

KATHLEEN HANCOCK
v
(1) VOTETI TRADING (2) REGISTRAR OF DEEDS

**SUPREME COURT OF ZIMBABWE
MALABA DCJ, ZIYAMBI JA, & GOWORA JA
HARARE, JUNE 17 & SEPTEMBER 20, 2013**

D Ochieng, for the appellant

T Magwaliba, for the respondents

ZIYAMBI JA: This appeal is against an order of the High Court ordering the appellant to transfer to the first respondent (“Voteti”), certain property called Lot 4 of Stand 31A, Groombridge Township 2, Harare, measuring 4318 square meters and held under deed of Transfer No. 5295/74. (“The property”).

The appellant is the registered owner of the property. She is resident in the United Kingdom. Sometime in January 2009, she gave to Vivian John de Villiers (“de Villiers”) power of attorney to manage her affairs here in Zimbabwe. In about July 2009 de Villiers advertised the property for sale on the internet. The respondent’s director Mrs Chipo Makamure, who had been on the lookout for a property to buy, heard of it through Midstar Properties Private Limited Estate Agents (“Midstar”). Together with her husband Alex Makamure, she viewed the property and made an offer to purchase which resulted in an agreement of sale being concluded on 25 August 2009. The agreement was drawn by Midstar and signed by de Villiers on behalf of the seller and Mrs Makamure for Voteti.

Clause 9 of the agreement contained the terms of payment. The purchase price was USD145 000 of which USD10 000 was to be paid by the seller as commission. A deposit of USD50 000 was to be paid upon signature of the agreement and the balance of USD95 000 was to be paid into the seller's account. No account was nominated in the agreement. Vacant possession was to be given to the purchaser on 1 November 2009.

When Mr Makamure, on behalf of Voteti, attempted to make payment into the offshore account details of which were provided by de Villiers (through Midstar) he was advised that the funds in Voteti's account were not free funds and could not be transferred to a foreign account without the approval of the Reserve Bank of Zimbabwe. Further, it would cost an additional USD2 000 to effect the transfer. The Makamures returned to Midstar to advise of the problem. Midstar's Group Chief Executive Officer, Dr A Magirazi, ("Magirazi") telephoned de Villiers who authorized payment of the purchase price into Midstar's account. On 2 September 2009, Voteti made full payment of the purchase price into the account of Midstar. On 4 September 2009, Magirazi wrote to Musariri Law Chambers instructing them to attend to the transfer of the property to Voteti.

In October 2009, the date is not given, the appellant came to Zimbabwe. During her stay she sold her personal belongings (which were at the property) and had cordial meetings with the Makamures. She was aware, according to de Villiers, that Midstar was in receipt of the entire purchase price, USD40 000 of which had already been transferred into the nominated account in Ireland which was held by her niece, one Fiona Fields. She did not discuss the purchase price with the Makamures. She met with Magirazi and her attorneys Lofty and Fraser. She returned to the UK after giving instructions to de

Villiers that the balance of the purchase price should be paid into Lofty and Fraser's trust account. The title deeds of the property were being kept by that firm.

By 19 October 2009, transfer of the property to Voteti had not been effected and its legal practitioners wrote to Magirazi as well as to Lofty and Fraser demanding the release of the title Deeds to enable the transfer to be effected and advising that in the event of their failure to comply with that demand it was their intention to sue for specific performance of the contract and damages. No response was received to this letter. Instead, on 1 November 2009, Voteti was given vacant possession of the property by de Villiers. By then, the balance of the purchase price had not been paid by Midstar to Lofty and Fraser.

On 3 November 2009 an agreement described as a 'Memorandum of Understanding' (MOU) was concluded between "Mr Viv De Villias "FOR KATHLEEN HANCOCK" being the seller of No.7 Thornburg Avenue, Mount Pleasant, Harare"(it is common cause that this was a misspelling of De Villiers) and "Midstar Properties (Pvt) Ltd HERETO REFERRED TO AS THE SELLERS' AGENT". The terms of the agreement were as follows:

"THE PARTIES TO THIS MEMORANDUM AGREED THAT:-

1. Midstar Properties (Pvt) Ltd received from the Voteti Trading (Pvt) Ltd the sum of US\$145,000,00 for the purchase of No 7 Thornburg Ave Mt Pleasant by the later.
2. The agent's negotiated commission was US\$10,000,00. The deposit amount of US\$40,000,00 was transferred by Midstar Properties (Pvt) Ltd into the seller's offshore account on 1st September 2009.
3. The next payment of US\$30,000,00 was paid by the agent into Lofty and Frazer Legal Practitioner's Stanbic Account on 29th October 2009.
4. Upon confirmation of delivery of US\$30,000,00 the total released at the date of this understanding is US\$70,000,00 leaving a balance of US\$65,000,00.

