CBZ BANK LIMITED
versus
JOEL MAMBARA T/A MAMBARA & PARTNERS

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 22-23 January 2018 & 19 September 2018

Trial

Adv. G.R.J Sithole, for the plaintiff
Mr T Chiriseri, for the defendant

CHAREWA J: Plaintiff issued summons against the defendant claiming $150 000 plus 28% interest per annum arising from the defendant's alleged negligence and breach of professional duty. The negligence arises from disbursing to the seller the purchase price of properties sold to the purchaser before registration of transfer into the name of the purchaser and registration of mortgage bond in favour of plaintiff which funded the transactions.

The facts and background

It is not in dispute that on 24 January 2011, one Isabel Zvishamiso Siwela, (the purchaser) entered into an agreement with Cecil Ruzvidzo (the seller), to purchase, and took occupation of, immovable properties known as Blue Ranges Plot No. 39B measuring 24,5259 acres and Plot No. 39C measuring 24,5259 acres, otherwise known as 39B and 39C Blue Ranges Kadoma. Nor is it in dispute that the purchase price for the properties was $150 000 payable in three tranches: $40 0000 being due upon signature of the agreement, $60 000 being due on or before 30 April 2011 and the balance of $50 000 being due on 31 July 2011. Further it is common cause that in terms of the agreement, all payments were to be made into defendant's trust account, as the seller's conveyancers, and were to be held in trust pending transfer.

There is no dispute that the purchaser did not have the capacity to make payment in terms of the sale agreement and that therefore the parties entered into a six months lease agreement on 24 January 2011 to provide a window to the purchaser to obtain mortgage finance

to fund the purchase price. It is common cause that she therefore sought and obtained, through the vehicle of Hantex Investments (Pvt) Ltd (Hantex), a company in which she was a director, mortgage finance from the plaintiff. Nor is it in dispute that plaintiff did advance a loan in the sum of $150 000 to Hantex which sum the plaintiff deposited into the defendant's trust account. Further, it is not disputed that the defendant released this sum to the seller before effecting transfer to the purchaser and consequent registration of a mortgage bond against title in favour of plaintiff to secure the loan. Finally, it is common cause that the plaintiff never gave instructions to defendant to release the trust funds to the seller.

Ultimately, the defendant never processed the transfer to the purchaser who then lost occupation of the properties after the seller went on to sell the property to an innocent third party. As a result, plaintiff has thus been unable to enforce the judgment it obtained against Hantex and or the purchaser following the breach of the loan agreement as the property which ought to have provided security for the loan is not available.

The issues

The issues properly synthesised at the pre-trial conference are therefore:

i. Whether the defendant acted improperly by releasing the sum of $150 000 to the seller of the property before transfer of title to the purchaser in circumstances where the plaintiff financed the purchase price and required that a mortgage bond be registered to secure its interest before such release of the purchase price; and

ii. If so, whether the defendant is liable to reimburse to the plaintiff the money it advanced to finance the purchase price.

Plaintiff's evidence

The plaintiff called only one witness, Thomas Tsvangirayi Gambiza, its Head of Recoveries and Collections. He testified that the purchaser was the director of Hantex Investments Private Limited, a company which operated an account with plaintiff. On 8 February 2011, the company applied for loan facilities with the bank comprising of an overdraft facility in the amount of $203 400 for working capital for poultry and crop production on Plots 39B and C Blue Ranges, Kadoma. Security for the loan was by way of cession of the insurance policy over the property. Subsequently, and on 1 July 2011, the facility was recrafted to include the amount of $149 600 being a loan to purchase the land described as Plots 39B and C Blue Ranges, Kadoma. This land formed the security for the loan in the form of a mortgage bond over Plots 39B and C of Blue Ranges, Kadoma, supported by a guarantee by the seller.

The witness testified that the provisions of the agreement of sale between the seller and the purchaser, which was provided to the plaintiff, satisfied it that any loan for the purchase price would be held in trust pending transfer. In addition, defendant undertook to transmit to plaintiff the title deeds once transfer to the purchaser had been effected to enable plaintiff to secure the loan facility, and further, reiterated to plaintiff the terms of the sale agreement which included the fact that the purchase price was only payable to the seller upon transfer. As a result, on 4 July 2011, plaintiff paid into defendant's trust account the entire purchase price.

The witness introduced into the record, with the defendant's consent, the plaintiff's bundle of documents marked as Exh 1. He testified that p1-7 comprises the agreement of sale between the seller and the purchaser which the said purchaser produced in proof of purchase of the property. The agreement was drafted by the defendant. The plaintiff understood that in terms of paragraph 6.2.b. thereof its loan advance would only be paid to the seller upon transfer to the purchaser. In turn the plaintiff would receive the transfer deed in favour of the purchaser.

