

NELSON NGUNDU
versus
JOCKSTAR INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 27-29 June & 19 October 2016

Civil Trial

N.B Munyuru, for the plaintiff
G Machingambi, for the defendant

TSANGA J: In this matter the plaintiff Mr Nelson Ngundu, seeks specific performance in terms of an agreement of sale executed with the defendant, Jockstar Investments (Private) Limited, (Jockstar). The property is described in the agreement of sale as Stand No. 2658 Zizalisali Rd, Lot 4, held under Deed of Transfer 1406/2003. It measures 2210 square metres. It was bought by Mr Ngundu from the developer, Jockstar, through an agent called Nispen Properties as represented by its director, one Mr Owen Musandiriri who had placed an advertisement in the paper. He failed to deliver \$7000.00 to Jockstar, being the remainder of the purchase price of US\$ 17 000, which Mr Ngundu says he paid. Nispen Properties has since closed shop and its Director is nowhere to be found. The gravamen of this matter which this court is asked to make a finding on, in order to deal with the ramifications of failure to transmit, is whether Nispen Properties acted as the agent of the purchaser or the seller in the sale process.

The dispute is characterised by a claim and counterclaim with the following issues having been referred to trial. As regards the claim in convention the issues are:

- a) Whether or not the plaintiff paid the full purchase price of US\$ 17 000.00 to the Defendant.
- b) Whether or not Nispen Properties was the agent of the Defendant or the Plaintiff
- c) Whether or not the plaintiff is entitled to an order for specific performance in respect of Stand Number 2658 Zizalisari Lot 4 or alternatively payments of the current market value of the property together with interest at the prescribed rate.
- d) Who should pay costs of suit and on what scale.

As regards the claim in reconvention two issues call for resolution:

- a) Whether the plaintiff breached the sale agreement between the parties by failing to pay the full purchase price despite demand.
- b) Whether the defendant is entitled to an order cancelling the sale agreement between the parties together with a tender of the refund of the deposit paid by the plaintiff.

The evidence of the parties

Mr Ngundu's evidence in chief was that on the 1st of June 2011, he saw the property through a newspaper advert placed by a company called Nispen Properties. The property was being advertised for US\$17 000. He responded to the advert by going to Nispen Properties whom he said had printed a contract of sale between him and Jockstar. However, it did not contain figures. He paid \$11 000 into Nispen Properties' trust account. Of this amount \$10 000.00 was for the deposit and \$1000.00 was for administration fees. It is not in dispute that the deposit he paid was duly transmitted to Jockstar and that thereafter an agreement between Jockstar and Mr Ngundu was also subsequently signed following this payment. Although he signed the agreement, Mr Ngundu did not himself go to Jockstar. It was Nispen Properties through Mr Musandiriri who went in his stead. In terms of the agreement of sale, once the deposit had been paid, the balance was to be paid in instalments over a stipulated period as follows:

1. \$2 234 on the 17th of July 2011
2. \$2 234 on the 17th of August 2011
3. \$2 234 on the 17th of September 2011

He had also subsequently paid the balance of the purchase price to Nispen Properties. Whilst Mr Ngundu said that in total he had paid a sum of \$18 000.00, he acknowledged that he had not stuck to the stipulated payment schedule and that his last payment was made on the 23rd of December 2011. He produced receipts evidencing payment to Nispen properties of the balance of the purchase price as follows:

| | |
|----------------------------|------------|
| 17 th June 2011 | \$1 100.00 |
| 14 July 2011 | \$1 170.00 |
| 16 August 2011 | \$1 100.00 |
| 6 September 2011 | \$1 200.00 |
| 17 October 2011 | \$1 170.00 |
| 22 November 2011 | \$1 000.00 |
| 14 December 2011 | \$ 700.00 |

23 December 2011 \$ 660.00

He acknowledged that the payments were out of time but said that he took refuge in the clause that penalised late payments which he said he was confident would kick in. In terms of the relevant clause, 10% per annum would be levied for such late payments. He also said that at the time, Nispen Properties had indicated that they were not sure when the stands would be serviced.

