ELISON KUDAKWASHE MARIKO
and
RUVIMBO CYNTHIA MAISVA
versus
STOHILL INVESTMENTS (PRIVATE) LIMITED t/a STOHILL PROPERTIES

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 24 March 2022 & 8 May 2023

Civil Trial – Claim for Damages against an Estate Agent

Mr *A Muchandiona*, for the plaintiffs
Mr *E Jera & Mr PE Chivhenge,* for the defendant

MUSITHU J: The plaintiffs are husband and wife. The defendant is a duly registered firm of estate agents trading under the style of Stohill Properties. The plaintiffs are victims of a fraudulent sale of a property. They lost a significant sum of their hard earned income in the hope of securing a property that they would ultimately call a home upon completion of construction. The transaction involved the defendant herein as the agent of the seller. Things went horribly wrong along the way, resulting in the plaintiffs instituting proceedings against the defendant. They seek the following relief:

> "a) payment of US$50 000.00 plus costs of suit on the legal practitioner and client scale. The said claim arises from your negligence and breach of your legal duty of care towards the Plaintiffs which resulted in Plaintiffs losing money which they had paid for an immovable Property in Mount Pleasant Heights, Harare after it turned out that the purported Seller was not the true owner of the Property which he purported to sell through your agency in March 2020."

The defendant opposed the claim

Background to the Plaintiffs Claim

The plaintiffs' claim is set out in their declaration as follows. Around March 2020, the first plaintiff approached one Kim Mubvumbi (Mubvumbi), a property consultant and director of the defendant for assitance in identifying a residential stand to purchase in the northern surburbs of Harare. On 20 March 2020, Mubvumbi informed the first plaintiff that the defendant had received a mandate to sell a residential Stand in Mount Pleasant Heights. He

invited the first plaintiff to submit his offer. Mubvumbi also assured the first plaintiff that the seller held good title to the property. The plaintiffs submitted an offer of US$50 000.

Mubvumbi sent a picture of the title deed to the first plaintiff via whatsapp. The title deed, being DT No: 4295/2009 was in the name of one Innocent Nyakudya, and it related to Stand 749 Bannockburn Township of Stand 1 Bannockburn Township measuring 3260m^2 in extent (hereinafter referred to as the property). Mubvumbi instructed one Claudius Chadiwa (Chadiwa), a Property Sales Negotiator employed by the defendant to handle the transaction on behalf of the defendant. Chadiwa assured the plaintiffs that he had undertaken the necessary due diligence processes, and they could proceed to enter into an agreement with the seller. On 28 March 2020, Mubvumbi invited the plaintiffs to sign an agreement of sale that he had prepared and the plaintiffs obliged.

A man purporting to be the seller, Innocent Nyakudya (Nyakudya) was introduced to the plaintiffs by Mubvumbi at the time of signing the agreement of sale. The plaintiffs released the sum of US$50 000 to Nyakudya after the signing of the agreement of sale.

Around May 2020, the plaintiffs discovered that the person who had been introduced to them as Nyakudya was infact a fraudster. The real Nyakudya, who was the owner of the property, had died on 29 August 2004. In the circumstances there was no way that the property could have been registered in the name of the same Nyakudya on 27 September 2009. The said sum of US$50 000 was therefore paid to a fraudster who could no longer be located.

According to the plaintiffs, at all material times, Mubvumbi and Chadiwa were acting within the scope of their official capacities as director and employee of the defendant. The plaintiffs further contend that their loss was caused by the defendant's breach of its legal duty of care and / or negligence, in that:

- the defendant assumed a duty to protect the plaintiffs when it accepted their request to find, on their behalf, a residential stand with good title in the northern surburbs of Harare;
- being a registered Estate Agency, the defendant was under a fiduciary duty to act positively and in a diligent and *bona fide* manner, to prevent harm from being suffered by the plaintiffs;
- the defendant was negligent in failing to uncover the true identity and authenticity of the purported seller and the title that he claimed to hold in the property;

- the defendant acted negligently in preparing an agreement of sale without a clause protecting the plaintiffs purchase price pending the registration of the transfer of the property into the plaintiffs names;
- the defendant acted negligently in failing to foresee the harm eventually suffered by the plaintiffs and in failing to take reasonable steps to prevent the occurrence of such harm.

The Defendant's Plea

The defendant denied giving the plaintiffs any assurances that the property had good title. It claimed that the information given to the plaintiffs was that after a deeds office search, the name that appeared on the title deed was similar to the name on the identity card of the purported seller. It was incumbent upon the plaintiffs to satisfy themselves about the genuineness of the seller's title. Mubvumbi conceded that he forwarded the picture of the title deed to the first plaintiff via whatsapp. That was meant to enable the plaintiffs to carry out their own due diligence, as they had expressed a desire to do so. The agreement of sale was only signed after the plaintiffs satisfied themselves of the genuineness of the transaction.

The defendant also averred that the plaintiffs had the occasion to meet the seller in person. They also verified the authenticity of the title deed and the seller's identity after he produced the original copies of the documents. The defendant's officials who witnessed the transaction, the conveyancer and the plaintiffs themselves were all convinced that the alleged seller was the owner of the property.

The defendant averred that it was not aware that the purported seller was a fraudster. It had done everything within its means to verify the identity of the seller who turned out to be an imposter. The defendant also claimed that it was not aware that the real Nyakudya had died in 2004. The defendant contended that the unfortunate events also exposed the weaknesses in the registration of title deeds. It did not show for instance that the registered owner of the property was deceased. The process of issuing identity documents had its own weaknesses. In the instant case, the fraudster had an identity document which had all the particulars of the late Nyakudya. One could not therefore tell that the fraudster was not the real Nyakudya.

The defendant denied responsibility for the plaintiffs' loss insisting that its officials performed their duties diligently. The plaintiffs' loss was not reasonably foreseeable under the circumstances. The defendant also argued that its mandate was limited to verifying the authenticity of the title deed and the particulars of the owner of the property in question. Its mandate did not require it to check the authenticity of the seller's identity documents with the

Registrar of Births and Deaths. Neither was it expected to conduct an investigation into the purported seller's background as nothing appeared suspicious.

The defendant further averred that the agreement of sale recorded what the parties had agreed. The defendant was merely there to faciltate what the parties wanted and not to dictate terms to them.

The defendant also claimed to have done everything that was reasonably possible including visiting the property and interacting with the caretaker. The plaintiffs also carried out their own due diligence and for that reason they could not impute negligence on the defendant simply because the fraud was not detected. The defendant contended that the plaintiffs had failed to establish a connection between the damages they allegedly suffered and the conduct of the defendant. The defendant prayed for the dismissal of the claim with costs on the punitive scale alleging that it was an abuse of court process.

The Trial Issues

The agreed trial issues were as follows:

- whether or not the defendant acted negligently and in breach of its legal duty of care resulting in the plaintiffs' financial loss;
- whether or not the defendant is liable for the plaintiffs loss.

The Trial

The first plaintiff gave evidence first. His evidence was as follows. He operates a customs clearing and logistics business. Some time back before this ill-fated transaction, he once purchased a property in Sentosa through the defendant. That transaction involved a property without title deeds. He was friends with Mubvumbi, one of the defendant's directors. He contacted Mubvumbi looking for a residential stand with a title deed in the northern surburbs of Harare. Around 20 March 2018, Mubvumbi sent him a message in which he advised that he had received a mandate to sell a residential stand in Mount Pleasant Heights. The property was being sold for US$65 000. He was assigned to Chadiwa to proceed and view the property. He was also informed that another prospective buyer had submitted an offer of US$58 000 for the same property.

