued that Trustees could be added and that Cleopas Murahwa had been added as a Trustee. The assumption that the Trustees’ at the time were only husband and wife at the time of issuance of summons was therefore said to be wrong. The minutes were also said to have clearly addressed the issue of abuse of trust assets as well as the suspension of the appellant and that the issue of seeking the return of Trust assets from the appellant was also discussed. There was therefore said to be a disconnection between the issues raised as this was a simple matter of hydrants taken by the appellant and not delivered.

Law and legal Analysis

The general principle as captured in *Trustees, Leonard Cheshire Homes Zimbabwe v Chiite & Ors* HH-267-10 is that a person who is *de facto* 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.

As for the appellant’s claim to be a rightful trustee, the minutes on record show that he was in fact suspended from his office for abuse of his position as Trustee. The minutes show that the issue of abuse of authority by the appellant was discussed at the meeting and that the minutes captured that the appellant was to be suspended with immediate effect and called for a hearing concerning the abuse of authority matters.

The Trust Deed which was also part of the record outlined the circumstances under which the office of the trustee shall be vacant. Amongst the situations included where a trustee abuses trust property and finances and where fifty percent of the trustees agree that a member

shows no commitment to the affairs of the Trust. Also included are acts by a trustee tantamount to abuse of power. The magistrate was therefore not in error in making a finding that the appellant had been suspended as a Trustee in terms of the document that were placed before the court. See also *Mashoko v Mashoko/Chikosi Family Trust & Anor* HH-12-11 for some of the commonly accepted grounds for the removal of a trustee from office which include where, without explanation, a trustee transfers trust funds from a safe investment into a personal account; where a trustee deliberately refrains from advising a co-trustee of a decision to be taken on behalf a trust; where a trustee treats trust property as his own. That case also deals with the principles governing the administration of trusts in particular the need to exercise his or her powers with care, diligence and skill which can be reasonably expected of a person who manages the affairs of another.

Some of these grounds emerge from the minutes and correspondence considered by the lower court in arriving at its decision that the appellant had indeed been suspended from office and replaced by Cleopas Murahwa. It is clear from those minutes that Mr Chapanduka was said to have acted contrary to the trust interests and that he was suspended for that reason. Furthermore action was to be taken against him. As such the first ground of appeal which relates to the error in holding that one Trustee of the respondent (plaintiff in the court *a quo*) had the relevant *locus standi* to bring an action in the name of the plaintiff in the absence of consent of the other trustee lacks merit. The magistrate was correct that based on the documents discovered it was clear that the appellant as defendant had been suspended at the time the summons was issued and that a replacement Trustee was already in place. Cleopas Murahwa was appointed as Trustee on the 2nd of January 2020 as per the document on page 181 of the record. The meeting at which the resolution was passed for Cleopas Murahwa to represent the company in all proceedings was held on the 22nd of January as per the record on pages 177 and 178. His appointment cannot be queried.

Turning to the second ground of appeal, which is that there was an error in relying on what was purported to be a copy of an extract from an extra ordinary board meeting of the respondent which does not appear anywhere in the minutes of the board meeting of Royale Housing Trust held on the 22nd of January 2020. This ground of appeal emanates from the erroneous assumption that minutes and resolutions ought to be verbatim mirrors of each other. Board minutes need not capture every word spoken at the meeting. It is sufficient that the resolution is captured. In this instance, the minutes are clear that the appellant had behaved

contrary to his fiduciary duties and had been suspended and action was to be taken against him. The ground lacks merit and is accordingly dismissed.

As for the third ground that the court was misdirected in finding for the respondent, this ground is vague. In any event the court limited itself to a finding only on those items that it found the appellant had admitted to receiving. Related to this is the fifth ground of appeal that the court erred in granting specific performance of a contract that was not proved. This is in reality an appeal against a finding of fact where the position is clear that an appeal court will not interfere unless the finding is such that no court would have arrived at the same conclusion. This is not such a case.

As for the appeal against an order of costs, these follow the cause and are always in the discretion of the court. The fourth ground of appeal that costs should not have been awarded against him also lacks merit. The final ground of appeal is that the court erred in ordering the defendant to release goods which he received and holds in his official capacity as a trustee without impinging or invalidating his position as a trustee. As already stated, the record that was placed before the court shows that he was suspended as a trustee. He himself acknowledged receiving specified goods for onward delivery at the pre-trial conference. The magistrate dealt with this fact in her judgement.

Overall the appeal lacks merit and is an attempt to circumvent the delivery of the goods as ordered by the court. It is also an attempt at remaining as a trustee even when the record shows that he was let go as a trustee for legitimate reasons of not acting in the interests of the trust, having been invited in that position in the initial instance by his wife.

The appeal is accordingly dismissed with costs.

MAXWELL J, agrees.....

Muringani Law Practice, appellant’s legal practitioners
Muvhiringi & Associates, respondent’s legal practitioners