He said he had not gotten any letters cancelling the agreement and that in terms of clause 9.2, all written correspondence was supposed to have been mailed or hand-delivered to him at his address, which was house No. 2876 Wadyegora Crescent in Ruwa. His claim, he said, was therefore essentially based on the fact that he paid the full purchase price through Nispen Properties as the seller's agent who had the mandate to sell the property.

He acknowledged in cross examination that whilst he had proof that he had paid Nispen Properties the balance of \$ 7000.00 he had no proof that the latter had transmitted the balance of the purchase price to Jockstar. In response to the question whether the \$1000.00 had been a charge for finding him property to buy, his firm position was that the property was already there and had been advertised in the Herald and as such it could not be argued that the agent had to find him property to buy. In further response to the enquiry whether Nispen Properties, through its representative, would be coming to give evidence, Mr Ngundu said that he had discovered that they had since closed shop and were nowhere to be found. Additionally, when he had failed to find Nispen Properties, he had gone to Jockstar who had insisted that he pay the \$7000.00 as this had not been transferred to them. He also confirmed in cross examination that he had sold the property to Josiah and Fungayi Chakanyeka sometime in 2012 and that what he was seeking was for the property to be transferred to him to enable him to further transfer to the Chakanyekas. He also emphasised that after Nispen Properties had received his initial deposit of \$10 000.00, he had no reason to suspect that they would not get the remainder of the purchase price through Nispen Properties, who, in his view, were the seller's agents.

Mr Antony T Parehwa gave evidence on behalf of the defendant. The core of his evidence was that Mr Musandiriri of Nispen Properties had come to Jockstar and indicated that he had a purchaser for a stand. He had agreed to him bringing the cash and it was on that basis that an agreement of sale had been prepared as well as an acknowledgement of receipt of the cash deposit. Contrary to Mr Ngundu's evidence who said that the agreement had been

drawn up at Nispen properties, Mr Parehwa stressed that it had been drawn up at Jockstar after the deposit had been paid as they would not have processed an agreement before then. What is common cause is that the agreement with Jockstar had been signed by the parties after the deposit was paid.

The form acknowledging receipt of cash had also been produced by Jockstar and had been signed by Mr Musandiriri as purchaser's representative whilst Mr Parehwa had signed on behalf of Jockstar. He also stated that he knew Mr Musandiriri as a former employee of Pride Real Estate, an agency of Jockstar that had exclusive agency to sell its stands. He said that at the time Mr Musandiriri came to him, he had left about a year earlier to start his own agency, Nispen Properties. Given the fact that Jockstar is a developer, he said that it was common for people to come with knowledge that stands were being sold and equally common for such purchasers to come through various fora. Furthermore, given the fact that Mr Musandiriri had previously worked for Pride Real Estate, he said he would have been privy to the fact that stands were being sold. Pride Real Estate who were the sole agents were also said to have been flighting adverts at the time.

His main point was that the fact that Mr Ngundu had come through Nispen Properties did not make the latter Jockstar's agent. He stressed that at no time had Nispen Properties been appointed as its agent, nor had it ever received a mandate to advertise the stand. He highlighted that the advertisement in any event had not been specific to their stand and that in no way could it be linked to Jockstar.

Among a myriad of properties in the advertisement of 1 June 2011 that appeared under Nispen Properties, the stand in question was simply described as follows:

"Mt Pleasant Heights
\$17 000|
2015 sqm, servicing is in progress
terms acceptable."

The payment of the \$1000.00 as administrative fee was said to be a private agreement between Nispen Properties and Mr Ngundu. He said that if there had been an agreement with Nispen Properties to act as Jockstar's agent, then the common practice would have been to pay a commission, which is generally 5% of the purchase price. He was therefore adamant that Nispen had come to them as purchaser's representative.

