

PHIGIDEMAC CONSULTANTS (PVT) LTD
versus
ZVIMBA RURAL DISTRICT COUNCIL

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 24 September and 14 October 2003,
30 July and 24 November 2004

Mr *Fitches*, for the plaintiff
Mr *A.M. Gijima*, for the defendant

Civil Trial

UCHENA J: On the 9th January 2001 the plaintiff wrote to the defendant inviting it to do business with it. On the 10th January 2002 the defendant wrote to the plaintiff inviting it to value its properties.

On the 12th January 2002 the plaintiff wrote to the defendant accepting the offer and requested for transport, indicating that its fee was 5% of the total value of the properties to be valued.

The defendant provided the plaintiff with transport from Kadoma to its properties on a daily basis until the work was completed.

The plaintiff prepared its valuation report and presented it to the defendant. The defendant did not respond. The plaintiff send a reminder to which the defendant responded by complaining that the plaintiffs valuation was inflated and that if the plaintiff wished it could sale the properties at those values on behalf of the defendant.

The plaintiff subsequently send a letter of demand and finally issued summons claiming \$18 557 550.00 being 5% of the total valuation of the defendants properties. The defendant did not concede. It raised the following further defences:-

1. That Mr Jonasi had no authority to contract on behalf of the defendant.
2. That the plaintiff was not qualified to do the valuations.

3. That Mr Chakwenya who prepared the report for plaintiff did not take part in the valuations and was not a qualified Estate Agent.
5. That the contract was illegal in view of the provisions of section 48(1) (b) of the Estate Agents Act [*Chapter 27:05*] hereinafter referred to as the Act.

The issues to be decided by the court are:-

- (1) Whether the parties entered into a binding contract.
- (2) Whether the contract was tainted with illegality
- (3) Whether the amount claimed is permissible in terms of the Estate Agents Act and
- (4) Whether Mr Chakwenya was qualified to do valuations and participated in the valuation of defendants properties.

I will first determine the issues based on law and then if necessary determine the factual issues.

THE CONTRACT

A contract becomes binding when the parties minds meet on the terms of the contract. In this case the plaintiff and the defendant clearly agreed on the properties to be valued and the contract price. Defendant took plaintiff to each of the properties in its own motor vehicles, the plaintiff's staff being led by the defendant's staff.

The plaintiff performed his part of the contract. The defendant should therefore in the absence of a valid defence also perform its part of the contract. The defendant alleges that the agreement never came into existence or is unenforceable as it is tainted with illegality for the following reasons:-

- (a) That Mr Jonasi had no authority to contract on behalf of the defendant.

- (b) That plaintiff not being a registered estate agent contravened section 48(1) of the Estate Agents Act [*Chapter 27:05*] and therefore the court cannot enforce an illegal contract.
- (c) That the plaintiff's fee of 5% of the total valuation is not permissible in terms of Estate Agents Act.

If the plaintiff's conduct is proved to fall under any of (b) or (c) above then the contract would be unenforceable because of illegality.

MR JONASI'S AUTHORITY

The plaintiff alleged Mr Jonasi as acting chief executive officer had authority to act on behalf of the defendant. The defendant on the other hand submitted that Mr Jonasi had no authority to contract on its behalf because council never passed a resolution enabling him to act on its behalf.

The parties dispute on this aspect can be resolved by an examination of section 79(3) of the Rural District Councils Act [*Chapter 29:13*] which provides as follows:-.

"Before a council enters into a contract for:-

- (a) the execution for the council of any work which involves the payment by the council of an amount exceeding such sum as may be prescribed; or
- (b) the supply to council of any goods or material which supply is likely to involve payment by the council of an amount exceeding any financial year such sum as may be prescribed or
- (c) the sale of any property of the council, the council shall call for tenders by notice posted at the office of the council and advertised in two issues of a newspaper.

