

NELLIE WANJOWA  
versus  
GUEST AND TANNER REAL ESTATE (PVT) LTD

HIGH COURT OF ZIMBABWE  
MATANDA-MOYO J  
HARARE, 12 October 2017 & 6 December, 2017

### **Civil Continuous Roll**

*T Tandi*, for the plaintiff  
*B. C Madanhe*, for the defendant

MATANDA-MOYO J: Plaintiff instituted action proceedings against the defendant for the following relief;

1. Payment of the sum of \$46 750 being damages arising out of defendant's breach of its duty of care and for misrepresentation and/ or breach of its implied authority.
2. Interest thereon at the prescribed rate from the 30<sup>th</sup> June 2014 to date of payment in full and
3. Costs of suit

Plaintiff's case is that she engaged the defendant as her agent in identifying and purchasing of a residential stand in the northern suburbs. The defendant through its employee Joseph Sanyanga identified stand 683 Mandara Township 16 of Lot 7A Mandara. Defendant represented itself as agent of the owners of that stand. The owners were Farai Nyajeka and Vimbai Chekenyere. Plaintiff acting on such representations entered into a sale agreement of the said stand with Theresa Nyajeka who purported to represent the owners. It later turned out that the defendant was never appointed agent of the owners with a mandate to sell the property.

As a result of the defendant's conduct the plaintiff paid out \$50 000.00 towards the purchase price of the stand.

Defendant failed to conduct a due diligence exercise as an estate agent resulting in plaintiff suffering damages in the sum of \$46 750.

Defendant denied being liable to the plaintiff's claim. Defendant pleaded that it made full disclosure that another estate agent Deep Horizon had the full mandate to sell the stand in question. Defendant also denied being liable to the loss suffered by the plaintiff as it was the plaintiff sole decision to pay the amount to the seller's representative. Defendant never recommended payment prior to transfer. Defendant averred that it acted professionally at all times and that due diligence was conducted before the sale. Even plaintiff conducted her own enquiries via her lawyers. Defendant thus denied being liable to the plaintiff in any way.

At a pre-trial conference held the following issues were referred for trial:

- 1) Whether defendant acted diligently, professionally and in accordance with the requirements of the law in the exercise of its duties as an estate agent.
- 2) If so, whether the plaintiff suffered any damages as a result thereto? And
- 3) The amount, if any, that is due to the plaintiff from the defendant.

The plaintiff admitted that the \$46 750.00 was paid to the sellers as a result of plaintiff's instructions. The defendant admitted that it was authorised to consummate the sale agreement on behalf of the sellers.

The plaintiff led evidence in support of her case. Her testimony was to the effect that her husband and herself used to own a Greendale home which they disposed of in 2014. After paying off mortgage from the proceeds, the plaintiff and her husband agreed to purchase a residential stand. They decided to engage a reputable estate agent so as to guard against possible fraudulent purchases. They settled for the defendant because of its reputation in the market. Her husband engaged the defendant and was referred to one of its employees a Mr Joseph Sanyanga. Joseph Sanyanga told plaintiff's husband that he had three stands one in Hellensville and the other two in Carrick Creigh. The plaintiff's husband did not like all the three, after which Joseph advised plaintiff's husband that there was another stand in Mandara going for \$75 000. He was asked to negotiate to \$70 000. After \$70 000 offer was agreed upon, plaintiff's husband viewed the stand and registered his interest thereon. Joseph asked plaintiff's husband to make any offer and her husband then made an offer of \$60 000 for the stand. The offer was accepted resulting in plaintiff and husband proceeding to sign an agreement of sale. They deposited \$50 000 into defendant's trust account.

She testified that the seller approached them for authority to draw down \$35 000.00 for purchase of a flat. Plaintiff and her husband acceded to the request but advised defendant to ensure all was in order before effecting payment. Defendant advised plaintiff and her husband

that it was in possession of original title deeds, special power of attorney duly executed by the sellers in Singapore, original title deeds and identification for the sellers representative. The seller was then paid.

A week later this witness was called to serious fraud squad where she was told they had been fraudulently sold the stand. That was the first time she met Charles Nyajeka from Deep Horizon who claimed he had the mandate to sell the stand. Joseph thereafter admitted to having not communicated with the sellers. After hassling with defendant, they were returned the commission that had been charged by the defendant. This witness explained how they tried to have matter resolved by the Estates Agents Council to no avail.

