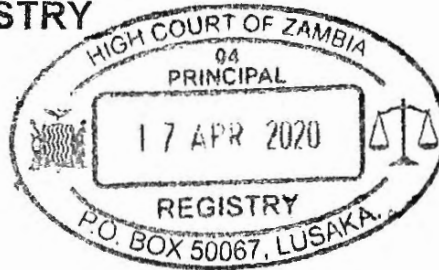


IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2018/HP/1018



BETWEEN:

ALFRED CHEWE

PLAINTIFF

AND

FAR PROPERTY COMPANY ZAMBIA LIMITED

DEFENDANT

Before the Honourable Mrs. Justice M. Mapani-Kawimbe on the 17th day of April 2020

For the Plaintiff: Mr. S. Mambwe, Messrs Mambwe Siwila & Lisimba
Advocates

For the Defendant: Mr. L. Linyama, Messrs Eric Silwamba, Jalasi & Linyama
Legal Practitioners

J U D G M E N T

Cases Referred To:

1. *Bernard Leigh Gadsden v Vincent Joseph Chila* (1991) (HC)
2. *Reigate v Union Manufacturing Co. (Ramsboltom)* (1918) L.R 1-KB 592
3. *Attorney General of Belize et al v Belize Telecom Ltd & Another* (2009), 1WLR 1980

Legislation Referred To:

1. *High Court Act, Chapter 27*

Other Works Referred To:

1. *Chitty on Contracts, Volume 1 (General Principles)* 26th Edition by H. G. Beale, Sweet & Maxwell, London 1999
2. *Law of Contract, 7th Edition* by P. Ricahrds, Pearson Longman, 2006
3. *Law Association of Zambia General Conditions of Sale* 1997

1. Introduction

1.1 On 13th April 2017, the plaintiff who owned Chilenje Mall sold it to the defendant. The parties executed a contract of sale and fixed the purchase price at US\$ 2,300,000.00 payable by 30th April 2017. A payment of US\$ 1,042,000.00 was to be made to Barclays Bank Zambia Plc (Bank) to release the plaintiff from the 3rd party mortgage obtained on the property. The parties agreed that the bank would issue a letter of undertaking to the effect that it would release the certificate of title to the defendant. The plaintiff obtained the letter of undertaking from the bank on 13th April 2017.

1.2 In the scheme of things, the defendant, only paid the bank on 14th July 2017 and the plaintiff claimed that he was charged additional interest and penalties because of the late payment. He averred that the defendant's actions breached the contract of sale and the issue this Court is confronted with is whether the defendant breached the terms of the contract of sale.

2. Pleadings

2.1 The plaintiff instituted this suit on 7th June 2018, by way of writ of summons and statement of claim seeking the following orders:

- "(1) The sum of United States dollars forty one thousand eight hundred and eighty, and thirty nine cents (US\$41,880.39) representing exchange losses suffered as a result of the defendant's breach of contract for the purchase of subdivision 09/65/4586 Lusaka otherwise known as Chilenje Mall.*
- (2) Interest at current banking rate.*
- (3) Further or other relief.*
- (4) Costs."*

2.2 The plaintiff pleaded that he sold the defendant land vide a contract of sale dated 13th April 2017 at USD 2,300,000.00. The purchase price was supposed to be paid by 31st April 2017 and out of that sum, the defendant was to pay Barclays Bank Zambia Plc (Bank) USD 1,042,000.00 to redeem the plaintiff's 3rd party mortgage on the property. The plaintiff averred that the defendant breached the contract of sale because it only paid the bank at the end of July 2017. Consequently, he suffered exchange losses and additional interest charges which he estimated at USD 41,880.39.

2.3 In response, the defendant entered appearance and filed a defence into Court on 22nd October 2018. It contended that it paid the Bank immediately after it issued a letter of undertaking on 13th July 2017 in accordance with clause 12 of the special conditions of contract.

2.4 The defendant further contended that the plaintiff delayed in obtaining state consent to assign, transferring leases of existing tenants, paying

property transfer tax and obtaining the letter of undertaking from the Bank. As a result, he was equally responsible for the delay. Further, he failed to issue a notice to complete in accordance with the Law Association of Zambia General conditions of Sale 1997. Given that the contract was dollar based, with a calculated risk of exchange losses, and the defendant denied that it breached the contract. It asked the Court to dismiss the plaintiff's claim.

3. Trial

3.1 I held trial on 29th May and 10th December 2019. And the Plaintiff delivered his evidence as (PW). He stated that he owned Chilenje Mall in Lusaka. He secured a 3rd party mortgage from the bank on behalf of Base Property Developers Limited (the holding company). When the company ran into financial difficulties, he sold Chilenje Mall to the defendant (a Botswana based company) at USD 2,300,000.00.

