EYELUTH PROPERTIES (PVT) LTD
versus
ROY HARVEY

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 27 & 30 January, 4 February & 29 April 2015

Civil Trial

T. Magwaliba, for the plaintiff
M. Nicolaou, for the defendant

MATANDA-MOYO J: The plaintiff issued summons against the defendant for payment of damages in the sum of $6 754.19. The plaintiff alleged that it instructed the defendant to invest its monies which were held in defendant's trust account which the plaintiff neglected to do, causing he plaintiff to lose out interest on the capital amount in the sum of $6 754.19. The plaintiff also claimed interest at the rate of 5% per annum from 23 November 2012 being the date of demand to date of payment plus costs of suit.

The defendant denied liability on the basis that R. J Lovatt, was not the plaintiff's duly authorised agent. The defendant denied ever being instructed by R.J Lovatt to invest the money on behalf of the plaintiff. Alternatively the defendant accepted receiving the instructions from R. J Lovatt but, could not act on the instructions as there was no indication he had the plaintiff's authority to so act. The request was illegal as it amounted to a request to unlawfully evade tax. Such instruction was allegedly contrary to conveyancing practice. The defendant also challenged the period of interest claimed and the rate thereof.

The issues referred for trial are as follows:-

(1) Whether Mr R. J Lovatt was the plaintiff's duly authorised representative.
(2) Whether the plaintiff's duly authorised representative aforesaid instructed the defendant to invest the sum of $127 237.50 into an interest bearing account with Tetrad Asset Management on the plaintiff's behalf?
(3) Whether the instruction to the defendant to invest the aforesaid funds was to unlawfully evade tax on behalf of the plaintiff?

(4) Whether the instruction to the defendant to invest the aforesaid funds was contrary to conveyancing practice convention and the intention of the agreement?

(5) Whether the encroachment into the said property was miniscule?

(6) Whether the plaintiff delayed and protracted the exercise to re-align the wall?

(7) Whether the defendant is liable to the plaintiff for the damages it suffered in the sum of $6 754.19, being interest it lost as result of the defendant's failure to invest its funds as instructed?

(8) Whether the defendant had a discretion as to whether to invest trust monies with Tetrad Asset Management?

The admissions sought by the defendant and accepted by the plaintiff were the following:

(a) That Tetrad Asset Management is not a bank or a building society.

(b) That Mr R. J Lovatt requested the money to be invested in his own name so that he could derive a tax benefit due to his age, and such tax benefit was not available to the plaintiff.

(c) The monies that were paid into defendant's trust account were deemed the plaintiff's and not Mr R. J Lovatt's money. Such monies were to be held in trust for payment to the seller after transfer.

(d) That plaintiff was threatening to cancel the agreement of sale due to an encroachment of an old boundary wall, and thereafter if this was not rectified and replaced by a new wall to its liking and specifications and such wall was to be constructed by contractors nominated by it.

(e) That plaintiff refused to have the original wall re-aligned, but insisted on a new wall being erected.

The plaintiff called Mr R. J Lovatt to testify on its behalf. He is a Director in plaintiff company. The plaintiff has two directors, Mr R. J Lovatt and his wife. He testified that sometime in February or March 2012, he and his wife bought the plaintiff, which was a shelf company for purposes of transferring into its name a certain piece of property they were purchasing. This witness on behalf of the plaintiff entered into an agreement of sale, where the plaintiff agreed to purchase number 439 Blair Road Borrowdale for $135 000.00. The plaintiff bought such property from Richard C. Leach. Richard C. Leach was represented by the defendant. Subsequent to the signing of the agreement the plaintiff deposited $127 237.50

into the Trust Account of Granger and Harvey Legal Practitioners. Such amount was transferred on 5 April 2012.

Upon engaging an architecture to draw plans for constructing a building on the property, Mr R. J Lovatt was advised that the boundary wall encroached into his property by about 5 metres Mr R. J Lovatt advised the agent Property link to sort out the problem. Mr R. J Lovatt approached Mr Tony Fisher of Tetrad Asset Management on possibility of investing the money pending the rectification of the boundary wall. He was offered an interest rate of 13% per annum. The money was drawable on 48 hours notice. Mr R. J Lovatt instructed the defendant to invest his money with Tetrad Asset Management until the issue of the wall was resolved. Despite several instructions the defendant did not invest the money and neither did he communicate with this witness with regard to the issue. On 7 August 2012 this witness demanded a refund of the purchase price from the defendant to no avail. He received no communication from the defendant. As a result of failure to invest the money in an interest bearing account the plaintiff lost interest in the sum of $6 754.19 which was the interest to be paid by Tetrad Asset Management had the defendant invested the funds as per the plaintiff's instructions.

