

EVERSON CHIMVERE  
versus  
BEN FARAI CHETSE

HIGH COURT OF ZIMBABWE  
TAGU J  
HARARE, 14 March and 21 August 2019

**Civil Trial**

*T. Deme*, for the plaintiff  
*S. Mugadza*, for the defendant

TAGU J: The facts of the case are that on the 24 May 2013 defendant through his estate agents, New Native Properties, placed an advert in the Herald newspaper for the sale of a certain piece of immovable property being stand number 7002/2 Highfield, Western Triangle, Harare. The advertised purchase price was US\$15 500.00 (fifteen thousand five hundred United States dollars). Plaintiff then responded to the advert by contacting one Angeline Musarurwa an employee of New Native Properties.

Plaintiff then visited the agent's offices and made a counter offer of US\$11 000.00 (eleven thousand United States dollars) instead of the original asking price of US\$15 500.00 (fifteen thousand five hundred United States dollars). Plaintiff proceeded with the said agent to meet the defendant at the property in question. Plaintiff stated that he was informed that the defendant who is a double amputee required the purchase amount so as to make payment for his medical bills and to acquire a small property, the defendant in his evidence did not question this.

Plaintiff then offered to make a cash payment but he was requested to make a bank deposit into the defendant's agent's bank account. He was taken to the bank by Thomas Sakutukwa and Angeline Musarurwa both of whom were the defendant's agents. Thereupon, he made a deposit of US\$10 400.00 (ten thousand four hundred United States dollars) being the purchase price. He gave the said agents US\$900.00 (nine hundred United States dollars) cash. The US\$600.00 (six hundred

United States dollars) was the balance for the purchase price and the US\$300.00 (three hundred United States dollars) was the agent's fee for the agreement of sale.

Plaintiff and defendant both signed the agreement of sale thereafter. Both parties acknowledged that the signatures on the agreement of sale belonged to them. Clause 2 of the agreement of sale was drafted to reflect a purchase price was US\$11 000.00 (eleven thousand United States dollars). Clause 3 also stated that the purchase price would be paid into New Native Properties (Pvt) Ltd Trust account.

Both parties together with the defendant's agents attended at Highfield Municipal District offices as well as City of Harare Department of Housing Remembrance Drive Municipal offices where they were interviewed and the defendant signed the cession documents thereby completing transfer of its property rights to the Plaintiff.

Clause 4 of the agreement of sale states that cession was to be effected within 5 days but however, despite the cession, defendant did not vacate the property in question thereafter. In his evidence in chief he noted that upon realizing that his condition was not so severe he changed his mind before cession and communicated this to his agents but his agents were acting in connivance with the Plaintiff and proceeded with the sale. He maintained that throughout the process he noted that the amount being offered was too little and he had changed his mind but his agents kept on pressuring him and used undue influence for him to sell his property.

There is no evidence whatsoever that was proffered that shows that Plaintiff knew the agents outside of the said transaction and if anything, the defendant's conduct does not reflect that of a person who had no interest in selling his property. Defendant at one point denied that he is the one who signed the agreement of sale as it was a product of forgery. He later on stated that he signed the document but was pressured into signing it. He also stated that he could not read anything in small print. His statements were so contradictory such that one could not tell whether he was distancing himself from the signature or he signed under undue influence. Defendant even alleged in his cross examination that he was only given the last page of the agreement for signing and had no idea what he was signing. It is also questionable whether the same arguments would apply as to why he even ceded his rights at the City council offices. Defendant was even present when Plaintiff made the City council outstanding rates clearance payment of US\$900.00 (nine hundred United States dollars), this in my opinion is consent in itself.

It is common cause that despite the allegations made by Defendant, he reported his agent Thomas Sakutukwa to the law society and instituted criminal proceedings against the said agent. As far as both proceedings went, Defendant admitted that the said Thomas Sakutukwa was his agent and that he misappropriated the purchase price of US\$11 000 (eleven thousand United States dollars). Defendant was even awarded restitution of the whole amount in the criminal matter. It then does not make sense why Defendant would then refuse that a valid agreement was reached when he acknowledged through both proceedings that Thomas Sakutukwa was his agent, an agreement with the Plaintiff was entered into and purchase price was paid in full. There was also no explanation as to why Defendant did not pursue the restitution amount which he was awarded in the criminal proceedings.

