IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE

CASE NO: 14791/07

In the matter between:

GERRIT JACOBUS VAN NIEKERK	Plaintiff
and	
EDWARD JOHN CLARKE	First Defendant
JOHANNA KATRINA CLARKE	Second Defendant
CORAM	**D H ZONDI J**
JUDGMENT BY	**D H ZONDI J**
FOR THE PLAINTIFF	**ADV. E J J SPAMER**
INSTRUCTED BY	**MALAN LOURENS INC. (STRAND) C/o MILLERS ATTORNEYS INC (CAPE TOWN)**
FOR THE DEFENDANT	**ADV. H C SCHREUDER**
INSTRUCTED BY	**DU PLESSIS & HOFMEYER INC. (SOMERSET WEST) C/o VAN DER SPUY & PARTNERS (CAPE TOWN)**
DATE OF HEARING	**24, 25 FEBRUARY 2010 & 30 APRIL 2010**
DATE OF JUDGMENT	**31 AUGUST 2010**

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE

CASE NO: 14791/07

In the matter between:-

GERRIT JACOBUS VAN NIEKERK Plaintiff

and

EDWARD JOHN CLARKE First Defendant

JOHANNA KATRINA CLARKE Second Defendant

JUDGMENT DELIVERED ON 31 AUGUST 2010

ZONDI, J

Introduction

[1] The plaintiff in his capacity as cessionary of the Newflo Trust ("the Trust") instituted an action against the first and second defendants claiming payment of a sum of R180 000-00 which at the trial was amended and reduced to R130 000-00.

Pleadings and Evidence

[2] In the particulars of claim the plaintiff alleges that on or about 22 December 2005, the Trust concluded a sale agreement with the defendants in terms of which the defendants sold to the Trust an immovable property namely the Remainder of Erf 1500 Bakkershoogte ("the property"), situate at Stellenbosch in the Western Cape for the sum of R3 600 000-00.

[3] In terms of the sale agreement a deposit in the amount of R180 000-00 was payable by the Trust on or before 31 January 2006.

[4] Pursuant to the sale agreement the plaintiff paid the sum of R180 000-00, on behalf of the Trust to the defendants' attorneys. This amount was to be held in trust by the defendants' attorneys pending transfer of the property.

[5] The sale was further subject to the Trust obtaining a loan for the balance of the purchase price from a financial institution on or before 31 January 2006 or within such extended period as the defendants might in their sole and absolute discretion allow. The defendants undertook to apply for a loan on behalf of the Trust.

[6] Clause 9 of the sale agreement makes provision for what would happen in the event of its breach by the Trust. It provides as follows:

> *"9.1 Should the Purchaser fail to pay the purchase price, or any portion thereof, or to deliver the guarantee for payment of the purchase price or any portion thereof within the time stipulated, or should the Purchaser fail to rectify any other breach of this agreement within 7 (seven) days after written demand is made by or on behalf of the Seller to do so, then in such event the Seller will be entitled to:*

9.1.1. Claim specific performance and payment of the full balance of the purchase price outstanding on date of such breach, together with interest thereon and/or any other consideration as stipulated herein, from date of such breach of contract; or;

9.1.2. To cancel the agreement in which event the Purchaser will be obliged, if he had already been given occupation of the property, to vacate the property immediately allowing the Seller to repossession thereof; and subject to any statutory limitations thereto;

(i) The Purchaser will forfeit the amount(s) plus interest which has already been paid by him to or on behalf of the Seller; and

(ii) The Purchaser shall be obliged to pay any arrear amounts immediately to the Seller;

PROVIDED THAT the Seller may waive the benefit contained in subparagraph 9.1.2(i) and 9.1.2(H) above and shall be entitled to claim only damages in which event the Seller will be entitled to retain any amounts plus interest already paid to him or on his behalf to be taken into account as a set off against his damages..."