PW testified that according to clause 7 of the contract of sale the parties agreed on a completion date of 30th April 2017 but the defendant conspicuously defaulted on paying the purchase price.

3.2 It was PW's evidence that clause 10 of the contract obliged him to pay property transfer tax and clause 12 required him to secure a letter of undertaking from the Bank. He stated that he secured the

letter in which the bank undertook to release 3rd party mortgage and title deed on 13th April 2017, upon the payment of US\$ 1,042,000.00. However, the defendant failed to pay the bank on time and confirmed its failure in its director's letter, Mr. Rum dated 18th May 2017 addressed to him. On account of the late payment, PW alleged that he suffered foreign exchange losses and was charged addition interest by the Bank.

3.3 PW estimated his loss at USD 41,880.39 and amplified that foreign exchange loss was calculated at the material time of actual completion and not when the defendant paid the Bank. PW averred that instead of paying the Bank USD 1,029,455.60 he ended up paying it USD 1,105,015 and the overpayment was USD 75,559.65. The Bank charged him interest of USD 25,171.89 and his total loss was USD 100,731.54. PW averred that he recovered USD 58,851.15 from the tenants' rentals after which a balance of USD 41,880.39 remained outstanding. He told the Court that if he had miscalculated his claim it could be sent for assessment but maintained that the defendant owed him money.

3.4 When **cross examined**, PW conceded that the contract of sale was informed by the LAZ General Conditions of Sale 1997. Further the contract was US dollar denominated and it did not provide penalties

on late payment. PW also conceded that he did not obtain state consent by 30th April 2017 but paid ground rates. In addition, property transfer tax was only paid on 21st July 2017. He could not confirm whether the defendant's lawyers received the bank's letter of undertaking dated 13th April 2017 on time. PW admitted that the bank issued another letter of undertaking dated 13th July 2017 but was not aware if the defendant paid the bank immediately after it received that letter.

3.5 PW averred that he sent several emails and letters to the defendant over the delayed payment that were not in Court. He personally suffered financial loss because he secured the 3rd party mortgage. He could not recall the material foreign exchange rates at the time of the transaction to show his loss. However, the notice of interest in the Bank's letter of undertaking was sufficient to support his claim. PW further admitted that the defendant did not undertake to settle exchange losses. On completion in clause 13 of the contract PW averred that it depended on him delivering clean title to the defendant.

3.6 In **re-examination**, PW explained that it was a general practice in business to pursue claims based on unforeseen circumstances. He

maintained that he sent several reminders to the defendant to complete the contract of sale but it defaulted.

3.7 That marked the close of the Plaintiff's case.

3.8 In response, the Defendant company's operating officer, **Shinu Joy, (DW)** testified that its records confirmed that it purchased Chilenje Mall from the plaintiff. It only paid the Bank its money on 14th July 2017 because the letter of undertaking was issued on 13th July 2017 to the defendant's lawyers. DW asserted that since the suit contract was denominated in US dollars, the plaintiff could not prove that he suffered loss. In any event, PW received his full payment on 16th August 2017.

3.9 In **cross-examination**, DW admitted that the date of completion of the contract was 30th April 2017. However, this did not imply that PW would receive the payment on that date because he had other responsibilities in the contract. DW acknowledged that PW sent the defendant emails on completion. As at 14th September, 2017 the defendant owed PW USD 100,000. However, DW insisted that the defendant only received the Bank's letter of undertaking dated 13th July 2017. When shown the letters of undertaking, DW stated that

they were almost identical except for the amount on interest which he could not explain.

3.10 DW averred that PW was paid in US dollars although the Bank's letter of undertaking reflected a kwacha amount. In reference to the letter addressed to Mr. Rum, the defendant's director dated 18th May 2017, DW admitted that PW reminded the defendant of its obligation to the Bank by end of April 2017. In response, Mr. Rum apologized for the delay.

3.11 In re-examination, DW replied that the defendant only received one letter of undertaking dated 13th July 2017. It paid PW the final installment of USD 100,000 after he paid property transfer tax and transferred the title deed.

3.12 That marked the close of the Defendant's case.

3.13 **Stephen Chikwa Chibwe (SW)**, a legal practitioner, came to Court as a subpoena witness. He testified that he was the defendant's lawyer in the sale transaction and prepared the draft contract of sale. It was accepted by the parties and in accordance with its terms, he received two letters of undertaking from the Bank. One dated 13th April 2017 authored by its employee Beene and received before the date of completion. The other dated 13th July 2017, was sent after

the completion date. SW went on to state that the defendant asked him to get the subsequent letter of undertaking of July 2017.

