

IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA  
(CIVIL JURISDICTION)

2019/HPC/281

05 MAR 2020

**BETWEEN:**

**AMATHEON AGRI ZAMBIA LIMITED**

**PLAINTIFF**

**AND**

**MIRRIAM BISHONGA**

**DEFENDANT**

**Before the Honourable Mr Justice K. Chenda on 5<sup>th</sup> March 2020**

**For the Plaintiff : Mr K. Wishimanga & Mr S. Banda both of  
AMW & Company**

**For the Defendant : Ms. K. Parshotam & Mrs L. Chirwa both of  
Andrew & Partners**

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**JUDGMENT**

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**Legislation (primary and subsidiary):**

- (i) The Limitation Act 1939
- (ii) The Lands Act, Chapter 184 of the Laws of Zambia
- (iii) The High Court Act, Chapter 27 of the Laws of Zambia
- (iv) The Zambia (State Lands and Reserves) Order, 1964; the Zambia (Trust Land) Order, the Zambia (Gwembe District) Order, 1964 - Statutory Instrument No. 7 of 1964
- (v) The Zambia State Lands, Reserves and Trust Land (Delegation of Functions) Order - Statutory Instrument No. 4 of 1989
- (vi) Administrative Circular No. 1 of 1985 on Procedure on Alienation

### Case Law:

- (vii) *Printing and Numerical Registering Company v Simpson* (1875) L.R. 19 E.Q. 462
- (viii) *Colgate Palmolive (Z) INC v Able Shemu Chuka & Ors* - Appeal No. 181 of 2005 (unreported)
- (ix) *Friday Mwamba v Sylvester Nthenge & 2 Ors* - SCZ Judgment No. 5 of 2013 (Appeal No. 174/2010)
- (x) *GE Capital Bank Ltd v Rushton and another* (2006) 3 All ER 856
- (xi) *National Employers Mutual General Insurance Association Ltd v Jones* (1987) 3 All ER 385
- (xii) *Wesley Mulungushi vs Catherine Bwale Mizi Chomba* (2004) Z.R. 96
- (xiii) *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Limited* (1942) 2 All ER 122

## **1 INTRODUCTION AND BACKGROUND**

1.1 The case before Court is a land dispute involving the Plaintiff as purchaser and the Defendant as Vendor of a property known as a portion of Farm No. 160a Mumbwa, Central Province. The said portion shall, for convenience, be referred to as the "**Property**" while Farm No. 160a Mumbwa shall be referred to as the "**Parent Property**".

1.2 The relationship of the parties in issue was created by a contract of sale in writing dated 30<sup>th</sup> November, 2012 which contract the Plaintiff passionately seeks to enforce with a view to concluding its acquisition of the property by seeking the following reliefs in the statement of claim of 17<sup>th</sup> June, 2019:

- (i) specific performance of the contract of Sale dated 30<sup>th</sup> day of November, 2012 made between the Plaintiff and the Defendant;
- (ii) damages for breach of contract in addition to specific performance;
- (iii) interest on all sums due;
- (iv) costs; and
- (v) any other relief the court may deem fit.

1.3 I will for convenience refer to the Contract of Sale as the "**Contract**". The Defendant has fervently opposed this action in its defence dated 22<sup>nd</sup> August, 2019 which refutes the Plaintiff's entitlement to any of the reliefs claimed.

## **2 SUMMARY OF EVIDENCE**

- 2.1 PW1 was Mr. Terry Minne, the Plaintiff's 47-year-old Managing Director. His testimony in chief was a was embodied in a witness statement dated 17<sup>th</sup> October, 2019.
- 2.2 He stated that the Plaintiff had initially offered to purchase a portion of 1,100 hectares of the Property in an offer dated 29<sup>th</sup> November, 2012 (at pages 13-14 of the Plaintiff's bundle of documents).

