

THANDANANI MALINGA

And

**JAMES MALINGA [herein represented by DANISA MOYO
through a Special Power of Attorney]**

versus

HENRIETA SANTANA SIZIBA

And

REGISTRAR OF DEEDS

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 15 MAY 2008

L Chikwaka for applicants

T Hara for 1st respondent

Opposed Application

NDOU J: The applicants are wife and husband. On 8 February 2006 the applicants entered into an agreement of sale with the 1st respondent's mother, Vainah Moyo, who purported to act as 1st respondent's agent. This agreement of sale was in respect of stand 71799 Lobengula West Township, Bulawayo. The applicants duly paid Vainah Moyo the full purchase price in terms of the agreement. Vianah Moyo duly acknowledged receipt of the purchase price in writing. Notwithstanding that the applicants paid the full purchase price, 1st respondent has not given them vacant occupation of the stand nor has she facilitated the transfer of the stand into the applicants' names. At some stage the 1st respondent indicated to the applicants that the conveyancers wanted a Special Power of Attorney from her since she is outside the country. She, through, Vainah Moyo demanded that the applicants pay \$20 000 000,00 so that she could send the Special Power of Attorney from England where she is based. In order to facilitate a quick transfer they paid \$20 000 000,00 even though

they opined that there was no legal basis for doing so. This payment was acknowledged in writing. Thereafter, the 1st respondent sent the “Special Power of Attorney”. She signed this “Special Power of Attorney” at Leicester College in England on 12 May 2006. In the applicant’s opposing papers it is not disputed that this Special Power of Attorney was signed by the 1st respondent for the purpose of transferring the stand into the names of the applicants. All that is raised by the 1st respondent is that the Special Power of Attorney was not attested to by two witnesses and deposited to before a Notary Public. Therefore the issue is the effect of such technical defects in the Special Power of Attorney. The original General Power of Attorney exhibited by Vainah Moyo at the time of signature on the agreement was signed by one witness but not by the 1st respondent. What is the effect of such comedy of errors? In the Special Power of Attorney that she personally signed, the 1st respondent appoints Vainah Moyo as her lawful agent to act on her name and *inter alia*;

“1 To sign:

To sign all document [sic] pertaining the sale of stand 71799 Lobengula Township of stand 1 Lobengula Township, in extent 137 square metres, situate in the district of Bulawayo, held under Deed of transfer No. 621/2006 ... including the transfer documents and any such documents pertaining to services required on the said stand”

This Special Power of Attorney was accompanied by an e-mail authored by the 1st respondent herself to her erstwhile legal practitioners in the following terms:

“Subject: Re: Transfer stand 71799 Lobengula

Date: 12 May 2006 ...

I have attached the special power of attorney that you sent for me to sign. My mom mentioned that I should also pay for the zimra well in that case I do not think I will be prepared to pay it. I suggest that you sell the house henrietah.”

In light of the above, was Vainah Moyo properly authorised to sell the property to the applicants? But before I deal with this point, the application should in my view be granted on the very basis that the 1st respondent challenges the contract i.e. lack of authority by Vainha Moyo to represent her. The 1st respondent cannot blow hot and cold on the issue of Vianah Moyo's authority to act as her agent. If Vainah Moyo does not have authority to represent her, then she has no authority to file an opposing affidavit on her behalf. Minus Vainah Moyo's opposing affidavit, then there is no opposition to the application. On that basis alone I should grant the application as unopposed. In any event, the said Vainah Moyo does not pretend or aver anywhere in the opposing affidavit that the 1st respondent authorised her to represent her in this application and in particular to file opposing papers. Because the principal is named, the said Vainah Moyo cannot litigate in her own name – *Sentrakoop Handelaars Bpk v Lourens & Anor* 1991(3) SA 540 (W) at 544H-545E. Because the “General Power of Attorney” is defective, there is no actual authority. The only issue left for me to determine is whether there is apparent authority. It is trite law that a person who, intending or apparently intending that the representation is to be acted upon, represents, or permits it to be represented, to a third party that he has given authority to another, becomes bound to a third person if the third person, induced by the representation, enters into a transaction reasonably believing that the other person has the authority which he has been represented to have – *Monzali v Smith* 1929 AD 382 at 385; *Stirling & Ors v Federated Insurance Co Ltd* 1983 (1) SA 897 (W); *Maytham v Logan* 1917 SR 80 at 85; *Seniors Service (Pvt) Ltd v Nyoni* 1986 (2) ZLR 293 (SC) at 299 and *Tank v Jacobs* (1881) I SC 289 at 290. *In casu*, Vainah Moyo represented to the applicants that she had authority to sell the property. The 1st respondent signed

a Special Power of Attorney to facilitate transfer from her name to those of applicants. She demanded money from the applicants to cover costs for the said Special Power of Attorney to be shipped from the United Kingdom to Zimbabwe. She actually “negotiated” that the applicants carry the ZIMRA costs (see her e-mail, *supra*). She did not challenge Vainah Moyo’s authority to act on her behalf at that stage. Her conduct was consistent with someone who had authorised Vainah Moyo to sell the property on her behalf. Even in this application, Vainah Moyo is still representing her on the basis of apparent authority.

This allegation of lack of authority is clearly an afterthought. Vainah Moyo had ostensible authority to act on behalf of the 1st respondent. What 1st respondent said in the e-mail and did by signing the Special Power of Attorney and demanding that applicants cover the costs (for its conveyance from the United Kingdom to Zimbabwe) is a representation which is such that it would unambiguously convey to a reasonable man in the position of the applicants (i.e. the representee) that the alleged agent had the authority which the applicants alleged that she had – *B & B Hardware Distributors (Pty) Ltd v Administrator, Cape & Anor* 1989 (1) SA 957 (A) at 961 I and *Monzali v Smith, supra*. In the circumstances there is apparent authority granted by 1st respondent to Vainah Moyo to act on behalf of 1st respondent. The applicants have made out a case for the relief sought.

Accordingly, I grant the order in terms of the draft order.

Sansole & Senda, applicants’ legal practitioners
T Hara & Partners, 1st respondent’s legal practitioners