THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case no: 71/05

In the matter between:

B E THORPE, S THORPE AND A E R DIXON
(In their capacities as Trustees of the Brian Edward Thorpe Trust) **1st APPELLANTS**

EASTGATE RENTALS (PTY) LTD **2nd APPELLANT**

and

J A TRITTENWEIN **1st RESPONDENT**

CONDERE BELEGGINGS 63 CC **2nd RESPONDENT**

Coram	**:**	**SCOTT, CAMERON, CONRADIE, LEWIS, *et* HEHER JJA**
Date of hearing	**:**	**6 March 2006**
Date of delivery	**:**	**24 March 2006**

Neutral citation: This judgment may be cited as *Thorpe v Trittenwein* [2006] SCA 30 (RSA)

Summary: Agreement for sale of immovable property signed by one of three co-trustees – in absence of authority in trust deed, such a trustee to be regarded as an 'agent' within the meaning of s 2(1) of the Alienation of Land Act 68 of 1981

JUDGMENT

SCOTT JA/…

SCOTT JA:

[1] The appellants applied in the High Court, Johannesburg, for an order declaring the sale of certain immovable property situated in Bedfordview ('the property') to be valid and enforceable together with certain ancillary relief which included an order aimed at enforcing the registration of transfer of the property in their names. The matter came before A P Joubert AJ who dismissed the application with costs. The appeal is with the leave of the court *a quo.*

[2] The sale which the appellants sought to have declared valid came about in somewhat unusual circumstances. On 8 December 2000 Mr Brian Edward Thorpe ('Thorpe') signed a written offer to purchase the property in the name of the Brian Edward Thorpe Trust ('the trust'). Although in the form of an offer, the document was intended to constitute a written agreement of sale once the offer had been accepted. It bears the heading 'Agreement of Sale' and makes provision for the signature of the offeree, who is described as the 'seller', to signify his acceptance. A feature of the document is its provision for both a 'Purchaser 1' and a 'Purchaser 2'. The name of the trust has been inserted in the space left for the identification of purchaser 1 but the space for the insertion of the name of purchaser 2 has been left blank. The purchase price is stated to be R2 520 000 of which purchaser 1 (the trust) is to pay R1 250 000 'for stand 1' and purchaser 2 is to pay R1 270 000 'for stand 2'. Each purchaser is to pay one half of the deposit of R252 000 within seven days of the acceptance of the offer. In the event, the first respondent accepted the offer and signed the document on the same day, ie 8 December 2000. I shall refer to it as the 'agreement of sale'.

[3] On 19 December 2000, a memorandum of agreement, headed 'Addendum A' was signed by the first respondent (as seller) and by a Mr Neil John Fuller. The latter is stated therein to act as a trustee for a close corporation or company to be formed or as nominee and is referred to as the 'second purchaser'. In the preamble the agreement of sale of 8 December 2000 is identified and the addendum is said to be attached to it. In the body of the addendum the parties agree that the second purchaser 'hereby purchases stand 2 [of the property] for a purchase price of R1 250 000'. A further, somewhat contradictory, clause provides that 'in the event of the second purchaser not finding another second purchaser within 90 days of signature of this addendum' . . . it will 'terminate forthwith and no longer be of any force and/or effect'. I mention in passing that Fuller is a member of Fuller Estates CC which carries on business under the style of 'Re/Max One' whose printed logo appears on the agreement of sale of 8 December 2000.

[4] On 6 March 2001 a further document was signed by the first respondent (as seller) and Fuller (as second purchaser) and headed 'Addendum B'. It amended the previous addendum in two respects. First, it amended the purchase price payable by the second purchaser from R1 250 000 to R1 270 000 so as to reflect the amount specified in the agreement sale. Second, it deleted the provision which permitted Fuller to find another second purchaser, failing which the agreement contained in addendum A would fail and confirmed unequivocally that the second purchaser was Fuller 'as trustee for a close corporation or company to be formed or his nominee'.

[5] Clause 4 of the written agreement of 8 December 2000 rendered the sale conditional upon the seller (first respondent) 'being able to establish a township on the property'. The clause provided further that the costs of a town planner and of establishing a township were to be born by the purchasers. It also recorded that the condition would be deemed to be fulfilled upon the town planner giving

notice to the purchasers that the application had been approved. In terms of clause 1 the purchasers were to provide bank guarantees to the seller's nominee for the balance of the purchase price within 15 days of the fulfillment of the condition. This meant, of course, that save for the deposits the first respondent was obliged to wait for the township approval before being paid.