[7] It is common cause that the Trust waived in writing the benefit of a suspensive condition regarding the obtaining of a loan for the balance of the purchase price and that in breach of clause 9.1 of the agreement failed to deliver the guarantees for the payment of the balance of the purchase price within seven days after it was demanded to do so by the defendants' transferring attorneys.

[8] In consequence of the Trust's failure to deliver the necessary guarantees pursuant to the sale agreement, the defendants cancelled the agreement and sought to withhold the deposit in terms of Clause 9.1.2 of the agreement.

[9] On or about 3 May 2007 the Trust ceded its rights, title and interest in all claims it might have against the defendants for the refund of the deposit. The deed of cession provided as follows:

> ***"DIE NEWFLO TRUST*** *verklaar hiermee dat dit verskuldig is aan* ***GERRIT JACOBUS VAN NIEKERK*** *in 'n bedrag van ten minste van R180 000-00 ten opsigte van die deposito wat deur Mnr Van Niekerk namens Newflo Trust betaal is in die transaksie* ***met EDWARD JOHN***
>
> ***CLARKE*** *en* ***JOHANNA KATRINA CLARKE*** *vir die aankoop van onroerende eiendom gelee te Irenelaan 220, Somerset-Wes.*
>
> *Ten einde terugbetaling van die vermelde bedrag aan Mnr Van Niekerk te bewerkstellig, en in mil waarvoor Mnr Van Niekerk herimee afstand doen van sy reg om aksie in te stel teen die Newflo Trust vir verhaling van die bedrag, sedeer die Newflo Trust an Mnr Van Niekerk alle reg, title en belang in enige en alle eise wat dit het of mag verkry teen Edward John Clarke en Johanna Katrina Clarke voortspruitend uit die laasgenoemde se retensie van die vermelde deposito.*
>
> *Dit word op rekord geplaas dat die sessie wat hierin vervat is, vir waarde ontvang is en dat Mnr Van Niekerk hierna geregtig sal wees om die vermelde eise van die Newflo Trust in sy eie naam in te stel."*

[10] The plaintiff contends that the defendants are not entitled to keep the entire deposit or any portion thereof as penalty in terms of the provision of Clause 9.1.2 of the sale agreement on the ground that on or about 7 August 2006, Plusko 111 (Edms) Bpk ("Plusko"), the company owned by the plaintiff, offered to purchase the property from the defendants for the sum of R3 780 000-00.

[11] The plaintiff alleges that the defendants rejected Plusko's offer and did not give reasons for doing so.

[12] The plaintiff avers further that on or about 8 September 2008 the defendants sold the property to Dekon Trust for R3 600 000-00 which is for an amount less than the offer made by Plusko.

[13] In their plea the defendants challenged the plaintiffs authority to bring the action and pleaded that they have suffered damages as a result of breach of the sale agreement by the Trust.

[14] The defendants pleaded as follows to the plaintiffs particulars of claim:

> *"6.2 Although the Defendants sold the property to Dekon Trust, as alleged in paragraphs 15.2.1, 15.2.2 and 15.2.3 of the particulars of claim, the Defendants suffered damages as a result of the breach of contract of The Newflo Trust, which damages exceeded the amount of the deposit ofR180 000-00 paid by The Newflo Trust, in that:*
>
> > *6.2.1. the Defendants were unable to take bookings for and conduct the business of a guesthouse on the property during the period January 2006 until October 2006;*
> >
> > *6.2.2. the Defendants were unable to conduct the businesses of a nursery and garden services on the property to the full and usual capacity of these businesses during the period January 2006 to October 2006;*
> >
> > *6.2.3. the Defendants were compelled to pay an additional amount of*

R50 000-00 in respect of a residential property bought by the Defendants in respect of which the Defendants were not in a position to perform timeously as a result of the delay caused by The Newflo Trust's breach of contract;

6.2.4. the Defendants suffered loss of income in the form of interest which they would have earned on the amount of R3 600 000-00, alternatively the amount of R2 400 000-00 (being the difference between the sale price of the property of R3 600 000-00 and the purchase price of the residential property bought by the Defendants, of R1 200 000-00), as a result of a delay caused by the Newflo Trust's breach of contract."

