IN THE SUPREME COURT OF ZAMBIA SCZ APPEAL No.13 of 1993

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

B E T W E E N :

LYDIA MAKUMBA APPELLANT

Vs

ROBINSON KALIKITI RESPONDENT

Coram: Sakala, Chaila and Muzyamba, J.J.J.S.

15th July, and 4th November, 1993

For the Appellant : L. Nyembele, of Ellis and Co

For the Respondent : H.H. Ndhlovu of H.H. Ndhlovu and Co.

J U D G M E N T

Muzyamba J.S. delivered the judgment of the court.

Cases referred to:-

(1) Re: Foster 1883 22 Chancery Division 797

(2) Jean Mpashi Vs Avondale Housing Project Limited SCZ Judgment No.13 of 1991

This is an appeal against a judgment of the High Court ordering specific performance of an agreement of sale made between the appellant and respondent for the sale by the appellant to the respondent of Chibombo Bar at Chibombo turn-off.

In our judgment we will refer to the appellant as defendant and respondent as plaintiff which is what they were in the court below.

The brief facts of this case are that sometime in 1978 the plaintiff, then employed by National Breweries as Driver/Salesman was approached by the

J2/...

defendant to rent her bar at Chibombo turn-off with a possibility thereafter of buying the bar from her. Subsequent to that, on 15th April, 1978 an agreement at page 20 of the record of appeal was drafted by PW.2, John Chinena, the plaintiff's brother-in-law and signed by him on his own behalf and on behalf of his sister, Evelyn Kalikiti. The other signatories were the plaintiff, defendant and DW2, Phillip Mali. The plaintiff then took occupation of the bar and on 20th February, 1979 he paid the defendant by bank transfer an amount of K10,000. After this payment the plaintiff dug two pit latrines and replastered the inside of the bar and painted it. Then in February, 1982 the defendant, using the Police, evicted the plaintiff from the bar. The plaintiff then brought an action to court contending that the defendant was in breach of the Sale Agreement. The learned trial judge found as a fact that there was a sale agreement between the parties. He also found that the agreed purchase price was K22,000 and that the K10,000 paid by the plaintiff to the defendant was a deposit. It is against these findings that the defendant appealed to this court. Initially, the defendant had filed two grounds of appeal namely:

(a) That there was no valid sale agreement as there was no memorandum to satisfy Section 4 of Statute of Frauds, 1677 and

(b) That the plaintiff was not entitled to an award of K5,000 damages for inconvenience because no such damages were proved.

At the hearing Mr. Nyembele for the defendant abandoned the second ground and the appeal proceeded on the first ground only.

It was Mr. Nyembele's contention that the decument at page 20 of the record which was made between the parties was a lease agreement and not a sale agreement because it omitted a vital term of any sale agreement, the purchase price. That the purported oral agreement between the parties could not be enforced because

it offended Section 4 of Statute of Frauds which requires that an agreement for the sale of land or an interest in land be in writing in order to be enforced. He further contended that the failure by the plaintiff to produce in evidence the agreement of 10th September, 1980, which could have shed some light on the issue, should be construed in favour of the defendant. He therefore urged the court to allow the appeal and set aside the order of specific performance made by the court below. On the other hand, Mr. Ndhlovu for the respondent argued that the lease agreement gave the plaintiff an option at the end of six months of the lease to buy the property from the defendant and that there was evidence that in the exercise of that option the parties later agreed on a purchase price of K22,000 and that the plaintiff paid a deposit of K10,000. That the presence on record of the subsequent agreement dated 10th September, 1980 could not in any way have affected the lower court's findings which were based on the demeanour of witnesses. He therefore urged the court to dismiss the appeal.

We have considered the arguments on both sides. The document at page 20 of the record reads as follows:-

> " LYDIA BAR 15.4.78
>
> AGREEMENT OF RENT OF THE PREMISES : RENT K200-00 PER MONTH
>
> The agreement was reached when Miss Evelyn Kalikiti and Miss Lydia Makumba met in the Bar for the Rent of the premises.
>
> The premises will be rented at K200-00 per month Starting from 1st of June, 1978. Failure to compromise to the Agreement Legal action will be taken.
>
> Miss Evelyn Kalikiti will be ready or prepared to buy the premises in January, 1979 and if he fails to buy she will tell you in advance as I will have time to advertise to sell the premises.
>
> Witnesses John Chinena Husband to the Buyer or Rentor

L. Makumba The Prop.
Mali (6711 Sgt) Brother to the Owner
(Signed) Brother of the Rentor"

There can be no doubt that this was a lease agreement and although Miss Evelyn Kalikiti is said to be the tenant, it is common cause that the plaintiff was for all intents and purposes the tenant and that Miss Kalikiti was used merely as a front because the plaintiff who was then in active employment feared to loose his job with the Breweries. It is quite clear from this document also that the plaintiff had an option to buy the bar in January, 1979. Although the defendant denied in her evidence that the option existed, all the witnesses including her witness DW.2, Phillip Mali said that the possibility of the defendant selling and the plaintiff buying the bar was discussed. In any case she signed the agreement and she is bound by it. In his evidence the plaintiff said that he exercised the option in that in January, 1979 he and the defendant sat and agreed on the purchase price of K22,000-00 and that on 28th February, 1979 he paid the defendant by bank transfer K10,000 leaving a balance of K12.000. That there was no time limit set for the payment of the balance. In her evidence the defendant agreed that she received K10,000 from the plaintiff and not Evelyn Kalikiti but contended that it was an advance payment against rent. This was contrary to the suggestion made by her Counsel in cross examination of the plaintiff that the K10,000 was for rent arrears and also paragraph 2 of her defence which reads as follows:-

> "The defendant denies paragraphs 3 and 4 of the Statement of Claim save that Evelyn Kalikiti who is not a Plaintiff in this matter paid the said K10,000 to the Defendant on condition that the balance of K12,000 would be paid within six months and that the premises were maintained in compliance with the tenancy Agreement".

Indeed her evidence is completely at variance with her defence and the learned trial judge disbelieved her and came to the conclusion that there was a verbal sale agreement and that the K10,000 paid by the plaintiff was a deposit. We have no reason to disturb his findings.

Section 4 of the Statute of Frauds, provides that no action may be brought upon any contract for the sale or other disposition or any interest in land unless the agreement upon which such action is brought or some memorandum or note thereof is in writing. In other words, a sale agreement for land or interest in land to be enforced must be in writing. But there are some exceptions to this general rule. In re: Foster (1) it was held by Jessel, M.R.

> "The doctrine of part performance is found on a change of possession, which is assented to by that party to the contract who is sought to be charged. It can not be alleged by him that he is a trespasser. You refer his possession, if you can, to a legal origin and you can do that by implying a contract."

That was a case of two partners, whose trade was in financial difficulties, who summoned a meeting of creditors, nineteen of whom out of twenty-seven attended and passed a resolution that a deed of assignment of the debtors' estate and effects should be made to three persons named, as trustees, for the benefit of the creditors with power for them to carry on the business for such a time as they should think fit and then sell it as a going concern. No deed was executed and amongst the property of the debtors was a leasehold factory. The trustees took possession of the property directly from the debtors. One of the questions which arose was whether the possession by the trustees amounted to part performance so as to take the arrangement out of the statute of frauds. As the trustees were third parties it was held that possession by them did not amount to part performance.

J6/..

It is quite clear from this decision that mere possession, without more, which originates from a verbal contract of sale of land or interest in land amounts to part performance. In the present case, although the original possession stems from the lease it might be validly argued that the continued possession by the plaintiff of the premises after the sale agreement was reached and before payment of the deposit amounted to part performance, for the lease had by then terminated. And in the case of Jean Mwamba Mpashi Vs Avondale Housing Project Limited (2) this court said:

> "The decision in Steadman's case shows that there is no general rule that payment of money can not be part performance but this payment must be referable to one transaction. The payment of the deposit in this case was clearly referable only to one transaction; such payment therefore amounted to part performance of the contract and is an exception to the rule requiring the memorandum in writing. There is consequently an equitable right to specific performance".

That is a case in which the appellant was offered a house to buy, subject to contract, at K125,000. She accepted the offer and made two payments of deposit totalling K25,000 but before a contract was signed the respondent increased the purchase price on the ground that the original price was lower than the cost of construction. The appellant refused to accept the new price and insisted on the old price.

A deposit therefore which is referable to a contract amounts to part performance. In the present case, the fact that the K10,000 deposit paid by the plaintiff to the defendant was referable to the contract of sale of the bar cannot be doubted. This case therefore clearly falls within the exceptions to the general rule. The agreement was therefore enforceable.

It was also urged for the defendant that failure by the plaintiff to produce in evidence the agreement made on 10th September, 1980 should be interpreted

in favour of the defendant. Paragraph (1) of the amended statement of Claim reads as follows:-

> "By a verbal Agreement made between the Plaintiff and the Defendant on the 2nd day of February, 1979 and accepted by the Defendant on 22nd February, 1979 and later partially reduced in writing on 10th September, 1980 the plaintiff agreed to purchase and the defendant agreed to sell the Chibombo Bar, at Chibombo Turn-off to the plaintiff in consideration of K22,000-00".

It would appear from this paragraph that one of the terms of that agreement was that the consideration or purchase price of the bar was K22,000. And paragraph 3 of the defence reads as follows:-

> "The Defendant admits paragraphs 5 and 6 of the Statement of Claim save that the Defendant exercised her rights to take possession of the premises on the Tenant's failure to purchase the premises within six months as per the Agreement."

It would also appear from this paragraph that completion of the sale was to take place within six months but it does not mention the event when the six months would start to run. However, a close look at the pleadings reveals that the six months started to run from the date of payment of the deposit because paragraph 3 of the defence above admits paragraph 5 and 6 of the statment of claim and paragraph 5 thereof reads as follows:-

> "Subsequent thereto the plaintiff continued to occupy and manage the bar and paid all the expenses incurred to maitain it upon the required standard and in conformity with health regulations."

The preceding paragraph 4 relates to the payment of the deposit of K10,000 and therefore the words 'subsequent thereto' in paragraph 5 which is admitted in the defence refers to the deposit. However, in her defence, the defendant gave a different reason for evicting the palintiff. She said that she evicted the plaintiff

J8/...

because he went about boasting that he had bought the bar and not because he failed to complete the sale as agreed. The learned trial judge found that this was not a valid reason for rescinding the agreement. We agree. We would also agree with Mr. Ndhlovu that the presence of the agreement on record would not therefore have affected the trial court's findings which were based purely on the demeanour of witnesses. We would only add that the presence of the agreement would have merely relieved the plaintiff of the burden of bringing the agreement within the exceptions to the general rule.

But the issue in this case is whether or not we should uphold the trial judge's order for specific performance. At our own motion we visited the premises in the presence of the parties and their advocates. This was necessitated by the long period when the breach occurred and the vendor repossessed the premises, in order for us to see the condition of the premises. We were satisfied that there has been no substantial change or alternation to the structure, but that it has been in possession of the defendant since February 1981 when she repossessed the bar. The question therefore, as stated earlier on is whether this is a proper case for us to uphold the order of specific performance made by the trial judge. Specific performance is no doubt an equitable remedy which is given at the discretion of the court. In our view, given the period which has lapsed from the time the defendant repossessed the bar to the completion of the proceedings it would be unconscionable to uphold the trial judge's order for specific performance. For this reason we would allow the appeal and set aside the order for specific performance.

In his pleadings the plaintiff pleaded in the alternative for damages. We note however that the learned trial judge awarded him only K5,000 for inconvenience. This award is totally inadequate and is therefore set aside bearing in mind that the purpose of damages is to adequately compensate a plaintiff and put him in a position

he would have been had there been no breach and in our view an award equivalent to the current market value of the premises would adequately compensate him. In this case however, there is no adequate evidence that would assist the court in assessing all appropriate damages to be awarded to the plaintiff. Having therefore set aside the order of specific performance we feel that, in the interests of justice, we should send this case to the Deputy Registrar for assessment of appropriate damages to be awarded to the plaintiff, which should of course include damages for inconvenience.

We have no doubt however that in so doing the Deputy Registrar will, in addition bear in mind what we have said should be appropriate damages.

In addition we order a refund of the deposit of K10,000 with interest at an average rate obtaining on 28th February, 1979 when it was paid and the current bank rate.

Costs of the appeal to the plaintiff to be taxed in default of agreement.

.....

E.L. SAKALA
SUPREME COURT JUDGE

.....

M.S. CHAILA
SUPREME COURT JUDGE

.....

W.M. MUZYAMBA
SUPREME COURT JUDGE

IN THE SUPREME COURT OF ZAMBIA Appeal no. 36 of 1992

HOLDEN AT LUSAKA

(Civil jurisdiction)

BRIAN SINAKAIMBI Appellant

-v-

ESTHER GUDO MASAITI Respondent

CORAM: Ngulube, A.C.J., Sakala and Lawrence, JJ.S.
On 24th November, 1992 and 29th January, 1993

For the appellant: E.B. Mwansa of EBM Chambers;

For the respondent: N. Kawanambulu of Kawanambulu & Co.

J U D G M E N T

Ngulube, A.C.J. delivered the judgment of the court

On 24th November, 1992 we heard this appeal and allowed it. We ordered a retrial before a judge of the High Court and awarded the costs of the first trial and of this appeal to the respondent and directed that such costs be payable as soon as they were ascertained by agreement or taxation without necessarily waiting for the retrial. As we promised on that occasion we now give our reasons.

For convenience we shall refer to the respondent as the plaintiff and the appellant as the defendant which is what they were in the action. The plaintiff is the administratrix of the estate of one Smart Kapunga, deceased, and she brought the action to have the sale of Stand no. 277, Siavonga to the defendant by a former adminstrator declared invalid and to recover possession of the property. The Writ was served and a memorandum of appearance duly entered on behalf of the appellant by Messrs Nkwazi Chambers. An order for directions was taken out and pleadings exchanged in which the defendant's position was that he purchased this property and that he should be reimbursed certain sums of money if the court invalidated the sale, The case was set down for trial on several days and there was evidence that Messrs Nkwazi Chambers received due notice of the several trial dates appointed by the court.

2/.....On each

On each such occasion, there was no appearance for the defendant. Messrs Nkwazi Chambers purported to withdraw from acting for the defendant in an informal manner by their letter of 26th September, 1990 to their opponents, then Messrs Shamwana and Company in the following terms:

"Dear Sirs,

re: E.G. MASAITI VS B. SINAKAIMBI

Your letter 2/5/MBM/NK/125/rk refers. We regret to advise that we are no longer acting for the Defendant herein. We have been at pains trying to locate the where abouts of our client whose last known address was c/o Bank of Zambia. We, therefore, wish you good luck in your endeavour for justice.

Yours faithfully,
NKWAZI CHAMBERS

Messrs Shamwana and Company sought to inform the defendant personally about the adjourned trial dates by writing to him at c/o Bank of Zambia. Finally the learned trial judge proceeded to hear the case ex parte in terms of HCR Order 35 and he awarded judgment to the plaintiff. When Messrs Nkwazi Chambers were advised of this development, they again wrote a letter dated 24th October, 1990 in the following terms:-

"Dear Sirs

E. GUDO VS B. SINAKAIMBI

Your letter of 19th October refers. I regret to advice that we are no longer the Advocates of the Defendant. Kindly in future direct all your correspondence to the Defendant whose last known address was c/o Bank of Zambia. We shall serve upon you a notice of cessation and/or withdrawal

Yours faithfully,
NKWAZI CHAMBERS"

3/.....The record

The record shows that on 1st November, 1990 the same Messrs Nkwazi Chambers filed a summons to set aside the judgment so obtained under the terms of Order 35. On 10th January, 1991 the learned trial judge declined to set aside judgment mainly on the ground that the trial had proceeded ex parte with the blessings of Messrs Nkwazi Chambers who had even wished the plaintiff good luck.

We heard arguments on both sides and it was quite clear that the defendant and his advocates at the time were at fault and he had to bear the costs. However, it was also plain that the defendant had a suffered gross injustice by reason that his former advocates purported to withdraw from the case in the most informal manner that we have ever come across. The injustice referred to could and should have been prevented by the learned trial judge whose obligation it was to insist that the rules of court and the correct procedures be followed where an advocate seeks to withdraw from a case at the advocate's own instance. RSC Order 67 and our own HCR Order 4 which it is here unnecessary to discuss extensively make it quite plain that there is no provision for such an informal withdrawal. The burden of the rules is that the advocate should formally seek the court's leave and the affected litigant should be afforded notice and an opportunity to make alternative arrangements. Accordingly, we would draw the attention of the courts below and the advocates to the rules we have mentioned and confirm that, as a general rule, this court will do all it can to put matters right and to ensure that a litigant abandoned by his advocates in the circumstances of this case is permitted a fair trial.

In addition of the foregoing, we were satisfied that, when the defendant applied to the court to set aside the judgment after an ex parte trial, the ruling by the learned trial judge did not suggest that the court was considering, in terms of Order 35 Rule 5, whether the defendant had shown sufficient cause for the setting aside of the judgment. Instead, the learned trial judge made much of the unfortunate letter from the defendant's former advocates who wished the plaintiff good luck. There was sufficient cause for the defendant's non appearance

4/.....since

since both advocates knew that he was in Siavonga and the whole case centred around his possession of property in Siavonga and yet letters were sent to him at Bank of Zambia. There was equally sufficient cause on the merits as shown by the pleadings and in the unfairness surrounding the informal withdrawal of the former advocates.

It was for the foregoing reasons that we allowed the appeal and ordered a retrial.

M.M.S.W. Ngulube
ACTING CHIEF JUSTICE

E.L. Sakala
SUPREME COURT JUDGE

A.R. Lawrence
SUPREME COURT JUDGE