ZAMBIA STATE INSURANCE CORPORATION LIMITED AND HELMOS TRANSPORT LIMITED v JOSEPH CHANDA (TRADING AS LINK EXPRESS MOTOR WAYS) (1992) S.J.

SUPREME COURT
NGULUBE, A.C.J., SAKALA AND CHAILA, JJ.S.
S.C.Z. JUDGMENT NO. 9 OF 1992

Flynote
Insurance - Subrogation - Release form - Whether the plaintiff could lay a claim after signing the release form

Headnote
The plaintiff (respondent in this appeal)'s omnibus was damaged in a road traffic accident attributed to the negligence of the second defendant's driver. The first defendant was made a party under the principle of subrogation as an insurer of the second Defendant. The first defendant paid for the repairs but resisted to pay for atter was referred to the first Defendant who requested the plaintiff to obtain three quotations. The first Defendant paid the repair costs based on the lowest of the quotations. The Plaintiff asked to be paid for the loss of use of the Omnibus but this was resisted by the defendants on the basis that when the repair costs were paid to the plaintiff, he had signed a form of release which included the following term:

> "I/we hereby release and forever discharge and indemnify HELMOS Transport and/or The Zambia State Insurance Corporation Limited from all claims competent to me/us whether now or hereinafter to be manifest relating to personal injuries, damages, loss of us of my/our vehicle AAC 4405 or consequential loss of any nature, and all actions or suits at law of whatsoever kind or nature, for or because of any matter or thing done, omitted or suffered to be done by HELMOS Transport prior to and including the date hereof."

The learned trial judge heard evidence and accepted the plaintiff's averment that at the time of accepting the cheque for repair charges and signing the release form the Plaintiff had insisted that he would like to be compensated for the loss of use and he was verbally assured he could still make such claim. There was evidence from the Plaintiff which the learned trial judge accepted that an official of the first Defendant had told the Plaintiff that while the first Defendant would pay for the repairs the Plaintiff must look to the second Defendant for the loss of use. it was also common ground that the release form was signed by the Plaintiff alone; that it was marked "without prejudice" and that the first Defendant's covering letter forwarding the cheque for repairs indicated that it was in respect of the repairs only. The learned trial judge was not impressed by the Defendant's case based on the release form and entered judgment for the Plaintiff for the loss of use to be assessed by the Deputy Registrar. It is against such judgment that the Defendants have appealed to this court.

Cases referred to:
(1) British Russian Gazette and Trade outlook Ltd.v Associated Newspapers, Ltd (1933) 2 K.B. 616
(2) Foakes v Beer 919840 9 a PP. 605

(3) D.C. Builders Ltd v Rees (1966) 2 Q.B. 617.
(4) Central London Property Trust Ltd v High Trees House Ltd 91947) 1 K.B. 130
(5) Lusaka West Development Company Ltd and othera v Turnkey Properties Ltd. S.C.Z. Judgment No. 1 of 1990.

For the Appellant: Mr. Sherpherd Akalutu, Zambia State Insurance Corporation
For the Respondent: Mr. D.M. Luywa, Luywa and Company

Judgment

NGULUBE, A.C.J.: delivered the judgment of the court.

For convenience we will refer to the respondent as the plaintiff and the appellants as the first and second defendants. The first defendant was made a party under the principle of subrogation as an insurer of the second Defendant.

The plaintiff's Omnibus was damaged in a road traffic accident attributed to the negligence of the second defendant's servant or agent who drove the other vehicle which was in collision with the Plaintiff's Omnibus. The matter was referred to the first Defendant who requested the plaintiff to obtain three quotations. The first Defendant paid the repair costs based on the lowest of the quotations. The Plaintiff asked to be paid for the loss of use of the Omnibus but this was resisted by the defendants on the basis that when the repair costs were paid to the plaintiff, he had signed a form of release which included the following term:

> **"I/we hereby release and forever discharge and indemnify HELMOS Transport and/or The Zambia State Insurance Corporation Limited from all claims competent to me/us whether now or hereinafter to be manifest relating to personal injuries, damages, loss of use of my/our vehicle AAC 4405 or consequential loss of any nature, and all actions or suits at law of whatsoever kind or nature, for or because of any matter or thing done, omitted or suffered to be done by HELMOS Transport prior to and including the date hereof."**

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We heard much argument in which Mr. Akalutu advanced a number of legal propositions to the effect that a release agreement will discharge the other party's right of action for any balance and that a document of this kind need only be signed by the party to be estopped from reneging on the agreement. There were also arguments that a written agreement should not be contradicted by oral evidence. These propositions, valid as they were, were not the issue in thermselves and the answer to the problem raised lay in considering in what circumstances, in law and in equity, a claimant may be prevented from resiling from a release agreement. This presupposes that there was a valid and eforceable release, in the instant case, by accord and

satisfaction.

