ZENUS BANDA
versus
EUNICE TAYLOR, (Later substituted by)
PAMELA LYNETTE YOUNG (the EXECUTRIX
of her Estate)
and
GABRIEL REAL ESTATES
and
REGISTRAR OF DEEDS
and
MRS V MATEKO

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE 18, 19 and 21 June 2007, 27, 28, 29 and
30 September, 8, 25 and 28 October, 9 and 19 November 2010

Civil Trial

R Mapondera, for plaintiff 18 to 19 June 2007
H Mutasa, for the plaintiff 27 – 19 November 2010
E Jori, for the first and second defendants
S Matsika, for the fourth defendant, 18 to 19 June 2007.
S Machiridza, for the fourth defendant, 27 to 19 November 2010.

UCHENA J: The plaintiff Zenus Banda who will in this judgment be referred to as the plaintiff, was the first defendant's tenant for many years before she decided to sale the property number 5, 7th Avenue Parktown, Waterfalls, Harare. .

Eunice Taylor the first defendant was the plaintiff's landlord from 1 July 1997 to the time she sold the property to the fourth defendant Miss V Mateko. She will be referred to as Taylor. Taylor died on 25 August 2008, before these proceedings were concluded and was by consent of all the parties substituted by Pamela Lynette Young in her capacity as the Executrix Testamentary of her deceased Estate.

The second defendant Gabrial Real Estate, was Taylor's agent when she leased her property to the plaintiff, and subsequently sold it to Mateko. It will be referred to as the Estate Agent

The third defendant is the Registrar of Deeds cited in his official capacity as the officer responsible for the registration and transfer of immovable properties.

The fourth defendant is Miss Varaidzo Mateko the eventual purchaser of the property in dispute. She will be referred to as Mateko.

When Taylor decided to sale the property she instructed the Estate Agent to handle the sale. The Estate Agent contacted the plaintiff, and offered him the property for $14 billion Zimbabwe dollars. The plaintiff Counter offered to buy the property for $12 billion. The Estate Agent advised him that the counter offer had not been accepted and gave him fourteen days to pay $14 billion for the property if he still wanted to buy it. The plaintiff told the Estate Agent to sale the property on the open market. The property was thus put on the open market for one and half months. Prospective buyers would come to view the property but, none made a firm offer.

The Estate Agent then invited the plaintiff to come and make an offer he was comfortable with. He went to the estate agent's offices and made an offer to purchase the property for $12 billion dollars. He completed an offer form exh 2 in which he indicated that he acknowledged that should his offer be accepted by the seller by close of business on 6 August 2006, the document would constitute an agreement between the parties. The offer was not accepted by the date indicated. The plaintiff phoned Miss Rabecca McNally an employee of the estate agent, who told him not to panic as his offer was still under consideration. He phoned a week later and was told that the property had been sold. The plaintiff's case was closed after leading the plaintiff's evidence. His counsel Mr Mapondera indicated that he was renouncing agency and as his last mandate applied for a postponement to enable the plaintiff to obtain the services of another legal practitioner. The case was postponed by consent.

The plaintiff did not come to court on the agreed date. The other parties applied for a default judgment which I granted. The plaintiff later applied for its recession which was granted by HLATSWAYO J by consent of all parties. The trial resumed before me on 28 September 2010, with the plaintiff, applying for the court's leave to re-open his case. The application was strenuously opposed by the first, second and fourth defendants.

Application to reopen the plaintiff's case.

Mr *Mutasa* for the plaintiff applied for the reopening of the plaintiff's case so that he could lead evidence from people the plaintiff sold his assets to, to fund his offer to buy the property. He submitted that Mr Mapondera may not have considered that evidence relevant but he on being instructed by the plaintiff, considered it relevant, to prove that the plaintiff believed that his offer had been accepted. He submitted that the further evidence was not intentionally withheld as he caused it to be gathered when he assumed agency. He further

submitted that the evidence was material as it will help the plaintiff to prove that he believed that his offer had been accepted hence the selling of his assets to fund the offer.

Mr *Jori* for Taylor and the estate agent relying on Herbstein & Van Winsen's *The Civil Practice Of The Supreme Court of South Africa* 4th ed., submitted that a party can only be allowed to reopen its case if he proves that he exercised due diligence in trying to secure that evidence at the trial, and the evidence to be adduced is material to the determination of the issue to be determined by the court. He demonstrated through the plaintiff's evidence that the evidence he seeks leave to lead could if the plaintiff was diligent, have been led when he led his evidence, and that the evidence is not material to the determination of whether or not the first defendant Taylor had accepted his offer.

