

HH 25-03
HC 11180/2000
SIMBARASHE MANHANDO
versus
STANLEY MTETWA
and
ZIWENI AND COMPANY

HIGH COURT OF ZIMBABWE
HUNGWE J,
HARARE, 20 September 2001 and 26 February, 2003

Civil Action

Advocate H Simpson for the plaintiff
Mr W J Mutero for the defendants

HUNGWE J: At the beginning of the trial first defendant had indicated his willingness to consent to judgment on condition he is allowed to pay it off in three months. This condition was rejected by the plaintiff's counsel. The matter proceeded to trial.

Plaintiff issued summons against the defendants claiming a refund of \$1 000 000,00 together with interest as well as costs. This claim arose out of the following facts which are admitted to be common cause.

Plaintiff and 1st defendant entered into an agreement of sale of an immovable property at Stand No 14040 Salisbury Township known as No 7 Dove Crescent, Vainona, Borrowdale, Harare for a total of \$2 200 000,00. A deposit of \$1 000 000,00 was payable by the plaintiff as a deposit. The deposit was to be held by second defendant for and on behalf of plaintiff pending transfer in favour of plaintiff. Second respondent was to invest the deposit in an interest bearing account pending the transfer. Second defendant did not hold the deposit in its trust account but paid it over to the 1st defendant notwithstanding that no transfer had taken place. As it turned out there was litigation over the property. That prevented the transfer from taking place. On learning of the litigation plaintiff cancelled the agreement and claimed a refund of his deposit.

The first defendant has virtually abandoned its defence to the claim by tendering payment of the sum claimed. In the premises the matter proceeded to trial in respect of the Second defendants who mentioned that they are not jointly and severally liable to make this refund.

Second defendant, through its principal partner, has denied liability on the basis that there was nothing in the agreement of sale between the parties that obliged it to hold on to the deposit pending transfer of the property. *Mr Ziweni* denied that the agreement of sale was crafted by his company although this agreement appeared to favour his firm and enjoined both the seller and buyer to

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pay the fees for its drawing. It was under the cover of his firm.

Mr *Ziweni* relied on the fact that it was the parties themselves who had agreed as to the methods of payment and therefore as he was merely acting in terms of the parties' wishes he could not be held liable for the payment of the deposit to the seller, before transfer had been effected.

In terms of the Agreement of Sale Messrs *Ziweni* and Company were appointed by both parties to act as the conveyancers to transfer the property from the seller to the buyer.

Having accepted that role, as agent of both parties Second defendant was a trustee of the funds. He became a stake holder with an interest in the funds. Mr *Ziweni* knew the reasons why this money had been paid, i.e. purchase of an immovable property. It normally would be paid once transfer had been effected. The position of the defendant was therefore a fiduciary one requiring the utmost good faith. See *De Villiers v James* 1996(2) ZLR 597 (S).

For a conveyancer to release a deposit to a seller paid by a buyer before transfer is effected in favour of a buyer is an act attendant with the utmost hazard.

Had Mr *Ziweni* acted more diligently, it is safe to say the plaintiff would not have found himself both out of pocket and without a roof over his head. This is exactly the mischief that led to the requirement of payments against transfer.

I am unable to agree with Mr *Ziweni* that his firm was perfectly entitled to act in the way it did. It was not. It acted prejudicially to its principals.

The firm is jointly and severally liable for the loss suffered by the plaintiff. I have been asked to award costs on the higher scale *de bonis propriis*, on the basis that Mr *Ziweni* as a legal practitioner, must have known better. There is substance in that submission. A legal practitioner who ignores a specific request which, if it had been complied, with was intended to safeguard the rights of a client and ought to be visited by costs on a higher scale. It is because of his attitude that the plaintiff suffered irreparable loss. I will award costs against Mr *Ziweni de bonis propriss* on a higher scale.

Manase and Manase plaintiff's legal practitioners
Ziweni & Partners , second defendant's legal practitioners