

WILLARD NHAU MTEMERERWA
and
PREVIOUS BEAUTY MTEMERERWA
versus
MARIA TAWARWISA
and
THE REGISTRAR OF DEEDS N.O.

HIGH COURT OF ZIMBABWE
KAMOCHA J
HARARE 15 June and 22 September 2004

Opposed Court Application

Mr *Jari*, for the applicants
Mr *Mantsebo*, for the 1st respondent
No appearance from 2nd respondent

KAMOCHA J: The applicants who are husband and wife sought for an order in the following terms:

“It is ordered that:

1. The respondent should sign all the necessary papers to enable registration of title within seven (7) days of the date of service of this order on them, failing which the Deputy Sheriff be and is hereby authorised to sign all the necessary transfer documents and papers on their behalf.
2. The respondent should pay costs of application.”

The applicants were based in Riyadh, United Arab Emirates but they wanted to buy a property, back home, known as 703 Moffat Heights, Avenues, Harare. By special power of attorney they appointed a Mr Hamadziripi Gwaendepi Msipa to conduct all transactions relating to the purchase of the property. The special power of attorney read in part:-

“That I

Do hereby nominate and appoint Hamadziripi Gwaendepi Msipa To be my General Attorney and agent for managing and transacting all my affairs, involving The Purchase of an Undivided 1,786% share being share No. 51 In certain Piece of Land Situate In The District f Salisbury Called LOT 1 of Stand 1721 Salisbury.”

The applicants executed their special powers of attorney in Riyadh on 30 October, 2002.

It is not clear from the papers filed of record whether or not Hamadziripi represented the applicants when the agreement of sale was signed by the respondent on 18 June 2002. Be that as it may the parties appeared to have agreed that the applicants purchase the property from the respondent for four million dollars. In terms of the agreement the full purchase price of \$4 000 000-00 was to be payable by the purchaser to the seller's conveyancers against registration of transfer. Thereafter the seller would be obliged to tender transfer of the property within seven (7) days of the date upon which the purchaser fulfils his obligation.

In the event of the purchasers wanting to make payment through the agent clause 10 of the agreement stipulated that any payment made to the agent must only be made to the office cashier in the offices of Alexander Court Estate Agents against issue of a formal company receipt. The applicants paid \$1 587 000-00 on 20 June 2002 and \$5 625 000 on 1 July 2002 through the agent and were issued with an acknowledgement of receipt which were in the following form -

"Acknowledgement of Receipt

DATE 20/06/2002

I Ronald Muchaka on behalf of Maria Kudakwashe Tavarwisa hereby confirm receipt of cash totaling \$1,587 000-00 (one million five hundred and eighty seven thousand dollars) from Willard Nhau and Precious Beauty Mtemererwa being part payment towards the purchase of Flat No. 703 Moffat Heights, Avenues, Harare."

The acknowledgement in respect of the balance of \$5 625 000-00 paid on 1 July, 2002 is worded in the same manner. Both of them were signed by the agent of the respondent and witnessed by two people.

The agreement of sale which the seller signed on 18 June 2002 was not signed by the purchasers for quite sometime. They still had not signed it on 4 July 2004 when the respondent called upon her agent Mr Machaka to ensure that the purchasers signed the agreement without any further delay as the unsigned one was of no use to her.

According to the respondent the agreement remained still unsigned up to 9 August 2004 when she decided to cancel it. The respondent said the applicants failed to sign the agreement that was the reason why she decided to cancel it.

The applicants, in their founding affidavit had averred that they had in fact signed it on 18 June 2002. That of course, was not true. The applicants conceded in their answering affidavit that they did not sign the agreement on 18 June 2002 as suggested in the founding affidavit. They in fact do not know when they signed it. They did not give any date. They simply say it was signed on the occasion they were back in the country but failed to say when that was. They submitted that it must have been before the respondent cancelled it. This submission does not assist the applicants at all as they do not recall when it was signed. The respondent, on the other hand, is clear on that point. She said it remained unsigned until she called it off on 9 August 2002. It, therefore, follows that since the agreement was unsigned by the applicants at the time it was called off no contract had come into fruition at that stage.

The respondent further stated that she had not even received any money as alleged by the applicants. Since the applicants claimed to have paid through the agent formal company receipts should have been issued to them. The acknowledgments of receipt cannot be said to have been company receipts of Alexander Court Estate Agents. The agent was clearly in breach of clause 10 of the agreement.

The respondent also pointed out that Hamadziripi had no mandate to institute proceedings to obtain transfer. The power of

attorney quoted above does not authorise him to do so. It was further submitted that a power of attorney is a document which is strictly construed and must be carefully drawn. More so, where the power of attorney is meant to authorise litigation, it must be particular as to the nature of the action to be instituted as well as the relief to be instituted as well as the relief to be claimed. There is merit in the respondent's submissions. Herbstein and Van Winsen 4th edition in their book entitled *The Civil Practice of the Superior Courts of South Africa* at page 233 state that "Authority to demand transfer does not include authority to institute legal proceedings to obtain transfer on behalf of the principal."

In *Ashley vs S.A. Prudential Ltd* 1929 (1) TPD 283 at 285 TINDALL J had this to say -

"But, in my opinion, where the authority is stated to be "to demand and receive the title deeds relating to such transfer" it cannot be said that bringing legal proceedings to obtain the title deeds is a necessary or usual means of executing the authority to "demand and receive". The institution and prosecution of legal proceedings is an important step which may involve the principal in great expense and I see no justification for holding that where a principal authorises an agent to demand and receive a thing, the principal must be taken to have intended to include the authority to bring and prosecute legal proceedings. There is no reason for construing the word "demand" in a sense other than its ordinary sense which is well understood and means "claim" in other words an extrajudicial demand."

In *casu* the power of attorney nominated and appointed the agent for managing and transacting all the principal's affairs involving the purchase of the property. There would be no justification for construing it to have authorised him to bring and prosecute legal proceedings. He had no mandate to do that.

In the light of the above findings this application must fail and is hereby dismissed with costs.

Wintertons, applicants' legal practitioners.

Mantsebo & Partners, first respondent's legal practitioners.