

SAUL MURIMBA
and
TENDAI FLORA MURIMBA
versus
THE LAWS ORGANISATION (PVT) LTD
and
SEKAI HOVE
and
DESAI & ASSOCIATES LEGAL PRACTITIONERS
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 1 October 2010 and 20 October 2011

N Madya, for the exceptient
C W Gumiro, for the plaintiff

GOWORA J: On 11 February 2010 the plaintiffs herein issued out summons against the four defendants for payment of the sum of US\$48 518-50 jointly and severally, the one paying the others to be absolved, interest on the said sum and costs of suit. Only the first and the third defendants entered appearance to defend. The first defendant then filed an exception to the summons and declaration after requesting and being furnished with further particulars. The third defendant has not filed any further pleadings.

The facts surrounding the dispute can be summarised as follows. The excipient is a registered estate agent. The excipient was engaged by the second defendant to advertise for and secure a purchaser for an immovable property known as Stand 780 Greystone Park Harare on defendant's behalf. On 3 September 2009 the excipient caused an advert to be flighted in the Financial Gazette for the sale of the Stand in question. The plaintiffs responded to the advert by attending upon the excipient. They were then given directions of the location of the stand to enable them to view the stand. The physical address given to them of Stand 780 Greystone Park was 32 Winchcombe Road, Greystone Park, Harare. According to the description the stand was unimproved.

In due course, the plaintiffs visited the stand and on 9 September 2009 they attended at the offices of the excipient and were advised that it, the excipient was acting as an agent for the second defendant who was the owner of the stand. On 14 September 2009 the plaintiffs entered

into an agreement of sale with the second defendant in respect of the stand for the purchase price of US\$45000 which sum was paid to the excipient in four instalments.

On 3 December 2009 the plaintiffs paid a sum of US\$3 518-50 at the excipient's offices towards transfer fees. On 10 December 2009 the plaintiffs were informed by the excipient that the title deeds had been processed and were ready for collection. On 11 December 2009 the plaintiffs learnt from the Surveyor General's Office that Stand 780 belonged to a Sekai Hove but was a developed stand and not an unimproved stand. They also learnt that it had a different physical address to the one that they had viewed. They then issued summons against all the parties involved in the transaction. The first defendant then filed this exception.

The first ground of exception is as follows:-

- (3) It being common cause that the first defendant was acting as agent for a disclosed principal, the plaintiffs do not allege or plead the basis upon which the first defendant owed the plaintiffs a duty of care not to act negligently. Negligence can only arise in relation to a duty only arise in relation to a duty of care owed to a party, ipso jure. First defendant owed the duty of care to its principal only and not to the plaintiffs.
- (4) Further and without in any way derogating from the foregoing, plaintiffs merely allege in para 17 that the first defendant was negligent in making representations to the plaintiffs without in any way alleging or stating the particulars in which it is alleged the first defendant was negligent in making those representations on behalf of its principal. First defendant is accordingly unaware of the manner in which it is alleged to have acted negligently in making the representations it made to the plaintiffs on behalf of the second defendant it being accepted that it was acting as agent of the second defendant.
- (5) Consequently, the first defendant is embarrassed as to the particulars of its alleged negligence in making the representations.
- (6) In addition to the foregoing and without in any way derogating therefrom, the plaintiffs acknowledge and accept in their pleadings that the second defendant

fraudulently misrepresented herself as the real owner of Stand 780 Greystone Park and duly signed the agreement of sale.

- (7) It being accepted that second defendant acted fraudulently, the plaintiffs neither allege nor plead the basis upon which the First Defendant can be liable for the second defendant's fraud. Plaintiffs neither plead nor aver that the first defendant was aware of the fraud.
- (8) It being common cause that the second defendant committed identity document fraud, the plaintiffs plead an obligation upon the first defendant of ascertaining the fraud that may have been committed on the Registrar of Births and Deaths which duty the law does not impose on the agent in the position of the first defendant. *Ipsa jure*, as no such duty devolved upon the first defendant the breach of which could give rise to an actionable wrong, the plaintiffs' claim is bad in law.
- (9) It being common cause *ex facie* the plaintiffs' pleadings that a contract of sale was executed by the plaintiffs and second defendant as a result of the fraudulent misrepresentations of the second defendant with respect to her identity and the identity of the property, the plaintiffs were and are entitled to claim restitution in integrum and can only recover from the first defendant (assuming there is a basis therefor) if they are unable to recover the purchase price from the seller and only then would they have suffered a loss. *In casu*, the plaintiffs neither aver nor plead that they have been unable to recover from the second defendant. Without such an allegation the plaintiffs have suffered no loss and consequently the plaintiffs' claim against the first defendant is bad in law and should be struck out.
- (10) Plaintiffs seek payment of US\$48 518.50 against the defendants "jointly and severally with the one paying the other to be absolved". By reason of the fraudulent misrepresentation by the second defendant which the plaintiffs acknowledge in paragraph 17.1 of their Declaration, the first defendant cannot at law be a joint wrongdoer in the absence of any allegation that it acted in collusion with the second defendant in perpetrating the said fraud. Consequently, the plaintiffs' claim as against the first defendant is bad in law and should be struck out.