He additionally said that in terms of the agreement, the balance of the purchase price was to be paid to Jockstar. This, however, was by implication as it was not specifically stated as such in the agreement.

When the balance of the purchase price remained unpaid, he said three letters had been dispatched to Nispen Properties. His explanation as to why the letters of demand had gone to Nispen Properties instead of directly to Mr Ngundu was that since the initial deposit had come through Nispen Properties, he had surmised that the purchaser would continue to act through this agent in paying the balance. He stressed that he was only seeing the receipts in court for the first time of the payment of the balance of the purchase price by Mr Ngundu through Nispen Properties as he had concluded that this had not been paid since there had never been any response to the letters of demand that were sent to them. His evidence was that the letters had been initialled as received by an official at Nispen Properties. He was emphatic that at no time had Jockstar ever received any communication from Nispen Properties regarding the progress of the sale.

With Mr Ngundu having since sold the property to Josiah and Fungayi Chakanyeka, Mr Parehwa produced an agreement of sale which he said had been brought to Jockstar by the purchasers to confirm whether or not they were indeed the registered purchasers of the property. He revealed that the agreement of sale which bore Jockstar's name was in fact a fake agreement of sale which had been prepared by Nispen Properties. Jockstar itself had never at any time entered into an agreement of sale with the Chakanyekas and neither had it ever signed any such agreement. He further highlighted that in any event the sale of the property by Mr Ngundu would not have been possible without the written approval from Jockstar as captured in clause 6.6 of the agreement. He also told the court in cross examination that a development fee of \$6 500.00 had not been paid by Mr Ngundu and that it was no longer necessary to pay because the contract with him had lapsed.

He told the court that as a counterclaim, Jockstar was averring breach of contract and offering to refund Mr Ngundu the \$10 000.00 he had paid. Since he had not paid the full purchase price they were equally seeking cancellation of the contract.

He was challenged in cross examination regarding the failure to send any reminder to the *domicilium citandi et executandi* that had been captured in the agreement of sale. He was also challenged on the fact that the letters sent to Nispen Properties following up on the payment were simply initialled by way of acknowledgement of receipt, thereby making it difficult to ascertain for a fact that they had been received since additionally there was no

stamp by Nispen Properties acknowledging receipt. His response was that under the circumstances of the sale, it had been reasonable to assume that Nispen Properties was purchaser's agent and that in any event the letters had been served in accordance with normal business practice.

Mr Josiah Chakanyeka also gave evidence on behalf of the defendant. He stated that sometime in February 2012 he and his wife had come across the stand in question being advertised by Elite Real Estate Agents. The seller was Mr Ngundu. It had emerged that the property needed to be ceded by Jockstar to Mr Ngundu. A visit to Jockstar had revealed that the property should not have been sold as it was under dispute. However, according to Mr Chakanyeka, the lawyer handling the sale on behalf of Elite and the seller had arranged for the cession which they said would be done through Nispen Properties. It was in this context that Nispen Properties had produced the disputed agreement with Jockstar consenting to a cession which had turned out to be a fraud. It also emerged from his evidence that the Chakanyeka's have a pending matter before the courts in which they taken Mr Ngundu to court for failure to transfer.

The legal submissions

The plaintiff's legal argument is premised on the general position that an agent generally acts on behalf of a seller and not the buyer. Against this backdrop, Mr *Munyuru* argued that Nispen Properties, acting as the agent of the seller, was the cause of the sale between the Mr Ngundu and Jockstar. He emphasised that an individual is the seller's agent if his efforts result in a sale. The cases of *Aida Real Estate Limited*¹ and *Doyle v Gibbon*² were cited for this contention. Reliance was also placed on specific performance, arguing as plaintiff did that he performed fully his side of the bargain. It was argued that the plaintiff having fulfilled his side of the bargain, the defendant Jockstar, has a contractual duty to effect transfer. This court was referred to the cases of *Farmers Co-op Society (Reg) v Berry*³; *Lasagne Investments (Pvt) Ltd & Ors v Hughdon Investments (Pvt) Ltd & Ors*⁴ in support of the thrust on specific performance where a party has fulfilled its end of the bargain. Plaintiff's counsel also argued that the defendant had failed to prove that he was in default since the

