RUTH CHIRIMUTA
versus
ACTION PROPERTY SALES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
PATEL J
HARARE, 2 to 3 March 2006 and 14 February 2007

Civil Trial

Ms *Chakasikwa*, for the plaintiff
Mr *Sinyoro*, for the defendant

PATEL J: The plaintiff's claim in this matter, as amended, is for damages in the sum of $2.5 billion as the current market value of the immovable property that was sold to the plaintiff through the defendant. In the alternative, she claims repayment of the purchase price of $220 million paid to the defendant together with interest at varying rates. The defendant denies liability in respect of both main and alternative claims.

Agreed Facts

The parties have agreed the following facts, to wit that:

(a) An agreement for the sale of the property, a piece of vacant land, was concluded between the plaintiff and Robert and Cuthbert Marange through the medium of the defendant.
(b) The plaintiff paid the defendant the purchase price of $220 million.
(c) The plaintiff paid and was subsequently reimbursed the transfer fees, capital gains tax and property rates.
(d) The current market value of the property is $2.5 billion.
(e) A report of fraud was made to the police by the defendant and the conveyancer and the matter is still pending.

(f) The sum of $138 million paid by the plaintiff was deposited in the defendant's trust account with the Trust Bank and that account was subsequently frozen on the 24th of September 2004 when the bank was placed under curatorship by the Reserve Bank of Zimbabwe.

Evidence for the Plaintiff

The plaintiff, Ruth Chirimuta, testified that she was taken to view the property by the estate agent, Amanda Coetzee. She subsequently signed the agreement of sale [Exhibit 1] on the 14th of September 2004. The agreement had already been signed by Robert Marange, on behalf of both sellers, on the 13th of September 2004. She did not meet the sellers before signing the agreement or at any other time. She was told by Coetzee that the Maranges owned the property and that Robert Marange had a written mandate to act for his minor brother, Cuthbert Marange. However, she was not shown any written mandate or the title deeds to the property which, according to Coetzee, were with the conveyancer. She was only shown a diagram of the property.

The plaintiff then paid the agreed price of $220 million to Coetzee over a period of two months by way of a cheque for $138 million and five cash payments totalling $82 million. She was later informed by Coetzee that the sum of $138 million had been frozen in the defendant's trust account with the Trust Bank and that Coetzee had only paid $82 million in cash to Robert Marange. It was not made clear how the balance was to be treated pending transfer of the property.

The plaintiff arranged for the payment of capital gains tax in November or December 2004 and telephoned the conveyancer, Mrs. Mudimu, in January 2005. Mudimu advised her that the transfer could

not go through because the purported seller was an impostor and the title deeds were fake. Mudimu had previously conveyanced the title deeds on behalf of the authentic Marange brothers who were the true owners of the property. The plaintiff then contacted Coetzee and a Mrs. Scallen at the defendant's offices but neither indicated what steps the defendant had taken to verify the authenticity of the sellers and the title deeds and neither was able to advise the plaintiff on the way forward.

Evidence for the Defendant

Amanda Coetzee is employed by the defendant as a sales negotiator. She was approached by the fake Robert Marange in September 2004. He presented title deeds to the property and a metal ID card. Coetzee checked and recorded the details on his ID card and kept the title deeds. She did not keep a copy of Marange's ID card nor deed she attempt to authenticate the title deeds as that, according to her, was the conveyancer's function.

Thereafter, Coetzee viewed the property and advertised it for sale. She then drew up the agreement of sale which was signed by both parties separately in September 2004. She stated that she did show the plaintiff the title deeds given to her by Marange but not the details of his ID card.

During the last week of September 2004, she forwarded the signed agreement and the title deeds to Mudimu as well as Robert Marange's power of attorney to act for Cuthbert Marange [Exhibit 2]. Mudimu rejected the latter and asked for a fresh power of attorney from Cuthbert's father who was in Zambia. According to Coetzee, Mudimu had handled the original transfer of title to Robert and Cuthbert Marange and was satisfied with the title deeds that were forwarded to her by Coetzee.

On the 29th of October 2004, Coetzee forwarded to Mudimu a fresh power of attorney, dated the 1st of Ocober 2004, and an authenticating certificate with a covering letter [Exhibits 3A, 3B & 3C]. In early November 2004, Mudimu told Coetzee that she could proceed with the transaction.

Before that stage, on the 5th, 27th and 30th October and 18th November 2004, Coetzee released cash funds to Marange in four separate instalments totalling $82 million. All the payments were signed for and receipts to that effect were produced in court [Exhibits 4A, 4B, 4C & 4D].

In early December 2004, Coetzee received a phone call from one Mabika who said that a certain Malembo Ngwenya was impersonating Robert Marange. Coetzee then spoke to Mudimu who looked through her records and discovered that a fraud had been perpetrated and that the title deeds *in casu* were fake [Exhibit 5]. The matter was consequently reported to the police for investigation.

Under cross-examination, Coetzee was unable to explain why she initially accepted the original power of attorney [Exhibit 2] even though it did not effectively authorise Robert Marange to act on behalf of Cuthbert Marange as was stated in the sale agreement [Exhibit 1]. In this respect, she conceded that Exhibit 2 was patently deficient for the purpose of authorising the transfer of Cuthbert Marange's share in the property.