2.3 Mr. Minne further stated that the Defendant's claim to title of the property was portrayed to the Plaintiff through:

- i) minutes of a meeting of a committee to the Mumbwa District Council on Plans, Works, Development and Real Estate;
- ii) a recommendation; and
- iii) the Defendant's application to the Ministry of Lands (appearing at pages 2-4, 5-7 and 10-12 of the Plaintiff's bundle of documents)

2.4 It was Mr. Minne's testimony that the Plaintiff and the Defendant thereafter entered into the Contract in pursuant of which the Plaintiff paid the Defendant a total of K80,960 evidenced by the documents at 21, 22, 23 and 25 of the Plaintiff's bundle of documents.

2.5 Mr. Minne stated that by clause 12 of the Contract the Defendant was required to obtain an offer letter from the Commissioner of Lands followed by title to the property and then apply for state consent to assign. It was Mr. Minne's testimony that completion of the conveyance was to follow according to clause 4, within 7 days after securing of state consent to assign.

2.6 It was Mr. Minne's that the Defendant did not do all the above which prompted the Plaintiff to issue a notice to complete dated 13<sup>th</sup> March, 2019 (appearing at page 27 of the Plaintiff's bundle of documents).

2.7 Mr. Minne concluded by stating that despite the notice the Defendant has failed, refused and neglected to complete the conveyance resulting in the Plaintiff suffering loss as it made payment without any benefit in return. According to Mr. Minne, the Plaintiff is ready to fulfil its delegations under the Contract but that if the Defendant is unwilling to complete, the Plaintiff is willing to accept a reimbursement of the money paid to the defendant

2.8 When cross examined by Ms Parshotam, it was Mr Minne's testimony that:

- i) the Defendant's care business is a large agricultural business in Mumbwa;
- ii) the Defendant ideally needs fertile land for its business
- iii) he was not sure whether the Property was seen by anyone from the Defendant prior to entering into the Contract;

- iv) there is a contract of Sale dated 30<sup>th</sup> November, 2012 and 14<sup>th</sup> December, 2012 respectively at page 16 of the Plaintiff's bundle of documents and page 27 of the Defendant's bundle of documents;
- v) the two contracts were signed in 2012 and from that time to issuance of the notice to complete in 2019, which is more than 6 years later, the Plaintiff did nothing to enforce its rights;
- vi) the documents at page 32 of the Defendant's bundle of document is a certificate of title to Farm 160a, Mumbwa in the names of Chrispine Musosha, the Defendant, Ismail Valley and Pine Roads General Contractors;
- vii) the Plaintiff's contracted with the Defendant but not the other parties to the title and the Plaintiff did not get their consent to buy the Property;
- viii) special condition No. 2 of the Contract at page 18 of the Plaintiff's bundle of documents recognised Folotiya Chiumya as Advocates for both parties but the cover letter notice to complete at page 26, the of the Plaintiff's bundle was addressed to a different firm;

- ix) the documents at pages 24-25 of the Plaintiff's bundle of documents are letters from Folotiya Chiumya to the bank but not confirmation that the funds had indeed been transferred to the Defendant such that it is possible that the Defendant did not receive the money;
- x) special conditions identity of the Contract required the Plaintiff to make payment through the Defendant's advocates but the Plaintiff did not breach it by paying cash to the Defendant director as shown by documents at page 22 of the Plaintiff's bundle of documents; and
- xi) the Plaintiff has not in its statement of claim sought reimbursement of the monies paid to the Defendant.

2.9 When re-examined by Mr Wishimanga, Mr. Minne testified that his tenure of work with the Plaintiff began in 2014 and his evidence was therefore based on institutional memory.

2.10 He also testified that the Plaintiff's delay in enforcing its rights was not out of disinterest in the Property because the Plaintiff had more than 30 other outstanding contracts by virtue of running a large business operation.

2.11 The Plaintiff was still interested in the property. Mr. Mine also clarified that he had not interacted with the Defendant's company title holders as it was assumed that the Defendant was selling in her personal capacity. It was Mr. Minne's testimony that the role of Folotiya and Chiumya was simply to facilitate the conveyance.