The witness testified that this persuaded the plaintiff to advance the loan in payment of the purchase price. The facility agreement for the loan was also entered into the record by consent as Exh 2.

The witness further testified that the proviso to paragraph 6.2 assured the plaintiff that no request for payment by the seller would be entertained by defendant until all suspensive conditions had been met. Therefore the plaintiff made direct payment into the defendant's trust account with the understanding that defendant would only make payment to the seller after transfer of title to the purchaser. Such payment to defendant's trust account was predicated on paragraphs 2.2, 2.3, and 2.4 of the agreement of sale. Further paragraph 7.2 made the plaintiff to believe that the seller was the title holder of the property.

The witness asserted that plaintiff, as the owner of the trust funds, never gave defendant authority to release the same to the seller. The witness also testified that the letter by the defendant to the plaintiff at p 18-19 of Exh 1 gave the plaintiff confidence to process the loan for the purchase price with its reference to a lease agreement entered into by the parties to enable the purchaser to continue operations while at the same time giving plaintiff the window in which to complete its loan processes. Further, on 7 February 2011, (p 20 of Exh 1) defendant created the impression that title deed in the name of the seller already existed, and upon receipt thereof from the Deeds Office, it would be forwarded to plaintiff and consequently that transfer to the purchaser was being processed. The witness thus testified that without the assurance of these letters, the plaintiff would not have made the payment to defendant.

In addition, the witness averred that the parties to the sale agreement, having entered into a lease agreement for six months up to 31 July 2011 to afford the plaintiff the opportunity to process a loan for the purchase price, it was improper for the defendant to demand payment of the full purchase price within a shorter period. Therefore defendant's letter of 20 June 2011 giving a deadline of 30 June 2011 for payment of the purchase price on pain of nullification of the agreement of sale was inappropriate. The plaintiff having made payment of the purchase price in full on 4 July 2011, (within the six months window), the sale agreement remained valid. In any event, the witness testified, if the sale agreement was no longer valid because of the purchaser's breach, then the defendant ought not to have accepted the payment and should have returned the plaintiff's money.

Further, the witness testified that privity between the plaintiff and the defendant was established by the fact that throughout, the defendant never demanded for payment from the purchaser but from the plaintiff. Correspondence by the defendant to the plaintiff at pages 18-22 of Exh 1 are consistent with a person owing a duty of care to plaintiff as defendant gave assurances to deliver the transfer deed to plaintiff. Defendant's conduct, in demanding payment from plaintiff, without even copying such correspondence to the purchaser, created the impression that the defendant would exercise due care in handling any funds paid by the plaintiff. It is for that reason that the summons alleges negligence and breach of professional duty in that the defendant persistently exhorted plaintiff to make payment to him in return of a promise to deliver the transfer deed once transfer was done. However, he failed to do so even after asserting that defendant was only awaiting receipt of the deeds, giving the impression that transfer had already been done and he had already received the instructions to so forward the deed (see p 20 of Exh 1).

For that reason, the witness asserted, the release of the purchase price to the seller when defendant knew that transfer of the property had not been done was negligent. Further, the transfer of plaintiff's trust funds to the seller without proof of plaintiff's instructions to that effect was also negligent and unprofessional. The witness concluded that plaintiff believed that, in addition to negligent and unprofessional conduct, defendant may have intentionally and knowingly participated in a transfer which he knew was not a genuine transfer of any property. This is because firstly, he now seeks to bring in issues of transfer and or security in the form of share certificates which are not part of the agreement of sale. Secondly, no transfer deed ever existed in the name of the seller, contrary to defendant's averments in its letters and therefore no transfer deed in favour of the seller was ever forwarded to plaintiff contrary to the

undertaking to do so. Thirdly defendant never gave any reason why he failed to process the transfer, either to the seller or to the purchaser.

Finally, the witness asserted that the agreement, drafted by the defendant, referring as it does to payment against transfer, suggests that transfer deeds in favour of the seller existed. It is thus improper and unprofessional conduct to have so imputed, tacitly or directly, when defendant well knew this to be untrue, particularly as this influenced plaintiff to grant the loan. Plaintiff's claim is therefore predicated on this basis and on the provisions of the sale agreement between the seller and the defendant, paragraph 6.2.b of which obligated the defendant only to release the purchase price upon transfer.

