

HC 9962/01

MIKESOME INVESTMENTS (PRIVATE) LIMITED
t/a SOMMERFIELD REAL ESTATE
versus
SILCOCKS INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
SMITH J
HARARE, 22 May and 16 July 2003

Mr *Mapfunde*, for the plaintiff
Mr *R. Fitches*, for the defendant

SMITH J: The plaintiff (hereinafter referred to as “Sommerfield”) issued summons claiming from the defendant (hereinafter referred to as “Silcocks”) the sum of \$3 277 500, in respect of commission due by the latter to Sommerfield as agent’s commission in terms of the Estate Agents Act as per the agreement entered into by the parties. Silcocks opposed the claim. It pleaded that there was no such agreement as alleged by Sommerfield; alternatively, if there was an agreement as alleged, the agreement was illegal and unenforceable because the permit to subdivide the land had not been granted; alternatively, even if there was an agreement as alleged, the parties had not agreed as to whether or not commission was to be charged. Silcocks filed a counterclaim for an order that Sommerfield refund the \$950 000 it had been paid by Silcocks as commission. The parties agreed that the question in dispute is one of law and, as most of the facts were agreed, evidence would be led on one issue and thereafter judgment could be given in accordance with Order 29, rule 204, of the High Court Rules.

The facts admitted by the parties and duly recorded are as follows. Silcocks gave Sommerfield a mandate to sell, on its behalf, certain residential stands on two farms owned by Silcocks. A plan had been drawn up showing the subdivisions but approval for the subdivision as required by s 39(1) of the Regional Town and Country Planning Act [*Chapter 29:12*] (hereinafter referred to as “*Chapter 29:12*”) had not been obtained at the time Sommerfield executed the mandate. Such approval

was subsequently obtained in November 2001. Sommerfield had sold some of the stands before that date and Silcocks had paid it \$950 000 in commission. When the Estate Agents Council became aware of such sales, it investigated the matter and then issued a Stop Trading Notice, which Sommerfield agreed to abide by, and disciplined Sommerfield. Sommerfield did not tell Silcocks what the Estate Agents Council had done. When Silcocks found out what had happened, it did not want Sommerfield to continue taking money in respect of the stands it had sold, because of the disciplinary hearing. Silcocks did not want to be involved in a scheme which could become the subject of a scandal, because the owner of the company is a senior officer in the Zimbabwe Republic Police. Silcocks convened a meeting of those who had purchased stands in the scheme and explained the situation. The purchasers agreed that payments of future instalments would be made direct to Silcocks. Sometime after that meeting approval of the subdivision was granted and the project was completed without any further problems. Sommerfield then sued for the balance of the commission it felt was due to it in respect of the sales it had made on behalf of Silcocks.

The questions of law for decision are -

1. Whether, at the time Sommerfield effected its mandate, the contract was void for want of compliance with s 39(1) of *Chapter 29:12*.
2. If so, whether Sommerfield is entitled to sue for its commission.
3. Whether Silcocks is entitled to a refund of the commission it had paid in the sum of \$950 000.

The parties wished to lead evidence as to the agreement that had been entered into between them.

The first witness was Mr S. Mhondamapango, who testified as follows. He is the principal registered estate agent employed by Sommerfield. He was mandated by Silcocks to sell stands and was promised commission on each stand he sold. It was Silcocks that had

HH 107-2003
HC 9962/01

drawn up the plans for the subdivision. He was not aware that the scheme was illegal. Silcocks had appointed a person to do the planning. The person concerned had prepared other schemes and he was conversant with the procedures relating to subdivisions and the relevant provisions of *Chapter 29:12*. The mandate he was given by Silcocks was to sell the stands. He thought everything was in order. The firm appointed by Silcocks to do the subdivisional plans was FM Eiving (Private) Limited (hereinafter referred to as "FM Eiving"). By letter dated 10 October 2000 that firm, acting on behalf of Silcocks, appointed Sommerfield as selling agents for shares in the company which owned the land. In the letter it was pointed out that "the subdivision is non-statutory" and that prospective buyers would be buying shares in Silcocks, not actual stands.