2.12 He also testified that notwithstanding condition 10 of the contract, the Defendant had the prerogative to choose a different account for payment.

2.13 The defendant is the one who received the money referred to in the documents at pages 21-23 of the plaintiff' bundle of documents and it was for the property. The Plaintiff paid more than what it was required to at the stage of the conveyance under the Contract.

2.14 DW1 was Mr. Chrispine Mumba Musosha a 62-year-old business man. His testimony in chief was embodied in a witness statement dated 1<sup>st</sup> October, 2019.

2.15 He stated that he is a co-owner of Farm 160a with a company with the Defendant and Pine Roads General Contractors Limited, where he holds majority shares.



2.16 He stated that he attended a meeting with the defendant at the Plaintiff's office in Mumbwa during which Mr. Minne (PW1) informed the Defendant that the Plaintiff had terminated the contract.

2.17 Thereafter, he entered into an agreement with the Defendant to develop Farm 160a which he had also applied to jointly own with the Defendant.

2.18 When cross examined by Mr. Wishimanga, Mr. Musosha testified that:

- (i) he began dealing with Farm 160a in 2010;
- (ii) the meeting at the Plaintiff's premises was called for by Mr. Minne and took place in October or November, 2016;
- (iii) there is no documentary evidence before Court of the meeting having taken place but there is an email of the meeting which is not before court;
- (iv) the documentation before Court shows that it's the Defendant who was recommended by Mumbwa Council in 2012 to the Commissioner of Lands to be offered Farm No. 160a in extent of 2500 hectares (per page 15-23, 38-39 of the defendant's bundle of documents)

- (v) the documentation before Court shows that the Defendant applied for Farm 160a alone;
- (vi) the joint certificate of title is dated 15<sup>th</sup> May, 2015;
- (vii) there is no record before court of an application for joint certificate of title confirms that Mr. Musosha and the other joint owners did so.

2.19 When re-examined by Mrs. Chirwa, Mr. Musosha testified that during the meeting which he attended with Mr. Minne and the Defendant, both Mr. Minne and him took down minutes. After the meeting Mr. Musosha sent Mr. Minne an email on the address on the business card that Mr. Minne gave him. That was on 2<sup>nd</sup> November, 2016

2.20 DW2 was the Defendant and her testimony in chief was embodied in her statement dated 1<sup>st</sup> October, 2019. She stated that she resides at Farm 160a Mumbwa.

2.21 She stated that she had applied for the said land from Mumbwa district council which application was approved firstly by the Councils Committee on Plans, Works, Development and Real Estates and by the full council all in October, 2012 as per documents at pages 15 – 22 of the Defendant's bundle.

- 2.22 It was the Defendant's testimony that her application to the Council was successful as per letter dated 18<sup>th</sup> October, 2012 at pages 22-23 of the Defendant's bundle of documents.
- 2.23 The Defendant stated that she was then approached by the Plaintiff's employee Mr. Joshua Cholobesa expressing that the Plaintiff wanted to buy Farm 160. She subsequently entered into a contract of sale with the Plaintiff as appears at pages 26-30 of the Defendant's bundle of documents.
- 2.24 Upon signing the contract, she received a deposit of K5,000 and later requested for a K50,000 from the Plaintiff which was paid to her. The Plaintiff eventually investigated the terrain of Farm 160a and called for a meeting through a Mr. Yang. At the meeting the Plaintiff terminated the contract for Farm 160a stating that it was too rocky.
- 2.25 The Defendant testified that after termination of the Contract, she partnered with Mr Chrispin Musosha, Pine Roads General Contractors and another for development of Farm 160a culminating into the offer letter and later joint certificate of title both in 2015, as appear at pages 31-33 of the Defendant's bundle of documents.

2.26 The Defendant concluded her statement that she was shocked to be sued more than 6 years later by the Plaintiff for a contract which the Plaintiff had terminated.