Defendant's case

The defendant gave evidence on his own behalf. He confirmed that he drew up the sale agreement, containing the payment plan in the undisputed facts, between the seller and the purchaser. He confirmed that he received no proof of ownership by the seller to verify the assertion in Part A of the agreement of sale. He in fact confirmed that the seller did not have title to the land subject of the sale agreement, but share certificates. He sought to produce the share certificates into the record. The plaintiff objected on the basis that the share certificates had absolutely no relevance as they do not relate to the title to the land in issue, being proof that the seller owned 40 shares in a company called Tessolin Investments (Pvt) Limited.

I agreed with the plaintiff and expunged the share certificates from the discovery schedule and acceded to the requested not to enter them into the record. My reasons are as follows: The sale agreement clearly shows that the purchaser did not buy share certificates in a company, but immovable property. The agreement makes no reference whatsoever to share certificates. Further, the loan facility agreement upon which the purchase price was raised, does not refer to any share certificates, security for the loan being predicated upon registration of a mortgage bond and provision of guarantees by the seller. Therefore, there can be no basis for the plaintiff to have demanded share certificates as security, nor is there anything on the record, either in the correspondence or documents discovered, that refers to these share certificates. Clearly, the defendant seeks to send the court on a wild goose chase. I decline to participate in such a wasteful exercise and will henceforth, treat the issue of these share certificates as either spurious or evidence of negligence by the defendant.

The defendant confirmed that the purchaser was unable to pay the first tranche of the purchase price and that she informed that she had approached plaintiff for a loan to fund the purchase. He confirmed that the plaintiff saw the sale agreement and on that strength was

agreeable to loaning the purchase price. However he claimed that the plaintiff did not pay the purchase price whereupon the seller intimated his intention to cancel the sale agreement. He confirmed that the purchase price was paid into his trust account by the plaintiff on 4 July 2011 with no instructions to withhold payment to the seller pending transfer or to release the money.

He asserted that, regardless of the lack of instructions with regard to the disposal of the trust funds, his understanding was that the purchaser already being in breach, payment to the seller was necessary to save the agreement. He confirmed that the agreement of sale provides that the purchase price is to be channelled through his trust account, as facilitator for the payment, but asserted that he owed no duty of care to the plaintiff as he had no instructions from plaintiff to withhold payment to the seller. He averred that, in any event, the purchaser instructed him to release the money to the seller.

He confirmed that he was the legal practitioner for the seller, and had instructions from him to transfer the property to the purchaser but could not do so as the sub-division was not compliant with municipal by-laws. He never got final instructions from the seller that the land was ready for transfer. He claimed that he only discovered, upon institution of HC 7885/13 when he acted as the defence counsel for Hantex Investments (Pvt) Ltd that plaintiff had loaned money to the purchaser to fund the purchase price. Having negotiated a deed of settlement in HC7885/13 he was surprised to receive, in 2015, summons against himself for professional negligence.

He argues that in reality, the basis of the claim against him is an agreement of sale to which the plaintiff is not a party. In any event, plaintiff has its own conveyancers to which list he does not belong. Besides, plaintiff ought to have done a due diligence before granting the loan facility to the purchaser. And since the plaintiff obtained a guarantee from the seller for the loan, it ought to have been well aware of the status of the land. Therefore the plaintiff is the cause of its own misfortune. All that he was required to do was to ensure that the purchase price was paid in order for him to effect transfer to the seller. He does not owe a duty of care to the whole world, particularly where there are specific instructions.

It also came out in his evidence in chief and under-cross-examination that defendant had prepared an agreement of sale in respect of unsubdivided land contrary to the Regional Town and Country Planning Act because, according to him, he never saw any subdivision permit or title deed in respect of the land. All he saw were the share certificates which I have already expunged from the record as irrelevant, and it was on that basis that he prepared the agreement of sale.

Defendant further averred that he has been in practice since January 2002, and is aware that a legal practitioner should not prepare an illegal agreement and that if he does so, then he can be held liable to third parties. He admitted that the land sold was not yet subdivided in terms of the law and yet still prepared an agreement of sale thereof. He agreed that he is aware that such agreements are unlawful. However he argued that this particular agreement was not in breach of the law as the land was held by a company in which the seller had shares. He quite properly abandoned this argument.

Under cross examination, he admitted that he is personally not a registered conveyancer though he participated in a conveyancing transaction. He averred that his firm does have a conveyancer who was to undertake the actual conveyancing. He also confirmed that he is the sole partner in his firm and that the conveyancer was only a professional assistant.

