

**NQOBIZITHA MICHAEL DUBE**

**Versus**

**SIPHIWE MTHUPHA**

**And**

**BULAWAYO CITY COUNCIL**

**And**

**THE REGISTRAR OF DEEDS**

IN THE HIGH COURT OF ZIMBABWE  
KAMOCHA J  
BULAWAYO 16 AND 24 JUNE 2010

*J Sibanda* for applicant  
*S S Mazibisa* for 1<sup>st</sup> respondent  
No appearance for 2<sup>nd</sup> and 3<sup>rd</sup> respondents

Opposed Court Application

**KAMOCHA J:** The order that was being sought by the applicant was in these terms:-

“It be and is hereby ordered that:-

- (a) The agreement of sale between applicant and 1<sup>st</sup> respondent in respect of stand 148 Neqi Township of Jos Peters 100 acre grant dated 5<sup>th</sup> December 2007 be and is hereby declared to be binding between the parties.
- (b) The 1<sup>st</sup> respondent be and is hereby ordered to sign all papers necessary to give effect to the transfer of the said property from her name to that of the applicant.
- (c) In the event that 1<sup>st</sup> respondent fails to sign such documents the Deputy Sheriff of Bulawayo be and is hereby authorized to sign such documents in the place and stead of the 1<sup>st</sup> respondent.
- (d) In the event that the title deed in respect of the said property has not been registered in favour of the 1<sup>st</sup> respondent at the time that this order is granted, that the 2<sup>nd</sup> respondent shall, according to law, and provided all requirements to effect

such transfer have been met, register the said property from the 1<sup>st</sup> respondent to the applicant.

(e) The 1<sup>st</sup> respondent pays the costs of this application.”

The background facts giving rise to these proceedings may be summarized thus. Eunice Dube the mother of the applicant wanted to buy him immovable property. As she went looking for a property to buy, she was referred to Calderwood, Bryce-Hendrie and Partners legal practitioners – hereinafter referred to as “Calderwood”. She was referred to the conveyancing department at Calderwood where she dealt with an employee known as Thando Mabaisa who worked in the conveyancing department as a conveyancing clerk.

It turned out that Calderwood, at that time, was handling the transfer of ownership of an undeveloped housing stand number 148 Neqi Township of Jos Peters 100 acres grant – “the property” from the Bulawayo City Council to Siphwe Mthupha – the 1<sup>st</sup> respondent, who was based in the United Kingdom. As a conveyancing clerk Thando Mabaisa – “Thando” had therefore access and possession of the documents relating to the transfer of ownership of the said property to the 1<sup>st</sup> respondent.

Thando had knowledge that 1<sup>st</sup> respondent intended to sell the property once ownership was transferred into her name. She then informed the applicant’s mother about the undeveloped property and that the 1<sup>st</sup> respondent who was based in the United Kingdom intended to sell it. She went on to explain to the applicant’s mother that the 1<sup>st</sup> respondent was being represented by her sister one Sibonginkosi Chidakwa.

After that explanation Thando arranged that the applicant’s mother and Sibonginkosi Chidakwa – “Sibonginkosi” meet so that the two could go to the property in order for the applicant’s mother to view it. The two met and went to view the property and parted ways and so did their stories as they become different from that point. The applicant’s mother seems to suggest that she went with Sibonginkosi to Thando’s office where she made known her desire to buy the property. Sibonginkosi, however, averred that she had last seen her when they left the property.

It is not difficult to tell where the truth lies on that point. It lies in Sibonginkosi’s version. This is so, because, after viewing the property she proceeded to Calderwood where she entered into a written agreement of sale with Thando who purported to represent the first respondent. That was very strange because Thando herself had earlier on told the applicant’s mother that the first respondent who was based overseas was being represented by her sister

Sibonginkosi. Yet, the agreement of sale reflects that the first respondent who was the seller was represented by Thando Mabaisa. Sibonginkosi does not feature in the agreement of sale.

After concluding the written agreement with Thando, the applicant's mother paid the full purchase price to her since according to the written agreement the purchase price of four billion Zimbabwe Dollars had to be paid when both parties signed it. Although the agreement reflected the price as four billion Zimbabwe dollars applicant's mother paid the sum of US\$3 000,00 to Thando who gave her an acknowledgment of receipt written on the compliment slip of Calderwood.

The agreement stipulated that the seller would arrange to tender transfer of the property to the buyer as soon as possible through Calderwood. The applicant's mother was advised accordingly. She then proceeded to take possession of the undeveloped stand and effected improvements thereon. She is in the process of constructing a dwelling structure which is at roof level.

Thando Mabais did all this without involving Sibonginkosi the sister of the owner of the property. Sibonginkosi was the representative of her sister. She denied ever authorizing Thando to enter into an agreement of sale of the property with the applicant's mother. There is no evidence that her sister did.

The suggestion that Sibonginkosi had no mandate to act on behalf of her sister does not need any serious consideration as the applicant's mother herself averred that Thando advised her that the seller who was based in the United Kingdom was represented by Sibonginkosi Chidakwa. Further, the applicant even obtained a court order to effect service of process on Sibonginkosi Chidakwa. Quite clearly Sibonginkosi was a known agent of her sister. The suggestion, therefore, that she had no mandate to represent her sister because the powers of attorney were defective was an exercise aimed at indulging in technicalities. In any event, I am satisfied that both powers of attorney are actually signed by Sibonginkosi's sister Siphwe Mthupha as required by section 5 of the High Court (Authentication of Documents) Rules, 1971 which provides thus:-

"Nothing contained in these rules shall prevent the acceptance as sufficiently authenticated by any court, tribunal or public office, of any document which is shown, to the satisfaction of such court, tribunal or public office, to have been actually signed by the person purporting to have signed the same."

In the light of the above I hold that Sibonginkosi Chidakwa had the mandate to act on behalf of her sister.

The next issue to be considered is whether Thando or Calderwood had the mandate to enter into the purported written agreement for sale in the manner they did. The duty of an agent is to introduce the buyer to the seller. That is all. An agent may not, without a special mandate, sign an agreement on behalf of a principal nor can he receive part or whole of the purchase price.

*In casu* Thando or Calderwood were specifically mandated to find a buyer with who Sibonginkosi and her under Single Moyo would negotiate the purchase price. Calderwood or Thando were not mandated to sign any agreement of sale of the property on behalf of Sibonginkosi and her sister let alone receiving the purchase price on their behalf. See *Skido Property Trust vs Peter Mkwanzani and John Pockock* HB-108-07.

Consequently it follows that the agreement of sale entered into by the applicant and Thando Mabaisa purportedly representing the 1<sup>st</sup> respondent was invalid and of no force or effect.

Having made the above findings the need to consider other issues that were raised in the papers does not arise.

I would in the result, dismiss the application with costs.

*Job Sibanda & Associates*, applicant's legal practitioners  
*Messrs Cheda & Partners*, 1<sup>st</sup> respondent's legal practitioners