The plaintiff submitted his offer in writing on a form with the defendant's letterhead. Thereafter, he was invited to the offices of Mbidzo Muchadehama & Makoni legal practitioners for a meeting to finalise the transaction. He went together with the second plaintiff. In attendance at the conveyancer's offices were the conveyancer, Mr Makoni, Mubvumbi, Chadiwa and the purported seller who had travelled all the way from Kwekwe. The meeting

was held on 28 March 2020, which was a Saturday, a few days before the Covid 19 induced national lockdown. The agreement of sale was prepared by Mubvumbi and given to him to peruse and sign. He was asked to pay attention to the names of the parties, the national identity numbers and whether the details on the purported seller's identity particulars tallied with those on the original title deed submitted by the seller. The agreement of sale was not on the defendant's letterhead and Mubvumbi attributed this to the late arrival of the seller.

After the signing of the agreement of sale, Mubvumbi handed over the cash he had received from the first plaintiff to the seller. A sum of about US$2 600 was deducted to cover Capital Gains Tax (CGT). The amount was handed over to Mr Makoni. The seller was supposed to pay the agent's commission. Conveyancing fees were to be paid by the plaintiffs. The plaintiffs were given a copy of the title deed which they were to hold as security until the transfer of the property, since businesses were to be closed because of the national lockdown.

When the lockdown was eased, the witness requested the site plan from the seller through Mubvumbi and Chadiwa since he was ready to start building. He was not given one. Around the same time, the witness received a call from the caretaker who informed him a lady by the name Pamela Nyakudya had put a banner on the property as a warning that it was not for sale. She further alleged that the the property belonged to her late brother who passed on in 2004. The deceased's estate was yet to be finalised since his children were in the United Kingdom.

The witness contacted Mubvumbi who told him to calm down. Mubvumbi advised him that he was sending Chadiwa to Kwekwe to look for the seller since he was unreachable on his mobile phone. He was later to be informed that Chadiwa's trip to Kwekwe was all in vain as the seller's address did not exist. The witness confronted Chadiwa in order to understand why the seller could not be located. It was at that point that Chadiwa informed him that he had met the seller on facebook. Chadiwa had only met the seller once on 28 March 2020, during the meeting at the conveyancer's offices. It also emerged that the title deed that the plaintiffs were given was fake. The seller's identity card was also fake, as he was not the original Nyakudya who owned the property.

The fake title deed was produced in court by consent. It was executed on 27 September 2009. It was prepared by a conveyancer called F. Mabaya. Mabaya also signed the last page of the title deed on behalf of the principal. The appearer was not F Mabaya. It was another legal practitioner by the name Maxwell Mavhunga. The witness stated that as an ordinary person, there was no way he could have known that the title deed was fake.

Also produced by consent were whatsapp chats between the witness and Mubvumbi, in which Mubvumbi confirmed the availability of the title deed when asked by the witness. In the same chats, the witness was also asked to send his national identity card and residential address, which he did.

Also produced by consent was the agreement of sale signed by the parties. After the signing of the agreement of sale, the seller signed an acknowledgement of receipt of the sum of US$50 000, being the purchase price of the property. The witness also stated that it was only after he received the fake title deed that he realised that the size of the property was in fact 3 260m^2 and not the 3 600m^2, as initially advised by Mubvumbi.

The witness insisted that Mubvumbi and Chadiwa ought to have been more diligent by virtue of their experience in the property industry. They were aware of some red flags surrounding the property and the alleged seller but they did not communicate the same to the witness. The title deed reference number initially matched that of a property in Mabvuku after an online search made by Chadiwa. The physical search however showed that it related to the Mount Pleasant Heights property. The witness also accused the two of failing to get basic information like the sellers's proof of residence. They also caused funds to be released to the seller before transfer was made thus exposing him to this loss. Mubvumbi and Chadiwa had not told him that the purchase price could also be released after the transfer of the property. The witness also averred that as professionals, Mubvumbi and Chadiwa should have picked the anomalies on the title deed.

Under cross examination, the witness admitted that he had also engaged a personal friend by the name of Frank Mapuranga to check the authenticity of the title deed at the Deeds Office. Mapuranga was once employed by the defendant. At the time that he was engaged by the first plaintiff, he was no longer an employee of the defendant. During the first search at the deeds office, the witness was informed by both Chadiwa and Mapuranga that the file for the property could not be located.

The witness also told the court under cross examination that although he went to view the property on 21 March 2020, he only submitted his offer on 26 March 2020. The delay in submitting the offer was intended to allow Mubvumbi and Chadiwa to carry out their due diligence as he had instructed them to do. His legal practitioners conducted their own due diligence at the deeds office at the same time that Chadiwa was doing the same. They could not locate the file on the day they looked for it. On his part, Chadiwa latter managed to locate the file and he advised the witness that the due diligence process had been completed.

The witness' legal practitioners were however unavailable to conduct their own verification when he informed them that the file had been found since it was late on a Friday. He told the court that his legal practitioners did not carry out any further searches after Chadiwa assured him that everything was in order. The witness denied that he engaged his legal practitioners to carry out a due diligence exercise because he did not trust the defendant's officials. He insisted that Mubvumbi assured him that the title of the property was clean on 27 March 2020 when he sent him his personal details. He trusted Mubvumbi because he was more experienced and he is the one who had been given mandate to sell the property. He had also dealt with him before.

The witness was asked to comment on whether he had compared the picture on the seller's national identity card and the person who presented himself as the seller at the meeting on 28 March 2020, and he stated that he had not focused on that. When he compared the other details he had found them to be matching. He had satisfied himself that there was no error. He also confirmed under cross examination that the purpose of checking one's identification against their identity card was to confirm the true identity of that person. The witness stated that he did not pay much attention to the seller's identification at the meeting because he thought that all those details had been verified by Mubvumbi and Chadiwa.

Under cross examination, the witness admitted that it was his responsibility to pay conveyancing fees. The conveyancing fees had not yet been paid. He was asked to explain why he had allowed the purchase price to be released when he had not paid the conveyancing fees. His response was that it was a weekend and the national lockdown had been announced. He had been advised that he would be invited to attend interviews at the Zimbabwe Revenue Authority (ZIMRA) once the lockdown was eased. He did not check with the conveyancer whether all the conditions had been satisfied before the funds were released to the seller, as was required by clause 18 of the agreement of sale. He had assumed that the agents had satisfied themselves on those conditions, since Mbvumbi had told him that everything was above board.

The witness confirmed that from the US$50 000 claimed by the plaintiffs, the sum of US$2 600 that had been retained by the conveyancer for CGT and rates clearance had since been paid back. The witness also admitted that at the meeting, he received the building plans from the seller. The details on the plan matched those of the seller as well as the information on the title deed. He also confirmed that at the meeting, the seller was accompanied by the caretaker. After the transaction, the caretaker remained at the property and the witness would

pay him for taking care of the property. He only stopped paying him when the status of the property was revealed to the parties. Asked if he enquired the details of the fraudster from the caretaker, he stated that the caretaker informed him that he knew the alleged seller as the owner of the property. The fraudster would come and pay him for taking care of the property after every month or two.

After discovering the fraud, the witness did not file a police report as Chadiwa had already done that. He was invited by the Police for the recording of his statement. The Police did not contact him after the recording of the statement. He had made follow ups with the Police but was advised that they had not made any breakthrough in their investigations.

The evidence of Ruvimbo Cynthia Maisva

Her evidence was not materially different from that of the first witness. She also averred that the defendant's officials did not carry out their due diligence properly as they should have checked the purported seller's residential address amongst other things. Not much was elicited from the witness in cross examination as she confirmed that she had never dealt with Mubvumbi or Chadiwa. The plaintiffs' case was closed after the testimony of the two witnesses.

Mr *Muchandiona* applied to amend the plaintiff's claim by reducing the amount claimed in the summons and declaration from US$50 000 to US47 400. The reason for the amendment was that the amount of US$2, 600.00 that had been retained by the conveyancers for CGT and rates clearance had since been paid back to the plaintiffs. The application was not opposed by Mr *Jera* for the defendant. The plaintiff's claim was accordingly amended by consent.