He claimed to be well versed with the law relating to trust accounts and confirmed that he gave plaintiff his account details for the deposit of the purchase price into his trust account, and that the letter at p.20 of Exh 1 advises that such payment will be made in terms of the agreement of sale. He confirmed that paragraph 6.2.b of such agreement enjoins that such payment shall be held in trust against transfer and that the payment made by plaintiff on 4 July 2011 qualified as such trust money. However, he claimed that once the money was paid into trust by plaintiff it became the purchaser's money even though she had not paid any money. He asserted that he thus acted on her verbal instructions to release the money to the seller as it was his understanding that written instruction to that effect was unnecessary. He could not recall when and how such instruction had been made nor produce written attendance note to confirm such verbal instruction but averred that the instruction was made telephonically.

Further, he avers, since there was a breach of the sale agreement by the purchaser, he was entitled to transmit directly to the seller any payment he received without seeking further instruction from the depositor. On being asked whether he understood that in terms of banking law, any money held by the bank belongs to the bank for the credit of the depositor, and thus once the bank makes a payment to a third party for funds to be held in trust, the bank's authorisation must be sought to disperse such money, he asserted that since the money was proceeds of a loan advanced to the purchaser, then his obligation was to the purchaser, not the bank. He claimed that his simple defence to the claim is that since he had no instructions from the plaintiff to keep the money in trust pending transfer he was entitled to assume that the money once deposited in trust belonged to the purchaser and to act on her instructions.

The witness confirmed that where monies are deposited into trust without instructions, it is the duty of a legal practitioner to find out who deposited the money and await verbal or written instructions about what to do with such deposit. He agrees he acted without the instructions of the depositor, the plaintiff, but disagrees that this was a failure of his professional duty since the purchaser did give him the instructions.

He confirms that he did not inform the plaintiff of the purchaser's instructions to release the money to the seller or seek its confirmation of such instruction. He claims that this was because he had no dealings with the plaintiff except to write letters to it on behalf of the purchaser to whom he owed a duty to protect her interests as she was his *quasi*-client, even though he was primarily the seller's legal practitioner.

Finally the witness testified that this matter is *res judicata*, plaintiff having sued and obtained judgment against the purchaser's company, Hantex Investments (Pvt) Limited.

Save to state at this point that I agree with the plaintiff's assessment that the defendant's testimony exhibited a woeful ignorance of the law and the duties and responsibilities of a legal practitioner which amounts to such negligence as puts the profession into disrepute, I will make a more detailed assessment of the testimony in my analysis of the facts relative to the law.

The defendant's second witness is the purchaser, Isabel Zvishamiso Siwela. Most of her testimony is irrelevant and does not take the matter further. The relevant part is important in the extent to which it decimated the defendant's defence.

She was incoherent and kept looking at defendant, as if for help, whenever she faced difficult questions. She appeared to me to be the epitome of a coached witness, except where she confirmed the plaintiff's testimony. She was called in to confirm the defendant's case that she gave the instructions to release the purchase price to the seller, yet this was never put to her in her evidence in chief.

She testified that the loan from the plaintiff was for production and not for purchasing the land in question, quite contrary to what defendant stated and also in contradiction to the documentary evidence. She appeared not to have first-hand knowledge of the loan transaction and incredibly stated that the loan advance was supposed to be paid into her company's account for her to pay to the seller, but was only paid to the defendant because the seller had no bank account. Quite apart from this testimony revealing an abysmal knowledge of the terms of the agreement of sale, that a business man like the seller, involved in investment and property development, had no bank account beggars belief.

She claimed that the purchase price was never intended to be held in trust pending transfer, but that the seller wanted immediate payment, something quite contrary to the agreement and to the defendant's testimony.

Under cross examination she claimed that the land was ready for sale, (for what its worth, I will allow that the witness is not a legal person and did not understand the law regarding unsubdivided land), but that it was never transferred to anyone because there was a debt for unpaid rates. However, she later admitted that no subdivision permit was ever produced by the defendant to prove the legality of the sale agreement. She admitted that she signed the sale agreement with full knowledge thereof and that the agreement provided that the purchase price would only be released upon transfer. She agreed that the release of money before transfer would be wrong but claims to be unaware whether the release by defendant was improper. She confirmed that no other subsequent agreement was entered into to change the terms of the sale agreement.

She claimed that she in fact paid the money into defendant's trust account and gave telephonic instructions for its release to the seller. However, on further questioning she recanted to say that it was in fact the plaintiff which made payment to the defendant's trust account. She claimed that the defendant only started communicating with plaintiff after the purchase price had been paid, but recanted to say this happened "only a week before payment". She claims to have been "sort of" defendant's client when she instructed him to write to the bank to follow up on the loan application. She further claimed that the plaintiff had sued her for defaulting on the loan facility, and confirmed that she had only paid $3 000 to discharge the debt. She agreed that the defendant had a duty to protect the plaintiff's interests in circumstances like the present, where the defendant wrote to the plaintiff demanding payment in exchange for depositing the title deed to the property.