Herbstein & Van Winsen's *The Civil Practice Of The Supreme Court of South Africa* 4th ed, at p 675 states:

> "In a number of cases it has been held that the applicant for the privilege of reopening must show that he has used proper diligence in endeavoring to procure the evidence at the trial."

They at p 677 dealt with the materiality of the evidence to be led as follows:

> "The applicant must also show that the evidence he proposes to adduce is material. The Appellate Division has ruled that "the test of materiality should be held to be satisfied where the evidence tendered , if believed, is material and likely to be weighty; it is not necessary to go so far as to show that the evidence would if believed, be practically conclusive"

I agree with the learned authors' exposition of the law.

The plaintiff's evidence clearly proves that he completed an offer form. He was to be advised after seven days on whether or not his offer had been accepted by Taylor. The seven days lapsed without communication from Taylor's agents. He phoned Miss McNally, who told him not to panic as his offer was still under consideration. He phoned a week later and was told the property had been sold to someone else. He in his evidence had told the court that he had the money to pay for the house. He said the money was in his bank account. He also had told the court that he had sold his assets including a lorry to raise the purchase price.

If the money was already in his bank account what is the relevancy of his selling assets to fund his offer. The evidence demonstrates that the plaintiff knew he had made an offer, for which he expected a response from Taylor's agents, on whether or not it had been accepted. He phoned McNally to inquire and was told his offer was still under consideration. The selling

of assets, to fund his offer, is not material to the question whether or not Taylor had accepted his offer. His evidence has already established that she had not. The selling of his assets is therefore irrelevant to the issue before the court.

The plaintiff's application to reopen his case must therefore fail, on both the lack of materiality of the evidence to be led, and lack of diligence in that he mentioned selling of lorries during his evidence, and thus traversed that part of his evidence without leading evidence to substantiate it. It seems to me clear that Mr Mapondera who represented the plaintiff when he led his evidence appreciated the issues before the court and consciously closed his case without calling the evidence the plaintiff now wants to lead.

It is unfortunate that the plaintiff's current legal practitioner allowed himself to be pushed into making this application against the glaring evidence exposing the immateriality of the evidence sought to be led.

The plaintiff's application to reopen his case is therefore dismissed with costs.

First and second defendants', application for absolution.

When the court ruled against the plaintiff's application to reopen his case, Mr *Jori* for Mrs Taylor and the estate agent, applied for their absolution from the instance. He premised his application on the plaintiff's not having led evidence to prove that his offer had been accepted by the seller. He said what the plaintiff proved was that he made an offer, but led no evidence to prove that the seller accepted his offer. He submitted that without such evidence the plaintiff has not led *prima facie* evidence on the parties having entered into a contract of sale. He submitted that because of that the defendants should be absolved from the instance because no reasonable man (court) acting carefully might find for the applicant on the evidence led by the plaintiff. He then proceeded to expose the deficiencies in the plaintiff's evidence, as has been already dealt with under the plaintiff's application to reopen his case.

Mr *Jori* also referred to the cases *of Cloud Neon Lights* (*SA*) *Ltd* v *Daniel* 1976 (4) (SA) 403 (AD), *Marine & Trade Insurance Co Ltd* v *Van Der Schwill* 1972 (1) SA 26, *United Air Charters* v *S Jarman* 1994 (2) ZLR 341 at 343 C, *Supreme Service Station 1969* (*Pvt) Ltd* v *Fox and Goodridge* (*Pvt*) *Ltd* 1971 (1) RLR 1, *Manhuwa* v *Mhukahuru Bus Service* 1994 (2) ZLR 382, and *Taunton Enterprises* (*Pvt*) *Ltd & Anor* v *Marais* 1996 (2) ZLR 303 at 313 C.

In *Taunton supra* at 313 C-F MALABA J (as he then was) said:

"The test is whether at the close of the plaintiffs case there is evidence upon which a reasonable man acting carefully might (not should) give judgment for the plaintiff on the issues before the court The judicial officer is enjoined by law to bring to bear upon the evidence what the judgment of a reasonable man might be, but not what he thinks the judgment is: *Gascoyne* v *Paul & Hunter* 1917 TPD 170 at 173; *Myburgh* v *Kelly* 1942 EDL 202; *Huizenga NO* v *Zwinoira* 1987 (2) ZLR 276 (H) at 280A-B.