In cross-examination Mhondamapango said that he was a registered estate agent. He had been so registered since February 2000 and had had 9 years of "hands-on" experience in selling property. Prior to his appointment by Silcocks, he had been involved in only one case of selling subdivisions. In that case, the sales were effected by the transfer of shares. He was aware that a permit approving the subdivision was necessary. When the Estate Agents Council investigated the matter he was told that his company could continue collecting money in respect of the stands he had sold, but he was not to effect any more sales. The sales he had effected were illegal. At the meeting he had with the planner, the planner had insisted that selling the stands by way of shares was lawful. It was not his responsibility to see that all the legalities were complied with. That was the responsibility of the planner. His duty was merely to sell the stands.

Silcocks called two witnesses. The first was Mr S. Gwasira who testified as follows. He has been a member of the Police Force for 23 years and holds a senior rank. He first met Mhondamapango in the year 2000. Mhondamapango was acting for a firm of estate agents called BHI and was selling stands on a farm next door to his. He mentioned that he wanted to subdivide his farm and sell stands, Mhondamapango came to his farm and said that there would be no difficulty. He then contacted Mr Chizema who was employed by FM Eiving, which practised as project planners, managers and property development consultants. Chizema told him that he would have to get a permit to authorize the subdivision of his farm. However Mhondamapango later told him that he could sell the stands before he got a permit for the subdivision. Mhondamapango said that the sale of the stands on the next door farm had been effected on the basis of selling shares in the company which owned the land, and he undertook to get some lawyers who could advise them as to the

procedures to be adopted and draft the necessary agreements. The farm is near Kadoma. Mhondamapango had arranged for the purchase of a shelf company, which was Silcocks, and the farm was transferred into the company's name. He relied on Mhondamapango's advice because he was a registered estate agent. The plans were drawn up by Chizema. They started selling stands in early 2000. Then in May Mhondamapango stopped selling stands. He got suspicious and approached the Estate Agents Council. He then found out that Mhondamapango had been ordered to stop selling the stands. He then called a meeting of those who had bought stands. Some had already finished their payments. They formed an association and agreed they would make their payments to him instead of Sommerfield. He had explained the position to them, telling them that the sale of shares was not acceptable and that a permit for the subdivision would have to be obtained. He told them that anyone who wanted to pull out could do so and would be refunded what he had paid. From then on he had worked hand-in-hand with the association of buyers. Eventually he had obtained the permit in November 2001 and thereafter the project had been completed successfully.

On 24 October 2000 he had written to Sommerfield to say that the firm had been duly appointed to be their estate agent and to act on behalf of Silcocks to dispose of the subdivisions, which were being sold on a share transfer basis. It was Mhondamapango who had said that the letter of appointment was necessary. The idea of selling the stands by way of share transfers was that of Mhondamapango and he was the one who had transferred the farm into the company's name.

Under cross-examination Gwasira made the following responses. The letter Chizema wrote to Sommerfield on 10 October 2000, appointing Sommerfield as selling agents, was written after he and Chizema met Mhondamapango and was written because Mhondamapango said what had been discussed must be put in writing. The meeting had taken place on the next door farm where Mhondamapango was selling stands on a "share transfer" basis on behalf of a firm called BHI. He had told them that it was possible for Silcocks to follow the same procedure and a permit for the subdivision would not be necessary. After the meeting with the people who had purchased shares, some of them did withdraw from the scheme and their deposits were refunded. When the Estate Agents Council instructed Sommerfield to stop selling stands in the project, Mhondamapango should have told him about it but he did not. That was why he terminated Sommerfield's mandate. The letter from Silcocks to Sommerfield, dated 24 October 2000, wherein the latter was appointed to be the estate agent to dispose of the subdivisions of the project had actually been drafted and typed by Mhondamapango and then given to him to be signed. Mhondamapango had done many letters for Silcox and then asked him to sign them.