5. The balance will be paid in weekly instalments of US\$20,000,00 effective 1st November 2009.
6. The agent, Midstar Properties (Pvt) Ltd, guarantees that these amounts shall be disbursed through telegraphic transfer into Lofty and Frazer Legal Practitioner's Stanbic Account.
7. The seller will allow the buyer to take occupancy of the property, namely No 7 Thornburg Avenue Mount Pleasant, Harare effective 1st November 2009 on a rental basis at a cost of US\$600,00 per month. This cost to (*sic*) shall be borne by the Agent and shall be payable until such time as payment has been received in full.
8. Legal costs incurred by both the buyer and seller as a result of the handling of this sale shall be borne by Midstar Properties (Pvt) Ltd and paid on presentation.
9. This understanding shall remain in force until such time as the agent has paid the whole outstanding amount and no amendments shall be made by either party unless by consent and in writing”.

Following this MOU, a payment of USD10 000 was deposited by Magirazi on 4 November 2009 into the trust account of Lofty and Fraser.

It was not until 4 January 2010 that the appellant's legal practitioners wrote to Voteti's legal practitioners responding to their letter of 19 October 2009. In that letter, they alleged that the purchase price had not been paid in full in accordance with the terms of the agreement and that unless the full purchase price was paid, it was the Seller's intention to cancel the contract. Four months later on 7 April 2010, the appellant's legal practitioners by letter to Voteti's legal practitioners advised that the agreement was cancelled.

By 13 June 2010, no further payment in terms of the MOU had been made and de Villiers reported the matter to the Police. Two days later, on 15 June 2010, Voteti issued summons against the appellant claiming, *inter alia*, transfer of the property and, in the alternative, a refund of the purchase money paid in the sum of USD145 000. The appellant

counter- claimed for the ejectment of Voteti from the property and tendered the amount received by her which she claimed to be USD80 000.

The court *a quo* heard evidence from Alex Makamure and Vivian de Villiers. It found Makamure's evidence to be 'more consistent and certainly more credible than the contradictory version presented by de Villiers'. It found that Midstar was the agent of the Seller and that it was endowed with authority by the Seller's representative, de Villiers, to receive payment of the purchase money into its account. It concluded that the payment by Voteti into the account of Midstar constituted a valid discharge of its obligations in terms of the contract of sale.

The main issues argued on appeal were whether the court *a quo* was correct in finding that Midstar was the agent of the Seller and if so whether Midstar was possessed of the necessary authority to receive payment on behalf of the Seller. These issues are dealt with in turn.

Whether Midstar was the agent of the seller or the purchaser

It was contended on behalf of the appellant that the finding of the court *a quo* that Midstar was the agent of the seller was wrong. It was also contended that Midstar was in fact the agent of Voteti since it was mandated by the Makamures to find them a property to purchase. The MOU, so it was submitted, was drawn up by Midstar in discharge of its mandate as agent of Voteti.

Apart from the denial by Makamure that Midstar was Voteti's agent, there are pointers in the evidence which support the conclusion arrived at by the trial judge.

a) The MOU signed by De Villiers and Dr Magirazi on the 4th November 2009, states clearly that Magirazi is the seller's agent.

b) In its (Voteti's) further particulars filed on the 28th July 2010, in response to a request filed by the appellant, the following paragraph appears:

"1. Ad Paragraph 1

First Defendant sold the house through her agent, Viv de Villiers and estate agent, Midstar Properties (Private) Limited. Plaintiff was instructed verbally to deposit the full purchase price into the Midstar Properties account, namely Kingdom Bank Limited account number 47025427."

c) When, on the 7th October 2010, the appellant filed her plea and counterclaim she made the following allegation in paragraph 5 of the counterclaim:

"5. Midstar Properties (Private) Limited, an estate agency was **appointed** prior to the signing of the agreement by Plaintiff (Appellant) for the purpose of, **specifically**, finding a willing and able **buyer** of the abovementioned property." (My emphasis)

d) Prior to that on the 26th June 2010, following upon the report made by de Villiers on the 13th June, the police recorded a statement from de Villiers. Thereafter on the 23rd August 2010, Magirazi was charged with Theft of Trust Property and a warned and cautioned statement was recorded from him. The preamble to that statement reads as follows:

"I, ANDREW MAGIRAZI NR – 43-089352B-43 of the house number 528 Gemsbok Close, Mandara, Harare, do admit having been informed by Detective Assistant Inspector Nduva of Criminal Investigation Department; Serious Fraud Squad, Harare, that enquiries are being made in connection with a case of Theft of Trust Property as Defined in Section 113 of Criminal Law [Codification and reform] Act Chapter 9:23, which occurred on the 25th of August 2009 at number 9 Lezard Avenue, Milton Park, Harare where it is being alleged that I was mandated by Viv De Villias to sell property styled 7 Thornburg Avenue, Mount Pleasant, Harare, for USD145 000,00 on behalf of the property owner KATHLEEN HANCOCK. It is further alleged that my company sold the said property and realised USD145 000,00 but only remitted USD80 000.00, to the owner of the property through Viv De Villias make this statement on my way free will."

On 28 October 2010, Voteti filed its plea to the counterclaim filed by the appellant. In relation to para 5 of the counterclaim (set out above), Voteti pleaded:

“2. **Ad Paragraph 5**

Plaintiff has no knowledge of the particular terms of reference for Midstar Properties and only knows that it is First Defendant’s Estate Agent with the usual mandate for Estate Agents.”

The appellant’s response in its replication in reconvention dated 15 November 2010, was:

“2. **Ad paragraph 2**

The **mandate of the estate agent excluded receipt of funds**. The agreement quite clearly demonstrates this. There was no express mandate to receive payment.” (My emphasis).

Clearly the appellant was, up to 15 November, asserting that Midstar was her agent. It was common cause at the hearing of the appeal that no amendment of the pleadings was applied for or granted. Thus it is difficult to understand why the question of the agency of Midstar became an issue which was stated in the joint pre-trial conference minute for determination at the trial.

In view of all the statements emanating from the appellant that Midstar was her agent the trial court’s conclusion to that effect cannot be faulted.

Whether Midstar was authorized to receive payment on behalf of the Seller

The resolution of this issue depends on the evidence which the court *a quo* accepted as credible. In this regard this Court, as an appellate court, is at a disadvantage.

This is because:

“The trial judge has advantages - which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked. Consequently, the appellate court is very reluctant to upset the findings of the trial judge.”

See *The Civil Practice of Superior Courts* in South Africa by *Herbstein & Van Winsen* 3 ed p 738-9. See also *Beckford v Beckford* 2009 (1) ZLR 271 (S) at 275 A-C.

The court *a quo* believed Makamure having found his evidence to be credible and that of de Villiers to be contradictory. This finding was justified on the papers. The appellant has not been honest. The denial of the fact of the agency of Midstar which it had accepted up to 15 November 2010 is clear evidence of this. Makamure’s evidence was that when he encountered difficulties in making the payment into the account of Fiona Fields, he and his wife approached Midstar and advised Magirazi of the problem. In their presence he telephoned de Villiers and explained the problem. Magirazi then advised them that de Villiers had authorised him to receive payment of the purchase price into his account. They then proceeded to make the payment as advised.

De Villiers’ behaviour after the payment into Midstar’s account is supportive of the fact that he had indeed authorised Midstar to receive the money into its account. He did not call the Makamures and request the balance of the purchase price. Instead of demanding the full amount of the purchase price, which he knew was being held by Midstar, he entered into an agreement with Magirazi extending the time of payment into Lofty and Fraser’s account by four to five weeks. He accepted an offer by Magirazi to pay rent at US\$600.00 per month until full payment of the purchase price was effected. At no time did

he indicate to the Makamures that the purchase price had not been paid as per his instructions. Instead, he proceeded to give vacant possession of the property to Voteti assuring the Makamures that there was nothing to worry about. The evidence, in my view, clearly established that de Villiers authorized Midstar to receive payment of the purchase price into its account on behalf of the Seller.

The judgment of the court *a quo* is therefore upheld and the appeal is dismissed with costs.

MALABA DCJ: **I agree**

GOWORA JA: **I agree**

Atherstone & Cook, appellant's legal practitioners

Dube Manikai & Hwacha, first respondent's legal practitioners