

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

2022/HP/1113

BETWEEN:

PAULINE NACHILINDI

AND

COMESA TRADERS TRUST

PLAINTIFF

DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 29th DAY OF
DECEMBER, 2023.**

For the Plaintiff : Mr. K. Zimba, Messrs Mosha and Company

For the Defendant : Ms. D. Kapitololo, ZS Legal Practitioners

J U D G M E N T

CASES REFERRED TO:

1. *Christopher Lubasi Mundia v Sentor Motors Limited 1982 ZR 66*
2. *Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others 2005 ZR 38*
3. *Attorney General v Roy Clarke 2008 Vol 1 ZR 38*

OTHER WORKS REFERRED TO:

1. *Black's Law Dictionary, Tenth Edition by Bryan A. Garner*
2. *Chitty on Contracts, General Principles, Thirty-Second Edition*
3. *Contract Law in Zambia, Sangwani Patrick Ng'ambi and Chanda Chungu Second Edition, Juta and Company (Pty) Limited, 2021*

1. INTRODUCTION

- 1.1 The Plaintiff, Pauline Nachilindi, sued the Defendant, Comesa Traders Trust, hereinafter referred to as the Trust on 21st May, 2022, seeking to enforce an agreement for the sale of a shop by Writ of Summons, which is accompanied by a statement of

claim and the other requisite documents. The reliefs claimed are:

- i. *An Order of interim injunction restraining Comesa Traders Trust from permitting any trader from occupying or trading in Pauline Nachilindi's Shop No. R19 until this matter is determined by this Honourable Court;*
- ii. *An Order for Specific Performance of the agreement between Pauline Nachilindi and Comesa Traders Trust to yield vacant possession of the shop to Pauline Nachilindi;*
- iii. *Damages for loss of business and breach of contract;*
- iv. *Interest on monies awarded and Costs; and*
- v. *Any other relief the Court may deem fit.*

2. STATEMENT OF CLAIM

- 2.1 The statement of claim shows that Pauline Nachilindi, is and was at all material times a member and trader in COMESA Trust Trading Centre. COMESA Traders Trust (the Trust), is stated as being, and was at all material times, a registered Trust under the Perpetual Succession Act, and operating a Trading Centre at COMESA in the city and province of Lusaka, Zambia.
- 2.2 Pauline Nachilindi, avers that she is a rightful owner of a container located in COMESA Trust Trading Centre. In that respect, her assertion is that in 2019, by an oral agreement between the traders and the Trust, the Trust embarked on a project to construct shops at COMESA Trust Trading Centre. She states that the Trust requested owners of containers and other makeshift structures to relocate to a temporal area that was designated by the Trust.

- 2.3 The contention is that it was an express term of the oral agreement, that the Trust would allocate and handover possession of the proposed newly constructed shops once completed to the relocated traders, on condition that the traders made payment of the requisite fees.
- 2.4 Pauline Nachilindi also states that she paid the requisite fees, that were representative of the size and space that the container had taken up, and Two (2) shops numbered Shop No. Q10 and Shop No. R19 were allocated to her, and certificates of ownership to that effect were issued in her favour by the Trust. It is further stated that notwithstanding the allocation of the Two (2) shops in her favour, the Trust has only yielded vacant possession of Shop No. Q10, and has purportedly withheld Shop No. R19, and has purportedly allocated it to an unknown person.
- 2.5 The averment is that the allocation of the Two (2) shops is reflective of the size of Pauline Nachilindi's business, a fact that was well known to the Trust, which duly accepted payment for Two (2) units, and issued certificates for the Two (2) units. However, the Trust without just cause or cogent reason, and in breach of the agreement, has withheld One (1) unit to her detriment.
- 2.6 Pauline Nachilindi's assertion is that despite numerous and repeated reminders, the Trust has refused to hand over possession of the second shop, and consequently stifled her sales and trading capacity. Her contention is that as a result of

the Trust's actions, she has suffered and continues to suffer loss, damage and inconvenience.

3. DEFENCE

- 3.1 In its' defence that was filed on 29th August, 2022, the Trust admits that it entered into an oral agreement with the traders, and that it was an express term of that agreement, that it would allocate and handover possession of the proposed newly constructed shops once completed, on condition that the traders made payment of the requisite fees.
- 3.2 It however, states that before the demolition of the previous structures was done, the parties orally agreed on the size of the shops to be allocated, which included 2 x 4 meters. The defence is further that Pauline Nachilindi at the time, was only allocated Shop No. Q10, which she later paid for, on or about the 10th day of December, 2020, and on 31st day of May, 2021. Also stated, is that sometime before July, 2020, upon identifying and recognizing senior members of the Trust, the Board of the Trust decided to give senior members who included Pauline Nachilindi, extra shops.
- 3.3 Therefore, sometime before 7th April, Pauline Nachilindi was offered Shop No. R19, as an extra shop. It is also stated that Pauline Nachilindi, however, requested that instead of being allocated Shop No. R19, the Board should instead allocate her a different shop, on the upcoming blocks along Lumumba road, which the Board accepted.
- 3.4 The contention is that Shop No. R19 remained vacant until sometime in July, 2020, when the Trust identified another

member, namely, Moses S. Chibwe, who was on the Trust's waiting list for allocation of a shop. Thus, Moses S. Chibwe was allocated Shop No. R19, and a certificate of ownership was subsequently issued to him in respect of that shop, on 14th February, 2022.