The contention by Mr *Madya* was that the excipient had disclosed all the information it had regarding the transactions and further that the plaintiffs were aware that the excipient was acting for a disclosed principal and that in the circumstances it was incumbent upon the plaintiffs to plead the basis upon which the excipient owed them, and not its principal, a duty of care.

Generally, negligence is defined as an absence of that degree of diligence which the law requires to be observed by everyone in the ordinary relation of life and may consist of acts of commissions or omissions. For an action based on negligence it is necessary for the plaintiff to prove patrimonial loss, provided the damages are not too remote. There will therefore be no damages sustained through negligence which may be considered too remote. The plaintiff must therefore allege and prove the causal connection between the negligent act and the damages suffered. An action will lie for damages based on negligent misstatements only if the defendant owed a duty of care in making the statement for example by reason of a contractual relationship between the parties. See *Herschel v Mrupe*. 1954 (3) SA 464 (A), *Bruce N O v Barman* 1963 (3) SA 21; *Hamman v Moolman* 1965 (4) SA 340 (A).

It is therefore trite that a plaintiff seeking relief under the Lex Aquilia is required to plead and prove wrongfulness on the part of the defendant. See *Barlow Rand Ltd v Lebos & Anor* 1985 (4) SA 341.

The averments on the alleged negligence of the parties to the transaction appear in paras 17 and 18 of the declaration which are worded as follows:

- “17. The first defendant was negligent in that it made representations to the plaintiffs to the effect that stand 780 Greystone Park was the same as stand 32 Winchcombe Road Greystone Park and that that particular stand was owned by the second defendant who was their principal, and that the stand was being sold by the second defendant. Further, the first defendant represented to the plaintiffs that it had verified the authenticity of the title deeds and that everything was proper and called upon the plaintiffs to repose trust in the first defendant.
- 17.1 The second defendant was negligent in that she signed the agreement of sale which knowing that she is not the real owner of stand 780 Greystone Park.
- 17.2 The third defendant was negligent in that it did not satisfy itself that the power of attorney to pass transfer was signed by the real owner of stand 780 Greystone Park and not the second defendant. Further, the third defendant was obliged to do a deeds search to establish whether the title deed presented by the second defendant was authentic.
18. As a result of the aforementioned negligence of the first, second and third defendants the plaintiffs parted with their money being the sum of US\$48 518-50 constituted of the purchase price and the transfer costs.”

A plaintiff must allege facts upon which wrongfulness can be inferred. Wrongfulness on the part of the defendant may then constitute the breach of a duty of care. The plaintiff must however allege the particular duty of care owed and the act or omission which is the basis of his cause of action. Where the plaintiff relies on the breach of a duty of care the plaintiff must set out the facts that could or should have been foreseen by the defendant. A plaintiff seeking relief based on the basis of negligence has an onus to establish that a *diligens paterfamilias* in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss and would take reasonable steps so as to guard against such an occurrence and that the defendant failed to take such steps.

The plaintiffs have not alleged that the excipient owed them a duty of care not to act negligently nor the facts upon which such duty of care was based on. It is correct as contented by Mr *Gumiro* that the relationship between an Estate Agent and its principal is *sui generis* and is distinguishable from the agency relationship as between principal and agent. He did not provide any authority for the need to distinguish between an ordinary agent and his principal and an estate and his principal. I did not hear him say however that the excipient was not acting for a named or disclosed principal. It is to that principal that the excipient was contractually bound, and in that sense to whom it owed a legal duty. An agent is contractually bound to protect the interests of his principal and it was incumbent upon the plaintiffs in their declaration to plead the basis upon which the agent of another party would have an obligation to protect their, the plaintiffs', interests in the absence of any relationship between the two. The plaintiffs have not laid a basis for the extension of this duty to themselves.

It would appear that after a realisation that the pleadings were wanting in some respect the plaintiffs found it necessary in the heads of argument to raise issues of alleged negligence on the part of the excipient, which allegations had been omitted in the declaration. It is argued in those heads that the excipient had made representations to the plaintiffs in a reckless manner without ascertaining the truth of those representations and that the reckless conduct on the part of the excipient amounted to negligence. The point is made that the excipient made representations to the plaintiffs that it had verified the said averments and requested the plaintiffs to repose their trust in it. It was concluded that the particulars of negligence were apparent *ex facie* the declaration. Counsel for the plaintiffs did not, however, point to the particular paragraphs of the declaration that exhibited the particulars of negligence he was referring to. Even if this court were persuaded to accept that the excipient had been negligent, negligent conduct on its own is not actionable. It is

only actionable where there is a positive act or an omission which causes damage to the person or property of another. Where the wrongfulness consists of omissions and for pure economic loss sustained as a result of negligent misconduct there must exist a legal duty not to cause such economic loss. There is no such duty pleaded on the part of the excipient.