The Defendant's Case

Mubvumbi was the first witness. His testimony was as follows. He is the defendant's operations director since the time of its inception in 2009. He knew the first plaintiff well because he had sold him a Sentosa property some 3 to 4 years back. The first plaintiff called him in early March 2020 looking for a residential stand in the Harare West surburb. His budget was between US$30 000 and US$35 000. The witness informed the first plaintiff that he had no properties in that area and they agreed that if anything came up, he would inform the first plaintiff.

Around 20 March 2020, Chadiwa informed him that he had received a new mandate for a Mount Pleasant Heights residential stand, through an advertisement that he had placed in a newspaper. In that advertisement, Chadiwa was looking for a residential stand for another

client in the Mount Pleasant Heights area. The fraudster had responded to the advertisement and calling Chadiwa. Chadiwa was given the number of the caretaker so that he could arrange for viewing.

After viewing the property, Chadiwa was advised that the propery had title deeds and the written mandate would be availed at a later stage since the seller was based in Kwekwe. The selling price was US$65 000. The witness then recalled that the first plaintiff was also looking for a residential property, and he immediately contacted him. His initial response was that the asking price was on the high side for him in light of his budget. He however expressed an interest in viewing the property and also asked if it had a title deed. The witness gave the first plaintiff Chadiwa's contact details. After viewing the property, the first plaintiff expressed an interest and promised to submit his offer. The offer was made on 26 March 2020.

The witness asked Chadiwa to get all the relevant paperwork from the seller. Chadiwa managed to get copies of the seller's national identity document and the title deed. The written mandate was only availed on 28 March 2020, when the parties met at the conveyancer's offices.

The witness denied that he and Chadiwa were negligent in failing to verify the seller's residential address alleging that it was not necessary at that point because the property was located in Harare. The seller had also given them the contact details of the caretaker which turned out to be correct. They had also confirmed that Nyakudya was the owner of the property. The witness also denied that they had not conducted a proper due diligence arguing that they did everything expected of them when carrying out due diligence. The process was that when they received the seller's identity particulars and a copy of the title deed, they would verify if the seller's identity particulars matched those on the title deed. At the Deeds Office, they compared the copy of the title deed from the seller to verify whether it matched that at the deeds office. They checked for caveats and mortgage bonds. They also checked for signatures and the authenticity of the stamp by the Registrar of Deeds.

In respect of the title deed in issue, the witness stated that they checked the title deed number, the particulars of the owner and whether they were caveats and mortgages on the property. They also checked for signatures whereever they were required. They also looked at the property description and the stamp impressions by the Registrar of Deeds. They did not pick any anomalies. Asked to comment on the allegation that they ought to have picked that the signature on the title deed was not that of Mavhunga but Mabaya, the witness stated that he did not know Mavhunga or his signature. He also did not know Mabaya or his/her signature.

The witness dismissed the first plaintiff's averment that he assured him that the property had good title. He insisted that they had done their due diligence and looked out for the key issues that they ordinarily checked for as part of their due diligence process. The witness stated that their due diligence started on 26 March 2020 and was completed on 27 March 2020. The witness tendered in evidence a copy of a receipt issued by the Registrar of Deeds on 26 March 2020, which confirmed that a deeds search had been conducted on that day. The witness denied that the plaintiffs relied on the outcome of the defendant's own due diligence alone. He averred that the delay in the consumation of the transaction was actually caused by the first plaintiff who was carrying out his own due diligence. The plaintiff engaged Mapuranga to conduct a deeds office search on his behalf. Mapuranga was also in the real estate business. The first plaintiff also engaged his own legal practitioners to carry out the same process for him.

The witness claimed that after the first plaintiff carried out his own due diligence, he informed Chadiwa that his legal practitioners had given him the greenlight to proceed with the transaction. The witness claimed that after receving this information from Chadiwa, he called the first plaintiff who confirmed that everything was indeed in order and they could proceed to prepare the agreement of sale. It was at that point that he requested the identity particulars of the plaintiffs. These were furnished on 27 March 2020, and he proceeded to prepare the agreement of sale.

The witness claimed that he discussed the terms of the agreement of sale with both the first plaintiff and the seller. Payment was going to be made in cash and the transaction was to be completed before a conveyancer. In view of the impending lockdown, the witness was assigned by the parties to look for a conveyancer who would be available on a Saturday so that the transaction could be completed before the lockdown. Of the three legal practitioners he consulted, only Mr Makoni was available on Saturday. That explains the meeting at the conveyancer's offices on 28 March 2020, a Saturday.

The meeting was scheduled for 1000 hours. The first person to arrive was the seller who was accompanied by the caretaker. Thereafter the plaintiffs also arrived. The meeting was chaired by Makoni. He asked the seller to produce his particulars that included the original identity card and the title deed. The witness had prepared the agreements of sale at his offices. After confirming that everything was in order, Makoni asked the witness to handover the identity particulars and the title deed to the plaintiffs. Makoni also asked the plaintiffs to thoroughly peruse all the documents before signing the agreement of sale. The plaintiffs expressed their satisfaction and the parties proceeded to sign the agreement of sale.

After the signing of the agreement of sale, the money was counted and handed over to the seller who confirmed that it was indeed US$50 000. The seller signed the acknowledgment of receipt of payment and the sellers were issued with a receipt confirming the payment of the said amount. The defendant's commission was paid by the seller.

The witness denied that he prepared an agreement which exposed the plaintiffs to the risk of making payment of the purchase price before transfer, insisting that it was the first plaintiff who suggested that because of the impending lockdown, they could release the purchase price if all the documents were in order. That also explained why they did not even raise any issue with the conveyancer. This arrangement was also consistent with clause 18 of the agreement of sale. In order to comply with that clause, all the documents were availed. The necessary declarations were signed. The conveyancer retained the amount for CGT.

The witness denied any culpability in the loss suffered by the plaintiffs. The plaintiffs had read, understood and signed the agreement of sale. They had satisfied themselves about the identity of the seller and the genuiness of the title deed. The witness was adamant that there was no way that he would have realised that the seller's identity document was fake since he tendered the original identity card. Everyone in the room was also satisfied that they were dealing with the seller of the property.

The witness denied that they were any red flags that they had failed to pick as they had done a thorough job. The witness stated that when the death certificate for the actual owner of the property was presented to them, they immediately lodged a police report. The witness and Chadiwa were called by the Police for the recording of their statements and they complied. The death certificate was availed to them by the plaintiffs' legal practitioners. Through their legal practitioners, the plaintiffs wrote to the defendant demanding a refund of the US$50 000 paid to the fraudster.

Under cross examination, the witness stated that the defendant only opened a file for the trasaction after receiving a copy of the title deed around 26 March 2020. It was at that point that he sent a whatsapp message to the first plaintiff advising him that he had a new mandate for a property measuring 3600m^2 in Mount Pleasant Heights. At that stage he had not seen the title deed for the property or spoken to the alleged seller. The witness conceded that it was not proper for him to have sent such a message to the first plaintiff before he had had sight of the title deed or visited the property or received a written mandate from the seller. As it later turned out, the property measured only 3 260m^2 , which was far much less than what he had told the first plaintiff. The witness also admitted that an estate agent owed a duty of care towards its

clients and the due diligence exercise was intended to ensure that the property being sold was the correct one and the seller was the owner of the property.

The witness was asked to explain why they relied on a copy of a title deed supplied by the alleged seller instead of the one certified by the Registrar of Deeds. His response was that they did not consider it necessary since they had never done it before. The witness admitted that the receipt issued by the Deeds Office showing that a search had been conducted did not mention the outcome of the search.

The witness confirmed under cross examination that he was not a registered estate agent. He also admitted that the alleged sale mandate given by the seller was incomplete because: it did not make reference to the purchase price and the commission to be paid as that portion was left blank; supporting documents that were required to be attached, including the proof of residence were not attached; banking details of the seller were also not provided, although the witness averred that these were not necessary in the case of a cash sale; the names of the principal registered agent were not endorsed as required by clause 9 of that form.

