

ALEX MASIYA
and
ESTHER MASIYA
versus
RONALD TAKAWIRA SADOMBA
and
HIGH RISE DISTRIBUTORS (PRIVATE) LIMITED
(TRADING AS HIGH RISE REAL ESTATE)

HIGH COURT OF ZIMBABWE
MUTEMA J
HARARE, 28 and 29 November, 2011

Civil Trial

A Marara, for the plaintiffs
C Maunga, for the defendants

MUTEMA J: The plaintiffs are husband and wife respectively while the defendants are respectively employee and employer.

The plaintiffs are claiming payment by the defendants jointly and severally the sum of US\$21 593-00 being (what they termed) damages which they suffered owing to the defendants' breach of duty of care and misrepresentation in the sale of a piece of land called stand 249 Good Hope which turned out not to belong to the purported sellers introduced to them by the first defendant when payment for the property had already been effected into the second defendant's trust account. By the time the plaintiffs discovered the true position the purchase price of \$20 000-00 had already been paid to the purported sellers while \$373-00 had been paid to the City of Harare to process building plans for the intended house and \$1 220-00 had been paid as conveyancing fees.

The claim is being disputed.

The plaintiffs' case is premised on the evidence of the two spouses. The first plaintiff's evidence is this: he resides at 6421 Mboroma Street, Masvingo. He is employed by Harare Municipality. Around June/July, 2010 the first defendant flighted an advertisement in the paper for sale of a stand in Good Hope. He contacted the first defendant via the phone number given in the advertisement. He drove the first defendant to the stand. When he

expressed interest in the stand the first defendant proceeded to draft an agreement of sale. He was egged into signing that agreement by the first defendant in the absence of the seller whom he had not seen. He later enquired if the seller had signed the agreement and was advised that the seller had not come so the intended agreement was called off.

Then in July, 2010 the first defendant phoned him on a Friday asking if he was still interested in a stand in Good Hope. He said he was and on the Monday he went to the first defendant's office and together they went to view stand 249. He was interested in it so on the Sunday he took the second plaintiff to also view the stand in the absence of the first defendant. His wife liked it also. On Monday 16 August, 2010 he went with the second plaintiff to the second defendant's offices where they had an interview with the first defendant. They told the first defendant that they had read in the newspapers about people being conned hence they wanted to deal with a registered real estate agency. The first defendant assured them not to worry about being conned because he had 31 years in the real estate business. He then went on to draw up exh 1 – the agreement of sale. One of the terms in that agreement was that the purchase price must be paid into the second defendant's trust account before 17 August, 2010.

The first defendant produced a copy of the title deeds. He asked him where the original title deeds were and the first defendant told him not to worry since he was in the business and would not release the money to the sellers he named as Nelson Matinde and I Matinde before the sellers satisfied all the necessary requirements. The second plaintiff also queried the absence of the original deeds and the first defendant told her not to worry since they were dealing with professionals. On asking where the sellers were the first defendant said they were at a funeral but would come and sign exh 1. Based on the first defendant's age and his assurance that they were dealing with professionals, they then signed exh 1.

The first defendant gave them the second defendant's trust account number and they went to the bank and deposited the \$20 000-00 into that trust account. Upon return to the second defendant's office they were then issued with exh 2 – receipt of payment. The first defendant told them Mr and Mrs Matinde would come and sign. Later on the first defendant told him that Mr Matinde had signed exh 1 but the wife had not. He said not to worry for the sellers had gone to Gokwe but he knew their cousin so the wife would come and sign.

After Mrs Matinde had signed the agreement of sale he went to the first defendant and again asked for the original title deeds. This is what the first defendant told him: Nelson Matinde had told him that his wife had gone behind his back and had borrowed money from a

lawyer's trust fund account using the original deeds as collateral therefore the original deeds could not be released. The first defendant then asked him to write a letter authorising the second defendant to release some money to pay the sellers an advance which they would use to pay off \$4 500-00 to enable the release of the original title deeds by the lawyers in Marondera. He refused to write such a letter. While there someone who said he was Mr Matinde phoned him asking him to write the letter so that the transaction would be speeded up. He told the person that he would not do such a thing.

On 24 August, 2010 he had paid for transfer fees to Mtombeni, Mkwesha and Muzawazi legal practitioners. In September, 2010 he went there and queried with Mr Msengezi why there was delay in the transfer. He was asked to top up the money with \$80-00 which he paid to make a total of \$1 040-00 – exh 3. The conveyancers said were still waiting for the original deeds to be sent to them by the second defendant.