The last witness was Chizema, a town planning consultant with FM Eiving. He testified as follows. Gwasira had approached him and asked him to subdivide the land. He was appointed planning agent. He prepared a layout plan of the subdivisions for lodging with the local planning authority. A firm called BHI had sold some plots on a neighbouring farm

HH 107-2003
HC 9962/01

by way of share transfers. Mhondamapango had recommended that as a method of selling stands in the project. He had attended several meetings where the matter was discussed. At the time Gwasira was the owner of the land, but a company was formed and the land transferred into the company's name. He had written the letter dated 10 October 2000 to Sommerfield appointing it as selling agent to sell shares for the subdivisions. He had described the subdivision as "non-statutory" because no permit for the subdivision had been obtained. The letter was written after the discussions between him, Gwasira and Mhondamapango. In cross-examination Chizema made the following responses. He has been practising as a project planner since 1995 and has planned many projects. He had drawn up the plans for the subdivision of the farm at the request of Gwasira. He had advised Gwasira that no subdivision could be sold legally unless a permit had been obtained in terms of s 39 of *Chapter 29:12*. That was why the scheme to sell the subdivisions by way of share transfers was adopted. Gwasira decided that he would sell the subdivisions because Mhondamapango had recommended the scheme and said that that was how the subdivisions on the next door farm were being sold. He had written the letter dated 10 October 2000 in the name of FM Eiving appointing Sommerfield as selling agents and advising that "the subdivision is non-statutory, that is, it is not in accordance with section 40" of *Chapter 29:12*. He only wrote the letter after he had been convinced that the sale of subdivisions by way of share transfers was legal. He had not had any previous experience of selling subdivisions by way of share transfers. Both Mhondamapango and the legal practitioner had discussed the matter with him and Gwasira and they had persuaded him that the scheme was legal.

Mr *Mapfumo* argued that it was Gwasira and Chizema who had suggested the share system to Mhondamapango, who was not aware that it was illegal. The letters written by Gwasira and Chizema to Sommerfield showed clearly that they were instructing that the sales be effected by way of share transfers. Mr *Fitches* submitted that Gwasira and Chizema had been credible witnesses and the probabilities supported their evidence. Mhondamapango is a registered estate agent and so they relied on his expertise.

Sommerfield's claim for \$3 277 500 is based on it having been appointed by Silcocks to sell certain pieces of subdivided land. The evidence clearly establishes that when Sommerfield was so appointed, no permit had been obtained in terms of s 40 of the *Chapter 29:12* for the land to be subdivided. In *X-Trend-A-Home (Pvt) Ltd v Hoselaw Investments (Pvt Ltd 2000 (2) ZLR 348 (S) McNALLY JA*, at 351, referred to s 39(1) of *Chapter 29:12*, which forbids an agreement for the change of ownership of any portion of a property except in accordance with a permit granted under s 40 which allows for a subdivision. He said -

"The agreement was clearly an agreement for the change of ownership of the unsubdivided portion of a stand. It was irrelevant whether the change of ownership was to take place on signing, or on an agreed date, or when a suspensive condition was fulfilled. The agreement itself was prohibited."

There can be no doubt, therefore, that the sales of the subdivisions in question by Sommerfield were unlawful. When the Estate Agents Council became aware of the sales it issued a Stop Trading Notice. As the sales were illegal, there is no valid basis for Sommerfield to claim commission on the sales it effected. In Joubert's *General Principles of the Law of Contract* at p 151 the learned author states -

"The basic rule is that agreements contrary to law are invalid. This means that no obligation arises from such agreements and that no action on any contract can be maintained. No party can claim performance of what has been promised to him. If the unlawful agreement is the *causa* for another agreement, then the lawfulness of the other agreement can be attacked."