On re-direct, she claimed that it was not improper for the defendant to release the purchase price to the seller and hence defendant should not be held accountable. She contradicted defendant when she claimed that the plaintiff was aware of her instructions to defendant to release the purchase price to the seller in her capacity as a "sort of" defendant's client even though she held no discussions with plaintiff on the issue.

Defendant's last witness is Reuben Mataka, the professional assistant who was the conveyancer in the matter. He testified that the seller and purchaser came to him to prepare the sale agreement which he did. He asserted that he was shown share certificates in favour of the seller as proof of title and authority to sell the land. The share certificates showed that the seller

owned 20 shares in Tessolin Investments (Pvt) Ltd, and that Tessolin Investments was the owner of Blue Ranges Farm. He saw no ownership documents in favour of Tessolin Investments for the land. Regardless, he concluded that the land could be legally sold, and that he would do simultaneous transfers from Tessolin Investments to the seller and then to the purchaser. He confirmed that the seller had no title to the land, but only shares in a company which owned the land. He admitted that share certificates were not proof of ownership of land.

He confirmed that transfer could not be done as the municipal/subdivision requirements had not been met and that up to the date of trial there is still no compliance with the development permit and no title can pass. He produced into the record as Exh 3 his letter dated 30 March 2015 to show that defendant is still pursuing the issue of transfer.

He asserted that he authored the letters at p.18-22 of Exh 1 and unbelievably averred that those letters do not give any undertaking to hold the purchase price in trust pending transfer.

He claimed that the agreement of sale was not illegal and that defendant was not negligent. He claimed surprise that plaintiff paid the purchase price into defendant's trust account rather than providing a guarantee of payment in terms of clause 8.1 of Exh 2, the loan facility agreement.

Under cross-examination, the witness claimed that the loan of $149 600 is what is secured by clause 8 of Exh 2, and it is this loan which was also guaranteed by the seller. However, he later recanted to state that he was not privy to the loan facility agreement and does not know what the guarantee refers to. He claimed that it was never a condition of the agreement of sale that the purchase price was to be released against transfer but admitted that Cl. 6.2.b. of the sale agreement does say so. This was done because the purchaser was in default.

He claimed to have prepared the agreement of sale for land which had title, thus contradicting his evidence in chief that he never saw any ownership documents. He confirmed that no security against transfer was given and that the seller's shares in Tessolin were never transferred to anyone, but claimed that the plaintiff demanded and was given the share certificates as security. He claimed that the purchaser advised defendant of this demand and that the proof of delivery of the share certificates to plaintiff exists.

However, he admitted that there was no evidence before the court to support this, and neither was there any such evidence at the defendant's office. He claimed that this was because

the file was missing. It is instructive to note that the defendant himself never made such assertions and claims in his testimony.

He admitted that proof of ownership in land is through title deeds and that share certificates are only proof of ownership of shares in a company but insisted that in this case, the share certificates proved ownership in the plots being sold in that they proved that the seller owned shares entitling him to ownership of land! He confirmed that verification of title is done at the Deeds Office, and that he never approached that office for the purpose. He stated that in this case he sought confirmation from Damofalls Land Developers who are not even the company secretaries for Tessolin Investments. He averred that acting on share certificates he was convinced that the seller had title to land and this showed due diligence on his part that the seller was the owner of land though transfer was still to be done from Tessolin.

He confirmed that he received no instruction from the plaintiff to disburse trust funds but that the instruction came from the purchaser because apart from being the owner of the money, she is his principal as she is also his client together with the seller! He further claimed that the agreement of sale was varied to allow for the transmission of the purchase price to the seller before transfer and it was on this basis that payment was made to the seller. He claimed that such variation agreement was misplaced. On it being pointed out that his evidence contradicted both the defendant and the purchaser's he urged the court to accept his version which is supported by a file, though such file is allegedly missing.

He averred that he is aware of banking law and did not act negligently in respect thereof by releasing the purchase price to the seller without the depositor's instruction.

The witness disowned the contents of his letter at p 20 of exh 1 as incorrect; claiming that the defendant did not in fact undertake to transmit the transfer deed to the plaintiff. He confirmed that p. 18 of Exh 1 is correct that payment was to be released in terms of the agreement of sale, but denied that the agreement of sale required that the purchase price was to be held pending transfer. He testified that he owed a duty of care towards the purchaser, and not to the plaintiff. In fact, even though the plea did not claim contributory negligence, he averred that the plaintiff was actually negligent in releasing money into defendant's trust account. I will not pay any regard to this averment which was never raised in the pleadings.

