KAMBUZI NINE MINE (PVT) LIMITED
versus
DOUGLAS PALFRAMAN
and
STEPHEN MURAMBASVINA
T/A JARVIS PALFRAMAN LEGAL PRACTITIONERS
and
JOLIE OBERT

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 4 AND 11 FEBRAURY 2016

Opposed Application

Advocate L. Nkomo for the applicant
Ms *P. Dube* for the respondents

MATHONSI J: In this application summary judgment is sought against the partners in the law firm of *Jarvis Palframan Legal Practitioners* of Kwekwe and Jolie Obert, who is said to be an employee of the firm, in the sum of $320 000-00 together with interest *a tempore morae* at the prescribed rate from 10 April 2014 to date of payment and admonitory costs being the sum of money lost by the applicant in a fraudulent sale of an immovable property, a sale presided over by Jolie Obert in Kwekwe.

The applicant instituted summons action against the three respondents in HC 707/15 for payment of $320 000-00 as recompense for the financial loss it suffered as a result of the alleged negligent misrepresentation by them that they had a mandate to sell an undivided portion of stand 32 Gatooma Township held by a company known as Laxman Investments Company (Pvt) Ltd on behalf of that company when in actual fact they did not.

It averred in its declaration that in the course and scope of their business of providing legal services as a law firm, the respondents represented to it that they were mandated and authorized by the owner to be its agents and attorneys to sell the property. They represented that the third respondent had been granted a general power of attorney by the owner to represent the

owner in concluding a sale agreement and to accept payment of the purchase price and to do the conveyancing work in order to pass transfer of the property to the seller.

The applicant further averred that by virtue of their special position as providers of legal services, it was reasonably foreseeable that the plaintiff would rely on their representation to decide to enter into a sale agreement involving the property. The applicant was induced by such representation to enter into a sale agreement and to pay the purchase price of $320 000-00 through the medium of the respondents who forwarded it to the seller who turned out not to be the owner of the property.

It averred that the respondents as providers of professional legal services owed it a duty to take reasonable care that their representation was true and reliable. They however wrongfully breached that duty of care in that the representation turned out to be a negligent misrepresentation which was incorrect and false because the true owner never mandated them as alleged. In addition, it was legally impossible to sell the undivided portion of the land as there was no subdivision permit as provided for in the Regional, Town and Country Planning Act [Chapter 29:12].

The respondents entered appearance to defend and filed a joint plea in the following:

"Defendants plead as follows to plaintiff's summons and Declaration

1) Ad Paras 1,2
   No issues

2) Ad Para 3
   It is denied that third defendant is employed by first and second defendants as a legal secretary

3) Ad Para 4
   It is denied that first and second defendants made any of the representations alleged either personally or through third defendant, or during the course and scope of their business. It is admitted that third defendant in her personal capacity made representations that she was mandated by General Power of Attorney;

   3.1 to sell the property and receive the purchase price on behalf of the seller,
   3.2 to prepare an agreement of sale and issue the necessary instructions to effect subdivision and transfer of the property.

4) Ad Para 5

It is denied that first and second defendants could reasonably have foreseen that plaintiff would place any reliance upon them. It is further denied that they made any representations to plaintiff.

5) Ad Para 6

5.1 It is denied that first and second defendants made any representations to plaintiff or that there was any nexus between plaintiff and themselves as legal practitioners, or that they played any part in inducing plaintiff as averred.

5.2 It is denied that third defendant's representations to plaintiff induced him to enter into the written agreement of sale.

5.3 It is admitted that third defendant received the sum of US$320 000 from plaintiff on behalf of the seller of the property and that payment was made by plaintiff in the belief that third defendant was authorized to receive payment in terms of a power of attorney executed by the seller.

5.4 Apart from the admission aforesaid, all averments herein are denied and plaintiff is put to the proof whereof.

6) Ad Para 7

This is denied and plaintiff is put to the proof thereof.

7) Ad Para 8

7.1 Ad Para 8.3, it is admitted that first and second defendants ought to have known of the provisions of the said Act. It is denied however that they prepared the agreement of sale. It is further denied that the agreement of sale in any way contravenes the said Act.

7.2 In all other respects the averments in this Para are denied and plaintiff is put to the proof thereof.

8) Ad Para 9, 10 and 11

These are denied and plaintiff is put to the proof thereof.

9) Ad Para 12

It is denied that first and second defendants provided any professional legal services to plaintiff. In all other respects the averments herein are denied and plaintiff is put to the proof thereof.

