

PRISCILLA MAKONI
versus
E MAKIWA
MR MPOFU
THE REGISTRAR OF DEEDS
and
HARARE MUNICIPALITY

HIGH COURT OF ZIMBABWE
PARADZA J,
HARARE, 13 November, 2002 and 10 July, 2003

Mr *Chinyama* for applicant
Miss *Njerere* for respondents

Opposed Application

PARADZA J; In this application, applicant, a widow, sought an order nullifying an agreement of sale that she entered into with the first respondent in February 2001.

The sale was in respect of a certain stand, namely, 9645 Budiro 5B, Harare. Although the parties have chosen to refer to the transaction as a sale, strictly speaking it is one of those cessions that seek to transfer property in a municipal area, but which property is strictly owned by the local authority. One of the parties cited is the City of Harare by virtue of it being the owner of the property and which party sanctioned the cession resulting in the property being registered in the name of the first respondent.

The second respondent acted as the agent who brokered the so-called sale between the parties. Although there is some dispute as to whether he worked for an estate agent called Guarantee Trust (Private) Limited, nothing seems to be of any consequence arising from that.

The third respondent is the Registrar of Deeds but I do not see why, being a cession in the strict sense, the Registrar of Deeds was cited under the circumstances.

Applicant herself does not seem to explain why the third respondent has been joined as a party.

In her application, which was opposed, and from her affidavit in support of the application, she states her case as follows -

In February 2001 she entered into an agreement for the cession of her rights, title and interest in the property referred to above (hereinafter referred to as "the property"). Prior to the agreement she had advertised in the newspaper. That is how, with the assistance of the second respondent, the agreement was finally concluded. It would appear that second respondent was acting at all times as an agent of the applicant. For convenience I shall refer to the cession as a sale.

In paragraph 7 of her supporting affidavit applicant states as follows -

"7, Sometime around August (*sic*), the 2nd respondent again called me and advised me that I should come and sign some papers. By then I had advised him that the house was now selling for \$1 500,000,00 (one million five thousand dollars). I was advised that the purchase price was changed to reflect \$1 500,000,00 and I was called upon to sign or to append my signature on (*sic*) the agreement as seller. I did append my signature to the agreement without making a finding as to whether or not 2nd respondent's averments were correct".

From the above paragraph which forms part of the supporting affidavit it is clear that applicant had engaged and appointed second respondent, to be her agent with the mandate to sell her property at a particular price. In her supporting affidavit she does not disclose what the initial purchase price was. What she discloses is the new selling price of \$1 500,000,00.

In her answering affidavit and commenting on the first respondent's response to that paragraph she denies respondent's averment that the purchase price had been pegged

at \$950 000,00. Instead she stated that nothing was discussed at all pertaining to what the purchase price was supposed to be. She states that she left the matter to be handled by an Estate Agent.

What happened thereafter was that on some date which was not made known to the Court, a cheque was issued in her favour in the sum of \$884 000,00 by Messrs Chingeya and Partners. She received the cheque payment and avers that she was advised that \$46 000,00 was deducted from what was due to her to cover the Estate Agent's commission. She says she tried to find out, presumably from Messrs Chingeya and Partners, when the balance of \$550 000,00 was going to be paid to her, but without success. She then went away and approached the purchaser, the first respondent in this application, and advised him that the purchase price was \$1 500,000,00 and that there was a shortfall of \$550 000,00. First respondent did not accept this and insisted that the agreement was for the sale of that property at the price of \$950 000,00. Her position is that the respondents knew the purchase price to be \$950 000,00 and yet she knew nothing about it. As far as she was concerned she had been defrauded and cheated in the process by the first and second respondents.