Provided that:

- (i) In the case of a proposed contract for a sale of any property of the council, the council may:
 - (a) resolve to dispense with tenders; and
 - (b) sell the property concerned by public auction or private treaty
- (ii) this subsection shall not apply to
 - (a)
 - (b)

- (c)
- (d)
- (e)
- (f) Any contract entered into by the council for the provision of professional service. (emphasis added)

This section clearly requires that council should pass a resolution before certain contracts are entered into. It however clearly excludes contracts for professional services from that requirement. This means Mr A. Jonasi had authority to contract for the defendant without a resolution of council authorizing him to do so, as the contract between the parties is for the provision of professional services.

THE ALLEGED ILLEGALITIES

It is trite that the courts will not enforce an illegal contract. The defendant alleges that the plaintiff contravened section 48(1) of the Estate Agents Act. Section 48(1) and (3) provides as follows:-

- “48(1) subject to this Act; no person shall
- (a) practice or carry on business as an estate agent, or describe himself or allow himself to be described or hold himself out to be an estate agent unless he is registered, or
 - (b) in the case of a company or partnership, practice or carry on business as an estate agent under any personal names which is not the name of a registered estate agent who is or was a principal, assistant or working partner of the company or partnership concerned.
- (2)
- (3) A person who is convicted of contravening sub section (1) or (2) shall be liable to a fine not exceeding one thousand dollars or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment....” (emphasis added)

In terms of section 48(1)(b) no company which is not registered as an Estate agent can practice or carry on business as an Estate agent under any

personal name which is not the name of a registered estate agent who is or was a principal, assistant or working partner of the company or partnership concerned.

In this case Mr Chikovero who is plaintiffs managing director is not a registered estate agent. Plaintiff does not within itself have a registered estate agent. It used a consultant one Mr Chakwenya. It is clear from Mr Chikovero's evidence that Mr Chakwenya is not an officer of the plaintiff. In the absence of any other explanation the plaintiff therefore contravened section 48(1)(b) of the Estate Agents Act.

The plaintiffs counsel submitted that the plaintiff did not contravene section 48 because the definition of "practice as an estate agent" as given in section 2 of the Act is subject to section 52.

Section 2(2) of the Estate Agents Act provides as follows:-

"2(2) For the purposes of this Act - practice as an estate agent subject to section fifty two, means the doing for payment or reward of any of the following acts-

- (a) In connection with the sale or proposed sale of immovable property belonging to another person -
 - (i) the bringing together or taking of steps to bring together the parties to the sale or proposed sale.
 - (ii) The negotiating of the terms of the sale or proposed sale.
 - (iii) Acting as auctioneer in connection with the sale or proposed sale.
- (b) The valuing for any purpose of immovable property or any part thereof.
- (c) The assessing of the rental value of immovable property or any part thereof." (emphasis added)

In the present case the plaintiff clearly valued the defendant's immovable property for payment or reward.

If plaintiff is not covered by section 52(3) then its actions fall under the definition of practicing as an estate agent.

Section 52(3) provides as follows:-

"For the purposes of this Act the following persons shall not be regarded as practicing or carrying on business as an estate agent whilst doing any act referred to in paragraph (b) or (c) of the definition of "practice as an estate agent" in subsection (2) of section two-

- (a) an architect registered in terms of the Architects Act [*Chapter 27:01*] in the course of his practice as such:
- (b) a member of the quantity surveyors Division of the Royal Institute of Chartered Surveyors or the Zimbabwe Institute of Quantity Surveyors in the course of his practice as such." (emphasis added)

My understanding of section 52(3)(b) which the plaintiff's counsel relied on is that the Chartered Surveyor or Quantity Surveyor is excluded from the definition in section 2(2) if he acts in the course of his practice as such. In the present case Mr Chakwenya was not acting in the course of his practice but was acting as a consultant to the plaintiff. The question which this court has to answer is whether Mr Chakwenya was acting in the course of his practice as a quantity surveyor.

This question can be answered by referring to section 2 of the Quantity Surveyors Act [*Chapter 27:13*] which defines the work of a quantity surveyor.