The commission that Sommerfield is claiming from Silcocks is in respect of subdivisions which it sold on behalf of Silcocks. The sales were effected before November 2001, which was when the permit approving the subdivisions was issued in terms of s 40 of *Chapter 29:12*. Clearly, therefore, those sales were unlawful. Consequently, Sommerfield cannot claim any commission in respect of the said sales.

In De Villiers & Macintosh on *Agency*, the learned authors state, at p 417, that an agent is not entitled to, and forfeits, his remuneration if he is guilty of wilful misconduct or breach of duty or if the transactions involve services which are illegal. The services provided by Sommerfield were to sell subdivisions. The sales were effected by way of share transfers. The sales were illegal because no permit had been obtained in terms of s 40 of *Chapter 29:12*. As Sommerfield did not complete its mandate, in that the sales it concluded had no legal effect, it was not entitled to claim commission on the illegal sales. Sommerfield, even if it was not aware that no subdivision could be sold if a permit has not been issued in terms of s 40 of *Chapter 29:12*, should have been aware of the legal necessities. It operates as an estate agent and Mhondamapango is a registered estate agent. The fact that the Estate Agents Council disciplined Sommerfield or Mhondamapango for purporting to sell the subdivisions by way of share transfers shows that Sommerfield had not acted in the manner expected

HH 107-2003
HC 9962/01

of registered estate agents. From the evidence led, I consider that it was established that it was in fact Mhondamapango who had suggested that the subdivisions should be sold by way of share transfers, so that the necessity of obtaining a permit could be avoided. It was he who persuaded Gwasira to embark on such a scheme.

Is Sommerfield entitled to retain the \$950 000 which Silcocks has paid it? In Joubert's *General Principles of the Law of Contract* at p 152 the learned author says -

"The only matter that remains is the question of recovery of performance by any of the parties to the unlawful agreement. In this regard the factual position is of importance. It may be that the performer is the poorer and that the recipient is the richer. This enrichment is without a legal cause and therefore unjustified. On principle it should be possible for the performer to reclaim his performance or whatever has enriched the other party. In the Roman law there was in fact a remedy, viz the *condictio ob turpem vel iniustam causam*. This remedy has survived into modern times. This means that basically the law recognises the right of the performer to reclaim his performance or whatever is left thereof. Apart from the above-mentioned *condictio* no other enrichment claim is recognized."

The money collected by Sommerfield in respect of the sales of subdivisions was owed to Silcocks. By retaining the commission Sommerfield became the richer and Silcocks the poorer. The enrichment of Sommerfield is without a legal cause because every sale it concluded was illegal. That being the case, I consider that Silcocks is entitled to a refund of the \$950 000 by virtue of the *condictio ob turpem vel iniustam causam*. Mr *Mapfunde*, quite rightly, did not argue that Sommerfield is entitled to retain the \$950 000 by virtue of the rule that *in pari delicto, potior est conditio possidentis*. There is no question of Silcocks, being *in pari delicto*. Sommerfield is a registered estate agent. It ought to have advised Silcocks of what the law required and how the sales should be conducted. It failed to do so. Gwasira acted on the advice of Mhondamapango.

Accordingly, the answers to the three questions posed are -

1. At the time Sommerfield effected its mandate to sell the

subdivisions, the contracts of sale it concluded on behalf of Silcocks were void for want of compliance with s 39(1) of *Chapter 29:12*.

2. Sommerfield is not entitled to claim commission in respect of the sales it concluded on behalf of Silcocks.
3. Silcocks is entitled to a refund of the commission it paid Sommerfield in the sum of \$950 000 with interest thereon at the prescribed rate from the date the claim in reconvention was filed.

Manase & Manase, legal practitioners for the plaintiff.

Dube Manikai & Hwacha, legal practitioners for the defendant.