2.27 When cross examined by Mr. Wishimanga, the Defendant testified that:

- i) when she initially applied for Farm 160a, she was the only applicant and when she received the recommendation from Mumbwa Council in 2012, it was only addressed to her;
- ii) there is a recommendation letter at pages 38-39 of the Defendant's bundle of documents from Chief Kainda to the Commissioner of Lands for issuance of title to the Defendant.
- iii) She entered into the Contract (at page 15 of the Plaintiff's bundle of documents) with the Plaintiff dated 30<sup>th</sup> November, 2012 and according to paragraph 6 of her defence, the Contract was terminated 7 days later but documents at page 23 of the Plaintiff's bundle of documents shows that she still continued to receive money from the Plaintiff even after terminating;

- iv) there is no written evidence before Court to show that the contact was terminated;
- v) there is also no written documentation to show that the meeting referred to in paragraph 19 of the witness statement actually took place;
- vi) there is no documentation to show that the Plaintiff rejected the Property because it was rocky;
- vii) special condition 10 of the Contract required that the Defendant would be paid through her lawyers but she still requested to be paid directly by the Plaintiff;
- viii) prior to 2015 she applied for Farm 160a alone but in 2015 she partnered with Mr. Musosha, Pine Roads General Contractors and another and went to the Ministry of Lands with them resulting in the joint title;
- ix) she did not tell the Plaintiff about the partnership;
- x) in 2016-17 her lawyers were GDC Chambers but she does not recall whether there was some dispute over Farm 160a as she was in hospital; and
- xi) the Defendant denied that it only became impossible to perform the Contract in 2015.

2.28 When re-examined by Ms Parshotam, the Defendant testified that in 2015, she and her co-owners of Farm 160a applied for title which was granted by the Ministry of Lands. Thereafter in 2016 Mr. Minne called the Defendant to his office where she went with Mr. Musosha and Mr. Minne stated that the Plaintiff would not proceed with the transaction because the Property was rocky.

2.29 The Defendant confirmed having received money from the Plaintiff after termination of the Contract as per page 21 of the Plaintiff's bundle of documents which money she used to pay for fertiliser.

2.30 She closed her testimony in re-examination by testifying that she was also called by the Plaintiff's Tom Young to Kabulonga where he rebuked the Defendant for not disclosing that the Property was rocky and as such the Plaintiff was not interested in purchasing the Property anymore.

2.31 DW3 was Mr. Joshua Cholobesa a 54 year-old former Councillor in Mumbwa up to 2016. His testimony in Chief was embodied in his statement of 1<sup>st</sup> October, 2019 in which he stated that he was at all material times employed by the Plaintiff and the land officer tasked to find land for purchase.

2.32 He re-affirmed the Defendant's testimony that he approached the Defendant on behalf of the Plaintiff offering to purchase the Property.

2.33 He also reiterated the Defendant's evidence of her obtaining recommendations from the Mumbwa Council and its Committee as well as the entry into the Contract with the Plaintiff.

2.34 He also stated that the Plaintiff had paid the Defendant a total of K55,000 and that after investigating the state of land the Plaintiff's director Mr. Tom Young called for a meeting.

2.35 The meeting was attended by Mr Young, Mr. Cholobesa, the Defendant and 3 others during which Mr. Young informed the Defendant that the Plaintiff was terminating the Contract as the Property was rocky terrain.

2.36 What followed was an internal staff meeting where Mr. Young informed the staff of the termination of the contract which meeting was minuted by Mr. Cholobesa.

2.37 When cross examined by Mr. Wishimanga, Mr. Cholobesa testified that:

- i) the Defendant applied for Farm 160a for 2500 hectares and she was the sole applicant;
- ii) he did not do the investigation for Farm 160a on behalf of the Plaintiff;
- iii) he did not recognise the documents at pages 21-23 of the Plaintiff's bundle as he was not dealing in the Plaintiff's finances;
- iv) he has not produced any notice of the meeting he attended with the Defendant nor minutes of the Staff meeting which followed; and
- v) there is no evidence before Court that the Contract was terminated because of rocky terrain.