- 3.5 However, sometime before 7th April, 2022, Pauline Nachilindi approached the Trust, requesting that she be allocated Shop No. R19, that was initially offered to her, as it had taken longer than expected to be allocated a shop in the new building. The Trust in response, indicated to Pauline Nachilindi, that the same was not possible, as Shop No. R19 had since been allocated to someone else, following her request to be allocated a shop in the new building.
- 3.6 It is stated that the Trust, however, assured Pauline Nachilindi that she would be allocated a shop at the new building as was agreed previously by the parties. Further in defence, the Trust states that Pauline Nachilindi, on or about 31st March, 2022 still went ahead and paid for the issuance of Two (2) certificates of ownership for Shop No. Q10, and allegedly Shop No. R19.
- 3.7 Thereafter, Pauline Nachilindi then prompted the Cashier to have the certificates of ownership approved and signed by the Board Chairperson and Board Secretary, as was the procedure. It is also stated that the Board Secretary upon receipt of the certificates of ownership from the Cashier, discovered that Pauline Nachilindi's name did not appear on the allocation list in relation to Shop No. R19, and as a result declined to sign the certificate of ownership relating to Shop No. R19.

- 3.8 The Trust's defence is that even after being informed of this, Pauline Nachilindi still opted to collect the uncompleted certificates of ownership from the Board Secretary without returning them to the Cashier, and signing off for them, as per procedure.
- 3.9 Then on 6th April, 2022, the Trust received a demand letter through Pauline Nachilindi's advocates, demanding that she be reinstated to the previous space. It contends that the allocation of shops was not based on the nature of business someone was doing, but was reflective of the approved plan from the local authority, and the size of the containers being claimed, are structures that were not approved.
- 3.10 The defence is further that the payment for the Two (2) shops was only accepted to the extent that Pauline Nachilindi was offered Two (2) shops, which however did not include Shop No. R19. It is contended that Pauline Nachilindi is not entitled to the reliefs sought.

4. EVIDENCE AT TRIAL

- 4.1 At trial, the Pauline Nachilindi testified, and she called no witnesses, while the Trust called five (5) witness.

5. PAULINE NACHILINDI'S EVIDENCE

PW1-PAULINE NACHILINDI

- 5.1 Pauline Nachilindi, produced her witness statement, and she told the Court that she relied on it, as her testimony before the Court. In that witness statement, her evidence was that sometime in 2019, the Trust embarked on a project to construct shops at COMESA Trust Trading Centre. Therefore, it requested

- that the owners of container shops and other makeshift structures that were located at the proposed construction site, should remove their container shops or structures, and relocate to a temporal area, that was designated by the Trust.
- 5.2 She stated that she was amongst the traders that owned container shops at the proposed construction site, and by an oral agreement, the Trust agreed that it would allocate and handover possession of the proposed newly constructed shops once completed to the relocated traders.
- 5.3 Pauline Nachilindi further testified that the condition for allocation of the proposed newly constructed shops, was that the traders had to make payment of the requisite fees. She stated that she was then offered Two (2) shops, being No. R19 and No. Q10 by the Trust, which offer was accepted by tender of payment of the requisite fees, which the Trust duly accepted.
- 5.4 It was also her testimony, that the offer of the Two (2) shops by the Trust, was on the basis of the size of her previous container shop, and the fact that she was a senior member. Pauline Nachilindi stated that after allocation of the Two (2) shops, she then requested that the Trust allocates the second shop on the upcoming block along Lumumba Road, which the Board accepted. She added that in view of the request, the Board promised that the allocation would be done in the shortest possible time.
- 5.5 Thus, she relinquished her right to Shop No. R19, on condition that a different shop would be allocated to her. Still in her testimony, Pauline Nachilindi's evidence was that contrary to

the promise by the Trust, the allocation of the new shop delayed unreasonably, and she later discovered that the Trust was allocating new shops to other traders, and the vacant shops were running out.

- 5.6 Her evidence was further that subsequent to the discovery that all the shops on the new building had been allocated to other traders by the Trust, she then requested that she retains her right to Shop No. R19, as the initial agreement of relinquishing her right to it, was on condition that the Trust allocates her a different shop, which it had failed to do.
- 5.7 Pauline Nachilindi testified that in addition to the requisite fees made for the Two (2) shops, she made further payment for the issuance of Two (2) certificates of ownership for the Two (2) shops, which were approved and signed by the Board Chairperson. Her evidence was that she made several follow ups and requested to be availed vacant possession of Shop No. R19. However, the Trust had allocated the same to another trader, notwithstanding that she had relinquished her right to Shop No. R19, on condition that the Trust allocates her a different shop, which it had failed to do.
- 5.8 Still in her testimony, Pauline Nachilindi stated that whilst she has paid the requisite fees and had acquired certificates for the Two (2) shops, the Trust had not performed its' end of the agreement. Her contention was that as a consequence, she had suffered and continued to suffer loss of business.