10) These are denied and plaintiff is put to the proof thereof.

WHEREFORE defendants pray for dismissal of plaintiff's claim and costs of this action." (The underlining is mine)

It is significant that the plea in question and indeed the notice of appearance to defend were prepared, signed and filed by the law firm of *Jarvis Palframan*. In addition it is noted that the reference of the person dealing with the matter is given as "DGP/jo." The first respondent's initials, even from the letter that he wrote on 13 November 2014, annexure "D" to the application, are "DGP". One cannot help observing that the third respondent's initials are "JO" for Jolie Obert. Put together therefore, it means that the individuals who were dealing with this matter right from the start are the first and third respondents.

In practice, law firms use references on correspondence and court process which start with the initials of the legal practitioner involved followed by a slash and then the initials of the secretary typing for that legal practitioner. It is a practice that is as old as the practice of law itself. *Ms Dube* who appeared for the respondents strongly argued that the inference that the first and third respondents' initials are the ones appended on all the court processes emanating from that law firm cannot be properly made.

In my view, that it trifling with the court in the extreme. A reference is put on court process or correspondence in order to identify both the legal practitioners and the secretary authoring it and nothing else. Courts of law are not robots that are programmed to accept only that which legal practitioners feed them with. They make observations including that which I have made. The business of judgeship would be extremely tedious if judges were to turn a blind eye on the obvious merely because it is convenient for counsel to do so.

Upon receipt of the plea which I have cited above, the applicant launched this summary judgment application on the basis that the plea reveals no *bona fide* defence at all to the applicant's claim and that appearance has been entered solely for dilatory purposes. The applicant maintained that a bald denial that the third respondent was employed by the firm is made, consistent with the fact that she was at all times employed and attending to members of the public at the firm especially as the applicant received rentals for two months for the property from the third respondent at the offices of the firm. This was after the purported agreement had been signed.

The applicant asserted that the sale agreement was prepared by the law firm whose address is given as that of the seller and it appoints them as the conveyancers selected by the seller to undertake the transfer. Accordingly his claim remains unassailable. The respondents'

lack of *bona fides* is reflected in their attempt to disown an employee who at all material times was working from the business offices of the firm, using their office, computers and stationery, attending to members of the public, accepting payment of the money being claimed and liaising with the first respondent on all that she did.

On 4 November 2014, the legal practitioners of the applicant *Mutatu and Partners* addressed a letter of demand to the law firm. That letter was responded to on 13 November 2014 by the first respondent by email which reads in relevant part thus:

> "Thank you for your letter dated 4th November 2014 which was sent to us by email. Your client entered into an agreement of sale with Laxman Investments (Pvt) Ltd in respect of portion of a commercial property owned by the said company. As you are no doubt aware, the agreement provided for the purchase price to be paid in cash, direct to the seller. Our Mrs Obert was acting for the seller under a power of attorney granted by Mr Baloo Laxman, a director of the seller. The purchase price was forwarded to the seller by way of a cash-in-transit delivery made by Fawcetts under armed guard and we hold the Fawcetts delivery note indicating that delivery.
>
> Despite the fact that your client appears to have been paid two months rental by the seller and despite considerable documentation to verify the transaction, the seller is now alleging that the transaction was inspired by some person resident in Harare who was acting fraudulently and who has forged signatures of both directors and carried out an elaborate scam.
>
> We cannot be certain at this stage as to the true facts. We have taken the precaution however of reporting the matter to the officer in charge of the serious crimes section of CID Fraud Squad in Harare and we have provided him with detailed statements relating to your client's transaction and that of a second sale which was carried out in relation to an adjoining property. The matter is currently under investigation and we will keep you advised of developments.
>
> Yours faithfully
>
> D. G. Palframan."

This was before it became too hot in the kitchen, before the applicant had commenced pointing an accusing finger at the law firm and the legal practice in question was then accepting that both D. G Palframan and Mrs Obert were part of it. Things were to take a nasty turn though the moment the applicant started trying to hold them to account for their professional conduct. In fact, as is apparent upon reference to the plea which I have quoted verbatim above, even at

that stage of filing a plea, their position was still that Palframan was part of the firm. That also changed when they opposed the summary judgment application.

Although Palframan prepared and signed the notice of opposition which was typed by Obert as his secretary through the agency of *Jarvis Palframan legal practitioners*, as signified by his signature and their reference, in his opposing affidavit he stated that Obert was not an employee of either himself or the second respondent but worked for him as a conveyancing clerk for many years before he retired eight years ago.