¹ *Aida Real Estate Limited v Lipschitz* 1971 (3) SA 871 (WLD);

² *Doyle v Gibbon* 1919 TPD 220

³ *Farmers Co-op Society (Reg) v Berry* 1912 AD 343 at 350;

⁴ *Lasagne Investments (Pvt) Ltd & Ors v Hughdon Investments (Pvt) Ltd & Ors* 2010 (1) ZLR 296 (H)

letters had not been served at the agreed address for service. He also argued that the plaintiff is justified to costs on a higher scale because the facts speak to such costs.

The defendant's counsel on the other hand argued that the onus was on the plaintiff to prove agency since it is the plaintiff who has based his claim on the allegation that he dealt with Nispen Properties as the agent of Jockstar. *Nyamambi v Ncube*⁵ and *High Court Sheriff v Kwekwe Consolidated Mines (Pvt) Ltd*⁶ were cited by Mr *Machingambi* in support of its position on onus.

Defendant's counsel relied on the definition of an agent as follows:

“A relationship which allows a principal to authorise somebody to carry out duties on his behalf”.⁷

Mr *Machingambi* argued that there was no evidence that Nispen Properties was expressly appointed to act on behalf of the defendant whether orally or in writing and neither was there any agency implied by conduct⁸. In particular he emphasised that Jockstar was not even aware that Nispen had put up an advert to attract a purchaser. He also argued that agency could not be inferred from the mere fact that that Mr Musandiriri once worked for Pride Estate Agent. He emphasised that agency is a creature of common law and that its existence depends not on labels, but on the factual circumstances. He also highlighted that the authorities cited by plaintiff's counsel on the cause of the sale misleading in that in reality they sought to address the question of when an appointed agent will be entitled to earn a commission from a principal. This observation on the thrust of the cases cited by Mr *Munyuru* is correct. They are indeed distinguishable from the facts in this matter.

He emphasised that an agent must have been given a mandate, which was not the case here whether in writing or verbally. He observed that *in casu* Nispen Properties sought its payment from the buyer, Mr Ngundu, and not from the seller, Jockstar. He denied that Mr Ngundu is entitled to specific performance since he did not pay Jockstar in full. He further argued that specific performance would in any event not have been due since the defendant had not finished servicing the stands. He emphasised that having failed to pay in full, the plaintiff at best was only entitled to a refund of the initial deposit of \$10 000.00.

⁵ *Nyamambi v Ncube* HB 82/15

⁶ *High Court Sheriff v Kwekwe Consolidated Mines (Pvt) Ltd* HH 39/15

⁷ The definition is said to be extracted from West Encyclopaedia of America law 2nd edition

⁸ *Monzali v Smith* 1929 AD 382

Whether Nispen was the agent of the defendant or the plaintiff

RH Christie⁹ defines agency as a contract where by one person engages another to act for him and to enter into contractual relationships that are binding between that person and third parties. Addressing directly the question of agency in transactions involving real estate, one author JM Grohman¹⁰ opines that the existence of agency is a question of fact unless such facts can be interpreted in only one way. Three elements in particular, are said to create an agency relationship in real estate transactions:¹¹

- 1) A principal's manifestation of the intent that the agent shall act for him. This may be either by written or spoken words or by conduct whereby the agent so acting has reason to believe that has been granted authority.
- 2) The agent must accept the responsibility although no specific words are necessary for such acceptance
- 3) The principal has the right to control the venture or direction in which the business is going. In other words, it is the principal who controls the cooperative effort of the transaction.