CROSS EXAMINATION OF PAULINE NACHILINDI

- 5.9 In cross examination, Pauline Nachilindi testified before Shop No R19, she was not allocated Shop No Q10. Her evidence was also that when Shop No. R19 came into being, she requested to be given a shop that faced Lumumba Road on the new building. It was stated that Pauline Nachilindi went back in April, 2019 and asked to be given Shop No. R19, which she was initially offered.
- 5.10 She agreed that she was told that it was already taken and the Secretary refused to sign the certificate. When referred to page 5 of her bundle of documents, Pauline Nachilindi stated that it was a certificate of ownership. Her evidence was that the signature the Secretary General was missing on the document.

RE-EXAMINATION OF PAULINE NACHILINDI

- 5.11 The clarity that was given in re-examination, was that when Pauline Nachilindi was given the Two (2) shops, she had indicated that Shop No R19 was too near to the other one. Thus, she had asked for a shop near the road. It was stated that the Trust had agreed, but it gave all the shops in the new building to other people contrary to what was agreed.

6. EVIDENCE BY COMESA TRADERS TRUST

DW1 - MISHECK MUSONDA

- 6.1 Misheck Musonda identified his witness statement at trial, and he relied on it, as his testimony before Court. He testified therein, that in July, 2018, the market was gutted by fire and the board of trustees embarked on a reconstruction process. It was his evidence that several meetings were held with the

general membership of the market, that culminated in an agreement being reached to construct a new structure for the market, as well as the size of the shops.

- 6.2 He stated that in so far as it was written, the structures were built, and the allocation process was done. Misheck Musonda told the Court that Pauline Nachilindi was one of the senior members of the market, and that she was supposed to be allocated a shop which measured 2 x 4 meters, and that in that respect, communication was made to her.
- 6.3 Further in his testimony, Misheck Musonda testified that sometime before July, 2020, a meeting was held by the Board members to discuss the allocation of shops. Then later, it was agreed that senior members of the market, including Pauline Nachilindi, be given an extra shop each. Misheck Musonda referred in that regard to the minutes of the meeting which were at page 4 of the Trust's bundle of documents.
- 6.4 Further in his evidence, Misheck Musonda stated that it was agreed that 2 x 2.5 meters each be given to the senior members. He also testified that the Board members agreed on the proposal, and Pauline Nachilindi was informed, and she happily accepted the offer. The evidence that was also given was that Pauline Nachilindi was allocated Shop No. Q10, which measured 2 x 4 m, and Shop No. R19 which measured 2 x 2.5 m on the opposite side.
- 6.5 Misheck Musonda testified that he was later informed by the Project Director, that Pauline Nachilindi had made a request that since Shop No. Q10 was opposite Shop No. R19, she would

be happy if the Board members could find another shop that faced Lumumba Road, and they agreed. Thus, Pauline Nachilindi relinquished ownership of Shop No. R19, and she was to be allocated another shop on the site, which was yet to be constructed.

- 6.6 It was stated that the Board reallocated Shop No. R19 to someone else, who was on the waiting list namely, Moses. S. Chibwe with reference being made to the List at page 3 of the Trust's bundle of documents. Further in his testimony, Misheck Musonda testified that on or about 5th November, 2022, before the Board members could finish the allocation of the shops, confusion started in the market place owing to a group of alleged political party cadres.
- 6.7 It was his evidence that the cadres started reallocating the shops that the Board of the Trust had already allocated. Misheck Musonda added that the incidents were reported to COMESA market Police Post. His continued testimony was that it was during that confusion, that Pauline Nachilindi demanded that she be taken back to Shop No. R19, that she had earlier relinquished ownership of. However, she was advised to wait for the other shops to be ready since Shop No. R19 had already been reallocated to someone else.
- 6.8 Misheck Musaonda's evidence was that Pauline Nachilindi insisted on being given back the shop, but the Board members informed her that they could not give her back Shop No. R19 as it was already occupied by another member of the Trust. He also testified that on 31st March, 2022, he signed a certificate

of ownership, which gave ownership of Shop No. R19 to Pauline Nachilindi, as shown at pages 12 and 13 of the Trust's bundle of documents.

- 6.9 The explanation given for doing this, was stated that Misheck Musonda had the belief that he was signing the same according to the new allocation list, and that the Cashier had already thoroughly checked against the said allocation list, as per procedure.
- 6.10 His evidence was further that he was promptly informed by the Board Secretary that the certificate of ownership that was issued to Pauline Nachilindi pertaining to Shop No. R19, that he had signed, ought not to have been signed because her name was not on the new allocation list. It was therefore Misheck Musonda's testimony that the certificate of ownership was incomplete and erroneous.