[15] In support of the allegations contained in the particulars of claim the plaintiff gave his own testimony and also relied on the evidence of Mrs M M Voges.

[16] The plaintiff, who is a building contractor and property developer, testified on how he got involved in the transaction which forms the subject of these proceedings.

[17] He was invited by a certain Mr Van Zyl, his business acquaintance to invest capital in the proposed property development project in Somerset West. The Trust intended to acquire land for development. It identified the defendants' property as a land suitable for its plans. The project involved the construction of a Medical Centre.

[18] The Trust then concluded a sale agreement with the defendants in terms of which it would buy the property from the defendants at the purchase price of R3 600 000-00. Funding for this transaction would have come from prospective investors and Imperial Bank. It was the plaintiffs understanding that Imperial Bank was to provide 80% of the funding by way of a loan and he was to raise 20%.

[19] In order to raise the purchase price Mr Van Zyl, who at the time was a quantity surveyor for the development project, approached the plaintiff and asked him to invest 20% of the capital necessary for the purchase of the property. In return the plaintiff was promised that he would be employed to build the Medical Centre at a cost of R5500-00 per square metre.

[20] The proposal appeared attractive to the plaintiff in that not only did it offer him an investment opportunity but also provided a work opportunity for him. It was the plaintiffs understanding that he together with Mr Van Zyl and Timo Voges would constitute the consortium. Van Zyl and Timo Voges would be responsible for raising 80% of the capital for the purchase of the property. At that stage he did not know Timo Voges. The latter was introduced to him by Mr Van Zyl at a later stage.

[21] As part of his contribution to the capital the plaintiff paid R180 000-00 deposit on behalf of the purchaser, the Trust. He made payment out of the cheque account belonging to Peak Star 133 (Pty) Ltd, one of his construction companies. He made payment to the defendants' attorneys. It was also the plaintiffs understanding that Timo Voges was *"the owner"* of the Trust.

[22] It is common cause that the defendants subsequently cancelled the deed of sale as the Trust could not raise the funds to finance the transaction. After the cancellation of the agreement the defendants refused to release R180 000-00 deposit which the plaintiff had paid on behalf of the Trust. The Trust elected not to sue the defendants for the refund of the deposit but instead ceded to the plaintiff its right in a claim for a refund of a deposit.

[23] The plaintiffs attorneys of record prepared a deed of cession which the plaintiff signed on or about 25 April 2007. After signing the deed of cession the plaintiff

delivered it to Timo Voges' house for signature by him. Timo Voges signed the deed of cession on 3 May 2007 outside his house in Strand. Armed with a deed of cession the plaintiff sued the defendants for the refund.

[24] Mrs Voges, who is the chairperson of the Trust and is one of the three trustees, testified on behalf of the plaintiff. Timo Voges is her husband. He is not one of the trustees but he manages the Trust affairs on behalf of the trustees.

[25] Mrs Voges signed on behalf of the Trust a deed of sale for the purchase of the property which the Trust earmarked for development. Timo Voges was driving the project for the development of the property and the trustees were not directly involved though Mr Voges informed them of the developments on an-ongoing basis.

[26] Mrs Voges never had any dealing with the plaintiff regarding the proposed development of the property. Her husband, Timo Voges dealt with the plaintiff at all the times.

[27] She is, however, aware that the plaintiff paid a deposit and that the defendants subsequently cancelled the contract because of the Trust's inability to raise the required purchase price.