Under cross-examination he stuck to his story that he just wanted his money to be invested. He admitted that he may not have been serious in cancelling the agreement of sale and did so under frustration. Mr R. J Lovatt also admitted that he advised that he wanted a brick wall as opposed to moving the prefabricated wall. It was suggested to him that he contributed to the delay in resolving the boundary issue to which he denied although it was clear from his answers that he made certain demands on the erection of the wall. Mr R.J Lovatt admitted that there was no clause in the agreement of sale that allowed him to recall the money or get the money back. He also agreed that clause 5 of the agreement of sale gave him right of occupation and right of profit upon payment of the purchase price. The plaintiff closed its case.

The defendant applied for absolution form the instance. It was the defendant's submission that for a plaintiff to succeed in a claim for Aquilian damages, such damages must be capable of precise calculation. It was incumbent upon the plaintiff to quantify the exact amount of damages suffered by it. The defendant submitted that the court should be alive to the fact that damages were being claimed by the plaintiff and not by Mr R. J Lovatt. There is no evidence before this court of any damages suffered by the plaintiff. Such evidence was available to the plaintiff but the plaintiff failed to place such evidence before

the court. His claim should fail on that basis. The defendant referred me to the case of *Hersman* v *Shapiro* 1925 TPD 367 at 369. The defendant argued that the evidence placed before the court is such that the court would not be able to assess the damages suffered by the plaintiff less any taxes etc. This court could not arrive at the conclusion on damages suffered by the plaintiff from available evidence. I was also referred to the cases of *Eramus* v *Davies* 1969(2) SA (AD) and *Lazarus* v *Reinsteel Co.* 1952(3) SA 49.

Mr *Magwaliba* for the plaintiff replied that a *prima facie* case had been made for the plaintiff entitling the court to place the defendant on its defence. The plaintiff argued that the plaintiff, Global Lubricants and Mr R. J Lovatt were one and the same person. Mr R. J Lovatt is the alter ego of the plaintiff and Global Lubricants. The plaintiff argued that the plaintiff is only a vehicle for holding property on behalf of Mr R. J Lovatt and his wife. A loss to plaintiff is a loss to Mr R..J Lovatt. The plaintiff submitted that there is evidence that the defendant was instructed to invest the purchase price in an interest bearing account and failed to do so. Counsel for the plaintiff referred me to s 13(3) of the Legal Practitioners Act which allows a Legal Practitioner like the defendant to invest money in an interest bearing account in joint names, of the law firm and the client.

It is plaintiff's argument that the issue of quantum was never disputed by the defendant and the general rule that, that which is not disputed is accepted should apply in this case. This is not a case where the court is being called upon to estimate quantum of damages. Counsel for the plaintiff urged this court to dismiss the application. In *Claude Neon Lights (S.A) Ltd* v *Daniel* 1976(4) SA 403 (A) at 409 G-H Harms JA dealt with the test for absolution as follows:

> "This implies that a plaintiff has to make out a *prime facie* case in the sense that there is evidence relating to all the elements of the claim to survive absolution because without such evidence no court could find for the plaintiff ….. Having said this absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises a court should order it in the interests of justice".

Consequently the plaintiff's evidence at the absolution stage should hold a reasonable possibility of success.

In this case the plaintiff is nothing but Mr R. J Lovatt's alter ego. The plaintiff was a company bought by Mr R. J Lovatt and his wife for purposes of holding the property. That meant that the money belonging to the plaintiff could rightly be described as Mr R. J Lovatt's money. The mere fact that Mr R. J Lovatt intended to invest the funds in his own name becomes irrelevant. The plaintiff has put evidence before me that Tetrad Asset Management

had offered Mr R. J Lovatt interest rate of 13% per annum with tax benefits. From the evidence available I am of the view that a reasonable court may find for the plaintiff. At this stage it is not admissible to scrutinize the evidence, a process which a court should do at the end of the trial. See *Gafeor* v *Unie Versekerings adviseurs (Edms*) *Bpk* 1961(1) SA 355 (A). The court at this stage should simply determine whether or not the plaintiff has crossed what has been referred to as the low threshold of proof that the law sets when a plaintiff's case is closed. See *De Klerk* v *Absa Bank Ltd and Ors* 2003(4) SA 315(SCA).