As if that was not enough she says that she approached the fourth respondent, that is the City of Harare's offices, to find out whether the property was still registered in her husband's name. When she did, she learnt with surprise that the property was now registered in the name of the first respondent. At the time she deposed to the affidavit, she says it was still a puzzle to her as to how the cession had been effected. It is surprising to me that she did not even find out from the fourth respondent how that had happened. Later, in her answering affidavit she admits that indeed she did sign certain

papers at the offices of the fourth respondent but she says she believed that the papers she signed were papers which were necessary to have the property ceded into her name from her late husband's estate.

From the applicant's papers, when she went to the offices of the fourth respondent, she says she was also cheated by a lady known as Miss Kawondera into signing papers that were completely different to what she expected she was signing.

I have noted that Annexure "B" a document that was signed by the applicant and the first respondent at the fourth respondent's offices bears the same signature as the one on applicant's founding affidavit. In addition she also initialled other pages of Annexure "B" which clearly indicates that the nature of the transaction was between applicant herself and one Emmanuel Makiwa, first respondent in this application. At least, applicant does not say that the initials "P.M." on the fourth respondent's document, namely Annexure "B" to respondent's opposing papers, are not hers.

It is therefore with this background information that applicant seeks nullification of that agreement. It also appears from the papers that any misrepresentation to applicant was not done by any other person other than her own agent, the second respondent. Although she goes on to blame other people including an employee of the fourth respondent, the weight of blame or misrepresentation lies heavily on second respondent who was applicant's agent.

The issue to be determined under the circumstances is whether applicant is entitled to the relief she seeks in circumstances where her agent, and not third parties, has not carried out a mandate given by her to her agent.

In the Heads of Argument filed on applicant's behalf, applicant argues that because there was no meeting of the minds between the parties, there was no agreement whatsoever. She also says that when the property was eventually ceded to the so-called purchaser, it was a result of a fraudulent misrepresentation.

As stated above the issue is not a question of the meeting of the minds of the parties. It is to determine whether applicant is entitled to the relief she is seeking in her application if the agent acted outside his mandate to sell the property at a particular price. It is also important to determine the rights of third parties under the circumstances *vis-à-vis* those of the applicant.

Before determining the issue, it is important to determine whether second respondent was indeed an agent of the applicant. The applicant says that second respondent misrepresented to her that she was an employee of the company called Guarantee Trust (Pvt) Ltd. This company was operating as Estate Agents at an address provided as, Fourth Floor, Fidelity Life Tower, Raleigh Street, Harare. When these proceedings were commenced, applicant's legal practitioners issued a certificate of service of the court application upon the second respondent, Mr Mpofu showing that service was effected at the same address as that of Guarantee Trust (Pvt) Limited. The certificate of service reads as follows -

"I, Farai Chikonzo, a legal clerk in the employ of Chinyama and Partners, the Legal Practitioners of record for the Applicant hereby certify that at Guarantee Trust (Pvt) Limited, 4th Floor, Fidelity Life Tower, Harare, on the 1st day of February, 2002 at 2.45 p.m., I have served the following document(s) namely, COURT APPLICATION, upon Mr Mpofu by handing it over to him personally".

The first respondent made that observation in his opposing papers while maintaining that he was not aware of any discussions that could have happened between

the second respondent and the applicant. The letter that was attached to the application from Guarantee Trust (Pvt) Ltd is dated 10 January, 2002. That letter purports to dissociate Guarantee Trust (Pvt) Ltd from the transaction between applicant and the second respondent. It does not say that Guarantee Trust (Pvt) Ltd is unaware of anybody by the name of Mr Mpofo. All it says is that as a company and an Estate Agent, it had no record of any payment of any agency commission or any Agreement of Sale involving the applicant and the first respondent.

It is also important to note that applicant met the second respondent sometime in February 2001 and through the involvement of second respondent an Agreement of Sale was entered into for the so-called sale of the property belonging to the applicant. Applicant says that she engaged the company Guarantee Trust (Pvt) Ltd to facilitate the so-called sale.