The same was also the case with the offer to purchase form. The details of the registered agent were not completed. According to the witness, both him and Chadiwa were joint sales negotiators in the transaction. Chadiwa was not a registered estate agent either. Details of the principal agent were not endorsed because she was unwell. Further, because of the urgency of the transaction, the registered estate agent was only going to be endorse her details on the form after the sale had gone through.

The witness was asked to explain why he concluded that the particulars supplied by the fraudster matched those on the genuine title deed at the Deeds Office since he had not seen the deeds office copy. His response was that the three parties who visited the deeds office to conduct a due diligence confirmed that everything was in order and the transaction could be proceeded with. The witness could not confirm if the copy of the title deed before the court was genuine or not be cause he had nothing to compare it with. He did not obtain a certified copy from the deeds office even on becoming aware that the title deed presented to him was irregular.

The witness also stated that he was aware that the deeds office file would have copies of the CGT withholding certificate and the declarations signed by the seller and the purchaser when the original title deed was registered in the seller's name. As part of their due diligence exercise, they had not bothered to check on these because their standard procedure only required them to verify if the names on the deed were those of the seller. After what had since

transpired, the witness agreed that as part of their due diligence they should have gone out of their way obtain certified copies of all the aforementioned documents from the Deeds Registry file.

According to the witness, an Estate Agent only advertised a property after receiving a mandate as well as having viewed the property. In the present circumstances it was desirable that the property be advertised so that the seller could get an offer that realistically matched his asking price. The witness stated that he did not advertise the property because he already had two clients that were looking for an undeveloped residential stand. The witness admitted that he prepared the agreement of sale in the absence of the parties, but insisted it was after he had consulted them.

The witness confirmed that Estate Agents were required to open trust accounts to preserve clients' funds for disbursement after the transfer of the property. He was also aware that there was an increase in property fraud cases although circumstances differed from case to case. The witness also told the court that the agreement of sale was not on their letter head as per their standard operating procedure because they had run out of letterheads during the week leading to the signing of the agreement of sale.

The evidence of Claudious Chadiwa

The second witness was Chadiwa. He is a sales negotiator with the defendant and his duties include looking for properties to sell, as well as carrying out due diligence on properties that they receive a mandate to sell. The witness denied that he did not carry out proper due diligence. He claimed that he went to the deeds office and found the box file containing the title deed. He looked at the first page of the title deed to check if the registration number was correct. He also checked for mortgage bonds and caveats and there were none. He also checked if the name on the title deed was that of the owner of the property. He also checked the property description and noted that it was similar to the property he had received mandate to sell. In short, the seller's copy of the deed was similar to the deeds office copy.

According to the witness, after the first plaintiff viewed the property, he indicated that he wanted to carry out his own due diligence through his legal practitioners. When the witness first went to carry out the deeds office search on 26 March 2020, he found the office already closed as he was making his way from the accounts office where he had gone to pay the search fee. He proceeded to conduct an online search at Mataka Legal Practice and the result showed that the title deed number related to a Mabvuku property. The legal practitioner advised him that mistakes were often made in capturing information so the online search was less reliable

than a physical search. He was advised to conduct a manual search as it was more reliable. He communicated his findings to the first plaintiff on the same day in the evening.

The witness claimed that he went back to the deeds office on 27 March 2020 and managed to locate the box file with the title deed. He called the first plaintiff and informed him that he had found the box file, and therefore his own legal practitioners could proceed to conduct their own verification and then advise on the way forward as he had intimated. After about an hour or so, the first plaintiff called him and advised him that his own legal practitioner had checked the title deed and found everything to be in order. As such the transaction could proceed.

The witness denied the averment that the due diligence being conducted by the first plaintiff's legal practitioners was only supplementary to the due diligence that the defendant was carrying out. The first plaintiff had indicated to him that he would proceed with the transaction once given the go ahead by his own legal practitioner who was carrying out his own due diligence on his behalf.

The witness told the court that he was given the seller's identity particulars and a copy of the title deed on 25 March 2020. These were sent via whatsapp. The first plaintiff only submitted his offer on 26 March 2023.

The witness told the court that the imposter seemed to be in a hurry to sell and that explained why the purchase price was reduced initially from US$65 000 to US$55 000 and then US$50 000. Prices of undeveloped stands ranged between US$40 000 and US$70 000 in that area depending on the size of the property.

Asked about the due diligence he performed in connection with the imposter's national identity document, the witness stated that he went to the deeds office to check if the details on the title deed matched those on the seller's national identity document. When the seller and the first plaintiff met, the first plaintiff was also given an opportunity to verify that information. Asked why he did not make copies of the documents in the deeds office file, the witness stated that the deeds office did not permit one to take photographs of documents. He was reminded by plaintiffs' counsel in cross examination that it was permitted to make copies of documents on paying a fee. The witness acknowledged that he was now aware, but back then he was not aware.

The witness averred that the first plaintiff told him that his legal practitioners had carried out their due diligence on 27 March 2020. In his whatsapp chats with the seller on 26 March 2020, the witness had however informed the seller that due diligence had already been

completed on the first plaintiff's side and if the offer was acceptable, the parties could transact the following day.

The witness admitted that the standard operating procedure in sales of this nature was for an Estate Agent to record the addresses of the seller and the purchaser at the outset as well as request their proof of residence. The seller was the defendant's client. In this case, the seller only signed the sales mandate after the agreement of sale was signed. The witness averred that it was perfectly proper to do that under the circumstances. This was because the mandate to sale came in different forms. In this case, they had agreed that the seller would submit a written mandate when he travelled to Harare since he was based in Kwekwe. The witness stated that they could not get the proof of residence for the property because Mount Pleasant Heights was a new area with no water or electricity bills. That was the same case with Sally Mugabe Way in Kwekwe where the seller allegedly resided.

The defendant closed its case after Chadiwa's testimony.

The Plaintiffs Submissions

Mr *Muchandiona* submitted that the gravamen of the plaintiffs case was that their loss was caused by the defendant's breach of its legal duties and/or negligence. There was a contractual relationship between the plaintiffs and the defendant. That contractual relationship created a legal duty on the defendants to ensure that no harm befell the plaintiffs. This is why the defendant was expected to carry out due diligence before the agreement of sale was signed. The defendant's officials had failed to carry out the basic due dilgence expected of them.

For instance, Chadiwa received a verbal mandate over the telephone from a person who posed as the owner of the property. He only received the written mandate after the completion of the transaction. It was a basic standard operating procedure that the agent must be given a complete written mandate as part of the due diligence. The mandate form itself was incomplete with several key details missing. More importantly, the sales mandate was supposed to be signed by the principal registered agent of the defendant, but it was not. The offer to purchase form also had missing details. It was not countersigned by the principal registered agent in accordance with the defendant's own procedures.

There were also suspicious occurrences in the entire transaction that would have required the defendant's officials to be more vigilant. An initial online search revealed that the title deed number was in respect of a Mabvuku property. Further, the purported seller himself did not appear to be a person of means.At one point he had to ask for airtime from Chadiwa.

He did not even have resources to buy fuel for his own car in order for him to drive from Kwekwe to Harare.

Chadiwa himself conceded under cross examination that there was need to carry out some due diligence on the seller's identity. For instance he checked through ecocash to verify the true identity of the caretaker. He belatedly alleged to have done the same in respect of the imposter. No such claim was made in the pleadings. Had the imposter been registered on ecocash, then it would have been easier for the Police to make a follow up and arrest him.

The seller claimed to be resident in Kwekwe and operating a mine. He took his time to furnish the details requested by Chadiwa. The fact that Chadiwa saw it fit to travel to Kwekwe after the fraud had been unearthed showed that he had been caught napping. There was no reason why the seller should not have been asked to provide his proof of residence at the outset. The reason given by Chadiwa that the seller's alleged residential area had no electricity and water bills that ordinarily serve to confirm one's proof of residence was simply not adding up.