The defendant's argument in support of this application is that the plaintiff has failed to put before the court the proof of damages. No calculations from banks have been put across. Garwe JA in *Matthew Mbundire* v *Tyone Sum Buttress* SC 13/11 at p 4 of the cyclostyled judgment quoted Stratford J in *Hersman* v *Shapiro and Co* 1926 TPD 367 @ 379-80 where he said:

> "… Monetary damage having been suffered, it is necessary for the court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced, in those circumstances the court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit a mathematical calculation of the damages suffered, still, if it is the best evidence available, the court must use it and arrive at a conclusion based upon it …..".

This is so because where the evidence is available to the plaintiff, it is the plaintiff who has the onus of proving the extent of damages, and the plaintiff should put across that evidence to the court. The court should not embark on an exercise of guess work where the plaintiff has in his possession sufficient evidence to enable he court to so calculate his damages.

The defendant also referred me to Vissers and Potgieters Book on the *Law of Damages* (1st ed) on p 437 where the authors stated that where the evidence was available to the plaintiff but he failed to produce it then the court should not attempt to assess the plaintiff's loss and should order absolution. The defendant attacked the document which was produced by the plaintiff as Annexure E, which the defendant submitted, did not stipulate whether the calculation was in respect of Mr Lovatt or in respect of the plaintiff's company.

The plaintiff believes it was not necessary to distinguish between itself, Mr Lovatt and Global Lubricants. Mr R. J Lovatt was the alter ego of all companies.

I do not intend to deal with the issues of whether indeed Mr R. J Lovatt is the alter ego of the plaintiff at this stage. At this juncture it is possible that the court may find for the plaintiff. If so it means the quantification presented for Mr R. J Lovatt suffices at this stage.

It is settled that courts are encouraged to refuse the granting of applications for absolution in favour of concluding the trial and giving a wholesome judgment at the end of the trial. I see no reason to depart from this laid down principle and accordingly the application for absolution from the instance fails.

The defendant gave evidence on his own behalf. He admitted that he acted on behalf of Richard Curtis Leach and signed an agreement of sale, whereby the said Richard Leach, sold his property number 439 Blair Road Borrowdale to the plaintiff for $135 000-00. Upon concluding the agreement of sale the plaintiff paid the purchase price out of which $127 237.50 was paid into the Trust Account of Granger and Havey and $7 762.50 which formed the agent's commission was paid into Property Link's current account at Stanbic Bank. The defendant was also appointed conveyancer of the property. The defendant therefore played two roles in the matter, that of agent of seller and conveyancer. He understood clause 5 of the agreement to mean that risk and profit passed to the Purchaser upon signing of the agreement. The title deed and diagram deed were shown to Mr R. J Lovatt who agreed that he had satisfied himself in respect of extent of the property. The defendant testified that he prepared the document authorising Mr RJ Loratt to act on behalf of the plaintiff. He understood the document to be giving Mr RJ Lovatt powers to appear at Zimra and to sign all documents required by Deeds Office for purposes of effecting the transfer, and to establish value of the properties for tax purposes.

The defendant acknowledged receiving an email from Mr RH Lovatt on 6 June 2012 purportedly cancelling the agreement of sale on the basis that the property size was not as described in the agreement. The defendant said he contacted Linda of Property link. He testified that when he received the email of 21 June 2012, Mr RJ Lovatt had already met Mr Tim from Property Link. In that e-mail Mr R J Lovatt indicated that they would hold defendant liable for all interest to accrue from 27 June 2012. The defendant said the only issue derailing transfer was of boundaries and since that issue was resolved he responded to Mr RJ Lovatt that the transfer could proceed then.

The defendant testified that Mr RJ Lovatt wanted a brick wall to be constructed and was responsible for the delay in transferring property. It was no longer an issue of moving boundaries but was introducing a new condition. He prayed for the dismissal of the matter.

Both parties agreed that they entered into an agreement of sale of stand 439 Blair Road Borrowdale. The defendant was the representative of seller and the conveyances of the property. The full purchase price was $135 000.00 and the plaintiff paid the full amount. Of the full amount $127 237.50 was deposited into the defendant's trust account whilst the difference which was the agent's commission was deposited directly into Property Link's account. After such payment the plaintiff took possession of the property. After realising discrepancies in the boundaries Mr RJ Lovatt instructed the defendant to halt transfer until same was rectified. On 22 June 2012 Mr RJ Lovatt instructed the defendant to invest his money with Tetrad Asset Management at an interest rate of 13% per annum until the issue of the boundary was resolved. In the e-mail the defendant was given an ultimatum to invest the money by 25 June 2012 or else the law firm would be held responsible for the lost interest.