2.38 When re-examined by Ms Parsohtam, Mr. Cholobesa clarified that he did not have any evidence before Court to prove that the contract was terminated.



### **3 ISSUES FOR DETERMINATION**

3.1 The following issues are common cause when one considers paragraphs 2, 3, 4, 5, 6, 7, 8 and 9 of the statement of claim and 2, 3, 4 and 5 of the defence.

- (i) the contract was entered into by the Plaintiff and Defendant for conveyance of the Property;
- (ii) the purchase price for the Property was pegged at K1,690,676,000 (unrebased) or K1,690,676 rebased towards which the Plaintiff made part payment to the Defendant;
- (iii) the Contract incorporated the Law Association of Zambia General Conditions of Sale 1997 with variations in the special conditions of the Contract; and
- (iv) the conveyance of the Property by the Defendant to the Plaintiff was never completed.

3.2 The pleadings also reveals the following controversy between the parties (as can be deduced from paragraph 8, 9, 10 of the statement of claim and paragraph 5, 6, 7, 8, 9, 10, 11 and 12 of the defence).

- (i) the Plaintiff contends that it has paid a total of K80,960 towards the purchase price while the Defendant alleges that only K55,000 was paid;
- (ii) the Plaintiff alleges that the Defendant has failed to complete the conveyance and to heed a notice to complete dated 13<sup>th</sup> March, 2019 whilst the Defendant contends that the notice to complete was never received and that it has not failed to complete the contract which was instead rescinded by the Plaintiff;
- (iii) the Plaintiff contends that it is entitled to the primary relief of specific performance of the Contract with ancillary relief of damages, costs and anything else deemed fit by the Court;
- (iv) the Defendant cross contends that the Plaintiff is not entitled to any relief as:
  - a) following rescission of the Contract, the Property is now owned by the Defendant jointly with 3 others;
  - b) the Plaintiff's cause of action did not accrue within 6 years from commencement as per section 2 Limitation Act 1939; and

c) the Plaintiff is barred from seeking equity as it does not have clean hands and it culpable of delay.

3.3 The issues for determination as I see them are therefore as follows:

- (i) whether the action is statute barred by Section 2 of the Limitation Act 1939;
- (ii) whether the Defendant had title to the property to pass to the Plaintiff through the Contract;
- (iii) whether the Contract was rescinded by the Plaintiff; and
- (iv) depending on the determination of (i), (ii) and (iii), whether the Plaintiff is entitled to specific performance of the contract, damages from the Defendant and / or any other relief in this action

#### **4 ANALYSIS AND FINDINGS**

##### **Whether this action is statute barred**

4.1 The English case of *Printing and Numerical Registering Company v Simpson*<sup>1</sup> was cited with approval by the

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<sup>1</sup> [1875] L.R. 19 E.Q. 462

Supreme Court at page 8 of its judgment in the case of **Colgate Palmolive (Z) INC v Able Shemu Chuka & Ors**<sup>2</sup> and in particular the exposition from the English case by Sir George Jessel who had this to say:

**“...if there is one thing more than another which public policy requires it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contract when entered into freely and voluntarily shall be enforced by courts of justice.”** (Emphasis added)

4.2 I also cite the more recent decision of this case **Friday Mwamba v Sylvester Nthenge & 2 Ors**<sup>3</sup> where Mumba Ag DCJ observed:

*“The law of contract regarding contracts entered into voluntarily by legal persons has been honoured since time immemorial.”*<sup>4</sup>

4.3 The Plaintiff and Defendant must thus be taken to be bound by the Contract, the provisions of which ought to be enforced by this Court. Public policy dictates so.

