

HOMEZONE COMPANY (PRIVATE) LIMITED

versus

MARTHA MURAYI

HIGH COURT OF ZIMBABWE

MANZUNZU J

HARARE, 24 July & 30 August 2023

CIVIL TRIAL

F Musudu, for the plaintiff

P Muzvuzvu, for the defendant

MANZUNZU J

A. ISSUES

In this civil trial there are five issues for determination. These are:

1. Whether or not the parties entered into a valid and binding agreement?
2. Whether or not parties were obligated to conclude a tripartite agreement?
3. Whether or not the plaintiff is entitled to payment of the invoiced amount of work done and if so how much?
4. Whether or not the plaintiff is entitled to damages for breach of contract and if so how much?
5. What order should be made as to costs?

B. PLAINTIFF'S CLAIM

The plaintiff's claim is based on contract between the parties. It is the plaintiff's case that the defendant gave the plaintiff a sole mandate instruction to carry out design and performance of all contractual works in relation to the development and upgrade of the defendant's property in Avondale. Having accepted the mandate, the plaintiff commenced work in October 2020. The instruction, *inter alia*, included feasibility studies, preliminary works, project costing budget, permit applications, roadworks designs, sewer drainage designs and construction of buildings. Plaintiff said it was a material term of the agreement for the defendant to pay the plaintiff for professional works carried out upon invoice and reimburse

the plaintiff for any fees paid to statutory bodies. The plaintiff applied for and obtained a development permit as part of the preliminary work for the construction of 8 garden flats.

On 6 July 2022 the plaintiff received a letter from the defendant cancelling the mandate. The plaintiff alleges a breach of the contract by the defendant and claims for specific performance or alternatively payment of US\$40 000.00 for the preliminary work done and US\$200 000.00 being consequential damages. However, the claim for specific performance is no longer tenable because the property upon which the project was to be carried out has since been sold.

C. DEFENDANT'S CASE

The defendant's position is that there was no binding contract which came into existence between the parties. Instead the parties were engaged in preliminary discussions which were intended to culminate into a tripartite agreement which was to include the plaintiff, the defendant and a financier. Defendant further said, all costs were to be taken care of by the financier in the tripartite agreement. The plaintiff had a duty to secure a financier as a condition precedent to the tripartite agreement. The defendant denied undertaking to pay any fees. She however admits she sold the property which was central to the intended tripartite agreement.

The defendant denies any liability.

D. THE EVIDENCE.

The parties relied on one witness each.

The plaintiff's director, Bonface Biri Matinenga, gave evidence in support of the plaintiff's case. He said the plaintiff's claim was in two categories, the first stage being for the paper work done and the second being lost profits and revenue. He said the agreement between the parties was partly verbal followed with a written mandate to seal what was agreed. He referred to the sole mandate document which was produced by consent as exhibit number P1.

The witness gave a brief background of how he met the defendant after she came to their offices to enquire about the services they provide. He said he explained all the professional services they provide. They visited some of the projects they did for the defendant to see for herself the standard of their work. He further said, having satisfied with the standard of their work, the defendant then invited the plaintiff to do three units for her. When the plaintiff agreed

to do the project for her, the defendant then gave plaintiff the sole mandate to start the first stage of the agreement which he referred to as the paper work up to when the permit is obtained.

He said they charge up to US\$5 000 per unit for the paper work stage in respect of the approved eight units. He produced as exhibit P2 documents annexures A to F which represent all the work they did. He said they involved the defendant at every stage of their work as some of the things required the defendant to sign as the owner of the property. It was further stated that the defendant participated in many ways which includes informing the neighbours about the upcoming project and paying all the outstanding rates with the Council.

A development permit authorizing the construction of 8 units was produced as exhibit P3 which permit could not be obtained without, *inter alia*, the title deed to the property, copy of defendant's ID and her signature to signify consent. The plaintiff received the cancellation letter from the defendant after a permit was sent to her.

According to the witness, the services for the paper work was supposed to be paid for at the end of the project had the defendant not cancelled the mandate. Upon receipt of the cancellation of the mandate, the plaintiff invoiced the defendant for the work done, that is in the sum of US\$40 000.00 and also claimed consequential damages in the sum of US\$200 000.00. A cancellation letter was produced as exhibit P5. Plaintiff said it accepted the cancellation. The new owner of the property is now using the permit obtained by the plaintiff to do the construction work.

The issue of the tripartite agreement was put to the witness in cross examination. He indeed agreed the arrangement for a tripartite agreement, but said it was meant to come at the second phase of construction.