One of the best definitions of accord and satisfaction was that formulated by Scrutton L.J. in British Russian Gazette and Trade Outlook Ltd. -v- Associated Newspapers, Ltd. (1933) 2 K.B. 616, where he said, from page 643:-

> **"Accord and satisfaction is the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative".**

In the further discussion of the foregoing which follows, it should be borne in mind in this case that it was never in dispute that, in the ordinary course and at common law, the Plaintiff was clearly entitled to damaged for loss of use against the tortfeasor in any event. one question which arises is whether there was any valuable consideration for the agreement. Mr. Akalutu contended that such consideration consisted of the defendants agreeing to pay the repair charges without obliging the plaintiff to litigate. But the plaintiff was already on firm ground as far as liability was concerned and no question had been put forward by the defendants to the effect that there was any dispute. As this case demonstrates, the plaintiff was not reluctant to go to court. The position of the parties to this appeal could be likened to that between a creditor and a debtor. In genral, a promise by the debtor to pay only part of the debt provides no consideration for the accord since it is merely a promise to perform part of an existing duty owed to the creditor. The part payment would in the circumstances also not be satisfaction: see for instance Foakes -v- Beer (1884) 9 app. Cas. 605 the rule in which was followed in the case of D.C. Builders Ltd. -v- Rees (1966 2 o.b. 617). In the latter case, Win L.J. said, at p. 632:-

> **"In my judgment it is an essential element of a valid accord and satisfaction that the agreement which constituted the accord should itself be binding in law, and I do not think that any such agreement can be so binding unless it is either made under seal or supported by consideration. Satisfaction, viz., performance, of an agreement of accord does not provide retroactive validity to the accord, but depends for its effect upon the legal validity of the accord as a binding contract at the time when it is made".**

We respectfully concur with Winn L.J. We are alive that it may be argued that the part payment of debt rule at common law should not apply where a claim is unliquidated since the court would normally not be concerned with the adquacy of consideration. However, the position in this case ws more like the case of a creditor who has two claims, one liquidated (the repair charges) and the other unlidquidated (the loss of us claim). In such a situation, if the debtor pays only the liquidated amount about which there is no dispute as to liability, the payment cannot constitute consideration for a promise by the creditor to accept such payment in full settlement of both claims: see the discussion at paragraph 214 CHITTY on contracts, General principles, 25th Edition.

Whether it is described as a compromise or release agreement or accord and satisfaction, there was in this case no valuable consideration given by the defendants. Although, therefore, a genuine compromise could raise an estoppel on the principle articulated in Central London property Trust Ltd. v High Trees House ltd. (1947) K.B. 130, a party to an arrangement who subsequently insists on his or her legal rights can only be barred from his or her legal rights when it would be inequitable for him or her to insist upon them. In the High Trees case, the Landlords accepted lower rents which were mutually negotiated with the tenants most of whom had deserted their flats to escape the bombings during the was and both sides acted upon the

agreement. it was held that the original higher rent could not have been successfully claimed in respect of the period of war covered by the mutual agreement. Here, in this case before us, it is not inequitable for the plaintiff to insist upon his legal rights when he had received no consideration for the release agreement and there was thus no true accord. What is more, the facts accepted below showed that, far from abandoning his other claim, the plaintiff made it plain he was insisting on the claim for loss of us and he received assurance that the could still pursue such claim. He may have been misled or induced by such an assurance so that it is inequitable forthe defendants take advantage and seek to enforce a gratuitous agreement which was patently unconscionable from any point of view. Equity requires that parties come with clean hands; the defendants' hands were not clean.

There was another argument based on the fact that the release form was marked "without prejudice". In view of what we have already said, it is unnecessary to dwell on this point save to point out that we still abide by the observations on such documents which we made in Lusaka West Development Company Ltd. and others -v- Turnkey properties Ltd. SCZ Judgment is No. 1 of 1990. The general rule is that such a document is inadmissible although, had it been necessary to belabour the point here, we might have considered this an appropriate case to make an exception since the whole of the defendants' case rested on the alleged settlement based on the release form. The agreement alleged must fail on the other grounds discussed.

It follows that the appeal is unsuccessful and we uphold the learned trial judge. The plaintiff will have his costs to be taxed in default of agreement.

Appeal unsuccessful

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