Paraphrasing Palframan's sworn statement on the relationship of the respondents will not do justice to it. He stated:

> "3.1 The 3rd respondent is not an employee of either myself or the second respondent.
> She worked for me as a conveyancing clerk for many years until I finally retired approximately eight years ago. Since that time my legal work has considered mainly of consulting work which I carry out in Harare or from my office at home. The third respondent works as an independent agent and since my retirement she has not received a salary either from myself or from the second respondent. She sets her own hours and although she uses the address of the Practice for the sake of convenience, her office merely adjoins the general complex occupied by the legal firm Jarvis Palframan and is entirely separate, with a distinct and clearly independent outside entrance separated from the main entrance to the Practice complex.
> ---.
>
> 3.2 The third respondent's work consists of rental collections for several of her clients and general work relating to agreements and property transactions. She and I do work together in conveyancing or certain contractual matters which may arise, in which event we have a fee-sharing arrangement. ----.
>
> 3.3 Although third respondent and I would in normal circumstances have benefited from conveyancing fees which would have been due pursuant to the purported transaction between the applicant and the seller, the execution of the agreement of sale itself was an entirely separate and independent transaction which was carried out by the applicant and the third respondent who was acting in the *bona fide* belief that she was duly authorized under a power of attorney granted by the seller.

3.4 I control an office which is, next door to third respondent's office which I use largely to store files and to accommodate the bookkeeper who is employed by a small mining company with which I am associated. ---.

3.5 The legal practice which is known as Jarvis Palframan is owned by second respondent. Nominally I am still a consultant to the practice but second respondent and I are not partners and neither am I an employee of the practice. There is no fee-sharing arrangement between second respondent and myself.

4. ----.

The use of the term 'our Mrs Obert' merely indicates an association and does not signify that she is an employee. ---.

4.6 ----.

There is nothing in the papers to indicate negligence or fraud (which has not even been alleged in the summons). Liability has been denied for very good reason, on the basis that there was no duty of care owed to applicant and that there was no negligence on the part of the respondents. ----."

Now that is a mouthful. The other two respondents also deposed to affidavits generally associating themselves with what Palframan says. Obert generously added that the discovery that they had been representing what she terms "a skilled confidence trickster" was made by none other than Palframan himself when by chance he met the real Mr Laxman, at which point Palframan and herself made a report to the police.

The essence of what the respondents are saying is that the legal practice of Jarvis Palframan belongs to Stephen Murambasvina alone. However there is also Douglas Palframan hovering about who retired eight years ago and does consultancy work at the firm where he has an office although he also works from home and Harare but prefers to do mining. He has retained his former secretary or conveyancing clerk, Jolie Obert, as "an independent agent," whatever that means, who also has an office somewhere at that firm and is in some kind of partnership, with Palframan. She and Palframan are involved in conveyancing work together and they have "a fee-sharing arrangement." All that is done in the name of the firm.

However, according to the respondents both Palframan and Obert are neither partners nor employees of the firm but stand alone, although Palframan responds to correspondence addressed to the firm. Although Obert is not a lawyer herself, being only a former conveyancing

clerk there, she drafts agreements for clients in the name of the firm and undertakes conveyancing work in its name (one wonders who signs her documents for lodgment).

Obert also gets herself appointed by general power of attorney to represent clients in their transactions with members of the public (third parties), collects money from third parties on behalf of clients, which she does not receipt but transmits to her clients by Fawcett Security. When she receives rentals from clients for transmission to third parties, she does so at the offices of the firm but does not issue a receipt for what is in essence trust funds.

A volley of questions pop up: What kind of law firm is this? Is it operating in accordance with the law? Is the Law Society of Zimbabwe which regulates legal practitioners in this country, aware of such a practice? Does it authorize it? Did it issue Palframan with a practicing certificate when he is into mining not the practice of law? If so, on what terms? Did it issue Jolie Obert with a practicing certificate? Clearly she is practicing law at the premises of that law firm and if the respondents are to be believed, she is doing so under the watch of the firm and illegally.

It is only if the story as presented by the respondents on the operations of that practice can be believed that they can successfully ward off this summary judgment application.

Ms Dube for the respondents submitted that it is not for the court in an application of this nature to concern itself with whether that explanation makes sense or not or with the conduct of the partners of the firm, it should be enough that they have denied that Obert is an employee or that Palframan is a partner. The truthfulness of that should be tested at the trial. All they have done is to establish triable issues.