CROSS EXAMINATION OF MISHECK MUSONDA

- 6.11 Misheck Musonda in cross examination, testified that as Chairman, he organized, led and facilitated. He also stated that he gave direction to the Trust and the Board, and that nothing happened without his knowledge. It was also Misheck Musonda's evidence, that before the allocation list for the shops was circulated, only the Project Director approved the list of names, and that he did not sign it, before the Board agreed. It was added that the Project Director kept the list on behalf of the Board.
- 6.12 When referred to the List at pages 1 to 3 of the Trust's bundle of documents, Misheck Musonda stated that it was a list of

persons that were allocated shops. He agreed that the said List was not signed by anyone. It was denied that anyone could just produce a list and bring it to Court. On being referred to pages 12 and 13 of the Trust's bundle of documents, Misheck Musonda testified that at page 12 was the certificate of ownership that was issued when money was received from a member by the cashier. He stated that he signed the Two (2) pages.

- 6.13 He further stated that Pauline Nachilinda did not take possession of the last shop in the new building, and that she did not sign to give up Shop No. R19, but rather, verbally gave it up.

RE-EXAMINATION OF MISHECK MUSONDA

- 6.14 In re-examination, Misheck Musonda testified that Pauline Nachilindi asked for a shop further away on Lumumba Road, and they agreed. However, there was delay due to confusion at the market. It was also his evidence, that the Cashier prepared a certificate of ownership, which he signed. He explained that in this case, the certificate was prepared based on the first list and he signed it.

DW2 - MOSES S. CHIBWE

- 6.15 Moses Chibwe also produced his witness statement at trial as his evidence. His testimony as contained in that witness statement, is that on 12th July, 2018, when the market was gutted by fire, the Board of Trustees embarked on a reconstruction process. He stated that before the building process started, they had several meetings with the Board for

the Trust on the new structure of the market, and the size of his shops was also agreed upon, which was about 2 x 2.5 meters.

- 6.16 It was also his evidence, that he was informed that he would not be allocated the shops until he paid for them, and he did so on 17th June, 2021, which included Shop No. R19. He referred to the receipts at pages 7 and 8 of the Trust's bundle of documents, as evidence of the payment. Moses Chibwe also told the Court that he put fittings in the shops and started trading.
- 6.17 Then on 14th February, 2022, he further paid for the issuance of the certificate of ownership for Shop No. R19, and it was issued, as seen at page 9 of the Trust's bundle of documents. It was also Moses Chibwe's testimony that in July, 2022, Pauline Nachilindi went to his shop, and started claiming ownership, and she threatened to lock the shop.
- 6.18 Moses Chibwe stated that he made her aware that it was his shop, and that he had documentation to prove it. His evidence was that he referred her to the Trust. The testimony that was also given, was that Moses Chibwe was subsequently made aware by the Board of the Trust, that Pauline Nachilindi had commenced a matter in Court relating to his shop.

CROSS EXAMINATION OF MOSES CHIBWE

- 6.19 Moses Chibwe when cross examined, testified that he had a shop at the market before it was gutted. When referred to pages 6 and 7 of the Trust's bundle of documents, his evidence was that at page 6, was a receipt dated 31st May, 2021, and that at page 7, the receipt was dated 7th June, 2021.

6.20 He agreed that Pauline Nachilinda had paid before he did, and he told the Court that the Chairman did not tell him that before he occupied Shop No. R19, it had belonged to Pauline Nachilindi.

DW3 - OBBY MWAPE

6.21 Obby Mwape also produced his witness statement as his testimony. It was his evidence in that witness statement, that he was a Cross-Border Trader and Project Director of the Trust. He stated that he recalled that in July, 2018, the market was gutted by fire, and the Board of Trustees embarked on a reconstruction process.

6.22 He explained that the Trust was tasked to supervise the new plan of the structure which was submitted to the Lusaka City Council. Obby Mwape also testified that before the building process started, several meetings were held with the general membership of the market, and they agreed on a new structure for the market and the size of the shops.

6.23 Like the witnesses before him, his evidence was that Pauline Nachilindi, as one of the senior members of the market, was supposed to be allocated a shop that measured 2 x 2.5 meters, and the same was communicated to her.

6.24 Further in his testimony, Obby Mwape stated that in due course, a meeting was held by the Board members sometime in 2020, to discuss the allocation of the shops to senior members. He stated that it was later agreed that selected senior members of the market be given extra shops, and in that regard, he

referred to minutes of the meeting of the Board at page 4 of the Trust's bundle of documents.

- 6.25 Obby Mwape also testified that he recalled that he proposed to the Board that the size of the shop should be 2 x 2.5 meters, which was adopted by the Board, and he also proposed that Pauline Nachilindi be one of the beneficiaries, because she was a senior member of the market. His evidence was that the Board also adopted that suggestion.
- 6.26 He stated that they communicated to Pauline Nachilindi and she happily accepted. Thereafter, the Trust and the other Board members proceeded to show her the shop, being number Shop No. R19 and she agreed to take it up. The continued testimony was that Obby Mwape was later approached by Pauline Nachilindi, who made a request that since the other shop allocated to her, being No. Q10 was opposite Shop No. R19, she would be happy if the Trust and the Board members could find her another shop that faced Lumumba Road, which proposal the board members agreed to.
- 6.27 It was also testified that Pauline Nachilindi thus relinquished ownership of Shop No. R19, and was to be allocated another shop. Obby Mwape testified that they were in the process of allocating her a shop on the site which was in the process of construction. Thus, the Board reallocated Shop No. R19 to someone who was on the waiting list, as shown at page 3 of the Trust's bundle of documents.
- 6.28 His evidence was further that sometime in September, 2021, before the Trust and the Board members could finish the

allocations of the shops in which Pauline Nachilindi was one of the beneficiaries, confusion at the market place started, and it was believed to have been started by people who belonged to a group of political cadres.

