

LANDALE (PVT) LTD  
Versus  
JUSASHE (PVT) LTD  
Trading as Pam Golding Properties Zimbabwe

HIGH COURT OF ZIMBABWE  
COMMERCIAL DIVISION  
CHILIMBE J  
HARARE 9 and 27 May 2024

### **Interlocutory application**

H. *Nkomo* with L. *Majogo* for excipient/defendant  
J. *Sinyoro* for respondent. Plaintiff

CHILIMBE J

### **BACKGROUND**

[ 1] Before me is a trial cause wherein defendant raised a preliminary point of law (see below) arguing plaintiff's absence of *locus standi*, concomitant to pleading over to plaintiff's claim. I will refer to the plaintiff and defendant herein as "Landale" and "Jusashe" respectively.

[ 2] Both parties are firms of estate agents registered to practice in terms of the Estate Agents Act [Chapter 27:17] ("the Act"). The two parties are also regulated by the Estate Agents Council, a body created for that purpose by same Act. Additionally, the Act and its regulations (one cited hereunder) also govern the relationship between estate agents operating in the jurisdiction in certain specified circumstances.

### **THE SPECIAL PLEA**

[ 3] In its plea to the merits, defendant raised what it termed a special plea. Neither the plea nor special plea were accompanied by a paginated and indexed bundle as prescribed by r12 (2) of the High Court (Commercial Division) Court Rules SI 123 of 20320 [ "the Commercial Court Rules"] which states that; -

“The plea, exception, special plea or other answer shall be supported by a paginated and indexed bundle of all relevant and material documentary evidence and a

summary of the evidence that the defendant relies on which shall be in Form No. CC 2.”

[ 4] This position created a problem in that in *Allied Bank Limited v Caleb Dengu & Anor* SC 52-16, the Supreme Court held that for a special plea to be properly entertained by the court, it ought to have been correctly raised and progressed in accordance with the rules. The court held further that for a legal complaint raised in the special plea to be alternatively considered and disposed of as a point of law, then it ought to have formally brought to the attention of the other party on notice.

[ 5] In that matter, one on the grounds of appeal was that the court a quo had erred by entertaining a special plea moved in breach of the rules. It held further per MALABA DCJ (as he then was) at page4 that; -

- i. “Pleadings are required to be raised in a formal manner for the court to rely on them. The respondents did not properly plead a special plea.”
- ii. “The Court holds in respect of the first ground of appeal that although the respondents could raise the question of *locus standi* (if the question arose at all) at any stage during the proceedings, they had to raise it in a formal way by giving notice to the other party.”

[ 6] Mindful of these considerations I invited the parties to a case management conference held in terms of r18 of the Commercial Court Rules which creates the following facility; -

(1) A judge shall, within ten working days after receipt of the record, on his or her own motion direct the registrar to cause the parties to the proceedings to appear before him or her, for the purposes of case management, in order that he or she may make such order or give such directions in relation to any case management as well as any interim application which the parties may have filed or intend to file as the judge deems fit, in order to achieve the just, expeditious and economical disposal of the dispute.

[7] I engaged the parties in order to address what threatened to develop into an accretion of interlocutory issues. The first related to the special plea and the second (still unresolved) concerned an intention to approach the court to amend the pleadings by defendant. After

consultations, it was agreed that the legal point raised by defendant in its plea (and special plea) was potentially dispositive of the matter and could be set down and argued.

[ 8] The matter was duly progressed on that understanding although during the hearing, reference was inadvertently made to “special plea”, the court sat to determine a preliminary point of law raised on behalf of Jusashe. After the case management conference, I thus directed the parties that; -

1. The case management conference be and is hereby adjourned and matter postponed provisionally to 15 February 2024 at 10:00 hours, subject to confirmation by the Registrar.
2. The Parties attend, whether by way of notice, consents, applications or objections as provided for in the rules of court, to the issue of the supplementary bundle and its resultant effect on the pleadings including issues for trial.
3. The Parties file written submissions, taking into account the issue provided in Paragraph 2 of this Order, addressing the legal point raised in limine by Defendant, and if in need of further guidance, the Parties may approach the Registrar.
4. Costs in the cause.