In October, 2010 a certain detective inspector Majaya invited him to his office. The police officer advised him that he had been swindled because Nelson and I Matinde do not exist. He had taken the first defendant in following a report of a certain stand whose title deeds had disappeared from some lawyers and on checking same lawyers the title deeds for stand 249 had also been discovered missing. He further said the purported sellers' given addresses were false, the given phone numbers were unreachable and the identity cards were forged.

In October, 2010 Mr Msengezi advised him that they had got the title deeds from the second defendant but transfer could not go through as the property had a caveat and there was need to verify authenticity of the Matindes. When he contacted the first defendant to explain the mystery the first defendant said he was sorry for he was also duped.

The second plaintiff's evidence is substantially corroborative of the first plaintiff's. After her evidence the plaintiffs closed their case.

For the defendants, only one witness, viz the first defendant gave evidence. It is to the following effect:

He is authorised to represent the second defendant via a company resolution – exh 9. He is employed by the second defendant as a property consultant. He has been a property consultant for twenty years but has been with the second defendant from 2003. His duties are to advertise for sale properties brought by clients or to advertise for properties which clients would have asked them to scout for. Where a client expresses an intention to purchase an

available property they convey the intention to the seller and if the parties reach an agreement he proceeds to draft an agreement of sale.

He knows both plaintiffs in this case. He dealt with the first plaintiff on a first sale of a Good Hope stand which failed to consummate. Regarding the second stand he had advertised for and Mr Matinde responded and showed him the stand 249 in Good Hope. He asked Matinde to prove he was the owner of the stand in question. He produced a copy of the title deeds and identified himself by producing his plastic national identity card. The particulars on the two documents tallied.

He later contacted the first plaintiff who came and he went and showed him the stand and he said he would buy it. He communicated with the seller and gave him the first plaintiff's offer which he accepted. He then proceeded to draft exh 1 – the agreement of sale after having checked with the Deeds Office that there was no caveat on the property. The conditions in exh 1 were given by the seller who said was in need of money for his development project so once all the conveyancing documents were signed the cash should be released to him.

The plaintiffs read through the agreement and never objected to the condition and they signed it. In order to protect the plaintiffs' interests he photocopied the sellers' identity cards (which were later taken by the police for their investigations).

The purchasers' declarations were signed in his office and he witnessed for them. The sellers' transfer documents were signed at Mtombeni's offices. The money was only released to the sellers after the necessary transfer documents had been signed and the original title deeds had been produced. The transfer documents were signed on 18 August, 2010, the first release of the money was on 14 September, 2010 viz the \$1700-00 needed for release of the original title deeds acknowledged via exh 10 – and the rest of the money was released on 28 September, 2010.

He confirmed that the first plaintiff phoned him expressing worry concerning the delay in the release of the original title deeds. The first plaintiff also told him Matinde had phoned him asking for release of the \$1700-00 so that the original deeds could be released. He told the first plaintiff that Matinde had also phoned him telling him that he had phoned the first plaintiff. This was on the phone and the first plaintiff said to him, "I cannot write but since it is that amount which is going to be subtracted from the purchase price, you can go ahead and do it."

He told the court that in terms of clause (a) of exh 1, it was not necessary to delay release of the purchase price until 14 September, 2010 or seek purchasers' leave since the clause had already been satisfied. The production of the original title deed was not a condition for release of the money in terms of exh 1. He only realised that the transfer could not go through when the police came to him saying there was a problem with the sale. Mtombeni had lodged the transfer documents with the Deeds Office and had told him that there was a problem with the property. He was adamant that he performed his brief regarding the sale of the property in the normal manner in the way he was supposed to do. He concluded by saying that he was duped and so were the conveyancers and Zimra. The defendants then closed their case.

The joint pre-trial conference minute reflects three issues, viz:

1. Whether or not the defendants are liable to the plaintiff in the sum claimed at all.
2. Whether or not the property had a caveat at the time the agreement was signed.
3. Whether or not the defendants breached a duty of care towards the plaintiff.

I consider that issues 1 and 3 above are interwoven in that once the defendants are found to have owed the plaintiffs a duty of care which they negligently breached, then it follows that they are liable in the sum claimed. As regards issue 2, it became common cause during the hearing that the property in question was not encumbered by way of a caveat at the relevant time. Exhibit 8 puts paid to the issue. This is a letter dated 31 January 2011 from the Chief Registrar of Deeds Office confirming the same.

