

FREDDY MAKUVISE
versus
ZHUWANKINYU CHAZARIRA
and
XINGRONG HU

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 27 June 2016, 2 and 3 August 2016 and 31 May 2017

APPLICATION FOR ABSOLUTION FROM THE INSTANCE: RULING

H. Chitima, for the applicant
F. Misihairambwi, for the 1st defendant
Adv Mehta, for the 2nd defendant

CHIWESHE JP: In this action the plaintiff issued summons claiming against the defendants, jointly and severally, the one paying the other to be absolved, payment in the sum of \$240 000.00, being 10% commission of the sum of \$2 400 000.00 for the role he played as agent in the sale of or investment into, the 1st defendant's mine. The plaintiff also claimed interest at the prescribed rate, collection commission and costs of suit.

The plaintiff's declaration is to the following effect. On 6 July 2011 he was given a written mandate by the first defendant to sell first defendant's mine in Kadoma for the sum of \$600 000.00 or secure a joint venture partner for the mine. Plaintiff would be paid 10% of the purchase price or 10% of the value of the investment.

On 21 September 2012 plaintiff introduced the second defendant to the first defendant as an investor into the said mine. A joint venture investment agreement was entered into between the two defendants in terms of which the second defendant would invest the sum of \$2 400 000.00. The plaintiff was thus entitled to 10% of this investment sum.

The plaintiff approached the first defendant for payment but was advised that first defendant was yet to receive payment from second defendant. On approaching the second

defendant, the plaintiff was told that the first defendant had been paid by the second defendant's principal, an investor company called China Wins Sun Group. The plaintiff was perplexed as each defendant kept sending him to the other for answers. He then decided to sue both defendants hence the present suit.

The mandate given to the plaintiff by the first defendant is filed of record at page 23. It reads in the operative portion thereof as follows:

"I ZHUWANKINYU CHAZARIRA

.....

.....

- i. Have given FREDDY MAKUVISE sole mandate to sell the MAMBO MINE in the Kadoma Mining district for an amount of \$600 000.00 (six hundred thousand dollars) for a 10% commission or to negotiate a Joint Venture in which case Mr Makuvise's commission will be 10% of the sum of \$600 000.00 (six hundred thousand dollars). The commission is to be paid upon introduction of purchaser or Joint Venture Partner to the seller.
- ii. The parties also agree that Mr Makuvise may sale the property for an amount above \$600 000.00 in which case he will be entitled to an excess above the selling price."

The interpretation of this mandate is crucial to the plaintiff's case. The import of this mandate is that the plaintiff must sell the mine for a minimum of \$600 000.00 in which case he would receive commission at 10% of the purchase price, that is \$60 000.00.

Should he sell the mine at a price higher than \$600 000.00, then he should still receive 10% of \$600 000.00 (that is \$60 000.00) but, in addition, he would retain any sums received above \$600 000.00.

In the event of a joint venture rather than a sale, the plaintiff would still receive 10% of the \$600 000.00, that is \$60 000.00. Either way therefore the mandate envisages 10% of \$600 000.00 regardless of whether the plaintiff secures an outright sale or a joint venture. The only time the plaintiff would get more than \$60 000.00 would be in the event of a sale above that value. Thus an investment of whatever value would restrict his commission to no more than \$60 000.00. That is the import of the written mandate given to the plaintiff.

As things turned out no sale agreement materialized between the defendants. Instead they entered into a written tripartite joint venture agreement filed of record at page 11. The

registered capital of the joint venture company is reflected as \$2 000 000.00 plus an upfront investment of \$400 000.00 making a total investment of \$2 400 000.00.

Contrary to the clear terms of the mandate given by the first defendant wherein a commission not exceeding \$60 000.000 was promised whichever way things turned out, the plaintiff now insists that he is entitled to 10% of the total investment sum, that is 10% of the \$2 400 000.00 or \$240 000.00.

At the pre-trial conference the defendants agreed to pay the plaintiff the sum of \$60 000.00. They did not accept the plaintiff's further claim, which further claim was referred to trial. Further the defendants argue that the joint venture capital was set at \$2 000 000.00 and not \$2 400 000.00. For purposes of this application I will accept that the total investment was \$2 400 000.000 as submitted by the plaintiff.

In his evidence in chief the plaintiff says his understanding was that if a joint venture agreement was reached he would receive 10% of the investment value. This is how he understood the written mandate given by the first defendant. When the second defendant came on board, the matter was discussed and a verbal agreement to that effect was entered into by the parties. Discussions surrounding the verbal agreement were held both in Zimbabwe and in China in the presence of witnesses. The plaintiff insists that the second defendant was part of those discussions and that he agreed to meet that obligation. The defendants deny that there were any agreements, written or otherwise, in which they promised to pay 10% of the investment capital to the plaintiff.

The plaintiff called no witness further than himself. At the close of the plaintiff's case, both defendants applied for absolution from the instance on the grounds that no *prima facie* case had been made against either of them.

The plaintiff was cross examined at length by both defendants and although he did not impress in some of his answers, I agree with his legal practitioner's submissions that a *prima facie* case against both defendants has nonetheless been made.

The requirements for an application for absolution from the instance to succeed are well traversed in numerous cases and authorities. In order to defeat such an application the plaintiff must make out a *prima facie* case – there must be evidence relating to all the elements of the claim. In the present case the plaintiff has stated that he not only relies on the written mandate

given to him by the first defendant but, in addition, he relies on subsequent verbal agreements reached with both defendants that he would be entitled to a 10% commission on the total sum invested. This way his evidence relates to all the elements of his claim. There is thus evidence adduced upon which a reasonable court could or might find for the plaintiff. See *Supreme Service Station (1969) Pvt Ltd vs Goodridge* 1971 (1) RLR (A), *Bailey NO v Trinity Engineering (Pvt) Ltd* 2002 (2) ZLR 484, *United Air Charterers v Jarman* 1994 (2) ZLR 341 (S).

The application for absolution cannot succeed. It is accordingly dismissed. The matter should proceed to the defence case.

Mbidzo Muchadehama & Makoni, plaintiff's legal practitioners
Lawman Chimuriwo, 1st defendant's legal practitioners
Hussein Ranchhod and Company, 2nd defendant's legal practitioners