Plaintiff testified that he defendant paid cash to the purported seller's representative and hence there is no evidence of movement of money from defendant's account. Defendant could not produce receipts of who received the money.

Under cross-examination the plaintiff admitted that she was not present during the initial meeting between defendant and plaintiff's husband. She admitted that when her husband was first shown the stand she was not present. She conceded that her lawyer carried out simultaneous due diligence together with defendant. The lawyer advised plaintiff that it was safe to release money before transfers. She conceded that the power of attorney exhibited to her by defendant seemed genuine. She conceded that there was a chance to compel transfer from the sellers. This witness admitted that her attendance at the police station was not as a result of a matter reported by her. She is not aware of the result of the report. This witness admitted that she authorised the defendant to release money to the seller before transfer to her was effected.

Joseph Sanyanga testified on behalf of the defendant. He dealt with plaintiff and her husband in the purchase of that stand. Initially he testified that he and plaintiff's husband went to inspect three stands, one in Hellensvale and the other two in Carrick Creigh. However they managed to inspect the Helensvale stand and only one in Carrick Creigh. Plaintiff's husband indicated he had no interest in the stands. It was at that point that this witness testified that he then told plaintiff's husband of another estate agent selling a stand in Mandara. Plaintiff's husband agreed that this witness phone the agent and view the stand. He got in touch with Deep Horizon and was directed to the stand. Plaintiff's husband indicated he had been shown the stand before by Property World but expressed that the stand was too expensive. This witness advised plaintiff's husband to make any offer. After two weeks plaintiff's husband indicated he was offering \$70 000.00. He however did not bring the offer form. After a week plaintiff

and her husband brought an offer of \$60 000.00. The offer was accepted. A draft agreement of sale was done in the presence of Charles from Deep Horizon, Theresa who was representing sellers, plaintiff's husband and this witness. The draft was taken to plaintiff lawyers Mr Chigwanda who effected certain changes to the draft agreement. All documents were been seen by the lawyer including special power of attorney executed in Singapore, original title deeds and identify documents. This witness testified that he even carried out a deed search and established that the deeds were original and genuine. The deed was also clean with no encumbrances. On how money was paid out to sellers before transfer this witness testified that the issue was initially discussed in a meeting between representatives of sellers and the purchasers.

They agreed between themselves. After that plaintiff's lawyer was consulted and he gave his consent for monies to be paid out to the sellers before transfer. An addendum to such effect was prepared on defendant's letterhead and signed by plaintiff and the seller's representative. This witness said he had refused that the money be released before transfer but plaintiff and her husband insisted. In fact the addendum was drafted and signed on the instructions of the plaintiff's legal practitioner. A letter from Chigwanda Legal Practitioners authorising such disbursements was produced before the court. He insisted he did all that a diligent estate agent was expected to do in the circumstances.

Under cross examination he admitted estates agents acted in terms of the law. He also admitted that an estate agent cannot transact without the consent of the owner. He was queried whether he had the mandate to sell that particular stand and this witness admitted defendant did not have the mandate but acted on the basis of the mandate given to Deep Horizon. He referred to a letter from Deep Horizon introducing the seller to the defendant. He also admitted that the defendant had not produced any documents showing movement of the money from its account.

This witness accepted that all the transactions bore their letterhead and not Deep Horizon's. He also admitted the \$50 000 was deposited into defendant's account and not into Deep Horizon's account. This witness admitted that he informed the plaintiff that he had original documents and that everything was above board. On being asked why Deep Horizon did not actively deal with the transaction, this witness answered that plaintiff's husband insisted defendant be involved in the transaction. This witness however denied that he was the one who instructed plaintiff to release the money before transfer. It was in fact plaintiff's husband and lawyer who instructed this witness to release the money. This witness also casted doubt on

whether the sale was fraudulent. He believed the sale could have gone through if they had pursued it. He didn't believe it was a fraudulent sale.