[6] A deposit of R126 000 was paid on behalf of the trust shortly after Addendum A was signed. Fuller on the other hand delayed paying for almost a year. In November 2001 he advised the first respondent that he had nominated Eastgate Rentals (Pty) Ltd (the second appellant) as second purchaser. In March 2002 the latter's deposit was finally paid. In the meantime, the town planner who had been appointed in late 2000 was experiencing difficulty with the township application. A late objection resulted in even further delay in the fulfillment of the condition. The first respondent was pressed for funds and was unable to pay the bond instalments on the property. Following an exchange of correspondence the first respondent's attorneys in a letter dated 10 October 2002 purported to cancel the sale, but curiously only in so far as it related to the second purchaser. Fuller ignored the cancellation and proceeded on the basis that the sale was binding, as did the first appellant. At some stage the bondholder obtained judgment against the first respondent and took steps to have the property sold in execution on 26 February 2003 by public auction. The second respondent (Condere Beleggings 63 CC) then stepped into the breach and provided the funds to enable the first respondent to liquidate his indebtedness to the bondholder. On 5 March 2003 the first and second respondents entered into a deed of sale in terms of which the former sold the property to the latter. In the meantime it appeared that the town planner had received word from the local authority that the township application would be approved. This was conveyed to Fuller on 2 May 2003.

[7] On 15 May 2003 the appellants launched their application for the relief referred to in para 1 above. They contended that the agreement of sale together

with its two addenda constituted an indivisible and valid contract, that the purported cancellation was ill conceived and groundless and that they were entitled to the relief claimed. The first respondent in his answering affidavit raised a plethora of defences. One of them was that the three documents said to constitute the deed of sale did not comply with the requirements of s 2(1) of the Alienation of Land Act 68 of 1981 ('the Act'). Most of the others were patently without merit. Fortunately, it is unnecessary to consider any of them. In response to a point raised in the answering affidavit of the second respondent (who was not represented by the same attorney as the first respondent) Thorpe stated in reply that he had been orally authorized by the other trustees of the trust to enter into the agreement of sale. He also said that the oral authority had in any event been subsequently ratified in writing by the other trustees and he annexed in this regard a copy of the minutes of a meeting of the three trustees held on 3 October 2003. In a further set of affidavits the second respondent contended that the absence of the written authority of Thorpe's co-trustees rendered the agreement of sale invalid for want of compliance with the provisions of s 2(1) of the Act and that the invalidity could not be cured by an *ex post facto* ratification. The court *a quo* upheld this defence and on this ground alone dismissed the application with costs. This is the issue to which I now turn.

[8] Section 2(1) of the Act reads –

'No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.'

The object of this provision, as in the case of its predecessors, is undoubtedly to put the proof of such an 'alienation' of land beyond doubt and thereby in the public interest to avoid unnecessary litigation. See eg *Philmatt (Pty) Ltd v Mosselbank Developments CC* 1996 (2) SA 15 (A) at 25B-D and authorities there cited. The need for the authority of an agent to be in writing is no less necessary to achieve this object than the need for the deed to be in writing.

[9] As observed by Cameron JA in *Land and Agricultural Bank of SA v Parker and others* 2005 (2) SA 77 (SCA) para 10 at 83H a trust is 'an accumulation of assets and liabilities'. Although forming a separate entity that entity, like a deceased estate, is not a legal *persona*. The assets and liabilities constituting the trust vest in the trustees and it is they who must administer them. They are therefore not the agents of the trust, nor for that matter of the beneficiaries (*Hoosen and others NNO v Deedat and others* 1999 (4) SA 425 (SCA) para 21). It is moreover trite that unless the trust deed provides otherwise, trustees must act jointly. In the absence of a contrary provision in the deed they may, however, authorize someone to act on their behalf and that person may be one of the trustees. (See *Nieuwoudt and another NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) paras 16 and 23.)

[10] The trust deed in the present case (a copy of which formed part of the record) makes provision for three trustees. In terms of clause 8.5 decisions of the trustees are to be taken on a majority vote, subject to certain exceptions. Clause 20.2 provides that 'any of the trustees shall be entitled to delegate all or any of his [or her] powers hereunder to any person approved by his [or her] co-trustees'. There is nothing, however, to suggest that a trustee may act on behalf of the other trustees without their authority. On the contrary, the deed clearly contemplates them acting jointly.

[11] The other two trustees are, and always have been, Sharon Thorpe and Allen Edwin Ross Dixon. From what has been said above it is apparent that neither signed any of the three documents which the appellants contend constitute the deed of alienation contemplated in section 2(1) of the Act. It is also common cause that while both were party to the decision to enter into the agreement of sale and therefore authorized Thorpe to do so, the authority of neither was in writing.