Materially, the onus is on the party who alleges agency to prove this as a fact. (See *Ministry of Agriculture and land affairs & Anor v De Klerk & Ors*¹². Herein, it is indeed the plaintiff who asserts that Nispen Properties was the agent of Jockstar, the seller. It is therefore the plaintiff who must prove this for a fact.

There was certainly no evidence placed before this court to suggest that the inclusion of the property in the advert was at the behest of the seller, neither was there any evidence placed before the court to suggest that the seller and the agent had a relationship regarding the property in question. The fact that the agent had previously been employed by Pride Real Estate which belongs to the sellers is not sufficient cause to impute an agency relationship. All it did in the courts view, was to give context to the overall surrounding circumstances under which Nispen Properties through Mr Musandiriri, may have gotten to know that property was on the market. He obviously maintained his contacts who had ears to the ground.

It follows that if in the initial instance the seller did not manifest any intention that the agent should act for him whether by written or spoken words, or by way of conduct, there can

⁹ R.H Christie *Business in law in Zimbabwe (Juta & Co) 1998 at p326*

¹⁰ Joseph M Grohman " *Reassessment of selling real estate Broker's Agency relationship with the Purchaser* St John's Law Review 1986-1987 at p 567

¹¹ Grohman *supra* at p 567-568.

¹² *Ministry of Agriculture and land affairs & Anor v De Klerk & Ors 2014 (1) SA 212 at p 223*

be no question of acceptance of any such conduct. There is also no evidence in my view that the seller sought to control the process of the cooperative effort. Given that the purchaser was not present when the agent presented his offer to the seller, materially the receipt which was generated by Jockstar regarding the payment of the deposit was signed by Mr Musandiriri of Nispen Properties on the purchaser's behalf as his "representative". I am also inclined to believe Mr Parehwa regarding the simultaneous processing of the agreement by Jockstar with the deposit in light of the fact that the evidence revealed that Nispen had later faked an agreement of sale between Jockstar and the Chakanyekas. If indeed Nispen Properties printed an agreement at its offices in Mr Ngundu's presence, it was of its own doing.

Generally, as argued by defendant's counsel, in real estate transactions where a broker has been commissioned by the seller, it would be the seller who would pay the commission. Such payment may be regarded as a strong indicator of an agency relationship. However, the payment of commission by a seller is in itself not pivotal as an agent can factually still turn out to have been a purchaser's agent when the total circumstances of a case are examined. In an article assessing the relationship between the estate broker and purchaser, Brett L Hopper observes as follows regarding the issue of payment of commission by a seller.

"Although the commission payment by the seller strongly evidences that the broker is the seller's agent, this factor is likewise inconclusive. Some courts have found the broker to represent the purchaser even though the broker was in fact paid by the seller"¹³

This was indeed the case in *Smit v Botha*¹⁴ where the court found as much even though the seller had paid the commission. The bottom line is that the argument by defendant's counsel that if Nispen Properties was its agent, Jockstar would have paid commission, therefore does not take us anyway. Much depends on the circumstances of each case.

In any event what is manifestly striking is that it is the purchaser who paid the agent \$1000.00 as the administration fee in facilitating the purchase. The *indicia* in this instance, applying the same agency elements to the purchaser, is of a purchaser / agency relationship arising not just from the payment of the administration fee but from the overall conduct of the parties in the transaction as a whole. This is not to say there was an express contractual agency relationship with the purchaser but rather that it was implied from the conduct of both

¹³ Brett L Hopper *The Selling Real Estate Broker and the Purchaser: Assessing the Relationship* Brigham Young University Law Review 1992 at p 1142

¹⁴ *Smit v Botha* 1976 (4) SA 885 (A)

parties. The buyer in particular continued to pay the balance of the purchase price through the agent whilst the agent continued to receive the payments.