3.14 In **cross-examination by the plaintiff**, SW explained that he received the first letter of undertaking on 13th April 2017 on behalf of the Defendant, and the second letter on 13th July 2017. The Defendant was supposed to pay the bank by 30th April, 2017 but failed to meet the deadline.

3.15 When **cross-examined by the defendant**, SW averred that PW was responsible for obtaining state consent to assign, paying property transfer tax and getting an assessment of the tax payable. He reiterated that the defendant paid the Bank after 30th April 2017 and the plaintiff did not issue a notice to complete. SW further stated that the parties were bound by the LAZ General Conditions of Sale 1997. The conveyancing process began in May 2017 after PW obtained state consent to assign and paid property transfer tax. The contract did not state when the purchase price was to be paid in full and the Bank released the certificate of title in August 2017.

3.16 The witness was not **re-examined**

4. Submissions

4.1 After the close of trial, learned Counsels for the parties undertook to file written submission. In the case of Plaintiff, submissions were filed into Court on 27th January 2020, while those of the Defendant were settled on 10th February 2020.

4.2 On behalf of the plaintiff, counsel submitted that the first letter of undertaking dated 13th April 2017 was issued on the day of signing the contract but the defendant failed to pay the Bank on time. The defendant's former advocate, SW testified that he received two letters of undertaking from the Bank dated 13th April and 13th July 2017. Further, the defendant acknowledged the plaintiff's email of 18th May 2017, where he reminded it of its obligation to the Bank and it acknowledged the mail. Counsel averred that the defendant failed to make the payment and as a result, the plaintiff incurred additional interest and costs. The consequence was that the defendant breached the contract of sale.

4.3 Counsel fortified his assertion by referring the Court to **Chitty of Contracts, General Principles, Sweet & Maxwell**, who state:

"Nature of damages

Damages for breach of contract are a compensation to the Plaintiff for the damage, loss or injury he has suffered through the breach. He is, as far as

money can do it, to be placed in the same position as if the contract had been performed.”

In concluding, counsel prayed to Court to grant the orders against the defendant.

4.4 In the rebutting submissions, learned counsel for the defendant contended that the plaintiff failed to prove that he suffered exchange losses from official bank sources because the contract was denominated in US dollars. The issue of exchange losses would not arise because the transaction only had one currency. Counsel asserted that the parties varied the mode of payment of the purchase price when the Bank delivered the letter of undertaking dated 13th July 2017. Thus, it was only at that point that the defendant could proceed to pay the full purchase price.

4.5 It was further contended that the plaintiff did not give notice to complete in accordance with general condition 21 of the Law Association General Conditions of Sale. Further, the plaintiff delayed in securing the letter of undertaking from the Bank, obtaining state consent to assign and paying property transfer tax. Because the completion date was altered, the plaintiff could not raise any remedies against the defendant on the contract.

4.6 Counsel stated that the defendant could only pay the full purchase price after state consent to assign was obtained. His assertion was motivated by the case of **Bernard Leigh Gadsden v Vincent Joseph Chila¹**, where the Court refused to treat the contract as repudiated on the reason that:

“...there is no evidence either from the plaintiff himself or his witness that the State’s consent to assign has been issued, neither was the consent if any produced in evidence or exhibited...”

4.7 Counsel went on to argue that state consent to assign had not been obtained by the plaintiff as specified by the parties in clause 5 of the special conditions of the contract. Further, the plaintiff had not paid property tax according to clause 12 of the conditions: therefore, the plaintiff could not hold the defendant to be in breach of contract. In concluding, counsel prayed to Court to dismiss the plaintiff’s case.

5. Determination

5.1 Having considered the pleadings, evidence adduced, submissions of the parties and authorities cited therein, it is common cause that the plaintiff sold Chilenje Mall to the defendant. The parties executed a contract of sale on 13th April 2017 and they agreed on a purchase price of US\$ 2,300,000.00. The amount was payable by 30th April 2017 and part payment of US\$ 1,042,000.00 was to be made directly

to Barclays Bank Zambia Plc (Bank), where the plaintiff had obtained a 3rd party mortgage for the Mall. The Bank would issue a letter of undertaking to the effect that it would release the certificate of title to the defendant.