Also curious was the fact that according to his own testimony, Chadiwa had a facebook friend with a name similar to that of the purported seller. That alone should have made him more determined to get to know the person who was purporting to be the seller, who shared a similar name with his facebook friend.

Mubvumbi, as Chadiwa's immediate boss, should have satisfied himself that proper due diligence had been done. What made his conduct more culpable was that he prepared the agreement of sale in the absence of the parties. How could the agreement of sale have been a product of discussions when the seller and the purchaser never got to meet with the agents before the agreement of sale was prepared? Mubvumbi just got copies of the seller's identity documents and used them to prepare the agreement of sale. The terms and conditions of the agreement were never discussed with the parties.

It was not the first time that the first plaintiff had dealt with Mubvumbi. It was the first time that the plaintiffs were looking to acquire a property with a title deed. The previous one they acquired was under a cession agreement. It ought to have been clear to Mubvumbi that the plaintiffs would rely on his expertise and experience in order to acquire a property with a title deed. Mr Mubvumbi went on to prepare an agreement of sale that authorised release of the purchase price upon its signing. Mubvumbi acknowledged that he was fully aware of the risks of releasing funds to a seller before transfer of the property. He was aware that a deeds office search also entailed checking copies of the title deed, declarations and the CGT certificates, which are filed when the property is transferred to the original seller. Had that been done, it

would have been very clear that the purported seller was an imposter. The CGT certificates would have had the correct details of the seller.

The original title deed from the deeds office was never produced by the defendant. The only reason could simply be that there was no original title deed at the deeds office. The appearance of the title deed that was presented in court was also telling. The appearer was one Maxwell Mavhunga. The title deed was however signed by an F Mabaya. The appearer and the signatory could not be different. Mr *Muchandiona* submitted that there was a clear breach of duty of care and negligence which had been proved against the defendant. Several decisions of this court were cited to confirm the approach of the courts in matters of this nature.

Mr *Muchandiona* further submitted that evidence on record showed that the plaintiffs decided to proceed with the transactions on the basis of assurances given by the two agents. Mubvumbi and Chadiwa did not deny that they gave the plaintiffs an assurance that the transaction was above board. There was nothing wrong with the plaintiffs carrying out their own due diligence. The duty still remained with the defendant to ensure that full due diligence was carried out. The defendant would have asked the plaintiffs to sign a full indemnity if it wanted to protect itself from liability for any loss suffered by the plaintiffs.

Commenting on the clause in the agreement of sale which permitted the release of the purchase price on signing of the agreement of sale, Mr *Muchandiona* submitted that the *caveat subscripto* rule could not be invoked in the present case. The consequences of releasing payment of the purchase price before transfer were never explained to the plaintiffs.

As regards the currency in which the claim was made, Mr *Muchandiona* submitted that the United States dollar remained legal tender in this country. In any case, the defendant had not disputed the currency in which judgment was sought. He insisted that the plaintiffs were entitled to judgment with costs on the punitive scale because the conduct of the defendant's officials showed a gross derelection of duty .

Defendant's Submissions

Mr *Jera* submitted that the plaintiffs bore the onus of proving that the alleged omissions by the defendant's officials caused their loss. He further submitted the position of the law was that a person was negligent when they failed to observe that degree of care which a reasonable person in similar circumstances would have observed. Further, any alleged ommissions had to be directly linked to the loss ultimately suffered by the plaintiffs. The defendant's position was that it acted in a diligent manner and did what a reasonable estate agent in similar circumstances would have done.

Counsel further submitted that harm occurred not because of any negligence or breach of duty on the part of the defendant. It occurred because all the people involved in the transaction, both the professionals and the lay were duped. All the parties were victims of a fraud and the defendant could not be entirely blamed for the loss. Counsel referred to the authority of *Music Room (Pvt) Ltd* v *ANZ Gindlays Bank of Zimbabwe*[1], to support this proposition.

Counsel further submitted that in assessing whether there was a breach of a legal duty, the court must evaluate what it is that the professional did or failed to do. The defendant did all it could have done to uncover the true identity of the alleged seller. The seller came into a boardroom in which all parties were present and produced his original identity card. The defendants visually looked at the identity card and the person before them and everything tallied. As far as the identity of the seller was concerned, the defendant could not be faulted for having been negligent.

Concerning the title deed, Mr *Jera* argued that there was nothing to show that it was fake at the material time. The defendants explained that as part of their operating procedures, they checked for such things as caveats, mortgage bonds and whether the details of the seller corresponded with those on the title deed. They also checked for the legal description of the property and whether the copy of the title deed was the same as the one at the deeds office. Upon checking, all the details were matching.

Counsel also argued that the averment that the signature on the title deed was not that of the appearer was misplaced. Mavhunga's signature was not placed before the court to show that he did not sign as Mabaya. No handwriting expert testified that the person who signed as Mabaya was not Mavhunga. The court was urged to look at the circumstances of the case at the material time. There was nothing to suggest that the title deed was fake. The submission that the defendant's officials should have gone out of their way to look for declarations and the CGT certificates did not suggest that the defendant was not diligent. The court was also urged not to look at how an ultra cautious Estate Agent would have acted.

Counsel also submitted that it was incorrect to suggest that the agreement of sale left the plaintiffs exposed. There was nothing to suggest that the parties were forced to sign the agreement of sale. Mubvumbi stated that he consulted both parties before they signed the agreement of sale. Clause 18 explained how the purchase price was to be disbursed. The

[1] 1995 (2) ZLR 167

conveyancer was required to satisfy himself that conditions allowed the release of the purchase price. If anyone was negligent, then it would have been the conveyancer. But from the evidence, the conveyancer asked the parties if they were all satisfied before the purchase price was released to the seller, and they both answered in the affirmative.

Mr *Jera* also urged the court not to ignore the role played by the plaintiffs and their legal practitioners, in the lead to the signing of the agreement of sale. When Chadiwa located the deeds office file on 27 March 2020, he advised the first plaintiff so that the plaintiffs legal practitioners could conduct a due diligence of their own. The first plaintiff himself was not just an unsophisticated ordinary person. He was the managing director of a company and obviously aware of the consequences of releasing funds to a seller before transfer of a property was processed. He did not check with the conveyancer if it was safe to release funds before the transfer of the property. By his conduct therefore, the first plaintiff also aided the imposter in committing the fraud.

It was also submitted that a written mandate could be provided in any form. To support this proposition, counsel referred to the case of *Stohill Investiments (Private) Limited* v *Mahachi & 2 Ors*[2]. The omissions made by the defendants did not detract from the position of the law. The mandate was eventually signed. Counsel further submitted that the failure by the defendant to verify the seller's residential address was an omission with respect to the defendant's own internal procedures. It did not detract from the overall due diligence that the defendant's officials had carried out.

Coming to the currency in which the claim was made, Mr *Jera* submitted that the position of the law was clear. Assuming the court was persuaded to grant judgment for the plaintiffs, there was no justification to order payment in a currency prohibited by the law. Counsel also submitted that there was no justification for the award of costs on the punitive scale since the defendant did all it could to protect both parties in the transaction.

The Analysis

Over the past two decades a very disturbing phenomenon has emerged within the real estate sector. It is called property fraud. Property fraud is now firmly entrenched in the real estate sector and cases of fraudulent sales of properties by imposters, conmen and fraudsters are almost a daily occurence. Such imposters and fraudsters have perfected the art to the extent

[2] HH 213/14

that even though such cases get to be widely reported in the media, with such criminals being arrested and getting locked up in prison, the cases have still continued on the upward trajectory.