Coetzee further stated that her practice was to conclude sale agreements before referring the respective title deeds to the handling conveyancers for deeds inspections. She accepted that this practice was clearly defective as purchase funds would already have been sourced and passed hands. She also stated that it was normal practice within the defendant's firm to confirm powers of attorney after sales

were concluded, despite the possible difficulties that might be entailed thereby.

The Issues

The issues for determination in this matter are as follows:-

1. Whether the defendant was negligent in failing to uncover the true identity and authenticity of the sellers and their title in the sale.
2. Whether the plaintiff is entitled to restitution of the sum of $82 million even though she authorised payment thereof by the defendant to the sellers.
3. Whether the plaintiff is entitled to restitution by the defendant of the sum of $138 million regardless of the fact that defendant's trust account bankers were placed under curatorship.
4. Whether the defendant is liable to the plaintiff for damages in the sum of $2.5 billion as per her amended claim.

Whether Defendant Was Negligent

On the evidence available before the Court, it is clear that the defendant as well as the conveyancer (Mudimu) were the seller's agents and not the plaintiff's agents. In this regard, it cannot be said that they were acting for both parties to the transaction as would happen in the case of a mutual agency.

On balance, it seems to me that the plaintiff was a more credible and reliable witness than Coetzee. On the plaintiff's version, which I accept, Coetzee did not show her the title deeds to the property but assured her that the original title deeds and the identity of the sellers would be verified by the conveyancer before the sale was concluded.

The evidence before the Court shows that Coetzee did not keep a photocopy of the alleged Robert Marange's ID so as to ensure the true identity of the seller. More significantly, she did not at the critical time take any steps to verify the authenticity of the title deeds furnished by Marange and whether or not the property was encumbered. Again, she did not examine the original power of attorney [Exhibit 2] to confirm that the purported seller duly represented the owners with full authority to transfer the property.

The evidence further shows that Coetzee drew up the agreement of sale [Exhibit 1] before confirming that the alleged Robert Marange had full authority to sell. She then proceeded to release part of the purchase funds to him in cash before verifying the title deeds and the power of attorney presented by him. Furthermore, according to her own testimony, she released the funds to Marange several weeks before Mudimu gave her the authority to proceed with the transaction.

Throughout her evidence Coetzee protested that it was defendant's normal practice to conclude sale agreements before verifying the authenticity of the attendant title deeds and powers of attorney. The fact that she adopted and followed this practice does not in my view justify her conduct. On the contrary, it serves to reinforce the plaintiff's contention that the defendant's conduct was unreasonable and did not conform to diligent standards of estate agency.

I am of the firm opinion that the defendant owed the plaintiff a duty of care not only to confirm the seller's identity and authority to sell but also to verify the authenticity of the seller's title in the property being sold. In the circumstances of this case, it was reasonably foreseeable that the plaintiff would be prejudiced if the defendant's duty of care was not complied with before the sale was concluded and especially before the purchase funds were transferred.

It was not in dispute that Coetzee was acting within the scope of her mandate and in the course of her employment with the defendant. It follows that the defendant, through Coetzee, breached its duty of care towards the plaintiff by failing to take reasonable steps conforming with the requisite standards of diligence. Coetzee's conduct was clearly negligent and the defendant, *qua* her employer, must be held vicariously liable therefor.

Restitution of $82 Million

It is common cause that the plaintiff authorised the defendant to release the cash payments of $82 million to Robert Marange. Nevertheless, it is clear from the evidence adduced that the plaintiff only did so on the strength of Coetzee's assurances as to the proper identity and title of the seller.

As already found, Coetzee's conduct was patently negligent in relation to the identity of the seller, his authority to transfer title and the authenticity of the title deeds presented by him. In my view, her negligence in these respects renders the plaintiff's authorisation immaterial and continues to attach liability to the defendant for the negligent release of funds to Marange. Accordingly, the plaintiff is entitled to restitution of the sum of $82 million from the defendant, with interest thereon at the prescribed rate.

Restitution of $138 Million

It is not disputed that the defendant elected to place the plaintiff's funds amounting to $138 million into its trust account with the Trust Bank and that the defendant was not specifically or otherwise instructed to do so by the plaintiff. It is also clear that the defendant held the sum in question as trustee on behalf of the plaintiff conditionally pending the conclusion of the sale *in casu*. It was

obviously the intention of the parties that the moneys so held would be refunded to the defendant in the event that the sale fell through. In the interim, the party entrusted with the purchase funds continued to remain liable therefor to the other party. In this respect, see the following remarks of KORSAH JA in *De Villiers v James* 1996 (2) ZLR 597 (S):

> "The trustee must in the performance of duties and the exercise of powers as a trustee act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another …… and except as regards questions of law, the trustee is bound to exercise an independent discretion." (at 603)
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> "I venture to say that there is a factor common to agents, trustees and stakeholders: they must all comply strictly with their mandate and act within the scope of their authority, namely, to hand over property, or pay funds over, to some person upon the occurrence of an event. They are all liable to the person who has an interest in the property or funds if they act without reasonable care and outside the scope of their authority." (at 605)

In the instant case, the sale transaction did in fact fall through, without any fault on the part of the plaintiff. The defendant banked the sum of $138 million which was entrusted to it by the plaintiff with the Trust Bank, without any instruction from the plaintiff to that effect. The legal relationship between the defendant and the bank was quite exclusive of the plaintiff who was not in any way privy to that relationship.

