

**CASSIM SIBANDA (On behalf of Nathan Madzwanya
and Kudzanai Madzwanya)**

Versus

BERNADETTE MUJURU

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 28 FEBRUARY AND 3 MARCH 2011

S S Mladzi for applicants
V Majoko for respondent

Opposed Court Application

KAMOCHA J: The applicant seeks an order for summary judgment in the following terms:-

“It is ordered that:-

- (a) Defendant pays a sum of US\$68 551,88; alternatively Stand number 6813 Bulawayo Township of 6872 A Bulawayo Township situate in the district of Bulawayo measuring 2331 square metres be sold by public auction or private sale conducted by the Deputy Sheriff to recover the sum of US\$68 551,88 and defendant gets the balance;
- (b) Defendant pays interest at the prescribed rate calculated from the 2nd June 2010 to date of full payment; and
- (c) Defendant pays costs of suit.”

The respondent had, during the month of September 2008, entered into an agreement of sale of house number 29 Landau Drive or 13 Copley Crescent, Khumalo, Bulawayo with Nathan Madzwanya and Kudzanai Madzwanya. The purchase price was US\$150 000 payable in installments. The purchasers were unable to meet their obligation as agreed. The parties ended up agreeing that it would not be possible for the agreement of sale to be consummated due to the fault of the purchasers who at that time had only paid US\$80 649,28 towards the purchase price.

When the parties took each other to court the seller invoked the provisions of clause 13 of their agreement of sale in terms of which, in the event of the purchaser breaching the agreement of sale by failing to pay on due date, she was entitled to cancel the agreement of sale and resume possession of the house and sue for damages she may have suffered, if any.

She was also entitled to retain 15% of any payments made by the purchaser which means that she was entitled to 15% of the US\$80 649,28 which is a figure of US\$12 097,39.

Having deducted the US\$12 097,39 from the US\$80 649,28 she should have given back to the purchasers the sum of US\$68 551,88. She was granted the court order on 2 June 2010. She resumed possession of the house and used the US\$12 097,39 she was entitled to but has failed to return the US\$68 551,88 to the purchasers prompting them to issue summons out of this court on 15 June 2010 claiming the said amount.

Summons was served on her personally on 19 August 2010 and she entered appearance to defend but has not filed her plea to date. When this application for summary judgment was served on her she resisted it contending that she had a defence to the purchasers' claim. Her defence was that the purchasers had breached the agreement of sale. She was, therefore, going to claim damages in terms of clause 13 of the agreement of sale.

The respondent was just being dishonest because she had earlier attempted to claim for damages in terms of clause 13 of the agreement of sale at the hearing of 2 June 2010. But when the provisions of section 5 of the Contractual Penalties Act [Chapter 8:03] "the Act" were drawn to her through her lawyer, she then withdrew the claim for damages. Section 5 reads as follows:

"5. **Restriction on entitlement to damages**

A creditor shall not be entitled, under a penalty stipulation, to both the penalty and damages or, except where the contract expressly so provides, to damages in lieu of penalty." Emphasis added

These provisions prohibit anyone from claiming both damages and a penalty stipulation. It also prohibits claiming damages instead of a penalty stipulation.

The advice that she should withdraw the claim for damages was sound and proper. It is therefore, difficult to understand why she now returns to this court to suggest that she had a defence to the purchasers' claim when she knows that she cannot claim damages as she already claimed a penalty stipulation which was granted. She clearly has no defence to the purchasers' claim of the sum of US\$68 551,88.

The respondent raised a number of issues. Firstly she alleged that this matter was not properly before this court as Cassim Sibanda instituted the proceedings in his own name instead of the names of his principals. As can be seen Cassim Sibanda says he was doing so on behalf of Nathan Madzwanya and Kudzanai Madzwanya. In *Sentrakoop Hendelaars Bpk v Lourens & Anor* 1991 (3) SA 540 (W). The court remarked that while it was procedurally wrong

for an agent to sue in his name on behalf of his principal, the procedure was not so fatally defective as to vitiate proceedings. At page 542 the court had this to say,

“The case of Leslie was so interpreted in *Hallis & Co. v Eastern Districts Sporting Club* 1909 TS 450 at 452, where SOLOMON J said:

“Because Alexander was merely acting as their agent, the petition was in fact the petition of *Hallis & Co* and it should have been so stated on the face of the petition, but I do not think that is a fatal defect. In *Leslie’s Trustee v Leslie* 1903 TS 701 it was pointed out that a petition by an agent on behalf of a principal should be drawn in the name of the principal, but the fact that it was drawn in the name of the agent was not held to be a fatal defect in that case, and I do not think that it should be so treated now. In any case, it was the simplest matter to amend the petition and put it in order, but personally I do not think that merely because there is such a defect in the petition, it should be treated as a fatal defect and that the rule nisi should have been discharged on that ground.”

In casu as alluded to above the agent instituted the proceedings in his name but made it clear on the face of this application and summons that he was doing so on behalf of his principals whose names he also endorsed on the face of the summons and this application for summary judgment. I hold the view that although what he did was procedurally wrong, the procedure was not so fatally defective as to vitiate the proceedings.

The respondent further complained that Cassim Sibanda had not entered into any agreement with her. She therefore did not know him. That, of course, cannot be true. She has dealt with him during negotiations for an out of court settlement in this matter. She knew he represented Nathan and Kudzanai Madzwanya.

Although papers of the applicants had a number of mistakes in them the mistakes were not so serious as to be classified as triable issues. There is no possibility of her succeeding as she does not even have a plausible case. Instead she was clearly dishonest when she claimed to have a defence in the form of a claim for damages as she knew that she was prohibited by section 5 of the Contractual Penalties Act *supra*. She had in fact withdrawn that claim before she was granted an order by this court on 2 June 2010.

This court shall express its displeasure by awarding the applicant costs on an attorney and client scale. In the result the order of this court is as follows:-

It is hereby ordered that:-

- (1) The respondent pays to Nathan and Kudzanai Madzwanya through their agent Cassim Sibanda the sum of US\$68 551,88 on or before Friday 1 April 2011; Failing which stand number 6813 Bulawayo Township of 6872 A Bulawayo Township situate in the district of Bulawayo measuring 2331 square metres be sold by public auction or private sale conducted by the Deputy Sheriff to recover the sum of US\$ 68 551,88 and defendant gets the balance;
- (2) Respondent pays interest on the sum of US\$ 68 551,88 at the prescribed rate of 5% per annum from 2 June 2010 to date of full payment; and
- (3) Respondent pays costs of suit on an attorney and client scale.

Samp Mlaudzi and Partners applicants' legal practitioners
Messrs Majoko and Majoko respondent's legal practitioners