[12] It is necessary to observe that the position of a trustee is distinguishable from that of a partner. A partnership, like a trust, is not a legal *persona*. But there is a fundamental difference between the two. In the absence of any provision in the partnership agreement to the contrary, each partner has authority to perform acts in the furtherance of the business of the partnership. That authority arises by implication of law and the partnership will accordingly be bound. For this reason a deed of alienation of immovable property need be signed by one partner only. See *Muller en 'n ander v Pienaar* 1968 (3) SA 195 (A). Different considerations similarly apply in the case of corporations, tutors and curators. See eg *Potchefstroom Dairies v Standard Fresh Milk Supply Co* 1913 TPD 506 at 512-513 (cited with approval in *Muller v Pienaar* at 200H-201C). See also *Myflor Investments (Pty) Ltd v Everett NO and others* 2001 (2) SA 1083 (C) at 1095I-1096D. But none of these is applicable to trusts. On the other hand, in the case of joint executors who, like trustees, are obliged to act jointly, it was held in *Tabethe and others v Mtetwa NO and others* 1978 (1) SA 80 (D) that an agreement of sale of immovable property was invalid for want of compliance with s 1 of Act 71 of 1969 (a predecessor of the present section) as it had been signed by one of two co-executors only and without the written authority of the non-signing executrix.

[13] The approach adopted by the court *a quo*, and embraced by the respondent in this court, was simply that Thorpe signed the agreement of sale of 8 December 2000 both as trustee, ie as principal, and as the authorized agent of the other two trustees, and because that authority was not in writing the agreement was void for non-compliance with s 2(1) of the Act. In this court counsel for the appellant challenged the correctness of this approach. He argued, first, that the term 'agents' in the section had to be strictly construed. Secondly, he argued that a distinction had to be drawn between the decision making process on the one hand and the function of signing the agreement of sale on the other. As far as the former is concerned, he contended that the joint action requirement of trust law required no more than that the co-trustees jointly

take the decision to enter into the agreement. Thereafter, so it was argued, the trustee signing the agreement did so, not as an ‘agent’ of the co-trustees in the strict sense contemplated by the section, but as a ‘functionary’ of the trust.

[14] The answer, I think, is that even if one regards the decision of the co-trustees to enter into the agreement of sale as no more than a matter of internal trust administration, the point remains that in the absence of the joint decision of the co-trustees (or the majority if that is all the trust deed requires), the assent of a single trustee to a contract (unlike in the case of a partner) will not bind the trust. The reason is the rule that requires co-trustees to act jointly. This much is well established and was readily conceded by counsel. A trustee who was not party to the decision making process and who therefore has not authorized the contract would be free to contest the validity of the transaction. In that event the other contracting party wishing to hold the trust bound would be obliged to prove the existence of that authority. The discharge of such a burden of proof would ordinarily be no easy matter.

[15] As previously indicated, the very object of s 2(1) of the Act is, on grounds of public policy, to facilitate that proof by requiring the authority to be in writing and so avoid needless litigation. Whether one regards Thorpe as having acted as a functionary of the trust and in that sense a principal or as both a principal (as co-trustee) and agent of the other co-trustees, the result in my view must be the same. Given the object of the section, it must be construed, I think, as being applicable on either basis. In other words, the reference in the section to ‘agents’ must be understood as including a trustee who may in a sense be said to sign as a principal (ie as the trust) but whose power to bind the trust is nonetheless dependent upon the authority of the co-trustees. To do otherwise would be to thwart the clear object of the section. It follows that in my view the agreement of sale (as supplemented by the addenda) is void *ab initio* and of no force and effect.

[16] The appellants in replying affidavits sought to rely in the alternative on a subsequent written ratification of Thorpe's conduct in entering into the agreement. In this court counsel abandoned the point. The concession was well made. Ratification relates back to the original transaction. There can be no ratification of a contract which is void *ab initio.* See *Wilken v Kohler* 1913 AD 135 at 143.

[17] It follows that the appeal must fail. The result may seem somewhat technical, especially since Thorpe was the founder of the trust, is clearly the dominant trustee and is also, with members of his family, a beneficiary of the trust. Counsel was at pains to point out that it was not – as is usual in this type of case – the trustees who were seeking to escape the consequences of the sale; it was the seller who was not in any way prejudiced by the absence of the written authority of the other trustees. But the trust is typical of the modern business or family trust in which there is a blurring of the separation between ownership and enjoyment, a separation which is the very core of the idea of a trust. (See *Land and Agricultural Bank of SA v Parker*, supra, para 19 at 86E.) Those who choose to conduct business through the medium of trusts of this nature do so no doubt to gain some advantage, whether it be in estate planning or otherwise. But they cannot enjoy the advantage of a trust when it suits them and cry foul when it does not. If the result is unfortunate, Thorpe has himself to blame.

[18] The appeal is dismissed with costs, including the costs of two counsel.

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D G SCOTT
JUDGE OF THE SUPREME COURT OF APPEAL

CONCUR:

CAMERON JA

CONRADIE JA
LEWIS JA
HEHER JA