

R M AFRICA PROPERTY CONSULTANTS  
versus  
JOHANESS MUCHIMIKA

HIGH COURT OF ZIMBABWE  
MWAYERA & MUNANGATI-MANONGWA JJ  
HARARE, 18 July 2017 & 18 January 2018

**Civil Appeal**

*T. S Manjengwah*, for the appellant  
*G Simango*, for the respondent

MUNANGATI-MANONGWA J: The appellant herein an estate agency negotiated a sale of an immovable property between the Estate Late Hayisa the seller, and the respondent. The respondent failed to raise the purchase price which he purported was coming from abroad. He duly notified the appellants as agents of the seller of his predicament advising them to sell the property to another purchaser. The seller cancelled the agreement of sale. The appellant then sought payment of \$4 427.50 as its purported commission. Of this amount, appellant was to get 60% as commission and the other 40% was to go to Delscart Properties (Pvt) an estate agent who had introduced the buyer. The appellant's claim was based on a clause in the agreement of sale which the parties herein admit is a penalty clause.

The court *a quo* dismissed the claim on the basis that the penalty clause could not be upheld as the burden placed on respondent to pay the commission was out of proportion with the prejudice purportedly suffered by the appellant, if any. Further, the Court *a quo* was of the view that no prejudice was suffered by appellant, it not being contested that the property was sold to a third party with the appellant facilitating such a sale.

Aggrieved by that decision, the appellant has approached this court on a single ground of appeal after abandoning the first ground. The paraphrased ground is to the effect that:

1. The court *a quo* erred in ruling that a penalty clause relied upon by the appellant was unenforceable.

The penalty clause in issue which is clause 13.4 of the agreement reads as follows:

“Should any party breach the terms of this Agreement of sale, causing the agreement to be cancelled, the defaulting party shall be fully liable for Estate Agent’s commission due in terms of this agreement of sale.”

It is common cause that the respondent failed to comply with the terms of the agreement leading to the cancellation of the agreement of sale. The legal question which neither the Magistrate nor any of the parties failed to appreciate and address was that; “who in the circumstances is the aggrieved party, who has a cause of action” In my view the answer lies in considering the parties to the contract. The agreement of sale is clearly between Estate Late Stephen Omar Hayisa as represented by Francis Haisaid the Executor Dative, and Johannes Muchimika the respondent. The appellant is not party to the agreement, as an estate agent he merely facilitated the agreement of sale. If he is not party to the agreement he cannot have a cause of action as the terms in the agreement are binding to the contracting parties and not a third party who in essence is the appellant. Legally and factually it is the seller who is the aggrieved party, for the respondent let him down by failing to honour the terms of their agreement. Any relief therefore lies with the seller, that is, if he had paid the agent’s commission which he could recoup by way of claiming for damages arising from breach of contract.

Suffice to say that the appellant entered into a totally different contract altogether wherein his services were contracted by Estate Late Hayisa to sell its immovable property. In this regard his services would be defined as follows as per the Estate Agent Act [*Chapter 27:17*]

“practise as an estate agent”, subject to subsection (2) and section sixty-two, means doing any of the following acts for payment or reward—

- (a) in connection with the sale or proposed sale of immovable property belonging to another person—
  - (i) bringing together the parties to the sale or proposed sale, or taking steps to bring them together;
  - (ii) negotiating the terms of the sale or proposed sale;

It is the fulfilment of the above acts that entitles the estate agent to his commission.

The common law position which at the moment has not been changed by any legislation stipulates that the estate agent's commission is due or payable by the seller. This position is further buttressed by the Estate Agent Act cited above which in section 69 states that

“Certain terms and conditions in sales of immovable property to be void  
No term or condition in any contract for the sale of immovable property shall be of any effect to the extent that it purports to—  
(a) enable a person practising as an estate agent to choose which of the parties to the contract shall be liable for the payment of commission;

This section entrenches the common law position which makes the seller liable to pay the agent's commission. A look at the agreement itself in particular clause 11 which stated that the agent's commission of \$4 427.50 was due immediately upon the signing of the agreement of sale clearly points to the obligation as lying on the seller. The only instance when the obligation could fall on the respondent as *per* the contract being the one when breach occurs.

Regard being made to the fact that the matter hinged on *locus standi* and whether appellant had a cause of action the whole debate on the applicability of the penalty clause comes to nought. I also note that apart from not having any cause of action as against the respondent, clause 14 of the contract made it clear that the appellant was only entitled to 60% of the commission with 40% going to Delscart Properties (Pvt) Ltd. The latter made it clear in evidence that it was not claiming the amount so the issue becomes on whose behalf was the appellant acting in claiming the 40% which is a component of the \$4 427.50 claimed.

As the appellant has no cause of action as against the respondent the appeal is bound to fail. The court *a quo* had reached a correct decision albeit on different grounds which it is not necessary to inquire into in this appeal given the finding that the appellant had no cause of action based on the agreement of sale. Accordingly the appeal is dismissed with costs.

MWAYERA J: I agree.....

*Wintertons*, for the appellant  
*Bherbende Law Chambers*, for the respondent