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<sup>2</sup> Appeal No. 181 of 2005 (unreported)

<sup>3</sup> SCZ Judgment No. 5 of 2013 (Appeal No. 174/2010)

<sup>4</sup> *Ibid.*, J19

4.4 Perusal of special condition 1. of the Contract<sup>5</sup> shows that it was subject to the then LAZ General Conditions of Sale 1997 (the “**General Conditions**”) which in clause 21 contain the following mandatory procedure to be exhausted before a litigant can move this Court for relief against a counterparty:

“21. (a) *If either party shall fail to perform its part of the contract the other party may give to the defaulting party or its Advocate at least fourteen days' notice in writing specifying the default complained of and requiring the defaulting party to make good the same before the expiration of such notice.*

b) *if the defaulting party is the vendor and the vendor does not comply with the terms of such notice then the Purchaser may either apply to the court for appropriate relief or rescind the contract by notice in writing to the vendor or his Advocate.*” (Emphasis added)

4.5 In the case before Court, there is a notice to complete dated 13 March 2019.<sup>6</sup>

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<sup>5</sup> See the Plaintiff's bundle of documents, page 18

<sup>6</sup> Ibid., page 27

4.6 Assuming that the said notice is valid, then the Plaintiff's cause of action against the Defendant arose after the lapse of the 14 day grace period given therein, thereby completely negating any claim that this action is statute barred as alleged by the Defendant.

4.7 However I note that the Contract did in special condition 2 designate Mesdames Folotiya & Chiumya Legal Practitioners as Advocates for both vendor and purchaser.<sup>7</sup>

4.8 Thus going by 21(a) of the General Conditions, the notice to complete given by the Plaintiff would only be valid if served on the Defendant in person or on Mesdames Folotiya & Chiumya Legal Practitioners.

4.9 Coming to the evidential record before Court, I note that the cover letter for the notice to complete was addressed to Messrs GDC Chambers and bears a received stamp from the said Firm.<sup>8</sup> I am however unable to accept such service as valid as:

- (i) there is no record of an amendment to the Contract to introduce GDC Chambers as the replacement Advocates for the Defendant;

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<sup>7</sup> *ibid.*, page 18

<sup>8</sup> *ibid.*, page 26

- (ii) there is no record of the Defendant otherwise having designated GDC Chambers as her agents for service in respect of the Contract;
- (iii) there is no record of correspondence between the Plaintiff's current Advocates and GDC Chambers over the Contract in which the latter are representing the Defendant; and
- (iv) the Defendant has denied having received the notice to complete.

4.10 I therefore find that the notice to complete issued by the Plaintiff is invalid.

4.11 Consequently, in the absence of a valid notice of default, the Plaintiff's cause of action for specific performance and any other relief in pursuance of the Contract has not yet accrued.

4.12 In other words, the jurisdiction of this Court to entertain an action founded on the Contract could only have been activated by the Plaintiff exhausting the mandatory procedure under clause 21 a) and b) of the General Conditions.

4.13 Therefore, the question of whether the Plaintiff's action is time barred by section 2 of the Limitation Act does not even arise.

**Whether the Defendant had title to pass to the Plaintiff**

4.14 The maxim '*nemo dat quod non habet*' (the "***nemo dat rule***") is a common law principle that a party cannot convey better title than that which they possess.

4.15 I am fortified by the observation of Moore-Bick LJ in ***GE Capital Bank Ltd v Rushton and another***<sup>9</sup>:

**"A fundamental principle of the common law relating to the transfer of property in chattels is that a transferor cannot give a better title than he has himself - *nemo dat quod non habet*."**  
(Emphasis added)

4.16 In the English case of ***National Employers Mutual General Insurance Association Ltd v Jones***<sup>10</sup>, May LJ heeded the *nemo dat* rule and expounded that it is applicable in the absence of statutory provisions to the contrary.