On re-examination he admitted that he was not privy to the relationship between the purchaser and the plaintiff and could not answer whether plaintiff was aware that the purchase price ought to be released to the seller. He reiterated that both the seller and purchaser were his clients though the seller was the primary client.

Finally, the witness confirmed that the basis of his conclusion that the land could be legally sold was what he was told by the property developers and that he did not see any subdivision permit and thus had no idea whether the subsequent sale complied with the law.

The law

Plaintiff's claim, being predicated upon negligence and breach of professional duty of care, and thus, being a claim for unintentional injury, is clearly delictual. For one to be held to be negligent towards another, it is trite that there must be a failure to observe that degree of care which a reasonable man would have observed.[1]

And further, it is true, as defendant asserts, that such duty of care is not owed to the whole world. As a result, there must be a causal connection or privity between the plaintiff and defendant in order for the duty of care to arise as between them. This principle was better enunciated per INNES CJ as follows:

> "Where in consequence of some positive act, a duty is created to do some other act or exercise some special care so as to avoid injuries to others, then the person concerned is, under Roman-Dutch law, liable for damages caused to those whom he owes such duty by an omission to discharge it."[2]

And in so far as the conduct of legal practitioners is concerned, it is settled in our law that in carrying out his paramount duty to his client, a legal practitioner is enjoined to ensure that no harm is done to any other party which does not flow from strict observance of his client's instructions. Thus legal practitioners do owe a duty of care to third parties who may be directly or indirectly affected by the conduct of the lawyer in the discharge of his professional duty. Therefore, where the lawyer acts in a negligent manner or breaches his professional duty he may be sued in delict by affected third parties. ADAM J, expressed it thus:

> "….there is no longer any rule that a legal practitioner who is negligent in his professional work can be held liable only to his client. He may be liable to…...others, as long as all the elements of Aquillian liability are satisfied."[3]

With respect to trust accounts, the basic principle is that monies held in trust can only be disbursed upon the instruction of the depositor. In that respect, the best practice is to act upon written instructions. Where trust funds have been deposited without any instructions as to their disposal, then a diligent lawyer must seek such instruction.[4]

---

[1] See *Cape Town Municipality v Paine* 1923 AD 2007
[2] *Halliwell v Johannesburg Municipality* 1912 AD 659 @ 672
[3] See *Maketo & Anor v Wood & Ors* (1) ZLR 102 @ 104
[4] See *The Law Society of Zimbabwe v Muchandibaya* HH 111-17 @ p.4

In so far as agreements of sale and or transfers in contradiction to the Regional Town and Country Planning Act Cap 29:12 is concerned, the law is settled. Such agreements are void for illegality and remain invalid[5]. Therefore, it goes without saying that a legal practitioner involved in the drawing of agreements of sale has an obligation to ensure that such agreement is in compliance with the law. Any failure to do so can only have two inferences: that the legal practitioner was at best guilty of professional negligence and in breach of professional duty, or at worst acted in a fraudulent manner. This court has consequently rhetorically asked:

> "Or that when s39 (1) (b) (i) of the Regional Town and Country Planning Act [Chapter 29:12] prohibits the sale of an undivided piece of land without a subdivision permit, a lawyer who represents a purported seller in breach of that law is not negligent?"[6]

Finally, it is also trite that funds deposited in the account of any customer of the bank remains the funds of the bank which can use those funds as it pleases as long as it pays the depositor, on demand, the equivalent of the amount deposited in the account. The relationship between the bank and its customer is thus a contractual one of debtor and creditor whereby the debtor, (the bank), has an obligation to pay the creditor (the depositor/customer) on demand and to honour validly drawn cheques as long as the account remains in credit.[7]

Analysis

Has the plaintiff discharged the onus upon it to prove that defendant owed it and negligently breached a professional duty of care in the management of trust accounts?