What is worrying is the level of gullibility exhibited by victims who fall prey to these agents of the dark world. The victims include owners of properties, genuine purchasers who wish to invest in real estate, legal practitioners and real estate practitioners alike. Legal practitioners and estate agents are supposed to play the watchdog role in the fight against property fraud but they also fall victims. They are the experts in this field, and by virtue of their experience and expertise in property management, a lot is expected of them where claims such as the present, grounded on the breach of a legal duty to act reasonably, are placed before the court.

As already noted, the parties herein agreed on two issues for trial. The second issue is of course reliant on the finding the court makes in respect of the first issue. I proceed to deal with the issues hereunder seriatim.

Whether or not the defendant acted negligently and in breach of its legal duty of care resulting in the plaintiffs financial loss

It is settled law in this jurisdiction that an estate agent owes a duty of care not just to the seller who engaged him to identify a purchaser for the seller's property, but to the purchasers as well. In order to maintain the highest standards of integrity by estate agents, the practice of estate agency is regulated by the Estate Agents Act[3] (the Act). Section 60 (1) (a) of the Act makes it an offence for one to practice as an estate agent or to describe himself as such or to allow himself to be described as such, without being registered. In the case of *Ruth Chirimuuta* v *Action Property Sales (Pvt) Limited*[4], PATEL J (as he was then) explained the position of the law as follows:

> "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."

In *Alex Masiya & Another* v *Roland Takawira Sadomba & Another*[5], MUTEMA J weighed in and held as follows:

> "On the totality of the evidence adduced, the probabilities and the law, I find it not only equitable but good law that in the real estate industry, an estate agent or property

[3] [*Chapter 27:17*]
[4] HH 5/07 at p 6 of the judgment
[5] HH 28/12 at p 11

> negotiator/consultant can be held liable for negligently breaching a duty of care which occasions financial loss to a client……"

The position of an estate agent is somewhat unique. Although he receives instructions from a prospective seller to find a buyer of an immovable property, and for which he is paid a commission, he also owes a duty of care to the very people that he introduces to the seller. Put differently, the estate agent assumes a dual role which requires him to exercise utmost care and diligence to both the seller and the purchaser of the property. This is because the purchasers rely on the information supplied by the estate agent in committing themselves to the transation. They only get to know the seller through the estate agent who for all intents and purposes is the face of the seller.

The plaintiffs contend that the defendant was negligent in the manner in which it carried out its due diligence on the identity of the seller and the status of the property which was the subject of the sale. As it turned out, the seller was an imposter while the title deed he tendered through the defendant was fake. The defendant through its witnesses denied any wrong and averred that it did everything that an estate agent in its position would have done. In determining the question of negligence and the consequential liability for the loss suffered by the plaintiffs, the defendant urged the court not to look at it as some super agent which is endowed with some clairvoyant powers that enables it to decipher issues beyond what an ordinary agent would have done.

The starting point is the law itself. As noted above, s 60 of the Act commands that no person shall act as an estate agent unless there are registered as such under that Act. However, s 64(1)(a) permits a registered estate agent to employ people that are not registered. The registered estate agent is however required to supervise such unregistered employees in the performance of their duties. Both Mubvumbi and Chadiwa were not registered estate agents. It follows that they were supposed to carry out their respective duties under the supervision of the principal registered estate agent. Mr Mubvumbi confirmed that there was a principal registered estate agent but at the material time she was indisposed through illhealth.

The registered estate agent was required to sign the sales mandate. The copy tendered in court as an exhibit was not signed. It was only signed by the imposter on 28 March 2020, the day the parties signed the agreement of sale. The principal registered estate agent was also required to sign the offer to purchase form, but she did not sign it. Mr *Jera* submitted that these documents were for the defendant's internal use and they did not detract from the position of

the law, that under the circumstances the defendant had done everything any other estate agent in a similar position would have done.

The position advocated for by Mr *Jera* is too simplistic and I would dare say it does not represent the practice or the law. The need for a registered estate agent to countersign the two documents referred above is not just a question of formality. It is not just intended for the defendant's own internal controls. It is consistent with s 64(1)(a) of the Act referred to above. By countersigning the mandate to sell and the offer to purchase forms, the registered estate agent is exercising his/her supervisory role as required by s 64(1)(a) of the Act. It is seal of approval by the registered agent that she/he has checked and satisfied himself/herself with the work done on her/his behalf by the unregistered employees. It therefore follows that if Mubvumbi and Chadiwa completed the transaction on their own without the input of a registered estate agent as required by the law, then the defendant violated the law. The two gentlemen were on a frolic of their own. The events leading to the unfortunate loss must be understood in that context. Had the registered agent exercised her oversight role at all the stages of the transaction, perhaps the fraud would have been detected much earlier before money changed hands.

No evidence was placed before the court to suggest that the registered estate agent supervised this transaction as required by the law. Mubvumbi and Chadiwa were not registered estate agents, and as such they could not act in the manner they did without supervision because those functions they purported to execute are otherwise reserved for registered estate agents.

The defendant's witnesses admitted that part of their mandate in the sale of a property involved checking the seller's identity and the status of the property being sold. The witnesses claimed to have done all that. They checked the title deed against the seller's identity and the details matched. On the day of signing the agreement of sale, the seller, who everyone present at the meeting was seeing for the first time, produced the original title deed and his original identity card. The originals were all circulated to the attendees of the meeting including the plaintiffs. Everyone appeared satisfied. No questions were asked even after the conveyancer availed himself to explain any gray areas or questions that may arise in connection with the transaction.

Clause 7 of the defendant's sales mandate states as follows:

"The following documents should accompany this application form at all times:
7.1 Copy of Identity document (Passport/National ID/Driver's License);
7.2 Proof of residence (Utility bills e.g. ZESA, City Council, Telone or Bank statement)
7.3 Copy of Title Deed/Cession"

Clause 9 was supposed to be signed by the registered estate agent. He or she was also required to endorse their registration number and physical address. The name of the sales negotiator was supposed to be endorsed. It was not. Clause 10 of that form was reserved for office use. It had the following portions that were supposed to be complted:

"10. For Office Use
Received by_____ Agent_____ Date_____
Processed by_____ Date _____ Checked by_____Date____"

The above portions were not completed. I have already stated that Mubvumbi and Chadiwa were not registered estate agents. They were expected to act under the supervision of a registered estate agent at the material time. The need to comply with the defendant's own internal processes cannot just be dismissed on the basis of an internal omission that at most would have prejudiced the defendant. Rather, it was part of the supervisory role played by the registered estate agent over Mubvumbi and Chadiwa. The registered estate agent was supposed to satisfy herself that the defendant's own due diligence processes had been complied with.

In my view, compliance with those internal processes was a condition precedent to the consummation of any transaction that involved an innocent and unsuspecting purchaser. As it turned out, the seller did not provide a proof of residence. When Chadiwa travelled all the way to Kwekwe, he discovered that the address furnished by the seller did not exist. The justification given by the defendant's witnesses for not insisting on the provision of a proof of residence by the seller is far from convincing. They alleged that the area in which he purportedly resided was a new residential area without electricity or water bills. But the defendant's own sales mandate form provided for other alternatives such as Telone or a bank statement. That information was not furnished yet it would have gone a long way in establishing the exact address of the seller.

Then there was the copy of the title deed allegedly furnished by the seller. On the face of it, it shows that it was prepared by F Mabaya, the conveyancer. On page 2 thereof, the appearer is listed as Maxwell Mavhunga. On the last page of the title deed, the person who again signed on behalf of the principal was F. Mabaya, who was not the appearer. Ordinarily in conveyancing practice and law, the appearer is the conveyancer who must append his/her signature on the title deed in that capacity. Mr *Jera* argued that the plaintiffs failed to prove that Maxwell Mavhunga's signature was not the one inscribed on the document as F. Mabaya.

While one may accept that Maxwell Mavhunga may as well sign official documents as F. Mabaya, that alone raises suspicion in the mind of a professional or experienced estate agent.