#### THE DISPUTE BETWEEN THE PARTIES

[9] Before proceeding, I will outline the genesis of the dispute between the parties. It arises from plaintiff's claim to 50% of the amount earned as agent's commission from the sale of an immovable property. The property was described as a certain piece of land, called Lot 156A Highlands Estate of Welmoed, situate in the District of Salisbury, Measuring 1,0598 Hectares, which was held under Deed of Transfer Number 1112/12/96, also known as number 52 Orange Grove Highlands, Harare. I will refer to it as “52 Orange Grove”.

[ 10] This property was sold, sometimes in 2020, by Mr. Robert Hoard, a director acting on behalf of the registered owner, Challacote Investments (Private) Limited. The purchaser was the Embassy of the United States of America, representing the (Federal) Government of the United States.

[ 11] An amount of US\$4,100,000 (four million, one hundred thousand United States Dollars) constituted the purchase price. This sale was brokered by the defendant Jusashe, (under

circumstances whose propriety is challenged by Landale), who duly proceeded to receive an agent's commission for its efforts. Landale claims herein, a share of this commission alleging a right to such based on an agreement between itself and Jusashe. But according to Landale, Jusashe subsequently breached this arrangement by surreptitiously concluding a sole mandate contract with Mr. Hoard.

#### THE CLAIM FOR A SHARE OF THE AGENT'S COMMISSION

[ 12] In its declaration, Landale averred that the parties concluded, sometime in 2019, an oral "conjunction agreement" or joint mandate to dispose 52 Orange Grove. In terms of such agreement, the parties agreed to split the agent's commission due from the sale equally between them. The amount in question was calculated as follows by Landale; -

- i. Purchase price: - US\$4,100,00
- ii. Agent's commission due on the sale at 5% of the purchase price: - US\$230,000
- iii. Landale's share thereof being 50% of the purchase price: - US\$115,000

[13] Jusashe admitted that the parties indeed concluded an oral conjunctive agreement. It however insisted that this agreement terminated on 21 May 2019 due to irreconcilable differences between Mr. Hoard, the seller, and the US Embassy over the purchase price. But on 3 February 2020, a period of 8 months after the conjunctive agreement had lapsed, Jusashe avers that Mr. Hoard approached them and executed a fresh mandate. This mandate (and contract) was completely independent from both Landale and the expired conjunctive agreement.

[ 14] Jusashe insisted in paragraph 1.5 of the heads of argument filed on its behalf that it was perfectly entitled to so proceed and conclude a fresh mandate with Mr. Hoard because "section 10 of the Estate Agents (Professional Rules) Conduct SI 200 of 1987 provided that an agent; - "may deal directly if the owner, without prompting, requests him to proceed with the sale or lease of his property after a period of at least sixty days from the date when the agent first made known to the owner's agent his interest in the property concerned".

[ 15] Under this new contract, Mr. Hoard extended a sole or exclusive mandate to Jusashe to negotiate and close the transaction. It is on the basis of negotiations carried out under this mandate by Jusashe that a sale was eventually concluded with the US Embassy over 52 Orange Grove sometime in 2020. This, according to Jusashe, was the contract that yielded the agent's

commission. On that basis, it was Jusashe's contention that Landale had absolutely no entitlement to the agent's commission yielded by the sale.

#### THE POINT OF LAW ON LACK OF *LOCUS STANDI*

[16] Mr *Nkomo* (for Jusashe) submitted that (a) it was incontestable that the conjunctive agreement between the parties had lapsed on 21 May 2019 and (b) that it was also common cause that the sole mandate contract between Jusashe and Mr. Hoard was exclusive to the two parties. Landale was a third party to that relationship.

[ 17 The doctrine of privity of contract ousted Landale's right to insist on a claim for the fruits of a contract exclusively concluded between two separate parties. For the legal point, counsel relied heavily on this court's decision in *Albert Chitumba v Thadius Chadenga & 3 Ors* HH 41-23 per CHINAMORA J.

