BOTHWELL MUWALO
versus
FAIRVEST REAL ESTATE

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 5, 6 July and 26 September 2007

Civil Trial

J Mambara, for the plaintiff
Advocate *H Zhou*, for the defendant

GOWORA J: The plaintiff filed summons with this court on 4 October 2006 against the defendant claiming the following relief:

a) $15 000 000 being damages for the failure to execute its mandate resulting in the loss of Stand No 5609 New St Mary's Township Chitungwiza.

b) interest on $15 000 000 from the date of judgment to the date of full payment.

c) costs of suit.

The claim by the plaintiff arises out of an agreement concluded between the parties in terms of which the defendant was given a mandate to sell the plaintiff's house in Chitungwiza afore-mentioned. The house was sold by the defendant but the plaintiff in its claim avers that he had specifically instructed the defendant to secure the deposit on the purchase price at the time of signing the agreement, with the balance being payable on or before the 3rd August 2005. Further, the plaintiff avers, the purchase price was to be paid immediately to the plaintiff on both those dates. The plaintiff avers that an agreement of sale was signed but he did not receive the money paid by the purchaser as he had stipulated in his agreement with the defendant. He was subsequently taken to

court by the purchaser for an order for specific performance and an order was granted against him. As a result the plaintiff lost his stand. He avers that the defendant failed to exercise care of a diligent and prudent person and consequently failed to execute its mandate. Thus he claimed damages for the loss he suffered. On the morning of the trial the plaintiff applied to amend his claim to $ 600 million. The defendant did not oppose the application which was granted by consent.

Evidence for the plaintiff was adduced from three witnesses including the plaintiff himself and, at the close of his case the defendant applied for an order of absolution from the instance. The parties elected to file written submissions and I am indebted to counsel for their assistance therein.

The first issue taken by Mr *Zhou* relates to the manner in which the claim was reflected in the summons and in the declaration. In the summons the plaintiff claimed the sum of $15 000 000 being damages for failing to execute its mandate resulting in the loss of stand 5609 New St Mary's Chitungwiza. In the prayer to the declaration the plaintiff claims the sum of $15 000 000 being replacement value of the stand in question. The defendant on the other hand contends that the matter should be determined on the merits and that therefore the application for absolution from the instance should be dismissed.

The test for determining an application such as this was stated by GUBBAY CJ in *United Air Charters v Jarman*[1] as follows:

> "The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such an application if, at the close of his case, there is evidence upon which a court, directing its mind reasonably to such evidence, could or might (not should) find for him. See *Supreme Service Station 1969 (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A) at 5D-E.; *Lourenco v Raja Dry Cleaners & Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 151 (S) at 158B-E."

The import of an application for absolution from the instance at the close of the plaintiff's case is meant to protect a defendant from assisting a plaintiff prove a claim if such plaintiff has not adduced sufficient evidence as would

[1] 1994 (2) ZLR 341 (S) at p 343B

convince a court to consider whether there was sufficient evidence on which a reasonable man might find for the plaintiff. Equally a defendant who has a case to answer should not be allowed to escape giving evidence in answer to the claim where there is evidence adduced on which a court acting reasonably might find for the plaintiff. The position therefore is that at this stage of the enquiry the court in order to determine the application is confined to the evidence and pleadings filed on behalf of the plaintiff.

The plaintiff adduced evidence from three witnesses, the plaintiff himself, one Cain Sibanda who is the person who purchased the immovable property thus giving rise to these proceedings and a registered estate agent Robson Mapfunde. I will deal first with the evidence of the plaintiff and Sibanda.

The pertinent issues to be extracted from their evidence is related to the dates when the contract was signed, the date when the addendum was signed, what was the price for the property when it was advertised and when the price was increased. It is also pertinent from their evidence to extract the date when the plaintiff cancelled the agreement with the purchaser, if he did so.

The evidence of the plaintiff was that he had signed the agreement of sale on 21 July 2005 and that is the day he was introduced to the purchaser. Sibanda on the other hand told this court that the agreement and the addendum thereto were signed by both parties on 5 September 2005. He said that when he went to pay for the purchase price as advertised, $230 million, the property negotiator had telephoned the seller who indicated that the price had been increased to $ 250 million. He was advised that the seller was not in the country. He had paid the $230 million on 19 July but had paid the balance sometime in August. It was only then that he was allowed to sign the agreement of sale. The balance of $20 million on the total sum of $270 million was paid by 29 September 2005. When he signed the agreement he left but as he went away he heard the seller asking for his money. The seller was told that a requisition would be made for a cheque to be issued. He had had no further dealings with the seller with the exception of a phone call he received from the seller asking if he had paid the purchase price in full. The seller had indicated that he had not been paid any of the money by the

defendant. The witness denied suggestions that the seller had told him that he was canceling the sale. He confirmed that he had sued the seller for specific performance of the agreement of sale and had obtained an order from this court.