**"Nobody can give good title to what he does not possess ... George Young [the rogue in the case] never had title to give to Calgary Automotive and consequently neither Leckie nor Borgal [the defendants] could receive good title from Calgary Automotive.**

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<sup>9</sup> (2006) 3 All ER 856 at 858

<sup>10</sup> (1987) 3 All ER 385 at 394



*The rule nemo dat quod non habet must prevail in the absence of overriding statutory provisions.* (Emphasis added)

4.17 In the case before Court the evidential record shows the following pertinent occurrences in October 2012:

- (i) a Committee of Mumbwa Council made a recommendation that the Parent Property be offered to the Defendant;<sup>11</sup>
- (ii) Mumbwa Council accepted the recommendation;<sup>12</sup>
- (iii) Mumbwa Council wrote to the Commissioner of Lands recommending that the Defendant be offered the Parent Property which recommendation is accompanied by a formal application by the Defendant endorsed by Mumbwa Council;<sup>13</sup>

4.18 There is however no record of the Commissioner of Lands having accepted the recommendation and offering the Parent Property to the Defendant alone as recommended.

4.19 Instead the record shows an offer letter to the Defendant jointly with 3 others, dated 18 February 2015 which later culminated into the joint certificate of title dated 15 May 2015.<sup>14</sup>

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<sup>11</sup> Ibid., page 15-16

<sup>12</sup> Ibid., page 5-7

<sup>13</sup> Ibid., page 8-9 and 2-4, respectively

<sup>14</sup> Ibid., page 31 and 32, respectively

4.20 There is no statutory provision that has been brought to my attention to exclude the application of the *nemo dat* rule to these circumstances and my independent research has not yielded anything to the contrary.

4.21 The *nemo dat* rule is thus applicable as unless and until an offer to the Defendant was generated by the Commissioner of Lands and accepted by the Defendant, the Defendant had no interest in the Parent Property to convey a portion of it to the Plaintiff as purportedly done in the Contract.

4.22 This can be contrasted with the ***Wesley Mulungushi*** case<sup>15</sup> where:

- (i) the pleadings in that case contained an admission of the vendor's title to the property whereas before Court the vending Defendant claims she does not own the Parent Property which is instead jointly titled to her and 3 others; and
- (ii) the vendor in that case had an accrued right as sitting tenant employed by the government to purchase the property from the employing agency which owned the property unlike the Defendant herein who was wholly dependent on the Commissioner of Lands accepting the recommendation from Mumbwa Council<sup>16</sup>;

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<sup>15</sup> In *Wesley Mulungushi vs Catherine Bwale Mizi Chomba* (2004) Z.R. 96 the Supreme Court reversed the Trial Court's mechanical application of the *nemo dat* rule in circumstances where the vendor did not have a certificate of title.

<sup>16</sup> The Lands Act, Cap 184 in section 3, continues the vesting of land in the President whose powers of alienation are delegated to the Commissioner of Lands, pursuant to Statutory Instruments No. 7 of 1964 and 4 of 1989. Councils for their part work as agents of the Commissioner of Lands to identify candidates for possible land alienation and make recommendations thereto to the Commissioner of Lands. This is provided for in

**Whether the Contract was rescinded by the Plaintiff**

4.23 Having found that the fulfilment of the Contract is precluded by the *nemo dat* rule, it becomes otiose to consider and determine whether there was a rescission by the Plaintiff.

**Whether the Defendant is entitled to specific performance, damages, costs or any other relief**

4.24 In the earlier part of this judgment I held that by virtue of the failure to issue a valid notice to complete (in conformance with General Condition 21a), the Plaintiff's right to sue on the Contract (pursuant to 21b) has not yet accrued.

4.25 Consequently, there is no basis upon which this Court can prematurely consider whether the Plaintiff is entitled to specific performance of the Contract and / or damages for breach thereof as pleaded.

4.26 However, the Plaintiff's predicament cannot be remedied by simply issuing a valid notice to complete and suing if it is not heeded. This is because as held above, the Contract is impaired by the *nemo dat* rule. What recourse does the Plaintiff then have in the circumstances?

4.27 The evidential record between the parties shows that the Plaintiff made payments in pursuance of the Contract. The point of departure being that whilst the Plaintiff pleads a total of K80,960 as paid, the Defendant refutes and counterpleads having received only K55,000.