[ 18] The court in *Chitumba v Chadenga* (supra) in turn relied on the Supreme Court authority of *TBIC (Pvt) Ltd and Anor v Mangenje and Ors* SC 13-18 where BHUNU JA held as follows [at page 11] regarding privity of contract and *locus standi*; -

“That conclusion of law renders both appellants strangers to the contract between the acquiring authority and the respondent. This brings us to the doctrine of privity of contract. That doctrine restricts the enforcement of contractual rights and remedies to the contracting parties, to the exclusion of third parties. The learned author Innocent Maja in his book *The Law of Contract in Zimbabwe* at p 27 para 1.5.3 graphically explains the doctrine 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.” [ Emphasis added]

## THE PRINCIPLES GOVERNING *LOCUS STANDI IN JUDICIO*

[19] What constitutes *locus standi in judicio* is a well-established legal principle. The term denotes the entitlement of a party to institute, participate in, and sustain legal proceedings in pursuit of the enforcement and or defence of legal rights. Such right derives from the interest a party has in the outcome of legal proceedings, which interest must be “direct and substantial”. See *Sibanda & Ors v The Apostolic Faith Mission of Portland Oregon (Southern African Headquarters) Inc* SC 49-18;

[ 20] The term “real and substantial interest” was further articulated in *Museredza & Ors v Minister of Agriculture &Ors* CCZ 1-22 where PATEL JCC held [ at 45] that; -

“It is settled that the principle of *locus standi* is concerned with the relationship between the cause of action and the relief sought. Thus, a party needs to show that they have a direct, personal and substantial interest in the matter in contention. In *Zimbabwe Stock Exchange v Zimbabwe Revenue Authority* SC 56-07, MALABA JA (as he then was) said: “The common law position on *locus standi in judicio* of a party instituting proceedings in a court of law is that to justify participation in the action; the party must show that he or she has a direct and substantial interest in the right which is the subject matter of the proceedings and the relief sought.” [ underlined and italicised for emphasis]

[21] The question necessarily arising is; -does Landale have a direct, personal and substantial interest in the right which it persists in enforcing? This right derives from the (contested) claim that Landale concluded a pact with Jusashe to share the agent`s commission. The relief sought is an order based on a (again contested) claim to 50% of the agent`s commission earned on the sale of 52 Orange Grove.

[ 22] This claim (causa) as well as relief sought are both contested as noted. Jusashe has argued that Landale`s interest is neither direct, personal nor substantial in the relief sought. This is because in its interpretation, Jusashe seeks to found a right from a contract to which it was not a party. It cannot enjoy as such, benefits flowing from a contract whose rights and duties were exclusively between Mr. Hoard and Jusashe. This argument necessitates an examination of the concept of privity of contract itself.

## PRIVITY OF CONTRACT

[23] A useful starting point in that discourse is an analysis of the two decisions cited herein on privity of contract. Naturally, such analysis must advert to the factual scenario before the court in both decisions of *Chitumba v Chadenga* as well as *TIBIC v Mangenje*.

[ 24] In *Chitumba*, the applicant therein claimed not to be a third party to a contract, but a direct beneficiary under it. It was the applicant's argument that his daughter, the party and signatory to the agreement, had executed the contract on his behalf. The court ruled that he was alien to the contracting relationship. Similarly in *TIBIC*, the Ministry of Agriculture as acquiring authority under the Land Acquisition Act [ Chapter 20:10] concluded a contract of lease over land with a third party (first respondent). It was held that the appellant was not a party privy to this contract despite the land having been registered in his name.

## THE CONJUNCTIVE AGREEMENT

[ 25] These above scenarios are, in my view, clearly distinguishable from the present matter. In those decisions, third party claimants sought to claim rights flowing from specific contracts, as if they were attempted to enjoy benefits under such contracts. They drew and confined their respective claims to the four sides of the contracts.

[ 26] Herein, Landale is pinning its claim on the conjunction agreement. It is not seeking to enforce any rights due to Mr. Hoard or Jusashe under their exclusive agreement. Put differently, Landale is not seeking to substitute itself as a party to the contract between Jusashe and Mr. Hoard. Its claim hinges entirely on the conjunction agreement. Further, one must revert to the concept of the conjunctive agreement itself. This type of collaboration apparently forms a common (if not indispensable) part of real estate practice. An online definition of this type of contract goes thus<sup>1</sup>;

- i. A real estate **conjunction** typically refers to a partnership between two real estate agents on behalf of their agencies, to sell a property.
- ii. Usually, agency one is appointed by the sellers as the 'listing agent' and lists the property for sale. Agency two supplies a buyer for the purchase. This arrangement

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<sup>1</sup> <https://www.reiq.com/articles/property-sales/conjunctions-and-referral-arrangements-in-real-estate>

is suitable where an agency other than the listing agency has access to a buyer that is suitable for the property. In this scenario, the commission payable is shared with a signed agreement set in place.

