SUNBEACH PROPERTIES (PRIVATE) LIMITED
versus
NATIONAL SOCIAL SECURITY AUTHORITY
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 11, 15, 17, 22, 23, 25 FEBRUARY 2011, 28 APRIL 2011 AND 24 APRIL 2013

Civil Trial

T.H. Chitapi, for plaintiff
M. Foroma, for first defendant

MUSAKWA J: The plaintiff issued summons in which the following relief is being claimed:

a) Payment of US$225 000 together with interest at the prescribed rate.
b) An order that the second defendant shall not transfer stand number 7488 Salisbury Township held under deed of transfer number 697/02 to the first defendant until payment of US$225 000 has been made to the plaintiff by the first defendant.
c) That the first defendant shall pay costs of suit on a legal practitioner and client scale.

Initially the plaintiff had sued Total Zimbabwe (Private) Limited (hereinafter called Total) but in due course the claim against Total was withdrawn. The dispute between the parties emanates from the sale of stand number 7488 Salisbury Township (hereinafter called Chibuku House) to the first defendant by Total. The plaintiff is thus claiming commission for facilitating the sale.

Evidence for the plaintiff was led from its Director, Sales Manager, Property Negotiator as well as the Health and Safety Manager of Total.

The first witness to testify for the plaintiff was its Sales Manager, Anthlem Tafirei Gwedegwe. He stated that around November 2009 Angeline Musarurwa, a property negotiator advised him that the first defendant was interested in Chibuku House and wanted to know if it was on sale. He then contacted the Health and Safety Manager for Total, Mr Kafuka. Mr Kafuka confirmed that the property was on sale but said he wanted to consult the Finance Manager. After a while Mr Kafuka reverted to him and asked what he wanted. When

the witness asked for a mandate to sell the property Mr Kafuka advised him that Total was not giving any mandate.

The witness contacted Mr Chidhuza, a representative of the first defendant and advised him that Total was not giving a mandate. Mr Chidhuza asked him to work out something as the acquisition of Chibuku House was one of their priorities. He then asked Mr Chidhuza to make an offer and sent Angeline Musarurwa with an offer form for confirmation.

According to Anthlem Tafirei Gwedegwe the offer form that was submitted to the first defendant remained unsigned. He made follow-ups and met Mr Vera the Investments Director who was in the office of the Finance Director, Mr Mapani. He queried why they were not making an offer and Mr Vera replied that they might state too low or too high a figure. He instead told Anthlem Tafirei Gwedegwe that Total must state their price.

When Anthlem Tafirei Gwedegwe indicated that Total wanted US$3 500 000 Mr Vera indicated that their budget was US$3 000 000. Mr Vera further wanted an acknowledgement that Total wanted the higher amount of US$3 500 000. When Anthlem Tafirei Gwedegwe asked if he could make a bid for US$3 000 000 Mr Vera was said to have agreed.

In respect of commission Mr Vera is said to have asked what they charged and Anthlem Tafirei Gwedegwe stated they charge 7,5%. Mr Vera is said to have stated that if Total showed seriousness they could not forgo their target over a commission. He further stated that he did not want correspondence signed by a junior representative from Total.

On 6 November 2009 Anthlem Tafirei Gwedegwe made an offer of US$3 000 000 which he copied to the defendant. There was no reply until the 28 November 2009. In the intervening period the witness claimed he had a discussion with Mr Chidhuza during which the latter wanted to know why Total was taking long to respond. When he enquired with Total he was informed that the board had not yet met.

On 28 November 2009 Mr Kafuka called Anthlem Tafirei Gwedegwe and asked for proof that there was direct communication between the plaintiff and the first defendant. Anthlem Tafirei Gwedegwe informed Mr Kafuka that there was no such communication. On 30 November 2009 Angeline Musarurwa collected a letter from the first defendant which was then submitted to Total. On the following day Mr Kafuka called Anthlem Tafirei Gwedegwe to collect a letter from them. The letter, which was addressed to the plaintiff confirmed acceptance of the offer. Anthlem Tafirei Gwedegwe then addressed a covering letter to the

first defendant. He was informed by Mr Mapani that he had done his part. The relevant letters were produced.

A letter was subsequently written to the first defendant enquiring when the commission would be paid. Mr Gwedegwe stated that he first talked to Mr Vera on the phone and he was referred to Mr Chidhuza. Mr Chidhuza then said the first defendant was not supposed to pay the commission. He was referred to the general manager, Mr Matiza.

The plaintiff's representatives were not involved when an agreement of sale was drawn up. During discussions with Mr Vera it was indicated that Bard Real Estate had once been engaged by the first defendant but they had failed to secure the sale. The witness stated that he was not aware of the involvement of any other estate agent.

