PROPERTY SHOP (PVT) LTD

Versus

KELVIN FARAI DOMBO

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 16 & 17 October 2024

Opposed application

A. Kadye for applicant
B.M. Machanzi for respondent

CHILIMBE J

BACKGROUND

[1] Applicant is a real estate firm and respondent its former client. Applicant seeks an order for specific performance directing respondent to pay an amount of US$ 20,037,50[1] being the sum allegedly due under a realtor`s mandate. Respondent contests the relief sought on the basis that applicant failed to deliver on that mandate.

[2] Both parties anchored their respective cases on the mandate agreement. It is my view that based on the respective positions set out in papers and argument, this decision turns on the terms of this agreement and how they were performed/breached. I will thus focus on its terms which I in part, summarise as well as quote hereunder.

THE "MANDATE TO SELL" AGREEMENT

[2] On 12 October 2021, respondent issued applicant with a written mandate to sell a vacant piece of land known as Stand 2950, Glen Township of Subdivision C, of Subdivision B, of Subdivision D of Nthaba of Glen Lorne in Harare. (Stand 2950). The reserve price was indicated on the mandate agreement as US$380,000. Applicant`s task under the contract was to "market and advertise" the stand to prospective purchasers. Simply put, it was to secure a

[1] This application was filed on 13 July 2022 well before the minimum monetary jurisdiction of the High Court of Zimbabwe (Commercial Division) prescribed in rule 3(2) of the Commercial Court Rules was automatically adjusted to the equivalent of US$50,001 in terms of the Magistrates Court (Civil Jurisdiction) (Monetary Limits) Rules, I 45/ 2023 effective 31 March 2023.

purchaser meeting the respondent`s requirements. (Or at law, as shall be seen below, secure a purchaser with whom respondent successfully concluded a sale over the piece of land.)

[3] The contract in question was a standard form document on applicant`s letterhead. It comprised of printed terms and dotted lines which were populated in handwriting. The printed terms carried in certain parts, the options to delete or indicate options selected. These included, in Part 1, choices on title being Mr/Mrs/ Miss/Dr/Prof and Other. One could also select between owner/representative as well as I/we. Part 2 of the agreement dealt with client instructions and provided as follows; -

> "I/We ……. KELVIN FARAYI DOMBO…...being the owner/representative of the above-mentioned property (Hereinafter called "The Seller") hereby grant Property Shop (hereinafter called the "Agent" a Sole and Exclusive Mandate OR General Selling Mandate (Delete One) on the following terms and conditions: -
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> PRICE-The Gross asking price is US …...380,000…. which will include Agents Commission (5%) and VAT at 15%
>
> PERIOD OF MANDATE The mandate commences on …...12 October 2021…. For a period of ……. Thereafter it will be reviewed and revised accordingly. During this time, either party may give 7 (seven) days` notice in writing to terminate the Mandate."

[4] Part 2 of the mandate form also carried provision for inserting special conditions. That part was left blank. Part 3 set out the property description. Part 4 bore the declarations by respondent affirming his instructions to sell, authority to issue same and undertaking to pay the agent`s commission. Two key points to note are that the parties neither specified whether theirs was a sole or open mandate. Nor did they fix the duration of the mandate itself.

[5] The payment terms for the property were not stipulated, apart from the gross amount of US$380,000. I may mention that it is becomes apparent from the face of the document that the averments made on behalf of applicant by Memory Muzenda-in paragraph 7 of her founding affidavit were inaccurate. The reserve price in the mandate agreement for Stand 2950 was set at US$380,000 not US$350,000 as stated my Memory Muzenda.

THE DISPUTE

[6] Memory Muzenda deposed further that applicant secured a prospective purchaser being the Ramson Family Trust represented by Ruth Sithabile Dangarembizi ("Dangarembizi"). This purchaser offered an amount of US$350,000 for Stand 2950. This development constituted fulfilment of mandate according to Memory Muzenda.

[7] Memory Muzenda stated that Dangarembizi, the prospective purchaser proceeded to conclude an agreement of sale and pay a purchase price of US$350,000 with the respondent`s (unnamed) legal practitioners. No details were released by Memory Muzenda regarding these steps. But on that basis, Memory Muzenda contends in her affidavit that the applicant became entitled to its agent`s commission. Applicant thus proceeded to claim its agent`s commission based on that concluded sale and instituted proceedings when respondent refused to pay.

[8] Respondent contested the facts as set out by applicant. He accused applicant of having failed to deliver on mandate. He insisted that what he issued was a general or open, rather than exclusive mandate to applicant. On that basis, he was at liberty to deal with other estate agents as he subsequently did. It was his argument further that the applicant did not, in any event, secure a purchaser bearing an acceptable offer. This same mandate did not authorise applicant to conclude a contract of sale without express authority.

[9] Respondent further indicates in his opposing affidavit that the reserve price for the piece of land was confirmed at US$380,000. He denied having accepted US$350,000 as purchase price, nor was the identity of Dangarembizi ever disclosed to him. What transpired was that he then received an offer from a purchaser secured by a firm known as Seeff Properties Estate Agents. ("Seeff Properties") Respondent averred that he had in fact, mandated Seef Properties to help him dispose of the property from as early as 2017.

[10] Respondent attached to his papers a mandate form dated 6 November 2017 with a firm cited as Smart Move in Realty. He also attached an offer to purchase completed by Seeff Properties dated 9 November 2021. Mr. *Kadye* for the applicant attacked these two documents. He submitted that the mandate with Smart Move in Realty had expired as at the time of the offer or sale and therefore invalid.

[11] He similarly dismissed the offer form by Seeff Properties as an invalid document authored by an unmandated firm acting in violation of the Estates Agents Council`s code of ethics. Counsel cited the decision of *Higher Dimensions Estate Agents v Mr and Mrs David* HB 56-08 in support of that conclusion. I will return to these arguments further below. Nonetheless,

respondent states that he accepted the offer of US$385,000 tendered by Seeff `s purchaser. With that acceptance, the transaction was then concluded and he duly paid Seeff Properties their 5% commission in the sum of US$ 22,041.

ARGUMENTS BEFORE THE COURT

[12] Mr *Kadye* for the applicant submitted that the facts before the court supported the well-established position at law. Namely that a real estate agent was entitled to its fee upon performance of obligation per parties` mandate including the introduction of a purchaser who subsequently closed a sale.

[13] Counsel relied in making that submission, on the decision of *Stohill Investment Properties (Pvt) Ltd v Mahachi & 2 Ors* 2014 (1) ZLR 533 (H). He further pointed out to the curious coincidence that the same prospective purchaser Dangarembizi, who had been secured and introduced by applicant, was the very person with whom respondent subsequently concluded the sale of Stand 2950 with Seeff.

[14] Respondent himself had made the admission in his opposing papers, so argued Mr. *Kadye*. In that respect, applicant had introduced a buyer who was both willing and able to pay the purchase price demanded by respondent. It could not have been merely coincidental that Dangarembizi became the ultimate purchaser of respondent`s property, argued Mr. *Kadye*. He thus urged the court to invoke the doctrine of fictional fulfilment of contract.

[15] This was because respondent had frustrated applicant`s complete performance in order to divert the agents` commission to third parties under unethical arrangements. In fact, counsel came short of outrightly condemning the purported transaction to dispose Stand 2950 as a sham or fraud. How could a purchaser who had earlier offered US$350,000 suddenly turn around and offer a much higher figure of US$385,000 for the same property?

[16] Ms *Machanzi* for respondent, reiterated the position taken in the opposing affidavit. She submitted that there had been no performance in terms of the mandate agreement by applicant. In that regard, applicant was not entitled to the agent`s fee. Ms *Machanzi* also refuted in argument, the applicant's contention that expiry of the Smart Move in Realty mandate invalidated the subsequent contract of sale between respondent and the purchaser.

[17] It was her further submission that the decision of *Higher Dimensions Estate Agents v Mr and Mrs David* (supra) cited by Mr. *Kadye* was distinguishable and inapplicable to the present.

That matter dealt with a realtor who insisted on its fee despite expiry of mandate. Ms *Machanzi* also argued that contrary to the submission by her colleague, respondent never in fact admitted that the prospective purchaser was introduced to him.

THE LAW

[18] Before reviewing the submissions, I will set out the position on realtor`s fee. This court dealt with the point and key legal principles per MATHONSI J (as he then was) in *Stohill Investment Properties (Pvt) Ltd v Mahachi & 2 Ors (supra).* The learned judge cited the following passages and dictum; -

> At page 547 G-H
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> "The point is made at para 385 of the Law of South Africa op cit at p 237 that: "The estate agent is not obliged to try to find a purchaser, but if he is given a mandate by his principal to sell property the principal is entitled to claim an exact performance of the terms of the mandate. However, should the agent fail to find a person who will purchase on the terms of the mandate but introduces a person who negotiates with the principal and the seller agrees to accept a lower price, the agent is entitled to commission even though he has not performed the original mandate." (the emphasis is mine)"
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> At page 548 A-C
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> "The same point is repeated by A J Kerr The Law of Agency 2 ed (Butterworths) at p 151 who quoted the judgment of Solomon J in *Woolley v Hunt and Birkley* (1894) 7 HCG 99 at 109-10. "Where a clear and definite mandate for the sale of any property is entrusted to an agent by a principal, the principal is entitled to demand an exact performance of the terms of the mandate, and is not liable for commission unless the person introduced by the agent is prepared to conclude a sale at the price and upon the terms set forth in the mandate … But suppose the agent fails to find a person who is prepared to purchase on the terms set forth in his mandate, but introduces to his employer one who us willing to negotiate with him, then if the introduction leads to business and the property is sold by the principal for a smaller amount or on different terms, that agent is entitled to commission, even though he failed to carry out the express terms of his mandate. In such a case the employer, having availed himself of

the services of the agent, must be taken to have agreed to pay the agent his commission upon the business transacted."

At page 548 A -549 A

"Writing about fictional fulfilment of a mandate, Kerr op cit states at p 154: "If a person deliberately, intentionally, and in order to escape an obligation, prevents an event from taking place that event may, by a fiction of law be deemed to have taken place. The authorities on the doctrine, which is known as the doctrine of fictional fulfilment, are discussed in The Principles of the Law of Contract (at 231-5). In agency cases the doctrine operates when the principal intends to escape either the obligation to pay commission or the obligation between himself and the third person."

[19] The guidance from the above authorities is both clear and consistent. Once an estate agent proves that it acted per mandate, or at least that it introduced the subsequent purchaser, it must be entitled to its commission. What further emerges from the authorities is that it becomes a matter of the agent offsetting the basic evidentiary burden of demonstrating existence of mandate, performance in terms thereof, and conclusion of a sale with an identified purchaser.

[20] From the above, I make the following observations. In the first instance, it must be noted that in *Stohill v Mahachi*, the court enjoyed the benefit of a fully fledged trial. The parties tendered evidence and testimony which was examined at length. This fleshed out the facts of that matter more fully than in the present matter. The agent in that matter was able to satisfy the court that it had fulfilled its obligation and was entitled to its fee. This was so despite the seller`s attempt to circumvent the agent on the final sale transaction.

[21] In the present dispute, respondent contests that applicant discharged the basic onus placed upon it. Ms *Machanzi* pointed out that the founding affidavit did not set out the claim to the required standard. I am in agreement. The founding affidavit was beset by a paucity of fact. It relayed a presumptuous account bereft of critical detail. Only in the opposing and answering affidavits did the full version of events unfold. Especially the participation of Smart Move in Realty and Seeff Properties.

[22] The answering affidavit came out more robustly. But the telling averments and evidence in it had to be expunged from the record on the basis that they constituted fresh facts and new evidence. I commend Mr. *Kadye* for properly volunteering to have such deleted from the record. It is an established principle that in motion proceedings, an applicant`s case ought to be

established in the founding affidavit. Only in exceptional circumstances will new facts and possibly further affidavits be admitted. This court held as follows in *Milrite Farming (Pvt) Ltd v Porusingazi & Ors* HH 82-10 at page 4; -

> "The basic rule pertaining to application procedures is that the applicant's case stands or falls on averments made in the founding affidavit and not upon subsequent pleadings. The rational for the rule is quite clear. It is to avoid the undesirable effect of litigation assuming a snowballing character, with fresh allegations being made at every turn of pleadings. Thus, the fresh allegation contained in the answering affidavit must be ignored, leaving the same cause of action and substantially the same facts in both the first and second applications."

[23] This approach followed earlier decisions such as *Mobil Oil (Pvt) Ltd v Travel Forum (Pvt) Ltd 1990 (1) ZLR 67 (H*); *Hiltunen v Hiltunen 2008 (2) ZLR; Loveness Serengedo v Eric Cable N.O. HH 32-08.* Similarly, subsequent decisions such as *Kaskay Properties (Pvt) Ltd v Minister of Lands and Rural Resettlement & 2 Ors HH 762-17; Nashe Family Trust* vs. *Chiware and anor,* 2018(2) ZLR 212 and *Busangabanye & Anor v Matsika & Ors* HH 680-22 adopted the same guidance on the issue of fresh facts and additional affidavits.

[24] I take note of the additional fact that the brief founding affidavit was met by a tenacious recusancy which contested applicant`s material averments. Respondent denied that Dangarembizi the purchaser was first introduced to him by applicant. In the same respect, respondent clung to the terms of the mandate agreement. It was not an exclusive mandate, he argued. Neither did he agree, as alleged by Memory Muzenda, that the reserve price was US$350,000.

[25] In his submissions, Mr. *Kadye* slighted the conduct, propriety and validity of the documents executed by respondent, Smart Move, and Seeff. Unfortunately, neither Seeff nor Smart Move were before the court. Nor did the purchaser Dangarembizi depose to an affidavit. Much would have been unravelled had she given her own version of what transpired. The applicant`s cause of action was premised on what it did in fulfilment of mandate rather than the aberrations of the third parties.

DISPOSITION

[26] The curious coincidence of Dangarembizi` s confounding offers to the two real estate firms does generate, as argued by Mr *Kadye* lingering doubts. But beyond stimulating conjecture, the

doubts will advance applicant`s case no further. It is my conclusion that, applicant has not offset the evidentiary onus incumbent upon it.

[27] Whilst the relief sought cannot be availed, I will, largely on the basis of the lingering doubts, dismiss respondent`s prayer for punitive costs. The applicant cannot be condemned as having launched a spurious application in circumstances which created room to conclude that it may possibly have been undone by a cleverer sleight of hand.

It is accordingly hereby ordered; -

1. That the application be and is hereby dismissed with costs.

Mlotshwa Solicitors- applicant`s legal practitioners
Maruwa Machanzi Attorneys-respondent`s legal practitioners

[CHILIMBE J___16/10/24]