On the 24th of September 2004, the Trust Bank was placed under curatorship and its assets were frozen by operation of law. The defendant did not adduce any shred of evidence in court to indicate that it had any assurance, official or otherwise, to the effect that the bank was on a sound financial footing and that any funds deposited with it would be secure and guaranteed for redemption. In this regard, the defendant has plainly failed to show that it acted with the requisite

care, diligence and skill which can reasonably be expected of a person who manages the affairs of another. In my view, it cannot now plead the bank's moribund status as a defence to the plaintiff's claim for reimbursement.

Although the defendant has a subsisting claim against the bank in respect of the funds deposited with it, the plaintiff herself has no legal recourse whatsoever as against the bank. The fact that the defendant's banker was placed under curatorship is, in the circumstances of this case, not relevant to the defendant's continuing liability to the plaintiff in respect of the funds held in trust on her behalf. Consequently, the defendant must be held liable to reimburse the plaintiff with the sum of $138 million. As regards the interest payable on this sum, the defendant did not challenge the rate of interest claimed by the plaintiff in her amended declaration and there seems to be no valid reason for denying her the rate that she claims.

Claim for Damages

As already stated, if the defendant had acted diligently and reasonably to confirm the seller's identity, power of attorney and title in the property in question, the fraud that was perpetrated by the impostor *in casu* would not have succeeded. By its lack of reasonable care the defendant failed to prevent the fraudulent delict committed by the purported seller. That being so, the defendant can be held liable for the latter's delict. See *Mapuranga v Mungate* 1997 (1) ZLR 64 (H), *per* MALABA J, at 76-77, where it was held that:

> "A defendant will be liable for a delict committed by another where he has by his acts created the situation leading to the delict or has failed to act to prevent its commission when he was under a legal duty to act. See *Silva's Fishing Corp (Pty) Ltd v Maweza* 1957 (2) SA 256 (A) at 265C-266G; *Min van Polisie v Ewels* 1975 (3) SA 590 (A)."

In the present case, the defendant must be held liable to the plaintiff at two levels: firstly, on its own account for having breached its duty of care towards the plaintiff; secondly, for the delict committed by its fraudulent principal.

It is well established that the object of an award of damages in a delictual action is to restore the plaintiff's patrimony as far as possible so as to place the plaintiff in the position he or she would have been in had the delict in question not been committed. See *Union Govt v Warneke* 1911 AD 657.

The plaintiff *in casu* founds her alternative claim for damages in the sum of $2.5 billion on the premise that, if the defendant had not breached its duty of care towards the plaintiff, she would have been the owner of the property in question and that, therefore, she is entitled to the equivalent of the current market value of that property as quantified by the independent valuer.

Regrettably for the plaintiff, I take the view that her claim in this respect is quite misconceived. There was no evidence before the Court to suggest that the genuine Maranges had at the relevant time contracted the defendant to advertise and sell their property. Therefore, if the fraud committed in this case had not been perpetrated or if the defendant had not breached its duty of care towards the plaintiff, the transaction which occasioned the plaintiff's loss would clearly not have taken place. No sale of land would have been concluded and the plaintiff would not have parted with her money or, if she had, it would have been duly refunded.

It is common cause that the fraudster who impersonated Robert Marange was not the genuine owner or seller of the property. If he had not approached the defendant with a fake ID and fake title deeds, the sale *in casu* would simply not have been conceived let alone concluded. Alternatively, if the defendant had not breached its duty of

care and allowed the fraud to succeed, viz. by carrying out the requisite checks and verifications at the outset, the sale of the property would not have gone ahead and the parties would not have concluded any sale agreement. In either event, the plaintiff would not have purchased and acquired title to the property.

It follows from the foregoing that the plaintiff is not entitled to the market value equivalent of a similar sized stand in the same area as the property in question. She is confined to her claim for damages in the form of restitution of the sums that she paid to the defendant. Those are the amounts, together with interest, that she is entitled to receive so as to place her in the position she would have been in had the delict *in casu* not been committed.

Order

In the result, judgement is granted in favour of the plaintiff as against the defendant for:

(a) payment of the sum of $82,000.00 (revalued) together with interest thereon at the prescribed rate, calculated from the respective dates in September, October and November 2004 (when payments were effected by the plaintiff to the defendant) to the date of payment in full;

(b) payment of the sum of $138,000.00 (revalued) together with interest thereon at the bank rate charged by the Zimbabwe Allied Banking Group, calculated from the 13th of September 2004 to the date of payment in full;

(c) the costs of suit.

Kantor & Immerman, plaintiff's legal practitioners
Sinyoro, Muunganirwa & Co., defendant's legal practitioners