

CAVIN CHIFAMBA
versus
NORBERT MUTASA
and
GUARANTEE TRUST (PVT) LTD
and
M V CHIZODZA

HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE 18, 19, 20 February and 4 March 2008.

TRIAL CAUSE

Mr J Mambara for plaintiff;
Mr K Maeresera for 1st defendant
Mr C Nhemwa for 2nd defendant
Ms P Takavadii for 3rd defendant.

MAKARAU JP: The plaintiff is resident in the United Kingdom. Sometime in 2003, he telephoned one Simbarashe Sagonda and Thomas Makwangudze, relatives of his, to proceed to view a property that was being offered for sale through the agency of the second defendant. The property, whose description and location in Ruwa was known to the second defendant's property negotiator, "Nyasha", is owned by the first defendant who holds freehold title to the land. It is common cause that the instructions to sell the property did not emanate from the first defendant but from a fraudster, still at large, who was making out to be the first defendant and not only had with him a forged copy of the Deed of Transfer in respect of the property bearing the first defendant's name, but also a driver's licence and a passport with the names of the first defendant but bearing his picture.

It is further common cause that the two plaintiff's relatives viewed the property in the company of Nyasha, the property negotiator and were satisfied with its condition in relation to the asking price. They accordingly but separately recommended to the plaintiff that he purchases the property. An agreement of sale was duly drawn up and the plaintiff cautioned that he wanted

the transaction to be supervised by a lawyer. Debut the third respondent in her capacity as a conveyancer and one who was well known to the second defendant and had done work for the second defendant previously.

On the date that the agreement of sale was signed, the fraudster, still making out to be the first defendant, attended at the third defendant's offices and not only did he sign the agreement as seller and 1st defendant, he also collected the deposit of the purchase price that had been paid in the sum of 8 000 pounds sterling. It is at this meeting that the fraudster exhibited the identity documents that he used to commit the fraud. The documents were inspected by all who were present including the plaintiff's representative who did not find anything amiss with the documentation. A further payment in the sum of 6 000 pound sterling was made some months thereafter. Soon after the payment of the balance of the purchase price, transfer fees were called for in anticipation of transferring the property into the plaintiff's name. It was at this stage that the fraud was discovered as the Registrar of Deeds, raised issues with the authenticity of the deed of transfer tendered with the transfer papers and advised that the matter be reported to the police.

Efforts to trace the purported seller of the property to obtain vacant possession of the property by the plaintiff's agent were in vain.

On 21 April 2004, the plaintiff issued summons claiming against all defendants, an order compelling them to transfer the property in dispute to him. In the alternative, the plaintiff sought an order against all the defendants jointly and severally for the payment of damages to be calculated as the purchase price of a similar stand in Ruwa at the time of payment less the Zimbabwe Dollar equivalent of 14 000 pounds sterling, \$2, 7 million and interest a *temporae morae* on the two amounts at the prescribed rates.

The action was defended by all three defendants. The first defendant denied that he ever put up his property for sale or connived with the fraudster to defraud the plaintiff. The second defendant denied conniving with the fraudster or misrepresenting any facts to the plaintiff. The third defendant also denied conniving with the fraudster or misrepresenting any facts to the plaintiff.

At the pre-trial conference of the matter, four issues were identified for trial. These were whether or not there was misrepresentation on the part of the defendants that led the plaintiff to

lose his money, the quantum of damages, from such damages were recoverable and who should bear costs of suit. I shall revert to the framing of the issues in detail later.

At the trial of the matter, the plaintiff called Simbarashe Sagonda and Thomas Makwangudze as witnesses. The testimonies of the two witnesses were to narrate what is essentially common cause in this trial.

It was Simbarashe's testimony that when he went to view the property in the company of the property negotiator from the second defendant "Nyasha", they were shown around by a lady of middle age. Also present were a gardener who opened the gate for them, a maid who was busying herself in the kitchen and some other young man. From the visit, he got the impression that Nyasha had been to the property before and knew all the faults and uncompleted details in the structure.

The witness gave his evidence well and I have no reason to disbelieve him. As indicated above, his testimony was a narration of facts that are not in dispute as between the parties.

Thomas Makwangudze also testified as to how he went to view the property in the company of Nyasha and one Lovemore Hombarume who was held out to be the nephew of the seller of the property. He also testified as to how an agreement of sale was then drafted and that at the time of signing the agreement and paying the deposit, he met the fraudster, who produced a driver's licence and passport all bearing the names of the 1st defendant. He inspected the documents together with 3rd defendant, Nyasha and a friend he had brought along to witness the transaction. All four of them did not notice anything irregular with the identity documents and were duped into believing that they were dealing with the 1st defendant, the owner of the property. He further testified as to how he paid the balance of the purchase price and transfer fees for the property.

Again in my view the witness gave his evidence well. I gained the impression that he is honest and reliable. He found it difficult on his observations to categorically hold that the defendants were conniving with the fraudster. He only assumed there may have been connivance between the 1st defendant and the fraudster but had no basis for making this assumption save the fact that he and Nyasha freely viewed the first defendant's property in the presence of his maid and gardener.