The agreement itself between Jockstar and Mr Ngundu did not in any way incorporate Nispen Properties as the agent acting on behalf of the seller regarding the payment of the deposit nor the balance of the purchase price. Manifestly, it was the purchaser's choice to continue channelling the sale through the agent because, as he said, he trusted him as a result of the fact that he had conveyed his deposit without drama. The seller and purchaser each had specific identities revealed when the agreement was signed and the deposit paid. There is nothing in the document that would remotely suggest that the agent was the sellers. It therefore matters not in my view, that Mr Ngundu finally paid to the agent the balance that was due. What is critical is that it was not paid to the seller.

Whether purchase price was paid in full or whether there was breach

The factual circumstances point to the reality that Nispen Properties acted on behalf of the purchaser. The important point is that Nispen Properties having failed to transmit the balance owing, the purchaser remained at all times in default of payment of the balance of the purchase price. He was liable for the unpaid amount as the agent was his and not the sellers. He remains in default and cannot claim specific performance on the grounds that he has fulfilled his side of the bargain.

Whether the defendant is entitled to an order cancelling the sale agreement

The issue was raised that there was no effective cancellation of the agreement by the seller as the notice of cancellation was not served in accordance with the agreement. The agreement of sale did address fully how notices were to be served. Where an agreement provides for the process to be followed by the parties in written communication with each, then it is obviously important for the stipulated process to be observed as it avoids the situation where the other party alleges that they have not received the communication. Notices intended for the other party were supposed to be sent by registered mail or hand delivered to the address that had been set out in the agreement. Mr Ngundu's address as the purchaser, was set out as 2876 Wadyegora Crescent, Ruwa whilst Jockstar's address as the seller, was set out as 2nd Floor Travel Plaza, Corner Mazowe and Chinamano St, Harare. Delivery by Jockstar of notices to pay and notice to cancel to Nispen Properties on the assumption that they were the purchaser's agent, was certainly not in accordance with the agreement.

But even if this is the case, I do not think that it places the purchaser's claim on any firmer footing in relation to the seller. Once the agreement of sale had been signed, he too knew where the seller could be contacted physically. As already observed, there was nothing in the agreement that said he should pay the balance to Nispen Properties. To the extent that the balance was not paid he was in default. Additionally, the development fee was never paid. Mr Ngundu has also sold the property illegally through a forged agreement prepared by Nispen. Mr Parehwa confirmed that the stand itself is no longer available as Jockstar had disposed of it on the basis that the agreement had been violated and that the balance of the purchase price remained unpaid. Confirmation of cancellation is in order.

Each party seeks costs in a higher scale against the other. In neither instance are such costs justified. This is a case in my view where each party should pay its own costs. The misappropriation of funds by Nispen Properties could have been unearthed much sooner if the notice for the payment of the balance had gone to the address as stated in the agreement. On the other hand, the plaintiff was not only in default of payment terms but the balance remains owing. A reading of the agreement by the purchaser would have revealed that nowhere at all was Nispen Properties to act on the sellers behalf for the payment of the balance or at all.

Jockstar in its counter claim has offered to tender back the \$10 000.00 paid by Mr Ngundu as deposit. This is fair under the circumstances.

Accordingly it be and is hereby ordered that:

1. Plaintiff's claim for the delivery by the defendant of stand Number 2658 Zizalisari Lot 4, held under deed of transfer 1406/2003 and measuring approximately 2210 square metres or alternatively for the payment by the defendant of the equivalent value of the stand is dismissed.
2. The Agreement of sale concluded with the plaintiff over the certain piece of property called stand 2658 Zizalisari Lot 4, measuring approximately 2210 square metres is cancelled.
3. The defendant shall repay the plaintiff the sum of \$10 000.00 within 14 days of this order.
4. Each party to pay their own costs.

Mvingi, Mugadza, plaintiff's legal practitioners
G Machingambi, defendant's legal practitioners