The defendant gave evidence in her own case after her lawyer had attempted to apply for an absolution from the instance which application suffered a still birth as he quickly withdrew the same. The application, which was more of a fishing expedition, was ill advised.

The defendant said the sole mandate letter was a request to the plaintiff to apply for a permit. Her evidence was quite short despite the long and detailed evidence by the plaintiff's witness. She confirmed that the issue of a financier was only to come after a permit was obtained. She denied knowledge that eight units were approved for construction. When she cancelled the mandate she was not aware the permit had already been approved.

E. ANALYSIS OF EVIDENCE.

The defendant's position is that there was no agreement between the parties. But her own evidence, that of the plaintiff's witness and the conduct of both parties, point to the existence of an agreement. Defendant in her own evidence said, she instructed the plaintiff to do a permit for her. Indeed the plaintiff took all the procedures of obtaining a permit and procured one. This could only be achieved through an agreement between the parties.

The defendant played her part in the process of applying for the permit. She availed copies of her title Deeds and ID and expressed her consent through a signature to Council. Before then, she had written a letter to the plaintiff part of which reads;

“SOLE MANDATE OF STAND NO. LOT 2 OF LOT 10 BLOCK D OF AVONDALE:

I Martha Murayi ID No. 63-453620A 05 being the legal and rightful owner of a piece of residential property identified as above do hereby give the sole mandate to Homezone Co. (Pvt) Ltd for the design and performance of contractual works in relation to the development and upgrade of the aforementioned property. The contractual works include but are not limited to feasibility studies, budgets, permit applications, liaison with relevant authorities, architectural designs, road works ,sewer, drainage, building construction, roofing, electrification, plumbing and fittings. I confirm my full consent for the project paper works to begin.

I look forward to the successful completion of this project under the banner of Homezone Company.”

It is clear from the evidence of the parties that they agreed on two things. The first is that the plaintiff will do a development permit for the defendant which permit can only be obtained upon a successful paper works by the plaintiff. The parties are in agreement that the paper works was done and the local authority issued a permit. It is also not in dispute that when the defendant cancelled the agreement, unknown to the defendant, the plaintiff had fully performed its obligations under this first phase. It is on the basis of this performance that the plaintiff claims US\$40 000.00 for the work done.

The defendant denies liability on the basis that there was no agreement. Having found that there was an agreement, defendant has no basis to deny liability. In fact, an admission of the existence of a contract and the defendant's liability can be inferred from her letter of 6 July 2022 in which she was cancelling the mandate. The letter reads;

“RE : CANCELLATION OF MANDATE BETWEEN MARTHA MURAYI -v HOMEZONE CONSTRUCTION

This letter serves as advice of cancellation of the above mandate. I have since sold my property and the new owner is ready to discuss issues around the council permit accordingly.”

As a matter of fact, cancellation can only be in respect of that which exists. If there were only discussions, as the defendant wants us to believe, then one would expect a notice to withdraw from such and not to cancel.

The second thing the parties agreed on was that there was going to be a tripartite agreement. The plaintiff's summons is silent about the intended tripartite agreement. While it is clear from the evidence that there was an oral agreement in respect to the paper work the same cannot be said about the construction of the buildings. What is clear though is that the construction of the buildings was one to be done by the plaintiff but regulated by the tripartite agreement. What the parties agreed on was that once the plaintiff finds a financier, then a tripartite agreement will be crafted. When the defendant cancelled the mandate, no tripartite agreement was in place. The second claim by the plaintiff is based on an agreement yet to be born. The issue of consequential damages can only arise if there was a breach of the tripartite agreement. The defendant was indeed entitled to deny liability in respect of this second claim.

COSTS

This is a matter where both parties, in the event of succeeding, have asked for costs on a higher scale as a matter of fashion. This is a proper case where the plaintiff, given the extend of its success, should be awarded 50% of the costs of suit on the ordinary scale.

DISPOSITION

1. The plaintiff's claim for specific performance be and is hereby dismissed.
2. The plaintiff's claim for payment of the sum of US\$200 000.00 for consequential damages be and is hereby dismissed.
3. The plaintiff's claim for the paper work done succeeds.
4. The defendant shall pay the plaintiff the sum of US\$40 000.00 for all the paper work done.
5. The defendant shall pay 50% of the costs of suit on the ordinary scale.

Manyangadze Law Chambers, plaintiff's legal practitioners

Hamunakwadi and Nyandoro Law Chambers, defendant's legal practitioners