Section 2 of the Quantity Surveyors Act provides as follows:-

"Work of a quantity surveyor" includes:-

- (a) Preparing bills of quantities from drawings for new buildings for purposes of calling for tenders or for negotiating a building or civil engineering contract.
- (b) Administering contracts based on bills of quantities in all matters of cost preparing and issuing statements for interim payment certificates and preparing the final account.
- (c) Preparing cost estimates for new buildings or alterations to existing buildings other than upon a cost per area basis;
- (d) Inspecting existing buildings, preparing valuations thereon and reporting for purposes of mortgages, rentals and insurance."

It is clear that the quantity surveyors work as in (a) to (c) is not in any way related to what Mr Chakwenya did for the plaintiff. However the work covered under (d) includes valuations but for specific purposes. The quantity surveyor can do valuations for purposes of mortgage rentals and insurance.

In the present case the plaintiff was to do valuations to advise the defendant on the value of the properties for the purpose of selling them. This is clearly not covered under the work a quantity surveyor can do. This

means Mr Chakwenya was not acting in the course of his practice as a quantity surveyor when he did valuations for defendant acting as plaintiff's consultant. The work he did is therefore not exempted under section 52(3) of the Estate Agents Act.

This issue cannot be exhausted until one considers the effect of section 53 of the Estate Agents Act to what Mr Chakwenya did for plaintiff.

Section 53(1) of the Estate Agents Act provides as follows:-

"53(1) A company or partnership, may notwithstanding section forty eight practice or carry on business as an estate agent or describe itself or hold itself out or allow itself to be held out as an estate agent if:-

- (a) The business of the company or partnership, in so far as it relates to the practice of an estate agent, is under the direct control and management of a principal who:-
 - (i) Is a registered estate agent and
 - (ii) Does not act at the same time in a similar capacity for any other company or partnership or on his own behalf and
 - (iii) Is an executive director in the case of a company or a working partner in the case of a partnership; and
- (b) In every premises where any business referred to in paragraph (a) is carried on which is not personally conducted by the principal referred to in paragraph (a) such business is conducted under the direction of that principal or by an assistant who is a registered estate agent."

My understanding of section 53(1)(a) and (b) is:-

- (1) Any business practicing as an estate agent must be under the actual control and management of a principal who is a registered estate agent who is not at the same time acting as such for another company or on his own. The estate agent is therefore expected to devote his attention to a particular company or partnership.
- (2) The principal is an executive director of the company or a working partner of the partnership.

- (3) If the principal referred to earlier does not personally conduct the business then that can be done under the control of an assistant who is himself a registered estate agent.

In the present case the principal or director of the plaintiff is not a registered estate agent. Plaintiff does not work under the direct control and management of an estate agent. It does not have as its official even an assistant who is a registered estate agent. Mr Chakwenya who is himself not a registered estate agent participated on consultancy basis. He has no other links with the plaintiff company.

Even if Mr Chakwenya was a principal or assistant within the plaintiff and was a registered estate agent his involvement with plaintiff would fail under section 53(1)(a)(ii) in that he was not devoting all his attention to the plaintiff alone. He had his own practice. His involvement would therefore fail in that respect.

In conclusion it is clear that:-

1. Mr Chakwenya as a Quantity Surveyor was not entitled to act as an estate agent for the purpose of valuations aimed at determining the value of defendant's properties for sale.
2. Mr Chakwenya was not a principal or assistant of the plaintiff. He was a mere consultant.
3. Mr Chakwenya is not a registered estate agent.
4. Mr Chakwenya's practice even if he was a registered estate agent was not confined to the plaintiff as required by section 53(1)(a)(ii) of the Act.

Therefore the work done by the plaintiff was prohibited by section 48(1)(b) of the Act as there is no allegation or evidence that plaintiff was exempted in terms of section 48(1).

The agreement between the plaintiff and the defendant is therefore not enforceable due to its being in contravention of section 48(1) of the Act.

In view of this finding I need not consider the other issues raised as nothing can be served once the contract is found to be tainted with illegality.

The plaintiff's claim is therefore dismissed with costs.

Wintertons, the plaintiff's legal practitioners

Manase & Manase, the defendant's legal practitioners