### Analysis of evidence

From the evidence led it is clear that the plaintiff's husband did the initial transactions. The plaintiff's husband was not called to testify on what happened initially, that is, on how they ended up viewing the Mandara stand. What is left is defendant's uncontroverted evidence that plaintiff's husband knew that the particular stand was being sold by Deep Horizon. However plaintiff's husband preferred to deal with Deep Horizon via the defendant. Whatever was said by the plaintiff pertaining to what transpired between plaintiff's husband and defendant during the initial stages became hearsay which is not admissible. See *Mhlanga v Phakatchane* HB 25/15. Plaintiff's husband is still alive but was not called to give evidence. I find therefore that plaintiff was aware that another estate agent had the mandate to sell the stand.

The defendant had an original special power of attorney whereby Farai Nyajeka and Vimbai Chekenyere appointed Theresa Nyajeka for purposes of disposing stand 683 Mandara Township 16 of Lot 7A Mandara. The original was exhibited before me and is a genuine document. Plaintiff made bold allegations that the defendant did not act diligently. She testified that defendant did not have original documents and that it failed to check the title deeds. The defendant's witness on the other hand explained the steps he took to ensure that he had genuine documents. He testified that he had original title deeds. He carried out a deeds check and established the deeds were genuine and clean. He also saw the original identification documents of the seller's representative Theresa Nyajeka which he photocopied. He had sight of the mandate given to Deep Horizon and satisfied himself that Deep Horizon indeed had the mandate to sell. Plaintiff again tried to dispute all this. However it was plaintiff's husband who dealt with the defendant at that moment in time. Without plaintiff's husband's testimony again the defendant's evidence stands. The defendant was requested by plaintiff's husband to handle the sale on plaintiff's behalf. Plaintiff's husband was more comfortable dealing with defendant and not dealing directly with Deep Horizon, hence their paying the purchase amounts into defendant's trust account.

The other evidence is common cause, that the agreement of sale was prepared and signed for by the defendant. It was prepared on defendant's letter head. Plaintiff paid \$50 000 into defendant's trust account. It is also not in dispute that plaintiff's lawyer was also involved in the transactions. However from correspondence from the lawyer there is no evidence that

the lawyer was shown the originals. A letter written by Chigwada Legal Practitioners dated 5 June 2014 was instructing the defendant to secure the original title deed and Specific Power of Attorney for onward transmission to them. Before me only the original Power of Attorney was produced. No original title deeds were placed before me. My view is that the defendant possessed no original deeds.

On the release of the purchase price before transfer the plaintiff admitted she gave that instruction. The addendum to the agreement signed by plaintiff authorising release of \$15000 to the seller was exhibited before me. Further the plaintiff's lawyer in his letter to defendant dated 5 June 2014 authorised the release of a further \$35 000 dollars to the sellers.

The plaintiff does not deny therefore that she authorised the release of the purchase price to the seller before transfer. Her testimony was to the effect that she did so based on misrepresentation by defendant that the sale was above board. She relied on the professional advice of the defendant to authorise release of the money.

The evidence led also showed that the money was not released to the sellers. Instead defendant paid out the amounts to a Kudzaishe Chakanyuka born on 9 February 1983 I.D. Number 59 – 049450 J 18 of 15 Russel Road Greendale. Defendant did that on the instruction of the seller's representative Theresa Nyajeka. A cash payment was done to the above. However no proof of movement of money from defendant's Trust Account was tendered before the court. The seller's representatives nor representatives of Deep Horizon were called to give evidence. I could not therefore conclusively find from the evidence before me that the sale was fraudulent.

#### The Law

The plaintiff's claim is based on the law delict. The plaintiff submitted that the defendant owed the plaintiff a duty of care and that the defendant violated such duty resulting in the plaintiff suffering damages. SCOTT JA in *Gouda Boerdery Bpk v Transnet Ltd* 2005 (5) SA 490 (SCA) at 499 said;

