

KNIGHT MTSAMAI

Versus

NYASHADZASHI DZVIMBO

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 23 SEPTEMBER 2003 & 12 FEBRUARY 2004

Finch for the plaintiff
R Moyo-Majwabu for the defendant

Civil Trial

CHEDA J: Plaintiff issued out summons against defendant on 25 February 2002 for the following relief:

1. An order cancelling the agreement of sale entered into between the parties on 1 June 2001.
2. An order evicting defendant from 22 Leask Ave, Newmansford, Bulawayo
3. Payment in the sum of \$32 000,00 in respect of occupational rental from 1 June to 31 January 2002.
4. Holding over damages at the rate of \$133,33 per day from 1 February 2000 to date of eviction.
5. Costs of suit.

The historical background of this matter is that defendant had been renting plaintiff's property which is now the subject of this litigation for about 2 years. Plaintiff decided to sell the property and offered it to defendant who agreed to purchase it for \$650 000. It was agreed that defendant pay \$20 000 as deposit which amount was paid on 7 June 2001. The balance of \$630 000 was to be paid on or before the 31 August 2001.

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It is plaintiff's evidence that during the month of July/August 2001 he visited defendant on at least three occasions enquiring about the balance. The last time he visited him was on 20 August 2001 whereupon plaintiff's father (Isaac Dzvimbo) advised him that they had a problem in meeting the deadline for payment before 31 August 2001 as their money was tied up in security bonds. He discussed this issue with his legal practitioner of record who then advised defendant by letter of 29 August 2001 that they had now given him a grace period of up to 30 September 2001 provided that interest of 30% per annum would be charged if no payment was made by 15 September 2001. Having received no payment by 30 September 2001 plaintiff then instructed his legal practitioner who wrote to defendant on 4 October 2001 threatening to cancel the agreement if the breach was not rectified within 7 days. He therefore, admits giving defendant a grace period.

Plaintiff admitted that defendant advised him of his plight of the possibility of failing to pay timeously. It is further his evidence that on or about 6 September 2001 he became aware that defendant had been granted a loan by Beverley Building Society. He went to his legal practitioner's office where he was given documents to sign but he declined to do so as he was of the view that the money which he was to sign for was less than the balance i.e. \$487 500,00 yet the balance due to him was \$630 000,00.

Defendant's father Isaac Dzvimbo's evidence is basically similar to that of plaintiff. The salient facts being that there was an agreement of sale of which the deadline for payment he could not meet. He informed the plaintiff who apparently indulged him to pay on or before 30 September 2001. By 6 September 2001 he had obtained the loan for \$487 500. He was to pay the balance from his own resources.

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I find that indeed there was a valid agreement of sale therein defendant was to pay-up the balance by 30 August 2001 but had the deadline extended to 30 September 2001. On 6 September 2001 he had been granted a loan by Beverley Building Society and plaintiff's legal practitioner were advised. Plaintiff was called to the conveyancing department of his legal practitioner's offices wherein he was asked to sign documents which were necessary for him to have the amount of \$487 500,00 released to him. Plaintiff refused to sign these documents as he was of the view that he was now being paid less than the balance due.

Plaintiff did not read the documents neither were the contents explained to him by his legal practitioner's conveyancing secretary. All this took place at his legal practitioner's offices. The legal practitioners who drafted the agreement of sale were also the conveyancers and had been chosen by the plaintiff.

It is clear that defendant did all he could reasonably do in the circumstances to finalise this matter but, however, he failed to get co-operation from plaintiff. Plaintiff's failure to read and understand what he was supposed to sign resulted in the derailment of the whole transaction. It is his actions which resulted in the abortive transfer.

The law in relation to contracts is that each party is expected to perform its part. Where the other party fails to perform due to deliberate diligence in ignorance as was in this case by plaintiff surely defendant can not be held liable. Had plaintiff, who is a literate man and a retired army officer (Major) read the documents instead of looking at the figure \$487 500 only he would have understood that the figure before him was only part payment being met by a loan facility from Beverley Building Society and that the balance was to come from defendant's own resources. By failing

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to read the document he deprived himself of adequate knowledge necessary in this transaction. His legal practitioner's secretary did not help him either as she merely handed him papers to sign without explaining to him the relevance of the figure \$487 500,00. It was her duty to do so, her failure to explain to him also contributed to his detriment. She therefore did not handle this matter with due diligence.

It is clear therefore that both plaintiff and his legal practitioner are to blame for this mishap and certainly not defendant.

As defendant performed his part of the bargain he naturally expected plaintiff to co-operate too, which he failed to do. Plaintiff's errors can not be visited on the defendant

I find that defendant did not breach the agreement and accordingly plaintiff's claim is dismissed with costs.

Webb, Low & Barry plaintiff's legal practitioners

Messrs James, Moyo-Majwabu & Nyoni defendant's legal practitioners