

ZIMRE PROPERTY INVESTMENTS (PVT) LTD
versus
DENNIS MATAMBO

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 11 & 26 June 2019

Civil trial

T. Ngoya, for the plaintiff
G. Nyamupanedengu, for the defendant

MATHONSI J: If making money in this country was as easy as the plaintiff in this matter would have us believe, then a lot of people out there would have long attained millionaire status. A real estate company which received a general mandate to sell a farm never met the buyer. It does not say that it ever inspected or visited the farm. It certainly never took the buyer to the farm in question. It never met any of the foot soldiers and middle men that ran around facilitating the sale of the farm. It never brought the buyer and the seller together and was never involved in any of the discussions, negotiations, the preparation and signing of the agreement or the determination of the purchase price.

That company is the plaintiff which claims commission, 5% of the purchase price it never negotiated, which was paid by a person it never met, at a venue it never visited and probably does not even know. Its only connection with the entire transaction is a written general mandate form signed by the seller 5 months before the sale was concluded, which sale was concluded about 3 months after the mandate expired. Even manna from heaven did not fall so bountifully and the claim itself is an affront to the intelligence of this court. What is however crystal clear is that vultures started circling around the defendant's proceeds of the sale of his Coburn 28 Farm located in Chegutu, the moment a Chinese national who purchased it paid him a sum of US\$1 100 000.00 for it.

The plaintiff sued the defendant on the basis of a mandate given to it by the defendant on 21 September 2016 to market and sell the farm in question for an asking price of US\$1,5

million and in terms of which the plaintiff would be entitled to an agent's commission of 5% of the gross sale price together with 15% VAT on the gross commission. It averred that sometime in December 2016, it introduced to the defendant one Xin Feng Li who bought the farm for \$1.1million. As the plaintiff was the effective cause of the sale, it is entitled to US\$63 250 000-00 being US\$55 000-00 gross commission and US\$8250-00 VAT.

The defendant resisted the suit disputing that the plaintiff introduced Li to him as a buyer and put the plaintiff to strict proof of those averments. What I am required to decide therefore is whether the plaintiff introduced the buyer to the defendant and whether such introduction, if it occurred, directly resulted in a valid sale agreement being concluded for which the plaintiff is entitled to commission.

The law governing the relationship between an estate agent and his or her principal was set out in great detail in *Stohill Investment Properties (Pvt) Ltd v Mahachi & Ors* 2014 (1) ZLR 533 (H). It is that an estate agent is an agent who is authorised to negotiate the sale or purchase of immovable property. The service expected of such an agent is the introduction of a person who is willing and able to purchase the property. Where the estate agent achieves a specified event he or she should be remunerated. The existence of a contract of agency can either be express or implied and would be implied where a person conducts himself or herself in a manner that from such conduct and from the surrounding circumstances it can be inferred that such person has authorised the agent to act on his or her behalf.

Indeed if the agent fails to find a person who will purchase in term of the mandate but introduces a person who negotiates with the principal and the seller agrees to accept a lower price, the agent is entitled to commission, even though the estate agent has not performed the original mandate. In agency, the doctrine of fictional fulfilment operates when the principal intends to escape either the obligation to pay commission or the obligation between him or her and the third party. It postulates that, by fiction of law, a person who deliberately, and in order to escape an obligation, prevents an event taking place that event may be deemed to have taken place.

Where the seller has side-lined the estate agent and gone on to accept a lower price than the one mandated for the sale, that would not disentitle the agent to the commission on the lower price accepted by the seller who deliberately prevented the agent from negotiating the price. Where the estate agent has introduced a person who subsequently purchased, the agent would have earned the commission. See also *Woolley v Hunt and Birkley* (1894) 7 HCG 99,

Gluckman v Landau & Co 1944 TPD 261; *Leader Tread Zimbabwe (Pvt) Ltd v Smith* 2003 (2) ZLR 139 (H).

The extremely unconvincing and unreliable evidence of the plaintiff was presented through Hopewell Chihombori and Fred Wadzanai Khoza alias Mlilo. Hopewell Chihombori is a real estate practitioner employed by the plaintiff and has 5 years experience. He is the one who was given the mandate to sell the farm by the defendant. He said nothing about visiting and inspecting the farm. He flighted an advertisement in the newspaper selling the farm which advert was not even produced. He however says that another estate agency known as Grace.com saw the advert in question and indicated to the plaintiff that they had a buyer who was interested in the farm. His name was Li, of Chinese nationality.