It was further submitted on behalf of the excipient that the plaintiffs had pleaded allegations of fraud against the second defendant. It was therefore suggested that given the fact that the plaintiffs were aware that the second defendant had acted fraudulently in offering the stand for sale, in the absence of any averment in their declaration that the excipient was aware of the fraud, any claim against the excipient would be bad in law.

In fact, although the substance of the complaint against the second defendant is that she had negligently signed the agreement of sale knowing that she was not the real owner of the stand, the implication behind the averment is that second defendant had acted fraudulently. It was an act done intentionally to cause prejudice to the plaintiffs knowing fully well that she could not transfer rights to the would be purchasers of the stand. It cannot be negligence when one sells or disposes of an article which one knows full well does not belong to one.

By pleading as they have, the plaintiffs accept that the second defendant had deliberately set out to defraud them by purporting to be the owner of the stand in question. The plaintiffs' action against the second defendant is premised on fraud. There is no suggestion that the excipient was a party to the fraud. Whilst a principal is liable for the fraudulent misrepresentations of his agent an agent is not liable for the fraudulent misrepresentations of his principal. It seems that the plaintiffs, having accepted that they were defrauded by a person whose identity cannot be ascertained, have decided to cut their losses by replacing the fraudster with the excipient. Their argument is untenable.

It is also common cause that the second defendant committed identity fraud in that she obtained, from the office of the Registrar of Births and Deaths, documents in the name of Sekai Hove. It is the possession of these documents that facilitated and perfected the fraud committed by the second defendant. In point of fact she defrauded every one she dealt with in connection with the stand. In so far as the excipient, she misrepresented that the title deeds she presented in respect of the mandate she had given for the disposal of a the stand related to an undeveloped stand when in fact it was a stand with developments. The stand shown to the excipient was not the one described on the deed of transfer.

The contention by the excipient is that the plaintiffs in the claim allege that the excipient had a duty to ascertain that the person selling the stand was not an imposter. The possession of documents lawfully issued by the office of the Registrar is *prima facie* proof that the holder of those documents is in fact the person described in the documents. The plaintiffs have sought in the declaration to have the excipient found negligent for not having found out that the person it was dealing with was an imposter. Given the possession of seemingly authentic documents by the so-called seller it was incumbent upon the plaintiffs to plead the legal basis upon which they sought to have such a duty imposed on the excipient. They have not done so. The fraud was also committed against the Registrar and it stands to reason that it would be impossible for the plaintiffs to prove the existence of such a duty upon the excipient.

The plaintiffs as part of their claim have sought an order for *restitutio in intergrum* against the three defendants cited in the summons. The excipient has argued that they can only seek this order against the excipient if they are unable to recover from the seller. It is correct that they have not alleged that they are unable to recover from the seller. Consequently, the excipient is arguing their claim against it for restitution is bad in law and should be struck out. I think that the excipient is tying itself in knots. It is admitted between the parties that the second defendant committed identity fraud. She has been cited in the name that she fraudulently used to sell the stand. If the plaintiffs had been aware of her true identity it stands to reason that they would have cited her correctly in order to obtain judgment.

It is correct however that the plaintiffs have not alleged that they have been unable to recover from the seller. As such their claim for restitution against the excipient is bad at law. It is correct as submitted by the excipient that in the absence of an allegation by the plaintiffs that the former was aware of the fraud perpetrated by the second defendant or further that the excipient had participated in such fraud then the two cannot be joint wrong doers. The claim against the excipient on the basis that it should be found jointly liable with the second defendant is accordingly bad in law.

The excipient has asked this court to dismiss the plaintiffs' claim against it. I will not put the plaintiffs out of court merely due to bad pleading on the part of its legal practitioners. In argument it was conceded by the excipient's counsel that the heads of argument filed on behalf of the plaintiffs contained the essentials of negligence that should have been pleaded in the declaration. To dismiss the claim would be to conclude that the plaintiffs do not have a cause of action against the excipient. I cannot say whether or not they have one because the exception was

not taken on the basis of a lack of cause of action. It was predicated on pleadings that were vague and embarrassing. I am of the view that the plaintiffs are entitled to an opportunity to amend their pleadings to make the necessary averments.

In the premises I would uphold the exception. The plaintiffs are given leave to amend para 17 of their declaration in order to remove the offensive paragraphs complained about by the excipient. None of the parties addressed the court as to the time frame within which the amendment should be filed and I will consequently not seek to impose a time in the absence of argument. The plaintiffs are ordered to pay the costs of the exception.

Mhiribidi, Ngarava & Moyo, plaintiff's legal practitioners

Wintertons, 1st defendant's legal practitioners

Desai & Associates Legal Practitioners, 3rd defendant's legal practitioners