According to Mr Gwedegwe the mandate from the first defendant was to facilitate and secure the sale of Chibuku House. Mr Vera had said that once written confirmation that the property was on sale was availed the first defendant would take over from there. He was not aware that Bard Real Estate had secured an offer for US$2 500 000. He was also not aware of the counter-claim.

The witness also stated that when he sought written confirmation from Mr Vera, the latter indicated that they had been dealing with Bard Real Estate and nothing had come out of it. That is why they were not willing to give written confirmation of a mandate. Under cross-examination he agreed when it was put to him that Mr Vera would deny authorising him to make an offer of US$3 000 000.

Having written to Mr Chidhuza on 6 November 2009, the latter called him on the following day. The witness also claimed that it was the first defendant's practice not to stamp letters written to them. However, when it was brought to his attention that there were letters in the bundle of documents which showed that they were stamped by the first defendant he conceded by singling out the letter dated 12 January 2010.

The witness denied that the plaintiff's director, Mr Mugadza was present during a meeting with the first defendant's officials. When questioned in respect of the letter of 12 January 2010 he agreed that he did not indicate to the first defendant that he had a mandate from Total.

Phillip Mugadza, a director of the plaintiff was the next to testify. He stated that he was not involved in negotiations for the sale of Chibuku House. He referred to an occasion when he and Mr Ndizeye, a legal practitioner went to the first defendant's offices and held discussions with Mr Mapani in the presence of Mr Vera. They discussed the possible

financing of fertiliser procurement and the first defendant's officials referred them to BancABC.

He specifically denied discussing the issue of properties and in particular, Chibuku House. He further stated that on their way out Mr Vera had indicated that they had funds to purchase surrounding buildings in order to establish NSSA Park. He denied ever going to the first defendant's offices in the company of Anthlem Tafirei Gwedegwe and Angeline Musarurwa.

Under cross-examination Phillip Mugadza stated that he only visited the first defendant's offices once. He denied ever calling Mr Mapani despite having been given his business card. According to him, it was Mr Ndizeye who called Mr Mapani in connection with the fertiliser issue. The call was made from his office, which he gave as Market Giant. Philip Mugadza was asked about his mobile phone number and stated it as 0772659200. He denied texting Mr Mapani in connection with Chibuku House on 9 December 2009.
It was put to him that there was a text message that emanated from his phone and he stated that because of time lapse he could not recall everything

Angline Musarurwa who used to be the plaintiff's property negotiator testified that a representative of the first defendant, Mr Matiza informed her that they were interested in Chibuku House. She was referred to Mr Chidhuza, again a representative of the first defendant who confirmed the same. Mr Chidhuza told her to verify if the property was on sale, and if so, the price. She was also told to establish if the seller was giving a mandate.

Angeline Musarurwa briefed Anthlem Tafirei Gwedegwe. Both of them went to see Mr Chidhuza to confirm whether the property was on sale. Mr Chidhuza confirmed so but told them Total was not giving a mandate. He told them to make an offer of US$2 500 000. They were also told to get their commission separately. Anthlem Tafirei Gwedegwe went to Total but the offer was turned down. Instead, Total indicated they wanted a written offer from the first defendant. Angline Musarurwa then took an offer form to Mr Chidhuza for confirmation. Subsequently, a second offer was made to Total on behalf of the first defendant.

The last witness to testify was Josphat Kafuka, the Transport and Safety Manager for Total.

Being a member of the Management Committee he knew that Chibuku House was on sale. He confirmed receiving enquiries by way of a phone call from Anthlem Tafirei Gwedegwe in November 2009. He consulted the Finance Manager, Mrs Musemwa. With an

offer having been made at US$2 500 000 he was told that they would not take anything less than US$3 000 000.

Later Anthlem Tafirei Gwedegwe brought a written offer which the witness took to Mrs Musemwa. He recalled that the offer was for US$3 000 000. Later Mrs Musemwa asked for proof that the plaintiff was acting on behalf of the first defendant. He relayed this to Anthlem Tafirei Gwedegwe who brought a letter from the first defendant confirming their interest in the property. He took the letter to Mrs Musemwa who in turn wrote a letter of acceptance which, upon being signed by the Managing Director, he gave to Anthlem Tafirei Gwedegwe.

He got to know during their weekly management meetings that the property was sold to the first defendant. He knew that another agent had made an offer but he did not deal with the issue. He only met Anthlem Tafirei Gwedegwe when he brought the offer letter. Under cross-examination he said he was not sure whether Anthlem Tafirei Gwedegwe had made the offer when he went to see the Finance Manager. He was also taken to task on why he did not state in his evidence in chief that the Finance Manager wanted the offer in writing.