Thereafter Chihombori does not say that he ever met Li or took him to the farm for viewing purposes or even taking Li to the defendant's Marlborough Harare residence or his office to bring the 2 together. In fact Chihombori never met Li at all. Instead he says an offer to buy the farm made by Li was brought to him by Grace.com. It was on a Grace.com letter head. He produced 2 such offers allegedly signed by Li, one for \$800 000-00 and the other for \$1 million dated 9 December 2016. The offers are of no evidentiary value because they do not even contain any important details which should have been included. Other than Li's name and the amount offered the blank spaces provided for additional information are not filled. The offers do not even indicate what properties were involved for which the offers were made. It is also significant that these were offers allegedly made by a person who had not even viewed the property being sold.

Chihombori says he took the offer from Grace.com to the defendant's office where he presented it to an individual called Cliff who rejected it out of hand without regard to the defendant. He does not explain why he did not make serious efforts to discuss the offer with the defendant if indeed he had received such an offer. He went on to say that Li had gone to China but returned to Zimbabwe in December 2019 (note that the offer he was relating to is dated 9 December 2016). It is only then that they made arrangements with Grace.com to take the buyer to view the farm. It is curious that Chihombori did not mention any name of the person he was dealing with at Grace.com and I am sure it is not without reason that none came to corroborate his story.

Be that as it may, he stated that Grace.com knew a nephew of the defendant called Ben (Benard Dzoro) who was to take the buyer to the farm "through Mr Khoza of Grace.com." The latter could not perform the exercise because it was a weekend and its employees are women

who presumably could not go to the farm. They then arranged for Khoza to take the buyer to the farm guided by Dzoro. This was done and the visit was successful, although he says nothing transpired thereafter until 1 February 2017 when they learnt through the grapevine that the defendant had side-lined them and sold the farm to Li.

That part of Chihombori's evidence is significantly incorrect. We now know that Dzoro is not a nephew of the defendant. He, himself told the court that he got to know the defendant when he took some white people who wanted to rent a farm to his farm to view it. He later dealt with the defendant and persuaded him to sell the farm instead. We also know that Khoza is not an employee of Grace.com. He is a serving soldier in the Zimbabwe National Army. His own version is that he had a buyer, Li, and approached two ladies at Grace.com looking for a farm and not the other way round. He was his own man and was not sent by Grace.com to do anything for them.

There is a huge gulf between what Chihombori and Khoza said making their evidence mutually destructive. Chihombori said it is the plaintiff which assigned Grace.com to take the buyer to the farm, through Khoza, whom he described as a freelance estate agent. I have already said that the plaintiff could not bring anyone from Grace.com to support their story and one wonders why that is so especially as Grace.com, according to the plaintiff's case, had an interest in the matter because the buyer was theirs. An adverse inference should be drawn from the plaintiff's failure to do so, it being immaterial that the firm in question is no longer operational.

The ubiquitous Fred Wadzanai Khoza is a captain in the Zimbabwe National Army who also doubles up as a freelance estate agent except that when moonlighting as such he does so in full military gear as attested to by the defendant. In fact other witnesses claimed that he had also given himself out as a Land Officer with the task of identifying farms and assisting those selling or purchasing same. His evidence is that he learnt from a "cousin" called Taruona Ushewokunze that a Chinese national was looking for a farm and was requested to help him. He turned out to be Feng Li, the buyer in this case.

As Khoza was not into real estate, and needed to help his cousin Ushewokunze, he says he approached Mrs Mazivire and one Olivia of Grace.com looking for a farm. They are the ones who pointed out the defendant's farm and advised him he would be shown the farm by Dzoro. As to how the 2 ladies got to know Dzoro, the witness did not say. He never knew Chihombori and never at any one time dealt with the plaintiff. He then told an elaborate story about how he had phoned Dzoro and arranged to go with him to the farm for Li to view it. Only that he and Li went alone leaving Dzoro behind. He later facilitated negotiations for the

purchase of the farm between Li and himself on the one hand and the defendant and Dzero on the other.

The whole story told by Khoza is muddled and convoluted in typical style of an unreliable witness trying to mislead the court. What is however clear is that Khoza involved himself in the farm issue for a reward. He was his own man, the same way that Dzero was. He did not work for Grace.com neither did he work for the plaintiff. In full military combat he pressed very hard to make the deal go through travelling to the farm in Chegutu, arranging the meeting between the seller and the buyer and immediately thereafter presenting his bill for a commission. He claimed 5% commission from the defendant and when he was denied he desperately tried to extract \$30 000 from the defendant. Again when none was given, he accepted \$2 250 from the defendant and \$2 000 from the buyer – an agent of both the seller and the buyer.

