

GUEST AND TURNER REAL ESTATES (PVT) LTD
and
HAZEL STOKES

HIGH COURT OF ZIMBABWE
CHITAKUNYE & NDEWERE JJ
HARARE, 30 June 2015 and 26 October 2016

Civil Appeal

J B Wood, for the appellant
T. Hove, for the respondent

CHITAKUNYE J. This is an appeal against the whole judgment of the Magistrate sitting at Harare in which respondent's claim was granted as per summons. The appellant seeks the setting aside of the judgment by the court *a quo* and its substitution with an order dismissing the respondent's claim with costs.

Background

Sometime in 2006 or early 2007 appellant entered into a property management agreement with respondent. The appellant being a property management company was tasked with managing respondent's two properties namely No. 6 Roseberry Place Avondale, Harare and No. 103 Newbury Court, Baines Avenue, Harare.

The appellant as a property Management agency was to among other things:

1. Ensure that the property would always be kept in good conditions as it was
2. Ensure that rentals would be paid in time
3. Ensure that all utility bills and levies were paid on time.

The appellant duly secured tenants for the two properties.

Later property no. 6 Rosebury Place Avondale, Harare was sold and appellant deducted some levies in the sum of US\$ 1 862.00 and ZESA bills in the sum of US\$692.00. This did not augur well with respondent as she felt these should have been met by the tenant had appellant done its management job well.

On property no. 103 Newbury Court, the respondent alleged that the property was damaged by the tenant and had appellant done its work well such tenant should have met the costs for repairs.

The respondent thus sued appellant seeking to be paid the US\$1 862.00, US\$692.00 and repair costs as damages. Respondent alleged that the relationship between appellant and respondent was one of agency and the appellant should bear the costs of all damages the respondent suffered as a result of the appellant's negligence or incompetence in carrying out its duties.

The appellant contested the claim. It denied any negligence or incompetence in the performance of its duties.

After a contested trial the trial magistrate found for the respondent. The trial magistrate held that appellant failed to carry out its mandate resulting in the respondent suffering the damages alluded to in respect of the two properties.

Being dissatisfied with the court *a quo*'s decision appellant has appealed to this court.

The grounds of appeal were couched as follows:

1. The learned magistrate erred in finding that the appellant was liable for the one tenant's failure to pay levies and electricity charges;
2. The learned magistrate erred in finding that the appellant was liable for damage caused by the respondent's other tenant to her property.
3. The learned magistrate erred in finding that the appellant breached its contract with the respondent.
4. The learned magistrate erred in finding that the appellant had a duty of care towards the respondent to ensure that her tenants paid levies and electricity charges.
5. The learned magistrate erred in finding that the appellant had a duty of care towards the respondent to prevent her tenants from damaging her property.
6. The learned magistrate misdirected herself in not having due regard to the requirements for imposing a duty of care on an agent and the requirement for an agent to be held liable for a breach of that duty.
7. The learned magistrate erred in finding that the appellant was liable to the respondent for unpaid bills which had been left by the respondent's one tenant.

It is trite law that an appellant court does not lightly interfere with the exercise of judicial discretion by the lower court. The lower court having heard the evidence is better placed to determine on issues of credibility and findings of fact, it is for this reason that an

appellate court has limited grounds on which to interfere with trial courts findings of fact see
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The test was also reiterated in *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) @ 670C-D where the following is stated:

“The general rule of law, as regards irrationality, is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion.”

It is common cause that the relationship between appellant and respondent was of agent and principal. It is in that light that after hearing evidence the trial magistrate ruled that appellant had failed to perform its mandate as agent resulting in respondent suffering damages.

The relations between the principal and agent are governed by the terms of the contract between them. In this relationship each has their own obligations.

The agent’s obligations include that he must perform the act or acts entrusted to him by his principal I – personally; ii – in accordance with his express or implied instructions; iii- with reasonable care, skill and diligence; iv- with utmost good faith; v- he must render an account to his principal, and vi- he must deliver to him all the proceeds of the mandate.

In Wille’s *Principles of South African Law* 8th ed. At p 599 -600 the author states thus:

“An agent must act in accordance with, and within the limits of, the authority conferred upon him by his principal, whether such be express or implied. If an agent either negligently or fraudulently fails to perform his obligations, or performs them improperly, and thereby causes loss to his principal, he is liable to him in damages; he is also liable if he causes loss to his principal while acting within his ostensible authority, but in excess of instructions privately given to him by his principal.

The agent must carry out his instructions with due care and diligence. The standard of care is the normal one of a reasonable and prudent man in the circumstances of the case. Where the performance of the mandate requires special knowledge, skill or qualifications the agent, by undertaking to carry out the mandate, impliedly warrants that he has the requisite knowledge, skill and qualifications.”

The principal’s obligations include that he must pay the agent his proper remuneration or commission as agreed.

In casu, the agreement between the parties was for appellant to manage the respondent’s two properties. Whether the agreement was in writing or not was not clear. Respondent believed the contract was in writing and appellant had retained all the copies of the written agreement whilst appellant’s witness said it was a verbal contract.