At the close of the case for the plaintiff Mr *Foroma* applied for absolution from the instance. He submitted that an agent can only introduce a property with authority from the seller or owner. Conversely, he submitted that an estate agent cannot introduce a property to a potential buyer without the authority of the seller or owner.

Mr *Foroma* made reference to correspondence constituting the first defendant's bundle. The letter on p 56 of that bundle purported to introduce the property on behalf of Total. In that respect he submitted that there is no issue that the plaintiff was acting on behalf of the first defendant. He further submitted that there is no written proof that the first defendant instructed the plaintiff to represent it. He also submitted that although Mr Kafuka testified that the Finance Manager had sought proof that the plaintiff had authority from the first defendant, all that was availed was an attempt in the form of a letter from the first defendant in which it expressed interest in the property.

Mr *Foroma* further submitted that there was no compliance with s 10 (2) of the Estate Agents (Professional Conduct) (Amendment) Rules (No. 2), Statutory Instrument 131/1991. This is because, as he submitted, when Angeline Musarurwa spoke to officials of the first defendant she had no authority from Total. In short, the thrust of Mr *Foroma's* submission is that the documentary evidence was not complemented by the oral testimony of the witnesses.

In addition, Mr *Foroma* also paused the question whether the plaintiff performed any mandate. He raised this in light of the letter by Total to the plaintiff dated 30 November 2009 in which an offer of US$3 000 000 was made to the first defendant. The same letter invited acceptance to be made in writing. Mr *Foroma* submitted that despite a follow up letter by the plaintiff there was no such acceptance by the first defendant. In such a case, it was his submission that there was no relationship of principal and agent between the first defendant and the plaintiff. Hence, no *prima facie* case had been made for the plaintiff. He thus prayed for absolution from the instance to be granted with costs.

On the other hand Mr *Chitapi* submitted that Mr *Foroma* had not addressed the issue of estoppel which can only be adequately addressed once all the evidence has been heard. He further submitted that what is of relevance is a letter addressed to the plaintiff by the first defendant which is dated 30 November 2009. That letters reads as follows-

> "NSSA is keen to purchase the property from Total.
>
> Your assistance will be very much appreciated if this deal can be concluded as soon as possible."

Mr *Chitapi* queried what deal was being referred to if the parties had no prior communication on the issue. He also submitted that the first defendant only approached Total after its offer of US$3 000 000 had been accepted. He further contended that the first defendant is estopped from denying agency because it acted on the communication between Total and the plaintiff.

Mr *Chitapi* further submitted that there is evidence of communication between the plaintiff and the first defendant. After the first defendant indicated the price at which they were purchasing the property, the plaintiff's roll was over. According to Mr *Chitapi*, it cannot be said that the evidence led is so improbable that any court acting on it might not find for the plaintiff. Despite the fact that the first defendant did not sign the mandate form given to it by the plaintiff, the latter continued to negotiate the sale. The contention here is that the plaintiff would not have continued to act if it had been told that there was no mandate as argued by the first defendant. He further contended that the involvement of the plaintiff has not been denied and in the absence of such denial the first defendant has a case to explain.

As for the test applicable, Mr *Chitapi* cited the case of *Supreme Service Station (1969) (Pvt) Ltd* v *Fox And Goodridge (Pvt) Ltd* 1971 R.L.R 1 (AD).

The law applicable in respect of an application for absolution from the instance is well established. In *Supreme Service Station (1969) (Pvt) Ltd* v *Fox And Goodridge (Pvt) Ltd supra* which Mr *Chitapi* cited BEADLE CJ had this to say at p 4-

> "The *locus classicus* of the cases dealing with the procedure of absolution from the instance is the old Transvaal case of *Gascoyne* v *Paul and Hunter*, 1917 T.P.D 170. In that case, it was pointed out that an application for absolution from the instance stands much on the same footing as an application for the discharge of an accused at the close of the evidence for the prosecution, but it is stressed (see p 173 of the judgment) that it would, indeed, be curious if, in civil cases, were to apply a more stringent rule of practice than in criminal cases. It would seem to me that, as in a criminal case the onus is always higher than in a civil case, evidence which in a criminal case would be insufficient to justify refusing an application for the discharge of an accused might well in a civil case be sufficient to justify refusing an application for absolution from the instance. Gascoyne's case stresses that it is perfectly competent for a court to refuse an application for absolution from the instance when the application is made at the close of the plaintiff's case, but to grant it if the defendant then promptly closes his case and renews the application without calling any evidence at all. There is no inconsistency in two such diametrically opposed orders, though the evidence before the court in each application is identical.
>
> The reason why there is no inconsistency is because the test to be applied when application is made before the defendant closes his case is 'what might a reasonable court do?'; whereas the test to be applied when the application is made after the defendant has closed its case is 'what ought a reasonable court to do?".