- iii. It is important to note that agency two will not be appointed to act on behalf of the buyer, and therefore must not provide property services to the buyer. Agency two may assist with facilitating the sale but should not make representations that they act for the buyer or have a fiduciary relationship with that buyer.
- iv. If the buyer has appointed a buyer's agent, then this will not fall within the scope of a conjunction arrangement, as the agent must only act for one party in the transaction.
- v. In some circumstances, two agencies (or licensees) will work together under a commercial arrangement, where it is required that both agents are jointly appointed to sell the property "in conjunction" with the other under the PO Form 6 Appointment. This type of arrangement will usually be dictated by the terms of the commercial arrangement such as a licence, franchise agreement or partnership agreement.

[ 27] As noted at commencement, the practice of estate agents is governed by the Estate Agents Act. Under the aegis of this Act are various regulations including the Estate Agents (Professional Rules) Conduct SI 200 of 1987. This SI 200 of 1987 caters for a spectrum of situations where firms, agents and property negotiators may variously collaborate to progress client mandates. These scenarios do no more than speak to what the parties herein have commonly referred to as conjunctive agreements. In fact Jusashe referred to section 10 of SI 200 of 1987 as freeing it from the strictures of a conjunctive relationship.

[ 28] Which means that it is statutorily permissible for real estate agents in Zimbabwe acting under specific statutory approvals to conclude lawfully enforceable contracts under co-mandate arrangements. Even if such contracts target third party contracts. I did not receive a suggestion from either Mr. *Nkomo* or Mr. *Majogo* to the effect that by permitting such contracts, the Estate Agents Act violated the principle of privity of contract.



[ 29] On that basis, Landale's interest in the benefits promised in terms of a valid and extant conjunctive contract suffice to accord it *locus standi* to mount these proceedings. The contest of course will still need to interrogate the veracity of the causa or claims regarding that underlying contract itself.

[ 30] A further point is that there exist material dispute of facts which warrant the leading of evidence to resolve. To begin with, Landale insists that the conjunction agreement was extant as at the time of the conclusion of the exclusive agreement on 21 May 2019. Jusashe dismisses that contention. It has reiterated that the deal between Mr. Hoard and the Americans had collapsed.

[31] Each party, according to Jusashe, had walked away from the transaction. This contention was met with opposing recusancy by Landale to the effect that the conjunctive contract was extant as at 21 May 2019. The two parties' respective positions on that aspect are so disparate as to be fundamentally irreconcilable. And this present dispute pivots precisely on that aspect. Consequently, the matter demands determination on both law raised as well as fact.

[ 32] In addition, the niceties regarding the exact terms and conditions of the conjunctive agreement appear either unclear or contested. Apart from disagreements over duration and performance of that agreement, the parties are not aligned the most critical term thereof; -the commission sharing ratio. Landale argues that the parties concurred on a fifty-fifty split of an amount calculated as 5% of the sale price. Jusashe says the agreement was on 3% of the sale price.

## DISPOSITION

[ 33] The point of law raised by the defendant Jusashe challenging absence of *locus standi* on the part of Landale cannot sustain. The primary reason being that the plaintiff's claim is based, not on the contract between Jusashe and the seller Mr. Hoard, but between Landale and Jusashe. And plaintiff claims breach of that contract by defendant. The additional grounds is that a

material factual disparity exists as to the nature, fate, performance and status of the oral conjunctive agreement between plaintiff and defendant.

[ 34] I have had regard to the submissions concerning prayers an award of costs on a punitive scale. I must state that based on the established principles which I need not revert to for they are trite, I find nothing persuasive in those prayers.

Accordingly, it is ordered that; -

1. The preliminary point of law moved by defendant be and is hereby dismissed with costs.

*Sinyoro and Partners* – plaintiff's legal practitioners

*Mhishi, Nkomo Legal Practice* -defendant's legal practitioners

[ CHILIMBE J \_\_\_\_27/5/24]