Though meant to pass for a signature, the words F. Mabaya were so prominently written and one could not mistake them for Maxwell Mavhunga's signature. Why would Maxwell Mavhunga sign official documents as F. Mabaya? That would obviously prompt a trained professional mind to investigate why this was so. This is where the experience and expertise of a registered agent was required. To check for those small details.

A reasonable registered agent would surely have picked the anomaly and requested an explanation from the conveyancer who allegedly submitted the title deed for registration. The Registrar of Deeds would also have been requested to provide an explanation. That office is the custodian of these records and there was nothing amiss to request an explanation on this anomaly. As it turned out, this deed of transfer was allegedly executed in favour of the seller on 27 September 2009, yet the death certificate produced in court as exhibit 1 shows that the owner of the property, Innocent Nyakudya died on 29 August 2004. The property could not have been transferred into Nyakudya's name in 2009 as he was already deceased.

The reason why parties are in court is because the plaintiffs were informed that the property was not for sale as the late Nyakudya's estate was yet to be finalised. Chadiwa admitted that he did not check the declarations or the CGT certificates at the deeds office. These documents ordinarily accompany an application for the transfer of the property. They would have provided an insight on when exactly the property was transferred to the late Innocent Nyakudya or this imposter who posed as Innocent Nyakudya.

The conduct of estate agents is regulated by law. As at the time the parties appeared in court, the defendant's witnesses, despite being aware of the anomaly and having reported it to the Police as a case of fraud, had not made an attempt to secure the deeds office copy of the title deed. In other words, Mubvumbi and Chadiwa accepted that the copy of the title deed provided by the alleged seller was fake and this explains why Chadiwa made a Police report. But then they do not even know what the original title deed looked like and yet they represented the seller whom they presented as the defendant's client. Even at this stage, it is not known if the original title deed for that property exists. What if the property does not even have a title deed in the first place? Mubvumbi made reference to a receipt issued by the deeds office to confirm that a search was conducted. But per his own admission, that receipt does not confirm the outcome of the search. It does not tell whether Chadiwa actually saw the title deed for the property when he carried out the search.

While the court accepts that the alleged seller presented himself on 28 March 2020 when the agreement of sale was signed, and tendered the original title deed and his original

identity card, the damage had already been done. The plaintiffs and the conveyancers can be excused for having failed to pick the anomaly in the meeting on 28 March 2020. On their part, they expected the estate agent to have performed all the necessary groundwork that would lead to the signing of an agreement of sale. After all the signing of an agreement of sale occurs at the tail end of the entire process. It is the estate agent that is involved in the preliminary stages that are vital for the consummation of an agreement.

From a consideration of the law as espoused in case law referred to above, it was the defendant that was required to carry out the due diligence on behalf of the plaintiffs. The plaintiffs may have indicated that out of an abundance of caution, they needed their own legal practitioners to do some verification or due diligence on their behalf. That still did not take away the legal obligations that the defendant owed to the plaintiffs. From my reading of the law, and based on the dictum in the cited authorities, there is no legal duty on a purchaser to carry out some due diligence beyond what the estate agent undertakes to do. The fact that the plaintiffs may have, out of their own volition, decided to carry out their own due diligence through their own legal practitioners, did not diminish the defendant's responsibility to act responsibly. There is therefore no merit in the defendant's contention.

While the court accepts that the alleged seller was a consummate actor, and at the meeting on 28 March 2020, he managed to deceive the plaintiffs, the defendant's agents and the conveyancer, that still does not absolve the defendant from culpability. On that day, the plaintiffs can be excused for having assumed that the basic due diligence had been done, bearing in mind that they on their part were entitled to rely on the assurances given by the defendant's representatives. It does not matter in the view of the court, that in terms of clause 18 of the agreement of sale, the plaintiff had authorised the disbursement of the purchase price before transfer. That the defendant's own representatives gave an assurance regarding the reliability of the information given by the imposter is clear from para 5 of the defendant's plea. It reads as follows:

> "…. The plaintiffs themselves indicated they wanted to also conduct their searches and satisfy themselves before signing the agreement of sale. As such, the agreement was not signed only on assurances of the defendant but after plaintiffs had satisfied themselves of the genuiness of the transaction." (Underlining for emphasis).

As already observed, the plaintiffs were under no legal obligation to satisfy themselves that the assurances given by the defendant's representatives were accurate through their own independent investigation. The legal duty on the part of the defendant to protect the interests

of the plaintiffs arose by operation of law. In summasion, the words of CHITAKUNYE J (as he was then) in *Nyandoro* v *Deep Horizon Real Estate & Ano*[6] are apposite. He said:

> "In my view, a real estate agent is deemed to have skill and experience in real estate matters, superior to that of a lay person, and that he is under a duty to use his superior skill and knowledge while pursuing the affairs of both the seller and the purchaser. This duty includes an obligation to discover facts relating to the seller and the property that a reasonable and prudent agent would be expected to investigate."

I associate myself with the views of the learned judge. For the foregoing reasons, the court determines that the defendant, through its officials Mubvumbi and Chadiwa acted negligently and in breach of its duty of care to the plaintiffs. That takes me to the next issue.

Whether or not the defendant is liable for the plaintiffs loss

Having determined that the defendant, through its officials acted negligently in breach of its legal duty of care to the plaintiffs, that caused financial loss to the plaintiffs, the next issue is whether the defendant is liable for the plaintiffs' loss. For in the eyes of the law, not every error of omission or commission entitles one to claim damages for loss. The question that needs to be answered is whether as between the plaintiffs and the defendant the legal duty arising engendered an expectation on the part of the plaintiffs that any breach of the duty of care by the defendant or its officials would result in loss to the plaintiffs.

In the court's view, the defendant, through the conduct of its officials, was the proximate cause of the loss suffered by the plaintiffs. It was the conduct of the defendant's officials, through commission and omission that caused the plaintiffs to enter into an agreement of sale with an imposter. Had the defendant's officials done proper due diligence, the plaintiffs would not have parted with their savings in pursuit of a transaction that was doomed from the outset. There is no reason in fact and in law, as to why the defendant should not be held accountable for the plaintiffs' loss herein.

By operation of law, the defendant was required to take all the necessary steps required to ensure that the seller was the owner of the property for which it was expected to find a buyer. The defendant was also expected to guarantee that the property itself was free of any incumbrances and capable of being sold to a willing buyer. The seller was its client by operation of law. Any misrepresentations, whether by inadvertance or otherwise were bound to cause financial harm to the plaintiffs. Put differently, loss to the plaintiffs was reasonably foreseable in the event that the representations by the defendant's officials regarding the status of the alleged seller and the property turned out to be false. The first plaintiff approached Mubvumbi

[6] HH 461/18 at p 13

because of their prior dealings. He trusted that Mubvumbi had the required expertise, professionalism and experience to secure for him, a property with title deeds. He had specified his preferred location. Mubvumbi had, even contrary to the first plaintiff's request, identified a property that was not within the plaintiffs preferred location. The fact that the plaintiffs proceeded with the transaction speaks to the trust they reposed in Mubvumbi.

The exigencies of the situation aided in escalating an otherwise untenable situation. The country was approaching a Covid 19 induced national lockdown. All businesses were going to be closed. It meant that all transactions leading to the transfer of the property to the plaintiffs were going to be suspended until the lockdown restrictions on business operations were eased. The defendant through its officials acted in haste. There was nothing exceptional about this transaction. After all the defendant's own principal registered agent had not sanctioned the transaction as required by the law. Mubvumbi and Chadiwa took a risk in proceeding with the transaction before the defendant complied with the law that regulates its own industry.