5.2 The plaintiff was expected to obtain a letter of undertaking from the Bank on 13th April 2017, which he did. A subsequent letter was issued on 13th July 2017 at the defendant's request. The defendant paid the bank US\$ 1,042,000.00 on 14th July 2017. The plaintiff averred that he was charged additional interest and penalties on the late payment and the defendant breached the contract of sale. The issue for determination is **whether the defendant breached the terms of the contract of sale when it paid the plaintiff's 3rd party mortgage after 31st April 2017?**

5.3 In support of his case, the plaintiff contended that the contract of sale provided the completion date as 30th April 2017. In terms of clause 12 of the special conditions of contract, he obtained a letter of undertaking from the Bank addressed to the defendant's advocates on 13th April 2017 wherein it undertook to release the plaintiff's title deed upon receipt of the full payment of US\$ 1,042,000.00. The plaintiff averred that the defendant failed to pay the Bank on time. As a result of the delay, he was penalised with additional interest and

suffered exchange losses in the sum of USD 100,731.54. While he recovered USD 58,851.15, the defendant owed him USD 41,880.39 for the breach.

5.4 In response, the defendant argued that it did not receive the Bank's letter of undertaking of 13th April 2017 but the one dated 13th July 2017. The letter arrived long after the completion date but it immediately paid the Bank on 14th July 2017. The defendant blamed the plaintiff for missing the completion deadline because he did not obtain state consent to assign, pay property transfer tax nor transfer the leases of the tenants at Chilenje Mall. The defendant challenged the plaintiff's claim for exchange loss because the contract was US dollar denominated and had factored the risk of exchange losses. Further, the issue would only arise in the case of competing currencies in a contract, but this was not the case. It also argued that the contract of sale did not provide penalties for late payments and the plaintiff failed to issue a notice to complete in terms of Law Association of Zambia General Conditions of Sale 1997.

5.5 After reflecting on the rival positions of the parties, I find it convenient to start by setting out that courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. I am

fortified by the case of **Reigate v Union Manufacturing Co. (Ramsbolton)**², where Scrutton L.J. held as follows:

“The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract.... A term can only be implied if it is necessary in the business sense to give efficacy to the contract.”

5.6 Equally in the case of **Attorney General of Belize et al v Belize Telecom Ltd & Another**³ at page 1993, citing Lord Person in *Trollope Colls Ltd Vs North West Metropolitan Regional Hospital Board* (1973) 1WLR 601 at 609, the English House of Lords held that:

“The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable.”

5.7 From the cited authorities, when faced with disputes that arise from written contracts, courts are bound to apply the express terms stated by the parties in their relationship. A term can only be implied if it can be stated confidently that at the time that the contract was being negotiated, if the parties would have been asked what would happen in a certain event, they both replied “of course, that was the expected outcome”. The key terms of the suit contract are as follows:

"5. The period fixed for obtaining the State's consent and any other necessary license to assign shall be (3) days after the discharge of the mortgage.

7. The date fixed for completion is no later than the 30th April 2017.

9. The tenants shall become subject to the purchaser on the date of completion of the transaction.

10. The property transfer tax shall be paid by the vendor and deducted from the purchase price.

12. The purchaser's advocates shall write to Barclays Bank Zambia PLC instructing them to immediately release the title deed to the purchaser upon receipt of US\$ 1,042,000 (United States Dollars One Million and Forty Two Thousand). Before the money is paid by the purchaser Barclays Bank Zambia PLC will write a letter of commitment to the purchaser's advocates.

13. Completion on this transaction means upon the purchaser obtaining a clean title in his name."

5.8 The material before me shows that it is indisputable that the Bank issued a letter of undertaking signed by Ms. Beene Kaoma dated 13th April 2017. It was addressed to the defendant's former advocates, Mr. Chikwa Chibwe of Messrs Ysakar Legal Practitioners. Ms.

Kaoma issued another letter of undertaking dated 13th July 2017, which was equally addressed to the defendant's advocates. Mr. Chibwe testified that he received the first letter of completion before 30th April 2017. However, the defendant's director asked him to secure another letter of undertaking. The Court notes that the letters of undertaking were almost identical in content except in paragraph 3 on interest. The earlier letter referred to interest of K1,677,354.16 while the subsequent letter showed that it increased to K2,020,814.54.

5.9 The defendant contended that the plaintiff failed to prove that its advocates received the first letter of undertaking contrary to Mr. Chibwe's evidence, which was uncontroverted. Thus, I find that the defendant's argument has no substance because Mr. Chikwa who was the dealing lawyer confirmed that he received the first letter of undertaking. The question that arises is *whether the defendant's payment to the Bank was delayed?*

5.10 The plaintiff argued that the defendant delayed its payment to the Bank and was made long after the first letter of undertaking was issued and after the completion date. He also stated that according to the contract of sale, state consent to assign was to be obtained three

days after the mortgage was discharged, while property transfer tax would be deducted from the purchase price.

5.11 In response, the defendant contended that the plaintiff failed to obtain state consent to assign, pay property transfer tax and avail it the letter of undertaking until 13th July 2017. Thus, it could not be blamed for delay and in any case, the contract of sale did not provide penalties for late payments. In addition, the plaintiff failed to issue a notice to complete in terms of General Conditions 21 of the Law Association of Zambia General Conditions of Sale 1997 informing the defendant of the default and could not seek remedies in Court.

5.12 From the competing evidence, I find that the plaintiff's obligation to obtain state consent to assign (clause 5 of the special conditions) expressly stated that it would be obtained three days after the mortgage was discharged by the bank (emphasis my own). In other words, the parties agreed that the plaintiff would obtain state consent to assign after the defendant fully paid USD 1,042,000 to the Bank. Thereafter, it would discharge the mortgage and enable the plaintiff to act on his obligation to obtain State consent to assign after 3 days. Further, I find that the parties agreed that property transfer tax would be deducted from the purchase price. Thus, the term depended on the defendant paying the purchase price from which the

money would be deducted. In my opinion, these conditions limited the plaintiff's control in complying with the terms of contract of sale because they were predicated by the defendant fulfilling its obligation of paying the purchase price.

5.13 The evidence on record shows that the defendant timely received the first letter of undertaking as confirmed by its former advocate Mr. Chibwe and before 30th April 2017. As such, it should have paid the Bank on time. I cannot therefore, help but to conclude that the defendant's delayed payment to the Bank breached the parties' contract. Even though the defendant averred that completion date as defined in clause 13 of the contract meant "the purchaser obtaining clean title", the obligation in my view, defined the final outcome. It did not provide an opportunity for the defendant to escape its express obligation stated in clause 7 of the special conditions of contract, that the date of completion was 30th April 2017.

5.14 Counsel for the defendant in his submissions went to great lengths to reproduce portions of the Law Association of Zambia General Conditions of Sale 1997. Now, what I find is that the defendant's witness did not refer to the conditions of sale. Further, the express terms of the contract adequately scoped the parties' obligations. Since counsel's submissions are not evidence, they are of little value

to the Court. Suffice to state that the express terms were clear on the parties' responsibilities in their relationship.

5.15 I am mindful that the defendant argued that the plaintiff did not adduce evidence on the exchange losses. In response, the plaintiff averred that he accrued interest on the mortgage because the defendant delayed the payment. A review of the letters of undertaking shows that interest in the first letter was stated as K1,677,354.16 and it moved up to K2,020,814.54 in the second letter. In my opinion, the only probable explanation is that the plaintiff was condemned to additional interest. Thus, I find substance in the plaintiff's claim. The calculation of the losses is a matter of detail that can only be ascertained by an assessment. Suffice to state that at this point, it does not bear on the plaintiff to engage the Court into a mathematical discussion.

5.16 Having found that the defendant breached the contract of sale, the question therefore, is what remedy is the plaintiff entitled to?

The learned authors of **Chitty on Contract (supra)** at paragraph 22-001, state that parties to a contract must perform their obligations as follows:

"The general rule is that a party to a contract must perform exactly what he undertook to do. When an issue arises as to whether performance is

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The learned authors of **Chitty on Contract (supra)** at paragraph 22-001, state that parties to a contract must perform their obligations as follows:

"The general rule is that a party to a contract must perform exactly what he undertook to do. When an issue arises as to whether performance is

contract does not entail that the defendant should not be held accountable. In any case, the Court has power under section 13 of the High Court Act to administer law and equity concurrently as follows:

"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 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."

5.19 Put differently, under section 13 of the Act, where a legal remedy is not available because the parties have not agreed on it, a Court can grant an innocent party an equitable remedy. The order can be granted absolutely or on such reasonable terms and conditions as a Court deems just, whether it be at an interlocutory or final stage. Therefore, this Court finds that it would make business efficacy to order the defendant to pay the plaintiff the differential interest and exchange loss occasioned by the defendant's late payment to the Bank.

5.20 Accordingly, I hold that the plaintiff's claim has merit and succeeds.

6. Final orders

These are the final orders of this Court:

- 1) I award the plaintiff the sum of US\$ 41,880.39 with interest at the short term bank deposit rate from the date of the writ of summons to the date of judgment, and thereafter at the Bank of Zambia current lending rate till the date of payment.
- 2) Costs are awarded to the plaintiff to be taxed in default of agreement.

Dated the 17th day of April 2020


M. Mapani-Kawimbe
HIGH COURT JUDGE