The main plank of the defendants' defence is that they breached no duty of care because they followed the standard practice of requesting a copy of the title deed which they used to ascertain the identity of the sellers gleaned from their national identity cards and did a deeds search and found no caveat placed on the property. They then prepared the agreement of sale – exh 1 which allowed them to release the purchase price less capital gains tax and estate agent's commission to the sellers upon the sellers signing the necessary transfer documents. That the plaintiffs should have been availed with the original title deeds is not only not a pre-requisite but is not a term of the agreement of sale.

The last averment that the issue of original title deeds is not contained in exh 1 prodded counsel for the plaintiffs to invoke his knack for the poetic by opening his written closing submissions with a quote from William Shakespeare's *The Merchant of Venice*, Act 4 Scene 1 at p 169 which reads:

“Portia: Have by some surgeon Shylock, on your charge,
To stop his wounds, lest he do bleed to death.

Shylock: Is it so nominated in the bond?

Portia: It is not so expressed, but what of that?
‘Twere good you do so much for charity.

Shylock: I cannot find it, ‘tis not in the bond.”

The position of the law regarding duty of care has been developed over generations. In *Halliwell v Johannesburg Municipality* 1912 AD 659 at 672, INNES ACJ said:

“... where in consequence of some positive act, a duty is created to do some other act or exercise some special care so as to avoid injuries to others, then the person concerned is, under Roman-Dutch law liable for damages caused to those whom he owes such duty by an omission to discharge it.”

Some eleven years later in *Cape Town Municipality v Paine* 1923 AD 207 (followed in *Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia Ltd* 1972 (1) RLR 56 @ 74) INNES CJ at pp 216 – 217 held that:

“It has repeatedly been laid down in this court that accountability for an intentioned injury depends upon *culpa*, - the failure to observe that degree of care which a reasonable man would have observed. I use the term reasonable man to denote the *diligens paterfamilias* of Roman law, - the average prudent person. Every man has a right not to be injured in his person or property by the negligence of another, - and that involves a duty on each to exercise due and reasonable care. The question whether, in any given situation, a reasonable man would have foreseen the likelihood of harm and governed his conduct accordingly, is one to be decided in each case upon the consideration of all the circumstances. Once it is clear that the danger would have been foreseen and guarded against by the *diligens paterfamilias*, the duty to take care is established ... But as pointed out in *Transvaal Estates v Golding and Farmer v Robinson GM Co* (1917 AD 18 and p 501) there is an advantage at adhering to the general principle of the Aquilian law and in determining the existence or non-existence of *culpa* by applying the test of a reasonable man’s judgment to the facts of each case.”

On the question of negligence, in the case of *Peri-Urban Areas Health Board v Munarin* 1965 (3) SA 367 (A) at 373, HOLMES JA had this to say:

“Negligence is the breach of a duty of care. In general, the law allows me to mind my own business. Thus if I happen to see someone else’s child about to drown in a pool, ordinarily I do not owe a legal duty to anyone to try to save it. But sometimes the law requires me to be my brother’s keeper ... I owe him such a duty if a *diligens paterfamilias*, that notional epitome of reasonable prudence, in the position in which I am in, would;

- (a) Foresee the possibility of harm occurring to him; and
- (b) Take steps to guard against its occurrence.

Foreseeability of harm to a person, whether he be a specific individual or one of a category, is usually not a difficult question, but when ought I to guard against it? It depends upon the circumstances in each particular case.”

But in *S v Burger* 1975 (4) SA 877 the same judge said:

“One does not expect of a *diligens paterfamilias* any extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or trained reflexes of a racing driver. In short a *diligens paterfamilias* treads life’s pathway with moderation and prudent common sense.”

I find either quote not detracting from the other.

And in England, on the concept of duty of care, LORD WILBERFORCE in *Anns & Ors v London Borough of Merton* (1977) 2 ALL ER 492 (HL) at 498 observed as follows:

“Through the trilogy of cases in this House, *Donoghue v Stevenson* [1932] All ER 1, *Hedley Byrne & Co. Ltd v Heller & Partners Ltd* (1963) 2 All ER 575 and *Home Office v Dorset Yacht Co. Ltd* (1970) 2 All ER 294, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. Firstly, one has to ask whether, as between the alleged wrongdoer and the person who has suffered damages there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative or reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.”