The demands of the parties, in this case the seller and the purchasers, regrettably did not justify an abandonment of the principles that underlie the conduct of real estate management business. Professionalism, skill, care and due diligence are some of the values that must be observed by estate agents. Had Mubvumbi and Chadiwa followed the hallowed basic principles of real estate management as espoused by the law, then the plaintiffs would not have suffered loss herein. It appears they were in a rush to earn a commission from the imposter, which apparently they did. But that commission has come at a price to the defendant.

As already stated, the provisions of the regulatory framework espoused in the law that governs estate agents, is meant to protect members of that profession and partakers of their services alike. Any violation of the law exposes the estate agent not just to criminal sanctions, but to contractual and delictual liability for loss caused by acts of omission or commission.

The currency in which the Plaintiffs Claim must be discharged

The parties counsel held divergent views with respect to currency in which the defendant's liability must be discharged assuming the court finds in favour of the plaintiffs. There is no doubt that the currency landscape was significantly altered by operation of law in this country.

On 22 February 2019, the Government of Zimbabwe introduced a new currency called the Real Time Gross Settlement Electronic dollar (RTGS), through the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) Regulations, 2019, (hereinafter

referred to as "S.I. 33/19" or the instrument). The instrument was gazetted on 22 February 2019. That date became the first effective date as defined in the Finance Act (No.2) Act, No.7 of 2019 (the Finance Act). The new currency ran parallel with other currencies that were accepted as legal tender, under what was known then as the multi-currency basket.

On 24 June 2019, the Minister of Finance and Economic Development gazetted Statutory Instrument 142 of 2019 (Reserve Bank of Zimbabwe (Legal Tender) Regulations, 2019) (SI 142/2019). The 24th June 2019 became the second effective date as defined in the Finance Act. This instrument abolished the multi currencies and declared the ZWL to be the sole legal tender in Zimbabwe. The two instruments were later incorporated into the Finance Act, which was gazetted on 21 August 2019. The key parts of the Finance Act are sections 22 and 23, which state in part as follows:

> **"22 Issuance and legal tender of RTGS dollars, savings, transitional matters and validation**
> 1) Subject to section 5, for the purposes of section 44C of the principal Act, the Minister shall be deemed to have prescribed the following with effect from the first effective date—
> (a) that the Reserve Bank has, with effect from the first effective date, issued an electronic currency called the RTGS dollar; and
> (b) ……..; and
> (c) that such currency shall be legal tender within Zimbabwe from the first effective date; and
> (3)…..
> (4) For the purposes of this section—
> (a) it is declared for the avoidance of doubt that financial or contractual obligations concluded or incurred before the first effective date, that were valued and expressed in United States dollars (other than assets and liabilities referred to in section 44C(2) of the principal Act) shall on the first effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar;
> (b) ……..; (Underlining for emphasis)
>
> **23 Zimbabwe dollar to be the sole currency for legal tender purposes from second effective date**
> (1) For the avoidance of doubt, but subject to subsection (4), it is declared that with effect from the second effective date, the British pound, United States dollar, South African rand, Botswana pula and any other foreign currency whatsoever are no longer legal tender alongside the Zimbabwe dollar in any transactions in Zimbabwe." (Underlining for emphasis)

Section 22(1)(d) of the Finance Act states that *".....for accounting and other purposes (including the discharge of financial or contractual obligations), all assets and liabilities that were, immediately before the first effective date, valued and expressed in United States dollars (other than assets and liabilities referred to in section 44C (2) of the principal Act) shall on the first effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar…".*

The words *"assets and liabilities"* are not defined in the Finance Act or in S.I. 33/19. The Supreme Court considered the issue of assets and liabilities in *Zambezi Gas Zimbabwe (Private) Limited* v *N.R. Barber (Private) Limited & Ano*[7]. The court said:

> "The liabilities referred to in s 4(1)(d) of S.I. 33/19 can be in the form of judgment debts and such liabilities amount to obligations which should be settled by the judgment debtor. In interpreting s 4(1)(d), regard should be had to assets and liabilities which existed immediately before the effective date of the promulgation of S.I. 33/19. The value of the assets and liabilities should have been expressed in United States dollars immediately before 22 February 2019 for the provisions of s 4(1)(d) of S.I. 33/19 to apply to them.
>
> Section 4(1)(d) of S.I. 33/19 would not apply to assets and liabilities, the values of which were expressed in any foreign currency other than the United States dollar immediately before the effective date. If, for example, the value of the assets and liabilities was, immediately before the effective date, still to be assessed by application of an agreed formula, s 4(1)(d) of S.I. 33/19 would not apply to such a transaction even if the payment would thereafter be in United States dollars. It is the assessment and expression of the value of assets and liabilities in United States dollars that matters." (Underlining for emphasis)

Further down in the same judgment the court went on to state that S.I. 33/19 was specific to the type of assets and liabilities excluded from s 4(1)(d), reasoning that the origin of the liabilities was not a criterion for the exclusion. The court highlighted that:

> "What brings the asset or liability within the provisions of the statute is the fact that its value was expressed in United States dollars immediately before the effective date and did not fall within the class of assets and liabilities referred to in s 44C(2) of the Reserve Bank of Zimbabwe Act…." (Underlining for emphasis).

In the court's view, the plaintiffs claim must be dealt with in terms of s 22(1)(e) of the Finance Act, which states:

> "(e) that after the first effective date any variance from the opening parity rate shall be determined from time to time by the rate or rates at which authorised dealers exchange the RTGS dollar for the United States dollar on a willing-seller willing-buyer basis."

The plaintiffs' claim can only escape treatment under s 22(1)(e) above if it falls within the ambit of s 44C (2)(b) of the Reserve Bank Act. That section states as follows:

> "**44C Issuance and legal tender of electronic currency**
> (1) ……..
> (2) For the avoidance of doubt it is declared that the issuance of any electronic currency shall not affect or apply in respect of—
> (*a*) funds held in nostro foreign currency accounts, which shall continue to be designated in such foreign currencies; and
> (*b*) foreign loans and foreign obligations denominated in any foreign currency, which shall continue to be payable in such foreign currency." (Underlining for emphasis).

[7] SC 3/20 at p 9

The plaintiffs claim does not fall within the ambit of s 44C of the Reserve Bank Act. The plaintiffs counsel did not suggest to me that it falls within the ambit of that law save to argue that nothing stands in the way of this court granting judgment in any foreign currency as such is not prohibited by the law. The submission is clearly without merit owing to the changes in the currency regime that were occasioned by operation of law as set out above. This court cannot grant judgment in a currency that is not permitted by the law save for those exceptions that the law recognises.

COSTS OF SUIT AND INTEREST

The plaintiffs through their counsel submitted that in the event of the court finding in their favour, then it must grant judgment with costs on the punitive scale. Counsel submitted so on the ground that the defendant's conduct was unreasonable and tantamount to a gross dereliction of its duties. On the other hand, the defendant through its counsel argued that there was no basis for an award of costs at that level because it was not established that the defendant did not conduct it a manner that was reasonable under the circumstances.

The circumstances of this case do not justify an award of costs on the punitive scale against the defendant. The defendant owed a legal duty of care to the plaintiffs, but did not carry out its due diligence process as would have been expected of a diligent estate agent in similar circumstances. Besides, one cannot ignore the role played by the imposter herein. Both parties were caught unaware although the ultimate blame must be shouldered by the defendant. In the circumstances, it is befitting that the defendant be ordered to pay costs of suit on the ordinary scale.

I note that in their summons and declaration, the plaintiffs did not claim interest in the event that the court found in their favour. No motivation was also made in that regard in the closing submissions.

DISPOSITION

Consequently it is ordered that:

1. Judgment is hereby entered in favour of the plaintiffs.
2. The defendant shall pay to the plaintiff an amount equivalent to US$47 400 in RTGS or Zimbabwean dollars calculated at the prevailing interbank rate on the date of payment.
3. The defendant shall pay the plaintiffs' costs of suit.

Danziger & Partners, plaintiffs' legal practitioners
Moyo & Jera, defendant's legal practitioners