The evidence of Mr Gambiza for the plaintiff dwelt on the fact that the agreement of sale obliged the defendant not to release the purchase price before transfer, and defendant did so contrary to the terms and conditions of an agreement which he himself drafted and was therefore well aware of. Further Mr Gambiza gave undisputed testimony that plaintiff made the payment into defendant's trust account upon exhortation by defendant to do so on assurance that such trust funds would be held in trust pending transfer in accordance with the agreement of sale. The letter at p 18-19 of exh 1. Attached to this letter was a lease agreement appearing at p 9-16 of exh 1 which defendant explained was meant to create room to enable plaintiff to carry out its processes to advance the purchase price to the purchaser. Further, and on 7

---

[5] See *Hativagone & Anor v CAG Farms (Pvt) Ltd & 2 Ors* SC-42-15. See also *X-Trend-A-Home (Pvt) Ltd v Hose Law Investments (Pvt) Ltd* 2000 (2) ZLR 348 @ 355 B-C.
[6] *Kambuzi Nine Mine (Pvt) Ltd v Douglas Palframan & 2 Ors* HB 26-16
[7] See *Standard Chartered Bank Zimbabwe Limited v China Shougang International* SC 49-13. See also *Standard Bank of South Africa v Echo Petroleum* CC 192/11 (2012) ZASCA 18(22 March 2012); *ABC Bank v Mackie Diamonds* SC 23/13.

February 2011, defendant wrote to the plaintiff assuring it that the security it required for purposes of loaning the purchase price to the purchaser would be forwarded by the defendant, which went on to assure plaintiff that it already had instructions from the seller to do so. Finally, on 20 June 2011, defendant wrote to plaintiff notifying it that the purchaser was in breach and therefore that the purchase price had to be paid by 30 June 2011 otherwise the agreement would be considered cancelled. In giving such assurances, defendant thus created a duty of care towards plaintiff. In any event, the deposit into defendant's trust account being trust funds, defendant owed a duty to plaintiff to handle such funds in accordance with plaintiff's instructions and failed to do so, thus breaching his professional duty.

In any event, it appears to me that the defendant wants to have his cake and eat it too. In one breath he claims that the sale agreement was no longer valid having been cancelled for breach by the purchaser, and in the next breath he wants the court to believe that it was perfectly acceptable for him to receive the purchase price on a cancelled agreement and forward it to the seller. If anything, this is but evidence of ineptitude in handling trust funds by the defendant.

It is my view that plaintiff has discharged the onus before it. Trust funds were deposited into defendant's account without any instructions, and without seeking the instructions of the depositor, defendant disbursed these trust funds before the conditions upon which they had been deposited had been met in circumstances where the defendant was well aware of these conditions. Further, the funds were deposited on 4 July 2011, a few days after the deadline, according to which, in terms of defendant's letter dated 20 June 2011, the agreement of sale was considered cancelled. It is in my view extremely negligent handling of trust funds to then transmit, for whatever reason, the purchase price for an agreement considered to have been cancelled.

I am in no doubt that once the defendant gave plaintiff the instructions to deposit the purchase price into his trust account against the assurance that it would be released to the seller upon transfer to the purchaser and the delivery of title deeds to plaintiff, then a duty of care was assumed by defendant towards the plaintiff. The question whether the reasonable man in defendant's position would have foreseen the likelihood of harm to plaintiff in the circumstances comes into play. Clearly, any reasonable lawyer in defendant's position ought to have foreseen that releasing the purchase price when he had not done the necessary transfers was likely to prejudice the plaintiff should no transfer eventually occur. Defendant therefore ought to have governed his conduct accordingly and guarded against such harm. Thus his duty of care to the plaintiff is clearly established.

Nor am I persuaded by defendant's argument that there is no proximity or privity between him and plaintiff. Granted, defendant does not owe a duty of care to the whole world, and in this case, plaintiff is not defendant's client. Further, the defendant did not participate in the loan arrangement between the purchaser and the plaintiff. However, defendant is a legal practitioner handling trust funds which third parties may deposit for the benefit of his clients. The duty to handle trust funds with the appropriate care is well established. Therefore, regardless of whether the depositor is the lawyer's client, the lawyer always owes a duty, in my view, to conduct himself impeccably with regards to trust funds deposited with him. It is for this reason that our courts make it clear that legal practitioners have a duty to third parties whenever they handle work which involves known and identified third parties who might be directly affected by the legal practitioner's conduct.

In the circumstances of this case, the defendant improperly conducted himself in such a manner as to negatively affect the plaintiff's interest. He had a duty in terms of clause 6.2.b. of the sale agreement to hold the purchase price in trust pending transfer. He failed to do so and his conduct directly caused prejudice to the plaintiff for which he must atone.

I have briefly touched on my impression of the defendant's testimony and his credibility in my summation of the evidence led. I find it incredible that a conscientious legal practitioner would claim to represent both the seller and purchaser, and purport to have acted on the instructions of the purchaser to release trust funds which the purchaser never deposited. Besides, this claim of the defendant is belied by the fact that all his correspondence with plaintiff where never copied to the purchaser upon whose instructions the defendant purported to have been acting.