It would appear that Khoza was unhappy with what he received because he repeatedly mentioned that both himself and Dzero could not get the full 5 % commission, as they were not registered estate agents something which did not stop them demanding it in the first place. It is what he did about his unhappiness which remains shrouded in secrecy. He came to this court as a witness for the plaintiff claiming that the plaintiff is entitled to commission in the sum claimed because it possessed the mandate to sell the farm even though we know he never dealt with the plaintiff. By his own admission he never knew Chihombori and did not deal with him at any one time. He could not shed some light as to how he gained knowledge of the plaintiff's mandate as to testify about it when he never related with the plaintiff.

Perhaps Benard Dzero's explanation is more plausible. According to him, after the 2 of them had received their tokens of appreciation from both the seller and the buyer, as Li's lawyer told them in no uncertain terms that not being registered estate agents, both of them were not entitled to 5% commission and the defendant had refused to pay them the reduced commission of \$30 000.00, Khoza complained bitterly that the commission they had received was too little. According to Dzero, Khoza vowed to engage registered estate agents to assist him get the 5% commission due to a registered estate agent. Dzero stated that after that discussion he later received a call from a private number and the person claimed to be from the plaintiff. He invited Dzero to join them presumably in this suit in order to claim more money from the defendant as commission. He was told he was stupid to accept peanuts after all he had done to facilitate the sale. He turned that caller down.

As far as Dzoro is concerned neither the plaintiff nor Grace.com were involved in any way in the sale of the farm. It is only himself and Khoza who brokered it. He had a seller, the defendant, while Khoza had a buyer, Li. In fact right from the start Khoza had told him that as a soldier he was working alone. At no time did he mention either the plaintiff or Grace.com. Those firms were dragged into this as a scheme to extract more money from the defendant.

Dzoro's evidence chimes impressively with what the defendant himself told the court. He is the one who elicited the assistance of Dzoro to find a buyer for his farm. Although he had given a mandate to the plaintiff, he never received any communication from them or Grace.com about introducing a buyer to him. Quite to the contrary, the plaintiff had invited him, through Chihombori, to their offices early in 2017 and they made an offer to purchase his farm. It is Dzoro who introduced him to the soldier, Khoza, who was acting for the buyer. When the sale was perfected he paid both Dzoro and Khoza \$2250.00 each as commission, as agreed.

The plaintiff bears the onus to prove its claim on a balance of probabilities. It has to prove, to the satisfaction of the court, that it introduced Li to the defendant and that as a result of that introduction, an agreement of sale was concluded for which it is entitled to the agent's commission. The plaintiff's case is that the introduction was done through the agency of Grace.com. Surely if that was the case, it should have been pretty obvious to the plaintiff that confirmation from that firm was necessary. Where a party claims to have performed its part of a contract through another, unless if the performance by that other party is apparent from the evidence or is admitted, it is necessary for evidentiary purposes for the third party to be called to corroborate the story.

The failure to call any witness from Grace.com certainly brought the plaintiff's case to its knees. However that is not all. Even reliance on the excitable Khoza with his multi-faceted activities did not help the plaintiff's case at all. Here is a full time attested member of the national army who had the uncanny habit of performing functions of an estate agent whilst unregistered as such but in military uniform. He summoned Dzoro for their first meeting in military kit. He was in that attire when he brought Li and the defendant together making it clear that he was working alone "as a soldier." If his dressing was meant to bring discomfort to the parties and persuade them to transact, it probably achieved its purpose because the defendant expressed that discomfort. Even though himself and Li had been slow to pay commission, both of them paid in the end.

That is not all. Khoza was clearly unreliable and failed dismally to link his involvement in the transaction with either Grace.com or the plaintiff. If indeed the 2 firms were involved, then they would have presided over the transaction and even drafted the sale agreement as is done by others in their trade. More importantly, Khoza would have had no business and certainly no right to levy a commission of \$57 000.00 or of \$30 000.00 as he did. The matter should end there.

I find that the plaintiff has failed to prove that it did anything to introduce the buyer to the defendant. It has not shown that there is anything it did to entitle it to claim commission for the sale agreement entered into between the 2. In fact I have no hesitation in finding that the plaintiff was used as a pawn by a shifty and extremely tricky character – Khoza - to try and wring more money out of the defendant whose only sin was benefiting from the agency of two unregistered individuals when he sold his farm.

In the result the plaintiffs claim is hereby dismissed with costs.

M. S. Musemburi Legal Practice, plaintiff's legal practitioners
Mataka Legal Practice, defendant's legal practitioners