Having discussed the distinction between "might" and "ought" the learned CHIEF JUSTICE went further to state at p. 5

> "The test, therefore, boils down to this: Is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff? What is a reasonable mistake in any case must always be a question of fact, and cannot be defined with any greater exactitude than by saying that it is the sort of mistake a reasonable court might make- a definition which helps not at all."

What comes out from this decision is that it must always be borne in mind that consideration must be given to the fact that the defendant would not have given evidence where an application for absolution from the instance is made at the close of the plaintiff's case.

Coming to the facts of the present matter it is common cause that the plaintiff had no mandate from Total. Having learnt from the plaintiff's representative that the first defendant wanted to know whether Chibuku House was on sale, the plaintiff, on 2 November 2009 wrote to the first defendant and introduced the property. Despite having enclosed an offer form, this was not completed by the first defendant.

It is also common cause that whereas the first defendant was interested in Chibuku House, it did not want to make an offer. It is also common cause that the plaintiff exchanged correspondence with both the first defendant and Total in connection with Chibuku House. At the stage when Total knew that the first defendant was interested in the property, it requested for proof that the plaintiff was acting on behalf of the first defendant. It is common cause that when proof that the plaintiff was representing the first defendant was sought the best that emerged was a letter which is on page two of exhibit "A" which is cited elsewhere in this judgment. It is also common cause that when Total accepted the "offer" of US$3 000 000 from the plaintiff it wrote back to the plaintiff indicating that there be a written acceptance by the first defendant. This was not to be as there was no written acceptance by the first defendant. Nonetheless, an agreement was subsequently concluded between the first defendant and Total but without the further involvement of the plaintiff.

Although Phillip Mugadza initially denied any involvement in the discussions on Chibuku House, his responses to questions put to him concerning text messages from his phone betrayed him. The contents of the text message read to him were as follows:

> "How has been your day uncle? I thought you should know that if you do not know do something about Chibuku House it will be taken by Africa Sun or Speciss. There are other agents interested. Bard House is also interested.
>
> Your brother, Mugadza."

The witness was quizzed about this message and he dismally failed to explain it. He was also quizzed about other text messages sent by Mr Ndizeye. Overall, he was defensive, evasive and anticipated questions. I would say he was a poor witness.

That being so this brings into focus the provisions of the Estate Agents (Professional Conduct) (Amendment) Rules (No. 2). Section 10 (1) of the regulations provides that-

> "Subject to this section, no agent shall seek or accept a mandate from a person in respect of a property for which he knows or has reason to believe that a mandate of the same nature has already been granted to another agent, unless-
>
> (a) the agent is offered the mandate without having sought it; and
>
> (b) the person offering it has withdrawn any sole mandate in respect of the property".

In light of Phillip Mugadza's testimony, it appears the plaintiff was aware that another agent was involved. The evidence led does not show that the requirements laid out in paras (a) and (b) of s 10 (1) were met. Now, it being known that the seller had not given a mandate to the plaintiff, the provisions of s 10 (2) of the regulations appear not to have been met.

Section 10 (2) provides that-

"Where an agent receives an instruction from a prospective purchaser or tenant to endeavour to purchase or hire property in respect of which the agent does not have a mandate to sell or lease, the agent shall-

(a) make known to the prospective purchaser or tenant that he shall be liable to meet all costs, including agent's commission or negotiating fee, unless the owner agrees to share or meet these expenses; and

(b) approach the owner or lessor and inquire whether he has appointed an agent with a mandate to sell or lease the property concerned, as the case may be, and where-

(i) the owner or lessor confirms that no other agent has been appointed to sell or lease the property concerned, as the case may be, the agent may negotiate the purchase or lease of that property directly with the owner or lessor; or

(ii) ……"

Anthlem Tafirei Gwedegwe claimed that the first defendant's representatives agreed to pay the agent's commission verbally. However, the parties appeared to have conducted their dealings in writing as evidenced by the correspondence that was produced during the trial. It was not properly explained why there was no such communication in writing concerning such an important aspect like commission. The only time the issue of commission came up for the first time was when the plaintiff wrote to the first defendant on 1 December 2009 after Total had accepted the offer of US$3 000 000. I am convinced that the plaintiff failed to comply with s 10 (2) (a) of the regulations with regard to securing attendant costs, including agent's commission.

Having made these observations it follows that in light of the unsatisfactory nature of the evidence given on behalf of the plaintiff no reasonable court might make a mistake and give judgment for the plaintiff. Absolution from the instance is hereby granted with costs.

T. H. Chitapi & Associates, plaintiff's legal practitioners
Sawyer & Mkushi, defendant's legal practitioners