In resolving the issue agreed upon at the pre-trial conference stated above, this court can afford to elaborate it and pose the following question(s):

In the real estate industry, can an estate agent or property consultant/negotiator be held liable for negligently breaching a duty of care which occasions financial loss to purchasers to whom he had made assurances that they would not be defrauded by the prospective seller; and can a real estate agency be held vicariously liable for the negligence of its property consultant even where vicarious liability had not been pleaded in the pleadings?

In endeavouring to answer the foregoing, sight should not be lost of the defendants’ main plank of their defence, which, although they did not specifically mention it, hinges at the doctrine of *caveat subscripto* since the plaintiffs appended their signatures on exh 1

whose clause (a) allowed release of the purchase price to the sellers once the necessary transfer documents had been signed.

Also, should our courts remain subservient to the John Austin positivist theory of jurisprudence or take a leaf from the salutary words of GUBBAY ACJ (as he then was) in the case of *Zimnat Insurance Company Limited v Chawanda* 1990 (2) ZRR 143 (SC) at 153 where he said:

“Law in a developing country cannot afford to remain static. It must undoubtedly be stable, for otherwise reliance upon it would be rendered impossible. But at the same time if the law is to be a living force it must be dynamic and accommodating to change. It must adopt itself to fluid economic and social norms and values and to altering views of justice. If it fails to respond to these needs and is not based on human necessities and experience of the actual affairs of men rather than on philosophical notions, it will one day be cast off by the people because it will cease to serve any useful purpose. Therefore the law must be constantly on the move, vigilant and flexible to current economic and social conditions.”

What was laid bare before the court, which is either common cause or found proven is the following:

The first defendant is employed by the second defendant; his dealings with the plaintiffs were done during the course and scope of his employment and was advancing the interests of the second defendant. The first defendant earned an agent’s commission which went into the coffers of the second defendant. At no stage in the pleadings did the second defendant put the issue of vicarious liability into question save to simply plead that “ad prayer: the defendants deny being liable to the plaintiffs in the sum claimed or at all and puts (sic) the plaintiffs to the strict proof thereof.” In the event, it is idle for the second defendant to now want to put vicarious liability in issue on the flimsy argument that the legal principle was never pleaded in the summons and declaration. It goes without quarrel that if the second defendant is found liable in *casu* its liability will be grounded on the basis of vicarious liability.

Also common cause or found proved is that the plaintiffs told the first defendant that they had heard of many prospective property buyers being defrauded by con people hence they had come to entrust their money in the hands of professionals/ registered estate agents. The first defendant assured them that he was a professional who had been in the business for a long time and that their money would be safe. In other words, the first defendant assured the plaintiffs that he would protect their interests. He therefore owed the plaintiffs a duty of care.

I say so because as between the defendants and the plaintiffs, there was created a sufficient relationship of proximity such that in the reasonable contemplation of the former, negligence/carelessness on their part might be likely to cause damage to the latter. Every person has a right not to be injured in their property by the negligence of another. The transaction in the instant case took place at a time when the real estate industry was awash with prospective innocent purchasers being conned of their hard earned money by fraudsters who thrived on the innocence or gullibility of the former. Where therefore a purchaser entrusts his/her money to a professional estate agency/property consultant who assures him/her that the money would be safe, a duty of care is thereby established. If the estate agency negligently breaches the duty of care so created, it must be held liable in damages for the ensuing harm where a *diligens paterfamilias* would have foreseen the danger and guarded against it.

In the case at hand, to hold that because in clause (a) of exh 1 the plaintiffs authorised the defendants to release the purchase price once the sellers had signed the relevant transfer documents, the defendants are not liable for the loss would not only be too simplistic and positivist, but the law would have dismally failed to do justice to the citizenry whom it is supposed to protect. It would also amount to glorifying fraud or con artistry.

The first defendant owed the plaintiffs a duty to take reasonable care not to cause the latter financial loss by carelessly inserting clause (a) in exh 1 when the standard practice in conformity with the actions of a *diligens paterfamilias* in the field of real estate is releasing the cash against transfer, not against mere signing of the necessary transfer papers. The duty of care here was made even more weighty if account is had of the numerous similar frauds perpetrated via the same *culpa* by estate agencies. When the fly by night sellers in *casu* proposed to the first defendant to insert clause (a) as he alleged happened, and not having even produced the original title deeds the first defendant should have been put on his guard and should have reasonably foreseen the likelihood of loss being occasioned to the plaintiffs if the purchase price were released before the actual transfer of the stand had gone through. A property consultant with 22 years experience in the field He now wants to lamely hide behind that clause when he owed the plaintiffs a duty of care to professionally alert them that the clause (a) in question was fraught with this danger.

Apart from failing to draft an agreement of sale with a safety valve of paying out the cash against transfer, the first defendant accepted a photocopy of the title deeds, he proceeded to draft exh 1 without having seen the other seller Ivy Matinde or her identity document, the

plaintiffs demanded to see the original title deed but same was not availed to them, he inexplicably failed to “reck” when on 16 August, 2010 “Nelson Matinde” told him that the original title deeds were at home with “Ivy” who was attending a funeral (in fact under cross-examination, the first defendant gave two conflicting versions, viz that he asked and was told Ivy had the original deed and that he never asked about it), on 17 August, 2010 Ivy came to sign exh 1 and no explanation is given as to why she did not bring the original deeds, and on the same date both sellers came and signed exh 6 – the power of attorney to pass transfer at the first defendant’s office and no explanation is given about absence of the original deeds. Again on 18 August, 2010 both sellers came and signed exh 7 declaration by the seller and a week later, it is when the first defendant says Nelson told him that the original deeds had been pledged by his wife as security. The first defendant did not alert the plaintiffs to all this. He accepted the purchase price on 16 August, 2010 well before Ivy Matinde the second seller had signed the agreement of sale and before he had verified her identity particulars. This was certainly gross negligence on his part. He advised the first plaintiff to pay conveyancers fees before the sellers had produced the original title deeds, when the first plaintiff complained about the delay in being shown the original title deeds, the first defendant assured him all will be well. The first plaintiff was phoned by Nelson to write a letter authorising release of \$4 500-00 from the purchase price to be used to redeem the original deeds but he refused – the first defendant was told about this but he went on to release \$1 700-00 for that purpose without advising the plaintiffs. The first plaintiff demanded his money back but the first defendant would not see reason but continued to promise to deliver him to the land of Canaan. The \$1 700-00 was released to one P Majoni – exh 10 but his other particulars were not recorded, the first defendant relying simply on the fact that he was Nelson Matinde’s cousin.

Under cross-examination I formed the impression from his demeanour and conflicting versions that the first defendant is a person not to be relied upon despite his advanced age. He said it was not necessary to let the parties meet one another because everything was done normally. He later surprised even himself when he averred that the plaintiffs did meet the sellers for when asked “where?” he zipped his mouth. He said the sellers could not meet the plaintiffs because the former signed exh(s) 6 and 7 at Mtombeni’s offices while the latter signed exh 5 – their declaration at his offices. He later reneged saying all the parties signed these documents at his offices but he could not give a plausible explanation why he failed to arrange that they meet. All he could say was that it was not a pre-requisite that they should

meet. "It was not in the Bond." But now he is saddled with the singular task of identifying the tricksters as per his letter to the State Agents Council exh 11. He also averred that he held onto the purchase price despite clause (a) of exh 1 having been satisfied because he was protecting the plaintiffs' interest by insisting on production of the original deeds yet he went on to release \$1 700-00 of it without having been furnished with the deeds. He could not explain why he did it save to lie that the first plaintiff had so authorised him.

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 negotiator/consultant can be held liable for negligently breaching a duty of care which occasions financial loss to a client and a real estate agency can be held vicariously liable for the negligence of its property negotiator or estate agent even where vicarious liability has not been pleaded in the pleadings provided that it is proved that the agent/negotiator was acting within the course and scope of his/her employment.

In the instant case I find for the plaintiffs but para (c) of the prayer in the summons and declaration, viz of collection commission must be expunged therefrom on the authority of *Scotfin Ltd v Ngomahuru Ex Parte Law Society of Zimbabwe: In Re: Scotfin Ltd v Ngomahuru* 1998 (3) SA 466 (ZH).

In the result judgment is entered for the plaintiffs as follows:

- (a) Payment by the defendants jointly and severally, the one paying the other to be absolved in the sum of US\$21 593-00;
- (b) Interest at the rate of 5% per annum on the above amount from the date of summons to date of full payment; and
- (c) Costs of suit on an attorney and client scale.

Matsikidze & Muccheche, plaintiff's legal practitioners
Maunga, Maanda & Associates, defendants' legal practitioners