The question as to whether or not the agreement had been cancelled was determined by the court that dealt with the application for specific performance and is therefore not before me except as background to this claim. In cross-examination the plaintiff admitted that he had not cancelled the agreement but had told the defendant that he wanted it cancelled. In the event, it is clear that the claim is not premised on a cancellation of the agreement. He however avers that he was not paid the purchase price after the agreement was signed as provided for in the said agreement. The stance taken by the plaintiff is that he was to be given his money as soon as the agreement was signed by the parties.

The property was sold by an estate agent and therefore all monies paid were deposited with the agent. The purchaser, Cain Sibanda said he thought that the agent would safe guard his money until after cession but thought that the plaintiff would be given the deposit. It is not clear what he meant by that evidence. His evidence however did not assist the plaintiff in showing that the money was to be released to him following upon the signing of the agreement of sale. I accept that he heard the plaintiff asking for the purchase price to be released to him but I did not understand him to say that in terms of the agreement the purchase price was to be released to the plaintiff once the agreement had been signed. I have been invited by Mr *Zhou* to look at the agreement in order to discern what was within the contemplation of the parties when the agreement was concluded.

Clause 1 of the agreement provides for payment of the purchase price in two installments, an initial payment of $230 million on the signing of the agreement and the balance of $20 million before 3rd August 2005. However, the property was sold for $270 million and in terms of the addendum the additional $20 million provided for in the addendum was payable on or before 5th October 2005. When one has regard to the provisions in the main agreement and in the addendum, the version given by Sibanda is more plausible than that of the

plaintiff. It is, in my view, safe to conclude that the two agreements were executed on the same day which is the only way in which the price of the property could have been increased from $250 million to $270 million. It defies logic that a purchaser having signed an agreement for the purchase of an immovable property and having paid the bulk of the price would agree to sign an addendum more than two months later for an increase in the price of such property. None of the clauses referred to provide for the payment of the price to the plaintiff immediately upon receipt of the same by the estate agent. Clause 6(a) of the General Conditions in pint of fact would seem to suggest that payment other than as provided for in clause 1 of the agreement. It does not however provide for immediate surrender of the purchase price to the plaintiff upon its receipt by the defendant. Taking into account the contradictory nature of the evidence adduced by Sibanda, the plaintiff has not placed any evidence before as would show that he was entitled to be paid his money for the house immediately it was paid to the defendant.

The evidence of Robson Mapfunde, was to the following effect. He deposed that he is a registered estate agent. He was called to give evidence on the replacement value of the plaintiff's house. He said that a standard structure is a solid house with a lounge, three bedrooms, a kitchen, toilet and shower. It had to be fenced and gated. He said that such a solid structure in about October 2006 would have been valued at about $14 million or $15 million. He said that by May this year this same structure would be worth anything between $1,3 billion or $1,4 billion. On the date of trial he said the value would be about $1,450 billion. He has never seen the house in question. He has no idea of its state, exact location dimensions and special features. All he knows is that the house is located in New St Mary's according to the information given to him by either the plaintiff or his legal practitioner.

With all these negatives, it is surprising that he took to the stand to give a value on a house he had never laid eyes. It is especially reprehensible that the legal practitioner saw fit to call him to give evidence in such circumstances when his evidence was to prove the damages or loss suffered by the plaintiff. His

evidence has no probative value as no damage has been established by the plaintiff.

At the end of the day in so far as the plaintiff's claim goes, I do not have evidence to show that the defendant should have released the purchase price to him before cession was effected. I also even if I were in error on the above finding, do not have evidence as to the specific amount that the plaintiff has suffered by way of damages. In any event, in so far as the claim has been pleaded it is difficult to decide whether the claim for damages arises out of failure by the defendant to pay the money to the plaintiff upon its receipt or whether it is due to the failure on the part of the defendant to cancel the agreement when so instructed by the plaintiff. Either way, it is not important, as there is insufficient evidence before as would persuade me to conclude that I might grant judgment in plaintiff's favour. In my view, this is a proper case for a finding of absolution from the instance in the defendant's favour. The defendant is consequently awarded the costs of trial.

In the result I order that the defendant is granted absolution from the instance with the plaintiff paying the defendant's costs of suit.

J Mambara & Partners, legal practitioners for the plaintiff.
Kanokanga & Partners, legal practitioners for the defendant.