

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 5512/2010

In matter between:-

SELLO Z .KHABOLA N.O

APPLICANT

and

SEMAKALENG P RALITABO N.O

RESPONDENT

HEARD ON:

17 MARCH 2011

JUDGMENT BY:

K.J. MOLOI, J

DELIVERED ON:

24 MARCH 2011

JUDGMENT

MOLOI, J

- [1] In this matter the applicant is a trustee of a business trust known as Lithakali Development Trust IT 708/2002 which owned two pieces of land on which farming activities were conducted. The land was sold to a third party cited as the fourth Respondent under a Deed of Sale signed by the applicant's three other trustees cited as the First, Second and Third Respondents. The Master of the High Court, the

registrar of Deeds and the Land Bank were also cited as Respondents nominally for their respective interests in the trust property, the land in question. The applicant sought an order setting aside the sale of the trust property in his personal capacity. The other co-trustees and the fourth respondent are opposing the application. Furthermore the co-trustees launched a counter-application seeking an order removing the applicant as a trustee of the trust, authorising them to liquidate the estate of the trust and to dissolve the trust.

- [2] During the hearing of the application it was agreed that the court decide the question of *locus standi* of the applicant and the co-trustees to bring in the applications against each other as they did. The question of *locus standi* became central to whether or not the court should proceed to hear the other aspects relating to the validity of the Deed of Sale, compliance with the provisions of the Alienation of Land Act and the validity of the counter-application.
- [3] In the Trust Deed founding the trust the applicant is described as the donor (founder) and the other trustees as mere

trustees. The applicant had invited the co-trustees to join him in this venture. The trust was formed for the purpose of acquiring agricultural land on which farming activities were to be conducted. It appears a loan of **R400 000.00** was obtained from the Land Bank to finance the purchase of the land and that the Department of Land Affairs made a grant of **R280 000.00**. The trustees were to contribute each an amount of **R500.00** per month towards the repayment of the loan. Only the first respondent made a contribution of **R10 000.00** for this purpose. No beneficiaries were appointed in the trust instrument. The applicant conducted the farming activities on the trust property until evicted by the new owner, the fourth respondent.

[4] In deciding the question of whether the parties herein have *locus standi* to initiate legal proceedings against each other over the trust property, the court must look at certain other aspects. The following must be considered:

- a) From the above exposition and especially the contributions that the co-trustees were expected to make, it seem the parties intended to form a partnership or some

other association which was simulated as a trust. In the Trust Property Control Act No. 57 of 1988 in section 1 thereof a trust is defined as:

“Trust” means the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed-

- a) to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or
- b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of person designated in the trust instrument or for the achievement of the object stated in the trust instrument, but does not include the case where the property of another is to be administered by any person as executor, tutor or curator in terms of the provisions of the Administration

of Estate Act, 1965 (Act No. 66 of 1965)".

(b) Under common law any person having a direct and substantial interest in the matter in issue has the required *locus standi*: United Watch & Diamond Co. v Disa Hotels 1972 (4) SA 409 (C); SA Optometric Association v Frames Distributors 1985 (3) SA 100 (O) Molotlegi v President of Bophuthatswana 1989 (3) SA 119 (B). The direct and substantial interest all the co-trustees have in the matter is clear from what is briefly described in paragraph 3 above.

(c) The court must also refer to the provisions of section 34 of the Constitution of South Africa Act No. 108 of 1996 which provides as follows under Access to Courts:

"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate another independent and impartial tribunal or forum".

[5] Having found that the parties clearly had the formation of a partnership in mind from the onset and tacitly agreed to the

applicant performing the role of a general manager, the alleged Trust seem simulated. No meetings of trustees were held either. Of course the partners in a partnership have a right to sue each other. The direct and substantial interest in the matter is clear in as far as everyone is concerned. The provisions of section 34 of Act 108 of 1996 need no further elaboration.

- [6] **Taking all the above factors into account the court finds that the applicant, on the one hand, the 1st 2nd and 3rd respondents on the other hand, have locus standi in respect of the application and the counter-application, respectively.**

The costs will be costs in the course.

MOLOI, J

On behalf of the Applicant:

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