6.29 He stated that it was during the time of the confusion, that they as the Board of Trustees for the Trust, were informed by the Chairperson that Pauline Nachilindi had demanded that she was taken back to the shop that she had earlier relinquished, being Shop No. R19. Obby Mwape's evidence was that Shop No. R19 had already been allocated to Moses Chibwe, referring to the List at page 3 of the Comesa Traders Trust's bundle of documents.

6.30 His testimony was that Pauline Nachilindi was advised that she had to wait for the other shops to be ready, since Shop No. R19 had already been allocated to someone else. However, she insisted on being given back the same shop, but the Board members informed her that they could not give her back the shop, as it was already occupied by another member of the Trust.

CROSS EXAMINATION OF OBBY MWAPE

6.31 Obby Mwape, in cross examination, stated that as Project Coordinator, he identified new projects, did the banking, sought approval for new projects, and sat on committees that allocated market spaces. He further stated that he worked with the Secretary and the Chairman in the allocation of market spaces and exchanged relevant information at all times. It was

also his testimony, that they initially gave Pauline Nachilindi Shop No. R19, in addition to Shop No. Q10.

6.32 Obby Mwape denied that it was agreed that Pauline Nachilindi moves to Lumumba Road and surrenders Shop No. R19. His evidence when referred to paragraphs 8 and 9 of his witness statement, was that he agreed with the contents of paragraph 9. Obby Mwape testified that Pauline Nachilindi relinquished Shop No. R19, and that she did not move into a shop on Lumumba Road.

6.33 It was agreed that Pauline Nachilindi had not been given a shop at Lumumba Road, and Obby Mwape did not know if there was a shop at the said Lumumba Road.

DW4 – REGINA CHANDA

6.34 Regina Chanda, a Cashier at the Trust also produced her witness statement as her testimony. In that witness statement, her evidence was that on 31st March, 2022, Pauline Nachilindi went to pay for the issuance of a certificate of ownership for Shop No. Q10, and allegedly for Shop No. R19.

6.35 She explained that after checking the old allocation list, she then proceeded to issue out receipts for the Two (2) shops and she prepared certificates of ownership for Shops No. Q10 and No. R19. Pages 10 to 13 of the Trust's bundle of documents was identified as the said receipts and certificates of ownership respectively. It was also Regina Chanda's testimony that she then proceeded to take the certificates of ownership to the Chairperson for his approval and signing, and he signed.

- 6.36 Then on another date, Pauline Nachilindi and her daughter went to collect the certificates of ownership, and she also proceeded to take the said certificates of ownership to the Board Secretary's office for his approval and signing as well.
- 6.37 However, the Board Secretary refused to sign the certificate for Shop No. R19, after he checked the updated allocation list, which indicated that the shop had already been given to someone else. Reference was made to the List, and the certificates of ownership in Pauline Nachilindi's names at pages 3, 12 and 13 of the Trust's bundle of documents respectively.
- 6.38 Regina Chanda further in her testimony, also stated that she had not yet received the updated list, hence the error. Further, that she then left Pauline Nachilindi and her daughter in the Board member's office, as well as both certificates, because the matter was no longer in her hands, but that of the Board members.

CROSS EXAMINATION OF REGINA CHANDA

- 6.39 In cross examination, Regina Chanda testified that she received payment from Pauline Nachilindi for Shops No. R19 and No. Q10. Regina Chanda agreed that she issued a receipt and a certificate of ownership, and that she gave the certificate of ownership to the Chairman who signed. It was also her evidence, that the Chairman knew what happened in all the sections, and therefore, he knew what he was signing, as he signed.
- 6.40 Still in cross examination, Regina Chanda testified that she had an allocation list at the time, and that her list had Pauline

Nachilindi's name. She added that, that was why she had issued a receipt on payment being made. However, she clarified that she had not been given the updated list at the time.