“the inquiry to wrongfulness will then involve a determination of the existence or otherwise of a legal duty owed by the defendant to the plaintiff to act without negligence in other words to avoid negligently causing the plaintiff harm --- If a legal duty is found to have existed, the next inquiry would be whether the defendant was negligent. The test to be applied will be that formulated in *Kruger v Coetzee*, involving as it does, first, a determination of the issue of foreseeability and, second, a comparison between what steps a reasonable person would have taken and what steps, if any the defendant actually took. While conceptually the inquiry as to wrongfulness might be anterior to the enquiry as to negligence, it is equally so that without negligence the issue of wrongfulness does not arise for conduct will not be wrongful if there is no negligence. Depending on the circumstances, therefore, it may be convenient to assume the existence of a legal duty and consider first the issue of negligence. It may also be convenient

for that matter, when the issue of wrongfulness is considered first, to assume for that purpose the existence of negligence---”

Considering this claim is based on a purely economical loss without any injury on person on property, recovery is limited through the application of principles of proximity and policy. Firstly the question to be answered is of course whether the defendant ought to have had interest of the plaintiff in mind when he undertook the action which resulted in the loss. The defendant to be liable must have had a *prima facie* duty of care.

The defendant is a registered Estate Agent who is expected to act professionally and in the interest of client. See s 7 of the Estates Agent (Professional Conduct) Rules S.I. 200/87. There is no doubt plaintiff engaged the services of an Estate Agent to protect herself from foreseeable losses. There is a fiduciary relationship between an estate agent and its client. The estate agent owes the following basic duties to its customer or principal as follows;

- a) honesty
- b) agency disclosure and material facts disclosure
- c) accounting
- d) undivided loyalty
- e) obedience
- f) reasonable care and diligence.

The law therefore prohibits the defendant from acting in any manner adverse or contrary to the interest of its client, the plaintiff. Plaintiff was entitled to the best efforts by the defendant see s 7 of the Estate Agents (Professional Conduct) Rules S.I. 200/87. I am satisfied that in terms of the law and the facts herein the defendant owed plaintiff a duty of care.

Let me move on to whether the defendant acted diligently, professionally and in accordance to the requirement of the law in the exercise of its duties as an Estate Agent. The plaintiff submitted that the defendant failed to act diligently, professionally and in accordance with the requirement of the law.

Firstly plaintiff submitted that the defendant dealt in a sale where it did not have the mandate to sell from the owner in violation of the law. As I found above the initial engagements were known to the plaintiff. Plaintiff knew that it was Deep Horizon which had the mandate but insisted that the defendant handle the transaction on her behalf.

However in so doing the defendant ought to have paid the purchase price to the agent who had the mandate. Section 10 (2) (b) of S.I. 131/87 is instructive on the point it provides;

“Where an agent receives an instruction from a prospective purchaser to endeavour to the agent does not have a mandate to sell, the agent shall

(b) approach the owner and inquire whether he has appointed an agent with mandate to sell – and where

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(ii) the owner advises that he has appointed an agent on more than one agent to sell the property, --- the agent who is the subject of this section negotiate the sale of the property.

A Through the appointed agent”

The defendant conceded that it did not have the mandate to sell the property from the owner. Deep Horizon had the mandate. Therefore in terms of the law all transactions were supposed be done through Deep Horizon. Evidence showed that Deep Horizon never received the purchase price. It was the defendant which disbursed the money. Defendant accepted that the money was not disbursed to the sellers but to some other third party on plaintiff’s instructions. The defendant argued that in disbursing the money it acted in accordance with plaintiff’s instructions. Whilst I agree that the plaintiff gave such instructions, I am of the opinion that she did so on the understanding that defendant had carried out due diligence. Due diligence has been defined legally as some “measure of prudence activity, and assiduity as is properly expected from and ordinarily exercised by a reasonable and prudent person under the particular circumstances.” It is that care which a reasonable person exercises to avoid harm to other persons. Lack of due diligence constitutes negligence. I am of the view that the estate agent acted diligently in the sale. Defendant obtained all documents required.

In order to succeed in a claim for fraudulent sale, the purchaser must lead evidence to show that the seller was not selling the property or that the purported seller is not the owner of the property. The seller was not called, their representative was not called. The outcome of the police investigation was not given. Therefore I am not satisfied that the plaintiff has proved that the property was sold without the knowledge and consent of the seller. The seller has not complained.

In the result the plaintiff’s claim is dismissed with costs.

*Kantor & Immerman*, plaintiff’s legal practitioners  
*Guwuriro & Associates*, defendant’s legal practitioners