On 22 June 2012 the defendant responded to the e-mail and insinuated that whatever concerns Mr RJ Lovatt had should not stop the transfer as parties involved were agreeable to moving the boundaries as per the plan.

The boundary was moved on 20 November 2012.

An analysis of the evidence by the plaintiff and the defendant show that the facts of the matter are to a large extent common cause and I shall not delve much into the factual issues.

The defendant challenged Mr RJ Lovatt's authority to give instructions for the investment of the money. The defendant argued that Mr RJ Lovatt required special authorisation from the plaintiff. On the other hand the plaintiff refuted that argument. The plaintiff relied on the "extract of minutes of a meeting of directors of Eyeluth Properties (Pvt) Ltd" held at Harare on 19 March 2012 where Roger James Lovatt was authorised to represent the company and to sign all documents that were necessary to give effect to transfer of the property. The plaintiff argued that the resolution authorised RJ Lovatt to act on behalf of the plaintiff with regards the matter. The defendant argued that he was the one who drafted the resolution and it only gave RJ Lovatt authority to attend to ZIMRA. I do not agree with the defendant's submission.

Mr RJ Lovatt was the authorised person dealing with the issue and that authority included making a decision on investment. The narrow interpretation of the resolution by the defendant is misplaced.

It is the defendant's argument that Mr RJ Lovatt's instruction was illegal as it had the effect of evading tax. The plaintiff objected to the raising of the issue on the basis that it was

an after thought by the defendant. At the time of the instruction the defendant never raised the issue and such issue is being raised for the first time during trial proceedings. The issue whether the instruction was unlawful or not raises a legal issue. This issue should be tackled together with the argument raised by the plaintiff that the defendant was supposed to advise the plaintiff of the illegality of investing with Tetrad under RJ Lovatt's name and at least come up with the investment options available to the plaintiff. As a conveyancer the defendant held the money on behalf of the purchaser. It was his duty to cause the purchase on the available options.

It is imperative that I at this stage determine whose money was the $127 237.50 which the defendant was holding. The plaintiff argued that the position is clear, before transfer the money belongs to the purchaser. It only becomes the seller's money upon passing of title to the purchaser. On the other hand the defendant argued that the money belonged to the seller. He held the money in trust for the seller.

The law is very clear on ownership of immovable property. At the conclusion of a sale the purchaser only acquires a right in *personam ad rem adquirendam* against the seller, he acquires no jus in re until the actual registration. As long as transfer of property has not been effected, ownership remains with the registered title holder. See *York & Co* v *Jones* 1961 R&N 490 (SR). It is trite that ownership of immovable property can only be conveyed by means of a deeds of transfer. See s 14 of the Deeds Registration Act [*Chapter 20:05*]. It is therefore my finding that Richard C Leach remained the owner of the property in question before transfer and the plaintiff acquired personal rights in the property. It follows therefore that before transfer the purchase price belongs to the purchaser. The money held in the defendant's Trust Account was the plaintiff's money and the plaintiff had right to issue instructions pertaining to the money. See *Manhando* v *Mtetwa and Anor* 2003(1) 220.

However the defendant had a right to ensure that the money was invested in a 'secure' investment pending the transfer. The parties have agreed that Tetrad Asset Management was not a bank or a Building Society and that such investment institution was not a secure investment institution is common cause. It follows that the defendant was under no obligation to invest the money in Tetrad Asset Management.

Section 13 (2) of the Legal Practitioners Act relied upon by the plaintiff provides:

> "(2) A registered legal practitioner, may in addition to the trust account referred to in sub section (1) open and keep a trust account bearing interest at a bank or building society with an institution approved by the council of the society for the purposes of this sub-section in which he may unless otherwise instructed by the person on whose account of whom the

> monies are held or received as the case maybe subject to subsection 4 and to such limitation and conditions as may be prescribed by regulation any such monies are not in immediately required for any purpose".

In investing such moneys a legal practitioner has to be diligent in the choice of investment. He should not invest monies in high risk investments.