After leading these two witnesses, the plaintiff closed its case.

At the close of the evidence, the plaintiff withdrew his claim against the 1st defendant, tendering costs. It is therefore unnecessary that I deal with the evidence led by the 1st defendant in his defence.

The second and third defendants applied for absolution from the instance arguing that the plaintiff had not established a prima facie case that the defendants had misrepresented to him any fact. I granted the application and indicated that my reasons would follow. I now set them out.

Before I proceed to deal with the application for absolution from the instance, there are two issues that I wish to remark on. These relate to the standard of pleadings exhibited in this matter and the need for legal practitioners at pre-trial conferences to assess the cogency of the evidence they intend to adduce at the trial of the matter.

The purpose of pleadings is not only to inform the other party in concise terms of the precise nature of the claim they have to meet but pleadings also serve to identify the branch of the law under which the claim has been brought. Different branches of the law require different matters to be specifically pleaded for a claim to be sustainable under that action. Thus, for example in a divorce action, the allegation of irretrievable breakdown is imperative while in a delictual claim for bodily injury, fault has to be averred against the defendant. This may appear trite but a number of matters coming before the courts seem to indicate that legal practitioners have abandoned the need to plead a cause of action by making the necessary averments to sustain such an action.¹

In *casu*, the plaintiff's legal practitioner appears to have simply rehashed the instructions he had received from his client in the declaration without making an attempt to precisely and concisely lay out the cause of action and the averments necessary to sustain such. I gain this impression from the wording of the concluding paragraph of the declaration which is framed as follows:

“All the defendants were either conniving together or misrepresented facts to the Plaintiff in order to deprive the plaintiff of the said stand and money.”

The defendants' legal practitioners did not fare any better in the matter. Instead of seeking clarification of the claim and its basis by either a request for further particulars or an appropriate exception, the defendants were advised to file pleas to the merits which pleas read no better than the declaration as they seek to deny the statements made in the declaration. (*Mr*

¹ See *S Pilime v B Chisvo* HH 10/07

Nhemwa was not representing the second defendant at the time the pleadings were exchanged). In my view, the exchange of pleadings between the parties is what may pass as conversation at a social gathering between disagreeing parties but bears not the slightest resemblance to pleadings in a court of law.

Legal practitioners are urged to read on the law before putting pen to paper to draft pleadings in any matter so that what they plead is what the law requires their clients to prove to sustain the remedy they seek.

The duty of a legal practitioner to precisely and concisely draw up pleading is closely related to the duty to establish and assess the evidence necessary to sustain each important averment made in the pleadings. This should be done before or at the pre-trial conference stage when the summaries of evidence are drawn up. Gaps in the evidence should be identified at this stage and brought to the attention of the party who may thus avoid the loss occasioned by a dismissal or absolution from the instance at the close of the plaintiff's case at trial. All too often, legal practitioners are heard in a pre-trial conference to whisper to their clients asking how many witnesses they will call at the trial of the matter. Preparedness is the hallmark of a good legal practitioner. It is no use for a legal practitioner to concede at trial that his client does not have sufficient evidence when pleading that the matter should not be dismissed but that absolution from the instance be granted.

It is my view that had the plaintiff's legal practitioner in this matter assessed the cogency of the evidence that he had, he may have avoided a trial in this matter and legal costs for his client as none of the plaintiff's witnesses testified as to a misrepresentation made to them and the second witness in particular, denied that there was any connivance by the defendants to deprive the plaintiff of his money. His testimony was to the effect that because the second and third defendants were professionals, they should have guarded against the loss. This in my view suggests a claim based on negligence rather than on misrepresentation or fraud.

Litigation in the High Court is serious business and the standard of pleadings in the court must reflect such.

In view of the evidence adduced on behalf of the plaintiff, it was clear at the close of the plaintiff's case that there was no need to call upon the defendants to testify. Even if I were to be overly generous and hold that the plaintiff had pleaded misrepresentation as a cause of action

against the defendants, the evidence adduced by the plaintiff revealed that it was the fraudster who misrepresented to both the plaintiff and to the defendants that he was the registered owner of the property that he was selling. It is this fraud that induced the sale between the parties. The fraudster went to the extent of producing cleverly forged documents to support his fraud. The defendants did not assist him in this fraud and were also the victims of the fraud. In any event, it was not specifically pleaded in the papers whether the alleged fraud by the defendants was innocent, negligent or fraudulent. Having alleged that he was induced into the contract by misrepresentation, the plaintiff proceeded to pray for transfer of the property into his name. I am not clear how the remedy of specific performance was pleaded after the alleged misrepresentation.

I may mention in passing that the rules require that particulars of any misrepresentation be stated in the pleading². The rule is often overlooked in drafting summons and declarations.

It is on the basis of the above that I granted absolution from the instance at the close of the plaintiff's case.

J Mambara & Partners, plaintiff's legal practitioners.

Sakutukwa & Partners, 1st defendant's legal practitioners.

C Nhemwa & Associates, 2nd defendant's legal practitioners

Tavadiyi & Associates, 3rd defendant's legal practitioners.

² See Rule 103 of the High Court Rules 1972.