[28] Timo Voges subsequently informed her that he had signed a deed of cession ceding to the plaintiff the Trust's right to sue the defendants for the refund of the deposit. Neither Mrs Voges nor the other two trustees were present when the deed of cession was signed by Timo Voges on 3 May 2007. They were, however, later informed of the cession and did not have an objection to it. All the three trustees signed a resolution on 12 February 2010 purporting to ratify the conclusion of the cession by Timo Voges.

Absolution Application

[29] At the close of the plaintiff's case Mr Schreuder, who appeared on behalf of the defendants, applied for absolution from the instance on the ground that the plaintiff had failed to make out a *prima facie* case against the defendants.

[30] Mr Schreuder argued firstly, that the plaintiff does not have *locus standi* to sue the defendant and secondly, that there was no evidence regarding the extent of prejudice suffered by the defendants.

[31] He advanced two grounds upon which he submitted that the plaintiff lacked the *locus standi.* Firstly, he argued that the deed of cession upon which the plaintiff sues is void and invalid as it was not signed by the trustees of the Newflo Trust. He submitted that because of it being void the deed of cession was incapable of ratification.

[32] Secondly, he argued that in any event the plaintiff did not pay the deposit. Peakstar 133 (Pty) Ltd paid the deposit and being so it should have brought the action not the plaintiff. The question is whether absolution should be granted at this stage.

[33] I now turn to consider the first contention raised by the defendants.

[34] Mr Schreuder submitted on behalf of the defendant that the cession upon which the plaintiff sues is invalid in that the person, who signed the deed of cession on behalf of the Trust whereby the latter's rights, title and interest in its claim against the defendants for the refund of a deposit were ceded to the plaintiff, did not have authority to do so.

[35] In developing this argument he pointed out that all the trustees of the Newflo Trust should have signed the deed of cession for it to be capable to confer any rights on the

plaintiff. He argued that the deed of cession was void and as such was incapable of ratification.

[36] In reply, Mr Spamer submitted on behalf of the plaintiff that the fact that the trustees have to act jointly in conducting the Trust affairs does not mean that the ordinary principles of the law of agency do not apply. He pointed out the trustees may expressly or implicitly authorise someone to act on their behalf as long as they did not abdicate their responsibilities in delegating their powers. In support of this contention he placed reliance on **Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) (Bpk)** 2004 (3) SA 486 (SCA) at 494D and **Coetzee v Peet Smith Trust en Andere** 2003 (5) SA 674 (T) 680 I).

[37] Mr Spamer argued further that in the present case the deed of trust does not contain any provisions prohibiting Timo Voges from exercising the broad powers employed by him in setting up and managing the property development project on behalf of the trustees . He argued that clauses 7 (k) and (s) and 17 of the deed of trust are a source of Voges' powers as they confer authority on the trustees to delegate.

Applicable Law

[38] It is correct that the test for absolution from the instance is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff **(Claude Neon Lights (SA) Ltd v Daniel** 1976 (4) SA 403 (A) and **Gascoyne v Paul and Hunter** 1917 TPD 170). What this means is that the plaintiff must make out a *prima facie* case in the sense that there is evidence relating to all the elements of the claim to survive absolution which in the present matter would include *locus standi.*

[39] The test is, however, somehow different where the issue turns on the interpretation of a document. If the plaintiffs evidence consists of the production of a document on which it sues and the sole question between the parties is the proper interpretation of the document, the distinction between the interpretation that a reasonable man might give to the document and the interpretation that he ought to give it, tends to disappear. In those circumstances absolution should be refused unless the proper interpretation appears to be beyond question **(Gafoor v Unie Versekeringsadviseurs (Edms) Bpk** 1961 (1) SA 335 (A) at 340 B-C

[40] It is trite law that in the absence of a contrary provision in the trust deed the trustees must act jointly if the Trust estate is to be bound by their acts. **(Land and Agricultural Bank of South Africa v Parker and Others** 2005 (2) SA 77 (SCA) at paragraph 15). In the absence of a contrary provision in the deed they may, however, authorise someone to act on their behalf and that person may be one of the trustees. **(Thorpe and Others v Trittenwein and Another** 2007 (2) SA 172 (SCA) at paragraph 9). See also **Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk,** supra at para 23 and Honore's South African Law of Trusts, 5,^{h}ed. at 324-325).