DW5 – NDAYA BUKASA

- 6.41 The last witness for the defence was Ndaya Bukasa. He also identified his witness statement, and he produced it as his testimony before Court. In that witness statement, his evidence was that he was the Board Secretary for the Trust. He repeated the events, as stated by the other witnesses that were called by the Trust, that led up to Pauline Nachilindi insisting on being given back Shop No. R19.
- 6.42 Ndaya Bukasa added that on 31st March, 2022, Regina Chanda, the Cashier, took Two (2) receipts for certificates of ownership. He stated that these were receipts number 3104 and number 3105, in the sum ZMW 300.00 each. Pages 10 and 11 of the Trust's bundle of documents were identified as the said receipts. The evidence that Ndaya Bukasa also gave, was that at the same time, the Cashier also presented him with Two (2) incomplete certificates for his approval and signing as Board Secretary of the Trust.
- 6.43 These were identified as the documents at pages 12 and 13 of the Trust's bundle of documents. It was his testimony that however, after he studied them, and compared them against the new allocation list, he discovered that Pauline Nachilindi's name did not appear on the said allocation list. Thus, he was prompted not to sign the said certificates, as evidenced at pages 12 and 13 of the Trust's bundle of documents.

CROSS EXAMINATION OF NDAYA BUKASA

- 6.44 In cross examination, Ndaya Bukasa's evidence was that Pauline Nachilindi was given Shop No. R19, in addition to Shop No. Q10. His position was that she did not pay for the properties. However, when referred to the receipts at pages 5 to 7 of the Trust's bundle of documents, he stated that she paid for construction, but not for the shops.
- 6.45 Ndaya Bukasa agreed that at pages 12 and 13 of the Trust's bundle of documents, were certificates of ownership that were signed by Musonda, the Chairperson. He however contended that he was supposed to sign before the Chairperson. It was stated that he was custodian as Secretary, but clarified that before the documents went to him, there was a procedure that had to be followed.
- 6.46 Ndaya Bukasa also testified that there was a list of allocations which he kept. He explained that the Cashier dealt with payments, and that she had her own list. When cross examined further, his testimony was that the Cashier counter checked her list before receiving payments. He stated that before the Cashier got the money from Pauline Nachilindi, she did not confirm the list.
- 6.47 It was further stated that Ndaya Bukasa was not aware that Pauline Nachilindi wrote a letter to surrender Shop No. R19. He nevertheless testified that he got a report that she would surrender Shop No. R19 from the Project Coordinator, so that she could get a shop outside, as there is business there. His

evidence was that the shop that was outside, was in the process of being built, and that Pauline Nachilindi did not move there.

RE-EXAMINATION OF NDAYA BUKASA

6.48 Ndaya Bukasa in re-examination, testified that Pauline Nachilindi surrendered an already built shop to get one on the road. However, it was not built so he changed from her name to another person. It was clarified that there was confusion and they could not continue.

7. DECISION OF THIS COURT

7.1 I have considered the evidence on record and the submissions that were filed by the Trust.

FACTS NOT IN DISPUTE

7.2 It is not in dispute that Pauline Nachilindi is a member and trader of the Trust. It is also not in contention, that in 2019, the Trust entered into an oral agreement with the Traders to construct shops after the market was gutted. It is common cause, that the Trust requested the owners of containers and other makeshift structures that were located at the proposed construction site to remove them, and relocate to a temporal area that was designated by the Trust.

7.3 It is further not in contention, that it was also agreed that the Trust would allocate and handover possession of newly constructed shops once completed to the relocated traders on the condition that they made payment of the requisite fees. It is common cause that the Trust held a meeting on 15th July, 2020 where it was agreed that selected senior members would be given extra shops that measured 2 x 2.5 meters and that

Pauline Nachilindi was one of the selected senior members that was to be given an extra shop.

- 7.4 It is also not in contention that Pauline Nachilindi was given shops No. Q10 and R19, and she later requested that she instead be given a second shop along Lumumba Road once the construction was completed. Therefore, she relinquished Shop No. R19. The facts also not in dispute are that Shop No R19 was reallocated to another trader Chibwe.

ISSUES IN DISPUTE

- 7.5 It is in issue, whether Pauline Nachilindi is entitled to the reliefs claimed? Pauline Nachilindi claims for an Order for Specific Performance of the agreement between herself and the Trust to yield to her vacant possession of the Shop No. R19. It is further in contention whether Pauline Nachilindi is entitled to damages for loss of business and breach of contract.

ANALYSIS

- 7.6 In her testimony, Pauline Nachilindi's evidence was that she was offered Two (2) shops, being Shop No. R19 and Shop No. Q10 on the basis of the size of her previous container, and the fact that she was a senior member of the Trust. Pauline Nachilindi testified that she accepted the offer, but later, she requested that she be given the second shop among the new shops that were being built along Lumumba Road. It was her evidence, that the Board accepted her request, and she relinquished Shop No. R19 on condition that she would be allocated a shop along Lumumba road.

- 7.7 Her further testimony was that the allocation of the new shops unreasonably delayed, and she discovered that the Trust was allocating the new shops to other traders, and they were running out. Pauline Nachilindi also testified that she discovered that all the new shops had been allocated to other traders.
- 7.8 Thus, she requested to retain her right to Shop No. R19. It was testified that Pauline Nachilindi in addition to the requisite fees paid, also made payment for the issuance of certificates of ownership for the Two (2) shops, which she stated were approved and signed by the Board Chairperson. Her contention, however, was that the Trust allocated Shop No. R19 to someone else, despite several follow ups and her requests for vacant possession.
- 7.9 In defence to the claim, Misheck Musonda, the Board Chairperson of the Trust testified that Pauline Nachilindi relinquished ownership of Shop No. R19, and she was to be given another shop, which was yet to be constructed. He stated that Shop No. R19 was then reallocated to Moses Chibwe. He, however, stated that before they could finish allocation of shops, political cadres caused confusion by reallocating shops that the Board had already allocated to members.
- 7.10 Misheck Musonda's testimony was also that it was during that time, that Pauline Nachilindi demanded that she be given back Shop No. R19. The events as highlighted by Misheck Musonda were also reiterated by Obby Mwape, the Project Director and Ndaya Bukasa, the Board Secretary, in their testimonies.