There is no doubt that the Defendant's agents acted upon his instructions. As far as him then trying to divorce himself from his agent's actions goes it is an established principle that a principal is bound by the actions of his agent. In *DUBE J in Rollex (Pvt) Ltd v Delta Beverages (Pvt) Ltd* HH 66/15 clearly enumerates this by stating,

“The South African Law of Insurance, Gordon & Getz 3rd ed, the authors state as follows:- “A contract made by an agent, on behalf of his principal, with a third party, is regarded in law as having been made by the principal himself” *In Taunton Enterprises (Pvt) Ltd & Anor* 1996 (2) ZLR (H) 314, the court expressed the general rule as follows:- “A person who acts as an agent and contracts with a third party in the name of the disclosed principal is not a party to the contract and is not personally liable in contract”. See also *Wood v Visser* 1929 CPD 55 where the qualified this statement and remarked thus, “The general rule undoubtedly is that a person contracting with an agent can only sue the principal on that contract, but in some cases he can sue the agent, if for example he contracts with the agent as a principal, makes him his debtor and gives credit to him and not his principal, then he can sue the agent personally on such contract.” A party who acts as an agent and enters into a contract on behalf of a principal with a third party, does so on behalf of the principal. He does not become a party to the contract and no liability attaches to the agent. A party wishing to hold an agent accountable is required to show that he contracted with the agent as a principal. Where the contract benefits the principal only, the agent cannot be held accountable. An agent will only be denied the protection of this general rule where he has chosen by his own conduct or form of the act or contract to create personal liability or where personal liability is implied or created by operation of the law.”

In the circumstances, the Defendant did not show that his agent was in any way a part of his agreement with the Plaintiff. As far as the agreement of sale goes, the agents acted in

accordance with Defendant's instructions. No evidence was shown that Plaintiff was a part of the relationship between the Defendant and its agents therefore he cannot be prejudiced as to whether the amount was remitted to the Defendant or not. Plaintiff's role only concluded upon cession of the rights to him.

The argument by the Defendant that he was not aware of what he was signing when he signed the agreement of sale is neither here nor there due to the principle of caveat subscriptor rule which states that it is the duty of whoever is signing a contract to acquaint himself with the details of what he is signing. Defendant therefore bound himself to the agreement as he should have practiced due diligence before signing both the agreement of sale as well as a cession of his rights. This principle was clearly enunciated by this honourable court in the case of *Taya v Madarameta & Others* HH 96 -17 where the court stated that,

***“Signer be aware rule”*** *popularly known in contract as the caveat subscriptor rule* still has relevance in this jurisdiction... In the case of *Muzuva v FBC Bank Ltd* SC 554/14 it was held that the fact that respondent is denying his signature brings into operation the caveat *subscripto* rule. In the case of *Oasis Medical Centre (Pvt) Ltd v Beck & another* HH 84/16 it was held that the signer must beware of whatever he is signing”.

The Defendant is therefore bound by the agreement of sale.

Defendant alleged fraud on the Plaintiff's part yet no evidence to that effect was brought forth. One cannot just make such a bare denial especially in light of the fact that the law states that he who alleges must prove (See *Chamu Mining Syndicate v Sibongile Mpindiwa N.O. and Another* HH13/17). This also applies to the Defendant's claims of undue influence. He in no way showed that his conduct was contrary to someone who was being unduly influenced, if anything he showed cooperation at every stage of the signing of the contract as well as transfer of the property.

Defendant should have vacated the property upon completion of transfer of cession rights and so his continued occupation of the said property only inconvenienced the Plaintiff and entitled him to holding over damages at a rate of US\$120.00 (one hundred and twenty United States dollars) which amount Defendant did not even challenge.

I find that there is no merit whatsoever to the Defendant's defense. He often contradicted himself and offered nothing but bare denials to the Plaintiff's case. I am even perplexed as to why the Defendant's counsel persisted with the suit in light of there existing another court order entitling his client to the purchase price and there being no legal defense or evidence of the Defendant's claims at all. The courts have time and again warned legal practitioners from pursuing suits which they are fully aware of as having no merit at all.

**IT IS ORDERED THAT**

1. The Defendant and all those claiming occupation through him be and are hereby ejected from stand number 7002/2, Highfield Township, Western Triangle, Harare.
2. The Defendant to make payment of the sum of US\$120.00 (one hundred and twenty United States dollars) (must use the prevailing interbank rate of exchange) per month being holding over damages from the 1<sup>st</sup> August 2013 to the date the Defendant vacates the property.
3. The Defendant shall pay costs of on a legal practitioner and client scale.

*Thoughts Deme Attorneys at Law, plaintiff's legal practitioners*  
*Madanhi, Mugadza & Company, defendant's legal practitioners*