Clearly, defendant's conduct fell far short of the reasonably expected skill and standards of a diligent legal practitioner as evidenced by his testimony and the testimony of his witnesses which revealed a woeful lack of rectitude and probity. Defendant's professional assistant and second witness was so uninformed as to believe that share certificates in a company are proof of ownership of land, and that confirmation of title is obtained from land developers. Further, he was even ignorant of the requirements of the Regional Town and Country Planning Act in so far as sales of undivided land without the necessary development permits is concerned. With full knowledge that the land was undivided and had no subdivision permit, he still went ahead and prepared an agreement of sale thereof. In addition, this witness testified that transfer could not take place because of the developer's non-compliance with City of Kadoma requirements.

If anything, this is further evidence of lack of diligence by the defendant: before preparing the agreement of sale, these are some of the issues defendant ought to have checked on.

Defendant himself was no better, which is understandable because he is not a conveyancer, but for him to employ a professional assistant whom he is not qualified to guide and supervise is the height of negligence. Further, both defendant and his second witness appeared totally ignorant of how to run trust accounts, itself an act of negligence at best. In addition, both of them had no idea as to the provisions of the law with regards to monies held and paid by banks. In *casu*, the plaintiff bank advanced money to a company, Hantex Investments (Pvt) Ltd and this money was credited to the company's loan account with the plaintiff. It was thus a deposit under the ownership and control of the bank up until the plaintiff paid it to defendant's trust account. Defendant thus remained accountable to the plaintiff for this money, not to the purchaser who could not therefore legitimately give instructions as to its disposal.

While these issues may not, strictly speaking, address the question whether defendant owed a direct duty of care and breached his professional duty to plaintiff, they help to crystalize how overally, defendant ineptly conducted himself. The fact that he prepared an illegal agreement and disbursed trust funds contrary to the principles governing trust funds is at best, an act of negligence. In my view, this is a situation which underlines the duty of a legal practitioner to act with due care and diligence towards third parties who may be affected by his conduct, on pain of facing a claim for damages.

As for the testimony of the purchaser, I have already commented as to the extent to which it helped destroy the defendant's defence and need not say more save to say that she actually confirmed that the land in question was sold without title or sub-division permit. Suffice it to say that no proof was adduced that she actually gave any instruction to disburse trust funds which she had not deposited. Besides, this money was never hers, being a loan advanced to Hantex Investments (Pvt) Ltd. In fact, she contradicted defendant's second witness's testimony that the instruction was made in a written variation agreement, as she claimed to have given the instruction telephonically. In any case no attendance note for such telephone call, or copy of such variation agreement was produced. *Ergo,* no instruction was in fact given to disburse the trust funds.

The contradictions between the defence witnesses' testimony shows that one or more of them lied to the court. In fact, the defendant himself had the nerve to lie in his testimony that he only became aware that plaintiff had advanced the purchaser the money for the purchase

price upon the institution of HC 7885/13, belying the evidence in his chain of correspondence with plaintiff and his own admission that he received the purchase price into his trust account from plaintiff. As for the defendant's second witness, he sought to distance himself from the meaning of letters he admitted to have authored. In the premises, I am inclined to, and do, disbelieve the defence testimony except where it rhymes with plaintiff's.

With regard to defendant's claim of *res judicata*, this I must also dismiss out of hand. HC 7885/13, the plaintiff sued Hantex Investments (Pvt) Ltd, the company to which it advanced the loan, in contract. Only $1 000 was recovered in that suit. Defendant was not party to the suit at all, and in fact, acted as the legal practitioner for Hantex, showing the incestuous relationship he appears to have had with the seller, the purchaser and the company whose loan proceeds were used to make the trust deposit towards the purchase price. If anything, the conduct of defendant reveals an unacceptable conflict of interest.

In the premises, I find that the defendant owed a duty of care to the plaintiff, and in particular, breached his professional duty to conduct himself with the necessary skill and knowledge required of a reasonable legal practitioner and ought to be held liable in damages to the plaintiff.

I put no stock on the defendant's argument that because plaintiff's claim is for the amount of the purchase price which he was prejudiced of, it consequently means that the claim is contractual and not delictual. That, in my view, is grasping at straws and is clearly a spurious argument. There is nothing to stop an injured party from claiming an amount in damages equal to the actual amount it was prejudiced of.

Disposition

Accordingly, defendant be and is hereby ordered to pay to the plaintiff the sum of $150 000 plus interest at the rate of 28% per annum from 4 July 2011 to date of payment and costs of suit.

Messrs Danziger & Partners, plaintiff's legal practitioners
Messrs J Mambara & Partners, defendant's legal practitioners