7.11 Misheck Musonda further stated that he signed Pauline Nachilindi's certificates of ownership for Shops No. Q10 and No. R19 on the erroneous belief that it was according to the new allocation list. Regina Chanda, the Cashier for the Trust on the other hand, testified that she issued out receipts and prepared certificates of ownership for Pauline Nachilindi based on the old allocation list.

7.12 Pauline Nachilindi claims an Order for specific performance of the oral agreement between herself and the Trust. ***Black's Law Dictionary Tenth Edition by Bryan A. Garner*** defines *specific performance* as:

"The rendering, as nearly as practicable, of a promised performance through a judgment or decree; specif., a court-ordered remedy that requires precise fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate, as when the sale of real estate or a rare article is involved. • Specific performance is an equitable remedy that lies within the court's discretion to award whenever the common-law remedy is insufficient, either because damages would be inadequate or because the damages could not possibly be established."

7.13 In discussing specific performance, in the book ***Contract Law in Zambia, by Sangwani Patrick Ng'ambi and Chanda Chungu Second Edition, Juta and Company (Pty) Limited, 2021*** the learned authors at page 422 state that:

“A decree of specific performance is a decree issued by the court which constrains a contracting party to do that which they have promised to do. The Supreme Court in the case of Trans-Continental Limited and Andrew Robb v Donald McIntosh and Eric Routledge SCZ Appeal 126 of 2012 defined specific performance as:

‘... specific performance is equitable relief, given by the court to enforce against a Defendant the duty of doing what he agreed by contract to do... the availability of the remedy of specific performance does not of itself import the existence of some equitable interest; all it imports, is the inadequacy of the common law remedy of damages in the particular circumstances.’

7.14 The definition of specific performance quoted in the cited authorities above, shows that it is a remedy that is given by the Court as a result of non-compliance with a contract between the parties. In this matter, it is not in dispute that Pauline Nachilindi and the Trust entered into an oral agreement, under which the Trust undertook to give Pauline Nachilindi Two (2) shops for her businesses in exchange for payment of the requisite fees.

7.15 In its’ submissions, the Trust states that the agreement between itself and Pauline Nachilindi was varied. In discussing variation, the learned authors of ***Chitty on contracts, General Principles, Thirty-Second Edition, paragraph 22 - 032*** state that:

7.20 It is worth noting that a perusal of the Trust's defence shows that it did not plead that confusion arose at the hands of alleged political cadres, that resulted in reallocation of shops that had already been allocated to other traders. The defence that was pleaded was that after Pauline Nachilindi paid for the shops, it was discovered that her name did not appear on the updated List, as she had relinquished Shop No R19 for a shop that was to be constructed on Lumumba Road.

7.21 In the case of **Christopher Lubasi Mundia v Sentor Motors Limited** ⁽¹⁾ it was held that:

"The function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. Once the pleadings have been closed, the parties thereto are bound by their pleadings and the Court has to take them as such."

7.22 It will however be noted that the Supreme Court in the case of **Attorney General v Roy Clarke** ⁽³⁾ held that:

"In the case of Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others, we emphasized the longstanding principle that a party cannot rely on unpleaded matters except where evidence on the unpleaded matter has been adduced in evidence without objections from the opposing party."

- 7.23 In this matter, the Trust in its' defence, did not plead that confusion erupted at the market at the hands of cadres that resulted in reallocation of the shops that had been allocated to the members. Its' witnesses brought up the evidence for the first time at trial. Pauline Nachilindi, however, did not object or challenge the evidence with regard to the confusion.
- 7.24 In line with the cases of ***Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and others*** ⁽²⁾ and ***Attorney General v Roy Clarke*** ⁽³⁾ therefore, that evidence not having been objected to, it is admissible.
- 7.25 Pauline Nachilindi as seen by her testimony, told the Court that she relinquished Shop No. R19 on condition that the Trust allocates her another shop along Lumumba Road. She stated that the Trust unreasonably delayed to give her the shop and she then discovered that they were allocating shops to other traders and vacant shops were running out.
- 7.26 She further stated that she later discovered that all the shops in the new building had been allocated to other traders. Pauline Nachilindi testified that she then requested to retain her right to Shop No. R19 as per the agreement. The evidence as given by Misheck Musonda, Obby Mwape and Ndaya Bukasa was that when Pauline Nachilindi requested to be given back Shop No. R19, she was informed that it had already been allocated to another member of the Trust.
- 7.27 She was thus advised to wait for the other shops to be ready but she insisted on being given Shop No. R19.