In *Supreme Service Station* (*1969*) (*Pvt*) *Ltd* v *Fox & Goodridge* (*Pvt*) *Ltd* 1971 (1) RLR 1 (A), BEADLE CJ drew attention to some of the features of the application which a court should bear in mind when considering what the judgment of a reasonable man might be on the evidence adduced at the end of the plaintiff's case. The learned CHIEF JUSTICE said the court should bear in mind that the defendant has not yet given evidence and cross-examined on it. If the plaintiff has made some case for the defendant to answer and the defence is something peculiarly within the knowledge of the defendant, justice demands that he should be heard. He pointed out that the general attitude of judges is that they should be very loath to decide upon questions of fact without having all the evidence on both sides. In case of doubt as to what the judgment of a reasonable man might be the safest course for a judge to take is that which allows the case to proceed."

In *Manhuwa supra* at p 387 C-D CHATIKOBO J said:

"However, in the *Supreme Service Station* case *supra* at 5 H-I BEADLE CJ said that:

> '... rules of procedure are made to ensure that justice is done between the parties, and, so far as possible, courts should not allow rules of procedure to be used to cause an injustice. If the defence is something peculiarly within the knowledge of a defendant, and the plaintiff has made out some case to answer, the plaintiff should not lightly be deprived of his remedy without first hearing what defendant has to say. A defendant who might be afraid to go into the witness box should not be permitted to shelter behind the procedure of absolution from the instance.'

The bus was on the defendant's premises. It is the defendant's servants who are accused of removing the parts. The defendant is therefore particularly well placed to answer the accusations and this would in normal circumstances be sufficient evidence upon which I could make a reasonable mistake and find for the plaintiff".

Mr *Mutasa* for the plaintiff opposed the application arguing that the plaintiff's evidence that he believed his offer had been accepted should persuade the court to order the trial to go on. He submitted that courts lean on the trial going on if there is a doubt as to whether a reasonable court might make a mistake and find for the plaintiff. He referred to the case of *Supreme Service Station supra* at pp 5 and 6 where BEADLE CJ dealt with these propositions. I agree with the legal positions but the issue in this case, is, are there doubts in

this case which would make this court lean towards continuing with the proceedings. Alternatively would a reasonable man make a mistake and find for the plaintiff.

The abovementioned legal principles are applied subject to the plaintiff having presented a *prima facie* case in that there is evidence relating to all the elements of the claim in order to survive absolution, because without such evidence no court, could find for the plaintiff.

The evidence led for the plaintiff proves he made an offer. He was then asked to wait while his offer was being considered. He was to check after seven days. When he inquired with the seller's agents he was told not to panic as his offer was still being considered. It is in my view not possible to say a reasonable man would make a mistake and find for the plaintiff that a contract of sale had been concluded between the plaintiff and the first defendant when its clear that the seller had not accepted the plaintiff's offer. The plaintiff's evidence establishes that his offer was being considered. The offer form exh 2 confirms that the offer was not accepted. It was only signed by the buyer, while the seller's part remained uncompleted.

I am therefore satisfied that Taylor's application for absolution must succeed.

In the case of the estate agent Mr *Mutasa* for the plaintiff conceded that, it was an agent of a disclosed principal, and could therefore not be held liable for its principal's conduct.

In *Taunton supra* at p 314 B-E MALABA J (as he then was) said:

> "The general rule is that a person who acts as an agent and contracts with a third party in the name of the disclosed principal is not a party to the contract and is not personally liable on the contract: Wood v *Visser* 1929 CPD 55; *Marais* v *Perks* 1963 (4) S A 802 (E); *de Villiers & Macintosh The Law of Agency in South Africa* 3 ed at 560.
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> After pointing out the fact that the general rule, that an agent who contracts with a third party in the name of a disclosed principal is not personally liable to the third party on the contract, is founded on general convenience and sound policy, Joseph Story in The Law of Agency states that our law does not however exempt the agent from personal responsibility where he has chosen, "by his own conduct or form of the act or contract," to create personal liability or where personal liability is implied or created by the operation of the law. These are obvious exceptions to the general rule.
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> The learned author sets out in para 393 the forms in which the exceptions may find expression. Of relevance to this judgment is the first exception which is mentioned as being:

> "Where, the contract is made in writing, expressly with the agent and imports to be a contract personally with him, although he may be known to act as an agent."

The exception extends to oral contracts: *Alien* v *du Preez* 1950 (1) SA 4 10 (W); *Overseas Trust Corporation* v *Godfrey* 1940 CPD 183".

I am therefore satisfied that Mr *Mutasa* correctly conceded that the estate agent should be absolved from the instance.

The first and second defendants are therefore absolved from the instance.
The plaintiff shall pay their costs of suit.

The fourth defendant's case

Miss Mateko the fourth defendant stays in the United Kingdom. She did not come to testify. Her brother Godfrey Mateko whom she gave a special power of attorney testified on her behalf. He told the court of how he and another relative went to view the property on 4 August 2006. They found the plaintiff at home. He showed them the house and the grounds. They recommended the property to Mateko who authorised them to buy it for her. They paid for the property and signed an agreement of sale on her behalf. Godfrey told the court that the plaintiff did not say anything to them when they viewed the house. He denied that the plaintiff had informed them that he had an interest in the property and that there was a dispute.

Godfrey explained how the plaintiff was given notice to vacate the premises. He said he and his young sisters wanted to take occupation by 1 February 2007. He instructed the estate agent (Gabriel Real; Estate) not to accept rentals for February 2007. He said the instruction was aimed at ensuring that the plaintiff vacates the property to facilitate their occupying it by the beginning of February 2007. He told the court that the plaintiff did not vacate the property and has not paid any rentals for the premises since February 2007.

When Mateko closed her case, as the plaintiff in re-convention, Mr *Mutasa* for the plaintiff, who was the defendant in re-convention applied for absolution from the instance. He submitted that the (plaintiff), defendant in reconvention, was a statutory tenant who could not be ejected without a certificate of ejectment issued by the Rent Board. He further submitted that Mateko (plaintiff), in reconvention, had not led evidence to the effect that, a certificate for ejectment had been issued by the rent board.

Mr *Machiridza* for Mateko (the plaintiff in reconvention), submitted that the plaintiff (the defendant in reconvention), did not pay any rentals since February 2007. He submitted

that only statutory tenants who pay rent by the 7th day of the due date are protected by s 30 (2) of the Rent Regulations S.I. 27 of 1982. Section 30 (2) provides as follows:

> (2) "No order for the recovery of possession of a dwelling or for the ejectment of a lessee therefrom, which is based on the fact of the lease having expired, either by effluxion of time or in consequence of notice duly given by the lessor, shall be made by any court so long as the lessee continues to pay the rent due within seven days of the due date and performs the other conditions of the lease, unless in addition—
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> (*a*) the lessee has done, or is doing material damage to the dwelling; or
> (*b*) the lessee has been guilty of conduct likely to cause material damage to the dwelling or material or substantial inconvenience to occupiers of neighbouring or adjoining property or to the lessor; or
> (*c*) e lessor has given the lessee not less than two calendar months written notice to vacate the dwelling on the grounds that the dwelling is required—
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> (i) by the owner; or
> (ii) where the lessee is a sublessee, by the person letting the dwelling of the sublessee; for his or her personal residential occupation or the personal occupation of his or her child, parent, brother, sister or employee; or
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> (*d*) the lessor has given the lessee not less than two calendar months written notice to vacate the dwelling on the ground that the dwelling is required for the purpose of a reconstruction or rebuilding scheme, and the nature of such reconstruction or rebuilding would preclude human habitation; or
> (*e*) the appropriate board has issued a certificate to the effect that the requirement that the lessee vacate the dwelling is fair and reasonable on some other ground stated therein, and the date specified in the certificate for the vacation of the dwelling has passed."

Mr *Mutasa* in response, submitted that the plaintiff, did not pay rent because he was prevented from doing so by the lessor's agent who refused to accept rent for February 2007. He referred to the case of *Matador Building* (*Pvt*) *Ltd* v *Harman* 1971 (2) SA 21 at p 25 where DIEMONT J said:

> "Payment is a bilateral transaction in which both the payer and the payee must co-operate".

He therefore argued that the lessor's refusal to accept rentals for February 2007, justifies the plaintiff's failure to pay rentals for the succeeding months. I agree that failure to pay rental because of the landlord's refusal to accept rent can not be used to found a ground to evict the tenant from the premises. However in this case the refusal was for the month of February 2007 and was intended to ensure that the plaintiff vacated the premises to enable the

fourth defendant's family to occupy the house. If that was the only default I would have found that absolution from the instance should be granted as the parties have reached a settlement on the issue of damages.

A reading of s 30 (2) and (4) of the Rent Regulations seems to suggest that a statutory tenant can only, be protected if he "continues to pay rent". I asked the parties to address me on the interpretation of these words.

Mr *Machiridza* for the fourth defendant, submitted that the use of the words "so long as the lessee continues to pay the rent due within seven days of the due date", means if the lessee fails to pay rent within seven days of the due date, he losses the protection given to statutory tenants by s 30 (2) of the Rent Regulations. S.I. 27 of 1982. He submitted that in terms of the Collins Learners Dictionary the word "continues" means "going on without stopping until finished". He therefore submitted that the words "so long as the lessee continues to pay the rent due within seven days of the due date" means so long as the lessee goes on without stopping to pay the rent due within seven days of the due date. He further submitted that a statutory tenant who stops paying rent can not successfully seek the protection of s 30 (2).of the Rent Regulations

Mr *Mutasa* for the plaintiff, submitted that the words "continues to pay rent" should not be construed to mean that the tenant should continue to tender rent for the subsequent months after the landlord's refusal to accept rent.

I agree with Mr *Machiridza*'s submission that if a tenant does not continue to pay rent he ceases to be a statutory tenant and can be evicted by the courts without a certificate of ejectment. The plaintiff must therefore explain why he did not continue to pay rent after February 2007.

I for that reason dismissed the plaintiff's application for absolution

The Merits, of plaintiff's defence to fourth defendant's claim in reconvention.

The plaintiff then led evidence, to the effect that he offered rentals for February 2007, which Mateko's agents refused to accept. He thereafter did not tender rentals for the following months to date. He admitted that in his plea he disputed Mateko's title to the property and said he could not pay rentals to her. In his evidence he again said he did not recognise Mateko's title to the property, and could therefore not pay rentals to her. It is common cause that in terms of the expired lease rentals should be paid, in advance on the "first day of each and every month". He should therefore in spite of the refusal of rentals for February 2007, have

tendered rentals for March 2007. The words "each and every month", means rent should be tendered or paid each month. The words "so long as the lessee continues to pay the rent due within seven days of the due date", therefore means rent should be paid or tendered for each month. Mateko's claim in reconvention was filed on 22 March 2007. The due date for March 2007 had come and gone without a tender of rentals by the plaintiff. The seven days, after the due date had also come and gone without a tender of rentals from the plaintiff. He thus deliberately refused to pay rent for March 2007 and the subsequent months. He thus did not continue to pay rent in terms of s 30 (2) of the Rent Regulations which required him to continue to pay rent within seven days of the due date. The plaintiff's failure to continue to pay rent as required by s 30 (2) of the Rent Regulations disentitles him from seeking the protection of the Rent Regulations.

In the result I find that the plaintiff does not have a valid defence to Mateko's claim in reconvention for his ejectment from Lot 5 of Lots 18 and 19 Parktown Extension of Upper Waterfalls..

It is therefore ordered as follows:

1. That the plaintiff (Zenus Banda) and all those claiming occupation of Lot 5 of Lots 18 and 19 Parktown Extension of Upper Waterfalls, through him must vacate, the property by 31 December 2010.
2. That by consent of the parties, the plaintiff shall pay the fourth defendant US$ 380-00 per month as holding over damages calculated from 1 February 2009 to the date of his vacating the premises.
3. That the plaintiff shall pay the accrued holding over damages for the period 1 February 2009 to 30 November 2010, on or before 30 November 2010, failing which the fourth defendant can execute the consent order to recover the amount in question.
4. The plaintiff shall pay all outstanding utility bills for the property in question on or before 31 December 2010.
5. The plaintiff shall pay the fourth defendant's costs of suit.

Gill Goglonton & Gerrans , plaintiff's legal practitioners
Wintertons, 1st and 2nd defendant's legal practitioners
Muzangaza, Mandaza & Tomana, 4th defendant's legal practitioners