4.28 The Plaintiff in its bundle of documents has produced proof of payment of a total of K85,961 to the Defendant<sup>17</sup> broken down as follows -

- (i) K25,961 collected by the Defendant from the Plaintiff;  
and
- (ii) K60,000 remitted by Folotiya Chiumya & Associates to the Defendant's bank account, with the last payment on 8 January 2013.

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<sup>17</sup> Refer to Plaintiff's bundle of documents, pages 21-25

4.29 I note that under cross examination, the Defendant admitted that the Contract required that she would be paid through her lawyers and she further conceded that she still requested for direct payments from the Plaintiff.

4.30 There is no record of the Defendant denying that she received the documented payments directly from the Plaintiff nor that the remittances into her account by the Advocates were never received.

4.31 I therefore accept the credibility of the Plaintiff's proof of payment appearing at pages 21-25 of its bundle of documents. As a result I find as a fact that, by 8 January 2013, the total payment made to the Defendant in pursuance of the Contract was K85,961.

4.32 In *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Limited*<sup>18</sup>, Lord Wright aptly put it that:

*"It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep."*  
(Emphasis added)

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<sup>18</sup> (1942) 2 All ER 122 at page135

4.33 In the case before Court, the Contract is (for reasons already discussed) incapable of being performed but the Defendant has received some money from the Plaintiff.

4.34 It would in the circumstances be unjust for the Defendant to retain the sum of K85,961 and instead fair that the Plaintiff recovers it under the pleaded head of '*any other relief that the Court may deem fit.*'

4.35 Such relief is also fortified by section 13 of the High Court Act<sup>19</sup> which provides:

***"In every civil cause or matter which shall come in dependence in the Court, law and equity shall be administered concurrently, and the Court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any***

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<sup>19</sup> Chapter 27 of the Laws of Zambia

*conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.”*

(Emphasis added)

4.36 I will address the repayment mechanics in the concluding part of this judgment.

## **5 CONCLUSION AND ORDERS**

5.1 A recommendation from a Council to alienate State land to an individual does not confer an interest in land for that individual.

5.2 The interest in land is instead conferred by an offer from the Commissioner of Lands at the point of its acceptance by the individual.

5.3 Consequently, persons contracting to purchase land from individuals holding a mere recommendation from a local authority / Council do so at their own peril.

- 5.4 There being no evidence of such an offer and acceptance in the case before Court meant that the Defendant had no interest in the Parent Property to convey a portion thereof to the Plaintiff through the Contract (*nemo dat* rule applied). As the evidence stands, the Contract is therefore incurably impaired.
- 5.5 Under the then LAZ General Conditions of Sale 1997, the right to sue on a contract of sale could only be activated by the lapse of a grace period given under a valid notice to complete served on the defaulting party or its Advocate.
- 5.6 There being no valid notice to complete given by the Plaintiff to the Defendant, this Court is deprived of jurisdiction to entertain and grant the reliefs of specific performance and / or damages. The Plaintiff's claim for the same is accordingly dismissed.
- 5.7 The evidence shows that the Defendant received as at 8 January 2013, ~~the Defendant had received~~ a total of K85,961 from the Plaintiff. Notwithstanding the impairment of the Contract, it would be unjust enrichment for the Defendant to retain the said monies.



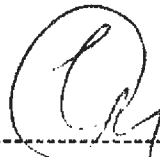
5.8 I accordingly order that the Defendant to repay the Plaintiff the sum of K85,961 together with interest:

- (i) at the average short term deposit rate per annum prevailing from 8 January 2013 to date of judgment; and thereafter;
- (ii) at the lending rate as determined by the Bank of Zambia from date of judgment to date of payment.

5.9 I further order that the judgment debt and interest should be paid within a period of 30 days from date of judgment.

5.10 Lastly, considering the success of this action (albeit partially), the Defendant shall bear the Plaintiff's costs, to be taxed in default of agreement.

Dated at Lusaka this 5th day of March 2020

  
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**K. CHENDA**  
**JUDGE OF THE HIGH COURT**