I am thus of the view that the plaintiff has managed to prove that he indeed instructed the defendant to invest his money pending transfer. The respondent was under an obligation to at least invest the money in an interest bearing account. It was the defendant's responsibility to advise the plaintiff why he could not invest with the Tetrad Bank but to then proceed to invest with other secure institutions. The defendant had an obligation to take instructions from the Purchaser who remained the owner of the funds pending transfer. See *Eralie Homes Estates* v *Miller* 1977 4 SA, 228(C), *Transvaal Incorporated Law Society* v *Kay* 1950 (4) SA(2) @ 450, *Van Viet* v *Alder Casley* and Salomon 1979 (3) SA 1159.

The plaintiff insists that its cause of action is derived from contractual damages, seeking to place the plaintiff in the position he would have been if the defendant, a trustee had invested the trust fund in an interest bearing account in terms of instructions given to him. I am not convinced by this argument as there was no contract between the plaintiff and the defendant. The parties did not agree on the issue of investment. The defendant was a Conveyancer holding the purchase price in trust pending transfer of the property. In contract no damages can be claimed unless breach of contract is proved. From the evidence before me the parties did not agree that the purchase amount would be invested in an interest bearing account. It was Mr RJ Lovatt who allegedly gave an instruction to the defendant to invest money in Tetrad Asset Management. The defendant never agreed to that. No contract existed in that regard. I am of the view that this claim is based on delict. I agree with the defendant that this is an acquilian action whose requirements are as follows;

1) That there must be some conduct on defendant's part (an act or omission) which the law recognise as wrongful or unlawful,
2) That the conduct must have led to harm to person or property and thereby causing financial loss, or to have caused purely financial loss,
3) The defendant must have inflicted the patrimonial, loss intentionally or negligently and
4) There must be a causal link between the defendant's conduct and the loss.

From the evidence presented by the plaintiff, it is evident that the plaintiff has managed to prove the above requirements. The defendant omitted to invest its money in an interest bearing account upon being instructed to do so and such omission caused financial loss to the plaintiff. Of course the plaintiff's omission cause the plaintiff not to earn interest on its money held in the Trust Account of the defendant. It is my finding that the defendant is liable for the loss suffered by the defendant.

Let me move on to consider the issue of quantum of damages. The plaintiff provided quantum of damages suffered by Mr Lovatt in his personal capacity. The figure as claimed by the plaintiff is based in investing the money with Tetrad Asset Management. I have already found that the defendant was under no obligation to invest money in Tetrad Asset Management and accordingly I cannot grant the amount claimed. As I reiterated above the defendant could have invested the money in a Bank and it is only fair and reasonable that the plaintiff recover interest as provided by banks during the period in time. The defendant could have invested the money in terms of s 13 (2) of the Legal Practitioners Act.

The plaintiff has not provided to the court the interest he could have received had the money been invested in a Bank. The plaintiff has quoted the words of Malaba J (as he then was) in *Wamambo* v *General Accident Insurance Co. (Zimbabwe)* ltd 1997 (1) ZLR 299 H where he relied upon *Nafre* v *Atlas Assurance Co. Ltd* 1924 (WLD) 239 where Krause J 2 p 241-242 stated that:-

> "Now you allege fraud and rely upon it as a defence, must prove it up to the hilt, and in this case it is necessary for the defendant, not only to establish the facts alleged in the particulars given but also to bring home to the plaintiff a knowledge of this fact"

Dumbutshena CJ in *Book* v *Davidson* 1988 (1) ZLR 365 (S) quoted with approval the words of Portgiezer AJA in *Mobil Oil Southern Africa (Pvt) Ltd* v *Mechim* 1965 (2) SA 706 AD at 711 EG.

> "The general principle governing the determination of the incidence of the onus is the one stated in the campus *luris simper necessitaprobandiincumbutilli qui a git*. In other words he who seeks a remedy must prove the ground /thereof."

The plaintiff was aware that Tetrad Asset Management was disputed as an institution approved by the Law Society for investments but failed to provide alternative figures should that point succeeds.

It was the duty of the plaintiff to provide the interest rates awarded by Banks during that period. Without such evidence the court is unable to come up with a figure of damages.

It is not the duty of court to source such information. It is my view that the plaintiff has failed to discharged the onus on it of establishing its extent of damages.

In the result it is ordered as follows;

1) The plaintiff's claim is dismissed with no order as to costs.

Atherstone & Cook, plaintiff's legal practitioners
Granger & Harvey, defendant's legal practitioners