It reminds me of the sentiments of McNALLY JA in *Matambo* v *Mutsago* 1996 (1) ZLR 101 (S) 103D –E where the learned judge of appeal said:

> "However charmingly, smoothly or impressively Mr Mutsago made these statements, the fact is that they are mechanically impossible. If a witness says he saw water flowing uphill unaided by a pump, you do not judge his veracity by reference to his demeanour. You apply the law of physics."

The Law Society of Zimbabwe takes pride in keeping a hawkish eye on the operations of all law firms in this country. It would not allow such glaring infractions to exist at a firm in Kwekwe and during spot checks would certainly bring such malpractices to a stop. What it

means is that the picture painted by the respondents of a ragged practice is so impossible in the circumstances of legal practice in Zimbabwe at the moment that it should be dismissed as nothing more than the self-serving fulminations of a group that finds itself cornered by a law suit for professional negligence which they simply cannot defend.

Summary judgment is an extra ordinary remedy in the sense that it denies a party who has shown an interest to defend a claim, the opportunity to do so. It is a procedure conceived so that:

> "a *malafide* defendant might summarily be denied except under onerous conditions, the benefit of the fundamental principle of *audi alteram partem* --- when all the proposed defences to the plaintiff's claim are unarguable, both in fact and in law ---." (*Chrisma* v *Stutchberry* 1973 (1) RLR 277).

It has been stated conversely that in order to succeed in defeating a summary judgment application the respondent must set out a *bona fide* defence by alleging facts which if proved at the trial, would entitle him to succeed. As poignantly stated by ZIYAMBI JA in *Kingstons Ltd* v *L. D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) 458 F- G:

> "Not every defence raised by a defendant will succeed in defeating a plaintiff's claim for summary judgment. Thus what the defendant must do is to raise a *bona fide* defence – a 'plausible case' – with 'sufficient clarity and completeness' to enable the court to determine whether the affidavit discloses a *bona fide* defence. He must allege facts which, if established, 'would entitle him to succeed.' See *Jena* v *Nechipote* 1986 (1) ZLR 29(S); *Mbayiwa* v *Eastern Highlands Motel (Pvt) Ltd* S – 139-86; *Rex* v *Rhodian Investments Trust (Pvt) Ltd* 1957 R v N 723 (SR)"

Having contented themselves with denials in the plea while admitting that the applicant made payment to the third respondent in the belief that she was authorized to receive payment by the seller, the respondents went on to burn their fingers in their opposition to this application by setting out the activities of the third respondent as being entirely the practice of law. They simply could not disown her as their employee because everything points to her being one.

To that extent, should the respondents be allowed to go to trial in order to abuse the court by trying to disprove the obvious. Should they be given an opportunity to spend more court time arguing that a lawyer and/or his employee who represent a person in the mistaken belief that such person is Laxman when in fact that person is not Laxman but "a skilled confidence trickster" and misleads members of the public into believing that it is Laxman that they represent, are not negligent? 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? What is there to try in such a matter?

It would be recalled that before they faced litigation, the respondents admitted that Obert was part of the firm. It was only as an afterthought that they sought to distance themselves from her. If there was any merit in their denial of her they would have maintained it from the very beginning. Where a person has two courses of action open to him and he unequivocally elects to take one of them, he cannot turn round afterwards and take the other course of action. This is because a litigant cannot be allowed to approbate and reprobate a step taken in the proceedings: *S* v *Marutsi* 1990 (2) ZLR 370; *Trinity Engineering* v *Karimazondo and Others* HH 672/15.

Having said that, the matter is therefore resolved. If ever the respondents had a defence to this claim which could be stood over for trial, they did not submit it in their papers especially in the plea they intend to rely upon. I am satisfied therefore that summary judgment should be granted.

In the result, it is order that:

1) The respondents, jointly and severally, the one paying the others to be absolved, shall pay to the applicant the sum of $320 000-00 being recompense for the financial loss suffered by him as a result of their negligent misrepresentation.
2) The respondents shall, jointly and severally, the one paying the others to be absolved, pay interest on that sum *a tempore morae* at the prescribed rate from 10 April 2014 to date of payment.
3) The respondents shall pay costs of suit on an ordinary scale.

Mutatu & Partners C/o Dube-Tachiona & Tsvangirai, applicant's legal practitioners
Messrs Jarvis Palframan C/o Messrs Webb, Low & Barry, respondent's legal practitioners