The issue before the magistrate was whether appellant had acted negligently or incompetently resulting in respondent suffering damages/loss. As alluded to the trial magistrate found for respondent. In this appeal the question is: given the evidence tendered, did the trial magistrate err in coming to the decision as he did.

From the evidence adduced in court it would appear that the magistrate was restricted to oral evidence and general principles of agency as no written agreement was tendered from which the specific obligations of each party as agreed could be ascertained.

The respondent gave evidence on the agreement she entered into with appellant as requiring the appellant:

1. To look for suitable lessees for the two properties. In the process it was appellant's responsibility to do a due diligence and take all necessary particulars of lessees;
2. To carry out periodic inspections of the two properties and report back to respondent of any damages that would have occurred.
3. To periodically check and ensure that all utility bills pertaining to the two properties were up to date. In the event of any complications appellant was to report to respondent as its principal;

Generally appellant was to manage the properties and account to the principal.

In return for this appellant was to take its commission. It was respondent's evidence that when property no. 6 Roseberry was sold appellant deducted money for unpaid utility bills and levies from the purchase price which bills and levies ought to have been paid by the tenant who had been in occupation of the property. The appellant failed in its duty to ensure the tenant paid and did not report such failure to respondent.

As regards property No.103 Newbury Court, respondent's evidence was to the effect that damages were occasioned to the property by tenants and appellant did not carry out periodic inspection to the property to ensure such damages were attended to by the tenant. As a result of appellant's negligence or incompetence in attending to its duties respondent incurred costs in repairing the damaged property,

According to respondent the agreement with appellant was entered into in about 2006 or early 2007. In about 2009/2010 No. 6 Roseberry was sold. The sale was finalised in 2011. She later took away the other property from appellant due to appellant's apparent failure to perform in terms of the agreement. She also alluded to the fact that in 2011 she had approached appellant and complained about the issues in question. She had then been promised that appellant would attend to the issues. This was to no avail.

Faced with the respondent's *viva voce* evidence appellant called one witness, Edwisch Kambanje. A major handicap noted with this witness is that he was not the one who had entered into the contract with respondent on behalf of appellant. In fact he was not employed by appellant during the tenancy of the agreement. According to this witness, he joined appellant in 2013 and so was never party to the agreement. At the most the witness could have been of some relevance had he tendered documents relevant to the contract.

This witness' inadequacies were exposed under cross examination when the following exchange took place at page 23 of the record:

"Q. Are you employed by Guest and Turner?

A. Yes

Q. When did you join it?

A. 2013

Q. Are you aware of the specific terms of contract between plaintiff and defendant?

A. Some of them

Q. What do you say that by the time I joined we were managing?

A. 103 Newbury

Q. When the contract was entered you were not there?

A. Yes

Q. In a way you do not know anything about the specifics in respect of the contract?

A. I do not know anything."

The witness appeared to be testifying on the general terms involved in the management of properties. In that regard he confirmed that the mandate included collecting rentals and management of utility bills and inspection of the property.

In as far as the witness had no records of the appellant having carried out its mandate diligently, he could not rebut respondent's evidence on the terms of the contract and the fact that appellant during 2006 to 2011 did not competently carry out its mandate. He could not, for instance, confirm with certainty that appellant carried out periodic inspections of the properties for the period prior to his joining appellant. He equally could not with conviction confirm the steps appellant took to ensure that utility bills and levies were paid by the tenants. These are the core issues in respondent's case.

I am of the view that the appellant's evidence was highly inadequate to show that it had indeed carried out its mandate diligently. The respondent's evidence remained largely unchallenged regarding events before appellant's witness joined appellant.

The appellant's counsel argued that the appellant as agent could not be held liable for the unpaid levies and bills as these were for the lessor. That in my view was missing the point. The issue was on whether appellant had carried out its duties in terms of the mandate or not. The aspect of the sums respondent had to pay for the levies, utility bills and repair

costs were a consequence of appellant's failure in its mandate. The sums were thus just the measure of damages respondent suffered as a result of appellant's breach of the contract. The respondent's contention that had appellant carried out its duties well the levies, utility bills and costs of repairs would have been paid for by the tenants was not disputed. At page 26 of the record Edwisch confirmed as much when asked by respondent's legal practitioner that:

"Q. So it was your responsibility that tenant pays rentals and bills?

A. It is correct

Q. Did you carry out that?

A. We tried our best but did not."

If therefore appellant did not carry out its responsibility why should it not be held liable for the consequences that befell respondent? I conclude that the trial magistrate did not err in finding appellant liable. Appellant did not perform its mandate in a manner expected of a property management agent.

In the circumstances the trial magistrate did not err in believing respondent's version as against appellant's version' I thus find that the trial magistrate did not misdirect himself in any of the aspects alleged. The findings of fact cannot be overturned as it was supported by the credible evidence adduced.

Accordingly the appeal be and is hereby dismissed with costs.

NDEWERE J agrees

Dhlakama B. Attorneys, appellant's legal practitioners
Hove Legal Practice, respondent's legal practitioners.