Exactly a year later she draws up an application which is before me and serves that application on Mr Mpofo at the offices of Guarantee Trust (Pvt) Ltd. To me it would be reasonable to conclude that indeed Mr Mpofo could well be identified over a long period of time with Guarantee Trust (Pvt) Ltd. The only reasonable inference to draw is that he was in one way or another connected with Guarantee Trust (Pvt) Ltd. This is the place where applicant always went to liaise with her agent when she wanted to know anything relating to the sale of her property. We are not told of any other meeting place where applicant went to when she wanted to see the second respondent to discuss anything about the sale. Applicant does not tell us where she went after being called by the second respondent to come in and sign certain papers in August, 2001 as contained in her affidavit (see paragraph 7). She does not tell us that each time she went to sign any

documents relating to the sale of her property she met the second respondent at any place other than the place she expected to see him, namely the offices of Guarantee Trust (Pvt) Ltd. I am convinced that as between applicant and second respondent whether second respondent was representing himself or a company where he was employed, the agreement to appoint second respondent as an agent of the applicant was indeed concluded. They had dealt with each other for a long time and no facts have been placed before me that point towards the second respondent not acting as an agent of the applicant. Whether or not he acted within his mandate is a completely separate issue. I am therefore satisfied that second respondent was indeed an agent of the applicant in concluding the mandate which involved cession of a property registered with the fourth respondent in the name of the estate of the applicant's late husband.

I now refer to the issue which I have stated above, namely, whether applicant can use dishonesty or fraud on the part of her agent as a basis for resiling from an agreement that has been concluded by her agent with the third party.

It is trite in our law that an act of an agent who has acted within the scope of his actual or apparent authority does not cease to bind the agent's principal merely because the agent has acted fraudulently. Even where the agent has acted in furtherance of his own interests the situation remains the same. See the case of *Oppenheimer v Attenborough and Son* (1908) 1 KP 221, Bowstead on Agency 15 Ed. p 279.

In the matter before me, it cannot be doubted that the applicant met with the second respondent on several occasions at the offices of Guarantee Trust (Pvt) Ltd. To me it does not matter where exactly they met and Mr Mpofu assumed agency to dispose of the property which the applicant had inherited from her late husband's estate. It is also

not material whether a purchase price had been agreed between applicant and second respondent although it is highly unlikely that such a price would not have been agreed to. In any case in her papers applicant indicates that at a later stage, she had changed her price from whatever is not disclosed to me to \$1 500,000,00. This appears to be the point in dispute. However, be that as it may, the second respondent proceeded to conclude a cession of rights of the applicant to third parties. An Agreement of Sale was drawn up which applicant does not dispute she signed. Cession papers were effected at the fourth respondent's offices, being the responsible local authority over such houses which again applicant does not deny that she signed. Her argument that she was not shown the original Agreement of Sale as well as the cession papers is not convincing to me. She was perfectly aware of what was happening. The only problem arose because of the realization on the part of the applicant that she could fetch more money than she had originally discussed with the second respondent. To me the cession that was effected by the first respondent with the second respondent acting as an agent of the applicant is indeed binding. First respondent was not privy to the contract of agency between applicant and second respondent and the extent of its mandate. Third parties in the position of the first respondent should not be prejudiced because the applicant and her agent have failed to clearly understand each other as to the nature of the mandate existing between them.

I also note that the draft order sought by the applicant seeks rescission of the contract. In her Heads of Argument filed on her behalf by her legal practitioners the applicant seems to be having a change of heart. Instead of seeking outright rescission she is seeking to enforce the same contract but subject to the first respondent agreeing to

variation of certain terms and conditions of the agreement. Balancing probabilities, it appears to me that applicant although alleging fraudulent misrepresentation, is not interested in an outright cancellation of the agreement. All she wants to do is vary the terms of the agreement so that she receives the best benefit out of the sale of the house.

I therefore make the following order -

The application is hereby dismissed with costs.

Chinyama & Partners, legal practitioners for applicant
Muskwe & Associates, legal practitioners for respondents