Findings

[41] The question whether or not the trustees have powers to delegate will turn on the interpretation of the deed of trust which is the source of their powers.

[42] The deed of trust in the present case makes provision for three trustees and the persons, who in terms of the Master's Letters of Authority dated 5 December 2005 are authorised to act as trustees, are Wilmien Lederle, Martha Maria Voges and Erik Wilhelm Voges. It allows the trustees to delegate their powers.

[43] Clause 17 of the Trust Deed provides for delegation of power. It states:

"The Trustees shall at times be empowered to employ an attorney or other agent to transact all or any business of whatsoever nature required or permitted to be done in pursuance of this Trust Deed and they shall be entitled to be allowed and paid all charges so incurred and shall not be responsible for the default or negligence of any such Attorney or Agent for any other loss occasioned by reason of his/her employment."

[44] Clause 7 (k) and (r) provides as follows:-

"(k) In dealing with the affairs of the Trust, the trustees shall, without derogating from the other powers and authorities given to them in terms of this Trust Deed, have all such powers and authorities as are normally vested in the Board of Directors of a Company.

(r) Without in any way derogating from the powers and authorities herein before vested in the Trustees, they shall have such ancillary and/or additional powers as shall be necessary or requisite to enable them from time to time, to deal with all matters opportunity to the trust is such manner as they deem advisable in

the interest of the Trust".

[45] It is common cause in the present case that Timo Voges, who signed the deed of cession, is not one of the persons authorised to act as the trustees in terms of the Letters of Authority. He is the husband of Mrs Voges (the chairperson and donor) and the father of the other trustees. Timo Voges manages the Trust estate on behalf of the trustees.

[46] I disagree with Mr Spamer's submission that the authority to delegate, which the trustees have under clause 17 of the deed of trust, includes the authority to employ a third party such as Timo Voges to conclude the deed of cession on their behalf. Clause 17 on its proper construction relates to the authority of the trustees to employ third parties to perform certain functions on behalf of the trustees because of their specialised skills and knowledge in a relevant task to be performed. Conclusion of the deed of cession is not a type of task which is delegable.

[47] It is clear from the provisions of Clause 17 that the trustees are not responsible for the default or negligence of the person they employ under Clause 17. The exclusion of the trustees' liability for the default or negligence of any such person is inconsistent with the concept of representation under the law of agency in terms of which the rights and obligations arising out of a contract concluded by an agent enure to the principal.

[48] The trustees cannot therefore in the exercise of their powers under clause 17 confer on a third party powers to cede trust rights, title and interest in the claim against trust debtors. The right to sue for the refund of the deposit is an asset of the Trust. It vests in the trustees and they must act jointly in disposing of such asset. Moreover the conclusion of the deed of cession is the function which involves the exercise by the trustees of their discretion. The trustees must act jointly in concluding the cession or authorise one of them to do so on their behalf. It is the function which the trustees

cannot delegate.

[49] It follows from the aforegoing that the trustees cannot rely on Clause 17 as providing authority for them to delegate to Timo Voges the power to cede the Trust claim. The deed of trust does not authorise them to do so. The deed of cession is void and invalid as the person who concluded it did not have authority to do so and it is an act which cannot be ratified.

[50] In the circumstances I hold that the plaintiff does not have a *locus standi* to bring this action as the document upon which he sues and on which he purports to derive authority is void and invalid. There is no doubt that the trust deed does not empower the trustees to authorise Timo Voges to conclude a deed of cession.

[51] In light of the conclusion that I have reached it becomes unnecessary for me to consider the other contentions of the defendants.

The Order

[52] In the result absolution from the instance is granted with costs.

ZONDI D H