

KEN ESTATE AGENTS

Versus

ASTRA BUILDING CENTRE (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 12 JULY AND 5 DECEMBER 2024

Civil Trial

T. Masiye-Moyo for the plaintiff
N. Sibanda for the defendant

MOYO J: Plaintiff issued summons claiming the following;

“Payment of the sum of US\$62 975,00 being 5% agents’ commission and VAT due to plaintiff for the sale of defendant’s property known as stand 949 Bulawayo Township and in respect of which property defendant gave plaintiff the mandate to sell and which property was sold to Fortune Dube Family Trust in or about August 2022 following the introduction of the said Trust to defendant, by plaintiff together with interest plus costs of suit”.

From the evidence led at the trial the following are common cause.

1. Plaintiff is an estate agent registered in terms of the Estate Agents Act Chapter 27:17.
2. Defendant owns or owned a building situate at 106 Herbert Chitepo St and is known as stand 949 Bulawayo Township.
3. Plaintiff was given a mandate to find a purchaser to buy the named stand which plaintiff was selling.
4. Plaintiff was to get a 5% commission for the transaction.
5. Plaintiff did find one Fortune Dube Family Trust. However, the amount offered first of US\$800 000 and second of US\$950 000 was not accepted by defendant
6. Somewhere along the line a Muzi Nkomo whose credentials are not clear allegedly came in and introduced the same Fortune Dube Family Trust to the defendant with a price offer of US\$1 100 000,00 (1,1 million USD).

7. In the meantime defendant had not cancelled its mandate to the plaintiff on the sale of the property, resulting in the parties (plaintiff, defendant and Fortune Dube meeting at Ascort for the finalization of a draft agreement of sale, drawn by plaintiff at the defendant's instance. At that meeting the parties failed to agree on the issue of commission with Fortune Dube representing the purchaser, suggesting that plaintiff and Muzi Nkomo should share the commission with one Mbedzi Muzi Nkomo getting a lion's share.

8. This is where the problem resulting in the dispute before this court then started.

Defendant proceeded to conclude the agreement of sale with Fortune Dube Family Trust and plaintiff was left out and never got any commission. Plaintiff insists that it did its part in terms of the transaction and is therefore entitled to its commission. Defendant maintains that plaintiff is not entitled to anything as it is Muzi Nkomo who subsequently concluded the transaction between the parties.

1. What this court has to determine is, the question whether in the circumstances plaintiff performed its duty as an estate agent?
2. Who is Muzi Nkomo and what is the effect of his presence in this transaction?

The 1st question whether plaintiff in the circumstances performed its duties. The answer lies in the provision of the Estate Agents Act Chapter 27:17. It is defined as;

“An act to provide for the functions and powers of the Estate Agents Council, to provide for the registration of Estate Agents and the regulations of the practice of Estate Agents in Zimbabwe, to provide for the operation of the Estate Agents Compensation Fund, to regulate the keeping of money held by estate agents on behalf of other persons, to repeal the Estate Agents Act, Chapter (27:05) and to provide for matters connected with or incidental to the foregoing” (emphasis mine)

Section 2 (definition section) defines to “practice as an estate agent” meaning doing any of the following acts for payment of reward (my emphasis)

- a) in connection with the sale or proposed sale of an 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 (my emphasis)

And the list continues but I will not allude to the rest of the estate agent's duties as they are not relevant for purposes of what I need to resolve in this dispute.

So the Act defines what an estate agents' performance with regard to the sale of an immovable property is. The legislature has come in to clear the air on what an estate agent must be paid for in the transaction he/she does on immovable property. The legislature did this so that there is clarity as to what an estate agents' mandate involves and what they can claim payment for.

The Act defines practicing as an estate agent for the sale of an immovable property as doing any of the 2 Acts, that is, an estate agent can either bring the parties together to the proposed sale, or take steps to bring them together. The estate agent can also negotiate the terms of the sale. It is important to note that the legislature did not provide for a certain bar to be attained in the performance of an agent in his duties. For instance, the legislature does not say, it must be for a specific amount, the legislature does not say it must be after a certain period or after a certain bar has been attained.

In this case it is common cause that plaintiff introduced the subsequent purchaser to defendant and that the mandate given by defendant to plaintiff was never withdrawn. The Act provides that doing any, between introducing the parties, and negotiating the transaction entitles the estate agent to remuneration.

I hold the view that defining what an estate agent should do for a reward with regard to a sale of an immovable property in the definition section of the Act, clears the air on the legal duties of an estate agent in order to attain a reward.

In this case clearly plaintiff brought the seller and the purchaser together. There is no doubt about that. *Mr J. Nkomo* for plaintiff confirmed under cross examination that the mandate given to plaintiff was never withdrawn.

Under cross examination he tried to distance himself from knowledge of the identity of the purchaser that had been sourced by plaintiff although he subsequently accepted that it is the same Fortune Dube introduced by plaintiff who subsequently bought the property allegedly being brought at a later stage by a Muzi Nkomo. It is clear from these facts that plaintiff

sourced the buyer being Fortune Dube Family Trust and accordingly performed its obligation as an estate agent in terms of the law.

The 2nd aspect for determination is who is Muzi Nkomo and the effect of his presence in this dispute. Muzi Nkomo it is not clear as to whose agent he was. We have not been favoured with his registration papers and documents as required by section 21 and 22 of the Estate Agents Act (supra).

It is also not clear from the facts how this Muzi Nkomo entered the stage. Defendant and Fortune Dube Family Trust already knew each other having been introduced by plaintiff, however, somehow along the line Muzi Nkomo calls defendant enquired about the sale of the property and the defendant confirmed that they were selling. Defendant told Muzi they wanted US\$1,1 million, Muzi came back with that offer and they accepted it. It is not clear on whose behalf Muzi was acting. *Mr J Nkomo* for the defendant was questioned during cross examination as to whether Muzi was his friend per his synopsis of evidence and he answered; “you can call him that”. He was further asked “you accept that he is your friend?” and he answered; “now that you have forced me I agree he is my friend”. So defendant’s witness was being evasive here, is Muzi his friend or not, he says he will accept as he is now being faced. But it is either Muzi is his friend or he is not? for nothing can force him to accept or deny that fact. Whilst Fortune Dube in his evidence in chief says Muzi knew that he was looking for a property and that he told him about defendant’s property, and that this was because plaintiff had given up saying the seller was being unrealistic, we do not have such evidence from both the defendant and plaintiff pointing to the fact that plaintiff gave up on the mandate. What is clear is that the parties continued together resulting in defendant bringing plaintiff on board to do the agreement of sale. Under cross examination Fortune Dube says Muzi Nkomo was the seller’s agent but defendant says he was approached by Muzi Nkomo and he did not look for Muzi Nkomo to act as his agent. Mr Fortune Dube confirmed under cross-examination that he scuttled the signing of the agreement of sale at a meeting between himself, plaintiff and defendant by suggesting that commission from the sale must be shared amongst one Mbedzi, plaintiff and Muzi. He confirmed that he saw the property outside when plaintiff took him to see it and that Muzi later showed him inside. He confirmed that after seeing the property as shown by plaintiff he did make an offer. What is clear about the Muzi character is that he came on board a transaction that had already commenced between plaintiff, defendant and Fortune Dube Family Trust with plaintiff’s mandate from defendant not having been cancelled, but

Muzi suddenly snatched the transaction and “concluded” it. This court also takes note that defendant never called this Muzi Nkomo to come and explain his role and how he came on board as his involvement leaves more questions than answers. Firstly, it is not clear if he is a registered estate agent, his credentials were never placed before the court. Secondly, it is not clear whose agent he was, he just got himself into an ongoing transaction to claim its “conclusion” it seems. This court finds that Muzi Nkomo is a pseudo character that was just brought in by defendant and Fortune Dube onto the scene to elbow out plaintiff’s entitlement to its commission in the transaction. I say so for it is not clear where he came from, how he came in and why? If Fortune Dube had made an offer for 950 000 USD and defendant did not accept it, yet he had more money to offer the seller, whom he already knew, why did he need Muzi Nkomo to do that? Clearly, Muzi Nkomo was brought in to defeat plaintiff’s entitlement to its commission, that is why his role and scope are not clear but he suddenly should have gotten the lion’s share of the commission. Yet again once the purchaser bought a property it is naturally not be their business whether there is a commission how much it is and to whom it is payable and yet Fortune Dube wanted to preside over the commission issue. This on its own shows that defendant with the assistance of the purchaser were now trying by all means to minimize what was due and payable to plaintiff.

I accordingly find per the afore-stated reasons that plaintiff has made a case for the relief that it seeks and its claim succeeds in terms of the summons.

Masiye-Moyo legal practitioners, plaintiff’s legal practitioners
Tanaka Law Chambers, defendant’s legal practitioners