- 7.28 A perusal of Pauline Nachilindi's bundle of documents at pages 1 and 2, show receipts dated 10th December, 2020 and 31st May, 2021 that were issued to her by the Trust. The receipts are for payment for construction that were made to the Trust in the amounts of K3,000.00 and K2,500.00 respectively.
- 7.29 Misheck Musonda testified that after the meeting of July, 2020, whose minutes appear at page 4 of the Trust's bundle of documents, it was agreed that senior members of the Trust be given an extra shop each. He stated that Pauline Nachilindi was allocated Shop Q10 and Shop No. R19. The receipts therefore confirm that Pauline Nachilindi made payment for Two (2) shops.
- 7.30 As regards Moses Chibwe, the current owner of Shop No. R19, the Trust's witnesses testified that the Shop No. R19 was allocated to him after Pauline Nachilindi relinquished her ownership to it. Pages 1 to 3 of the Trust's bundle of documents show a copy of certified lists that appear to be headed '*Allocation on the Perimeter, Final and Verified or Checked*' respectively. Moses Chibwe's name appears on page 3 at number 19.
- 7.31 A receipt also appears at page 7 of the Trust's bundle of Documents dated 17th June, 2021, which was given to Moses Chibwe by the COMESA Construction Project for construction in the amount of K2,500.00 as per narration. When crossed examined on the receipts, Moses Chibwe stated that Pauline Nachilindi paid before he did, and that the Chairman did not tell him that Shop No. R19 belonged to her.

certificate of ownership for Shop No. R19 which appears at page 5 of her bundle of documents.

- 7.36 Ndaya Bukasa, the Board Secretary also testified that when he was presented with Pauline Nachilindi's certificates of ownership for his signature, he compared them with the new allocation list, he discovered that Pauline Nachilindi's name was not on the list and he did not sign it.
- 7.37 It is however also worth noting, that Ndaya Bukasa may have been prompted not to sign after being informed of the error by Misheck Musonda. Misheck Musonda's testimony with regard to his alleged error in signing on the certificated of ownership is however, also probable. None of these Two (2) witnesses were seriously discredited in cross examination, such that it can be concluded that they were untruthful in their evidence.
- 7.38 As earlier pointed out, Moses Chibwe's certificate was issued on 14th February, 2022, while Pauline Nachilindi's was issued on 31st March, 2022. The issuance of her certificate of ownership could therefore have been based on an old list, as Moses Chibwe had already been allocated Shop No. R19 at the time Pauline Nachilindi applied for one, and the list at page 3 of the Trust's bundle of documents does indeed contain Moses Chibwe's name at number 19.
- 7.39 The witnesses who were called by the Trust gave evidence which also shows that when Pauline Nachilindi requested to be given back Shop No. R19, she was told to wait for the other shops to be ready as Shop No. R19 had already been given to someone else. In its' submissions, the Trust has stated that it has not

failed to allocate Pauline Nachilindi a shop along Lumumba Road as per the varied oral agreement.

- 7.40 It is actually amenable to allocate her the same once it is available when the construction of the shops is completed. In light of this evidence, as the Trust has received payment from Pauline Nachilindi for a shop, and has gained a benefit in the form of payment for the shop, this is therefore a proper case where an order for specific performance can be made, and I so Order.

DAMAGES FOR LOSS OF BUSINESS

- 7.41 With regard to the claim for damages for loss of business and breach of contract, breach of contract is discussed in the book ***Contract Law in Zambia, Sangwani Patrick Ng'ambi and Chanda Chungu Second Edition, Juta and Company (Pty) Limited, 2021 at page 334*** as follows:

“A breach of contract occurs if a party to a contract, without lawful cause, fails or refuses to comply with their obligations or perform what is due from them under the contract or performs their obligations in a defective manner. It may also occur where one party to a contract fails to comply with the terms of the contract.”

- 7.42 In this matter, it has already been determined that the parties' initial agreement was for the Trust to give Pauline Nachilindi Two (2) shops on the condition that she paid the requisite fees. The agreement was later varied, when she requested to be given the second shop facing Lumumba Road. It will be noted that

the agreement between the parties had no specific date for performance. The time of performance was however determinable, which was when the shops along Lumumba road had been completed.

7.43 Pauline Nachilindi testified that she asked the Trust if she could retain Shop No. R19 when she discovered that all the shops on the new building had been allocated to other traders. As earlier, pointed out, the Trust has through its' witnesses stated that the shops are still available, and are yet to be completed. Therefore, it cannot be said that they have discharged their obligation under the agreement, but it is yet to undertake the obligation.

7.44 Based on that, it cannot be concluded that it has breached the contract. As a consequence, the claim for damages for loss of business cannot succeed and it fails, and it is dismissed.

8. CONCLUSION

8.1 Pauline Nachilindi having succeeded on the claim for specific performance, she is awarded costs, which shall be taxed in default of agreement. Leave to appeal is granted.

DATED AT LUSAKA THE 29th DAY OF DECEMBER, 2023.

S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE

