IN THE SUPREME COURT OF ZAMBIA SCZ APPEAL NO.17 OF 1993

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

MANUEL MOTA DE SOUSA Appellant

and

JOHN KEES MUMBA Respondent

Coram: Sakala, Chaila and Chirwa, JJJ.S
at Lusaka on 6th May, 1993 and 9th September, 1993

For the Appellant : Mr. F.M. Chomba, S.C of Mutinondo Chambers
For the Respondent: Mr. N. Kawanambulu of Kawanambulu & Co

J U D G M E N T

Chirwa J.S delivered the judgment of the court.

This is an appeal by Manuel De Sousa (in this judgment referred to as defendant for that is what he was in the court below) against the judgment given in favour of John Kees Mumba (herein after referred to as the plaintiff). The Plaintiff sued the defendant to rescind a contract of sale for the sale of Stand No. 7238, Lusaka and the forfeiture of the sum of K5,995.16 paid by the defendant as purchase price. The Plaintiff also claimed possession of the said Stand No. 7238 and mesne profits for the use of the said stand from April, 1982 up to the date of possession.

The evidence in the Court below was that the Plaintiff was interested in some industrial property in Lusaka and he applied to the City Council for the same. The City Council gave him Stand No. 7238 and demanded K5,995.16 as service charges. The Plaintiff did not have the money and he approached the defendant for help.

2/..The defendant

The Defendant and his wife are sole owners of a company known as Soman Technical Services Limited and to assist the Plaintiff the Defendant used this company to provide the funds and an agreement was entered into by the Plaintiff and the company whereby the Company provided the money as consideration for the purchase of the said stand upon exercising the option to purchase. This option was to be exercised in writing. This agreement is dated 8th March, 1982 and was executed in the Plaintiff's Advocates' offices. The Defendant then moved on to the stand and started developing it. The Plaintiff was given the title deeds to the stand and he handed these to his advocates for safety and as security for the money advanced by the Defendant. In around 1985 the Plaintiff wanted the Defendant to exercise his option to purchase the land and went to see his advocates who wrote the Defendant on 22nd January, 1985 asking him to exercise the option. There was no response from the Defendant. It appears it is during this time that the Defendant was most of the time out of the country because of his and family's health problems. In October, 1987 the Plaintiff's advocates again wrote the Defendant and again got no response. It is after this that the Plaintiff commenced these proceedings.

In her judgment the learned trial judge held that the agreement was an open ended one as no date was fixed within which to exercise the option. That this agreement was not a contract for the sale of the stand in question and it merely gave the Defendant an option to purchase the stand anytime from 8th March, 1982. She went on to hold that this option was not to be there forever but to be exercised within reasonable time and the time the Defendant has taken to exercise this option, which even at the time of trial had not been exercised, was unreasonable and she rescinded the contract and ordered the Plaintiff to take possession of the stand and that any improvements made on the stand

should be assessed by the Deputy Registrar and which the Plaintiff should reimburse the Defendant and title deeds released to the Plaintiff. She dismissed the Plaintiff's claim for mesne profits. It is against this Judgment, as we have already said that the defendant has appealed to this court.

In arguing the appeal on behalf of the appellant, Mr Chomba argued five grounds of appeal. The first ground was that a wrong party was sued as the agreement in issue was between the plaintiff and Soman Technical Services Limited, the company was an individual in itself at law and it should have been sued in that capacity and not the present Defendant. He submitted further on this point that although the defendant did not protest him being made a party to the proceedings, he brought this point in his submissions. For the authority that a company was a person at law, the court was referred to the case of SALOMON V. SALOMON [1897] A.C 22,51. If this argument is accepted, it was submitted that the appeal should succeed. The second ground advanced was that the learned trial judge erred in holding that the agreement was not a contract of sale but an option. It was argued that in case of options, a small portion of the price is paid and the balance is paid when exercising the option and whereas in the present case the whole purchase price was paid thereby making it a contract of sale of the property. It was further submitted that as there was an agreement embodied in writing, the written document, if not vague, should be the only document used to interpret the parties' intention and in the present case although terms such as "intending vendor" and "intending purchaser" were used, they were infact vendor and purchaser as the full purchase price was paid and also as shown at the attestation in the agreement. Carrying on the argument of option in the third ground of appeal, Mr. Chomba argued that an option remains for the life time of the signatories plus 21 years thereafter.

4/..In this regard

In this regard he referred the Court to the Elements of Conveyancing by E.G. Bowman and E.L.G. Tayler at P. 28 and Hanburg's Morden Equity, 9th Edition at P. 239. He concluded that the learned trial Judge erred in holding that it was absurd to expect the option to remain open forever.

The fourth ground of appeal was that the learned trial Judge erred to have vindicated the unconscionable conduct of the plaintiff who was trying to reap the fruits of the development done by the defendant as it was clear from the evidence that the Plaintiff had no money to develop the property and yet he was claiming mesne profits, this would be unjust enrichment.

The final submission by counsel for the appellant was that where there is a written agreement, extrinsic evidence should not be allowed and that the agreement in this case was complete in itself and it was wrong for the learned trial Judge to accept that the K5,995.16 paid by the Defendant was a debt. It was therefore prayed that the appeal be allowed.

On behalf of the Plaintiff Mr. Kawanambulu submitted that it was too late in the day for the Defendant to argue that he was a wrong person sued as he never protested the service of the writ nor did Soman Technical Services Limited apply to be joined as a Defendant in accordance with the High Court Rules. It was further submitted that in fact the evidence shows that the original agreement was oral and the written agreement was merely a memorandum of the loan agreement and as such the Defendant was properly joined.

On the second ground of appeal, it was submitted on behalf of the Plaintiff that when the K5,995.16 was obtained from the Defendant, the Plaintiff had no interest or title in the stand in issue at the material time and the Plaintiff could not contract to sale what he did not own. Alternatively it was submitted that even if the agreement was for sale of the stand,

the same is null and void for want of registration as required under Section 4 (1) and 6 of the Lands and Deeds Registry Act.

As to ground 3 it was argued that the use of the word "option" in the agreement was a misnomer and the proper words should have been the "right of pre-emption" or the "right of first refusal" and that both these rights create an interest in land and as such they require registration under the Lands and Deeds Registry Act, and since it was not registered, it is null and void. It was further submitted that the land was offered to the Defendant and the Defendant has up to date not reacted to this offer and the Plaintiff was entitled to withdraw after the Defendant failed to respond within a reasonable time.

Grounds 4 and 5 were argued, together and it was submitted that since there were no improvements on the land, the same could not be sold as this would be contrary to Section 13 of the Land (Conversions of Titles) Act of 1975. Further the arrangement between the parties whereby the Defendant were to develop the stand first before obtaining the State Consent was also contrary to Section 13 of the Land (Conversion of Titles) Act and this amounted to the Defendant purchasing his own improvements. On rescission of the contract it was submitted that the learned trial Judge was right to rescind the contract as the Defendant and/or Soman Technical Services Limited were not Zambians and as there was no special permission from the President, the stand could not be assigned to either of them in terms of Land (Conversion of Titles) (Amendment No. 2) Act. of 1985.

We have seriously considered submissions by both counsel and also the evidence on record. We have now to consider the matter on its merits.

The parties to the agreement in question are the Plaintiff and Soman Technical Services Limited, a company owned by the

Defendant and his wife. It is trite law that a Limited Company has its own individual personality at law but as it is a company its actions must be through natural persons and it is the position of the individual purporting to act on behalf of the Company that the liability or otherwise of the company will be determined upon. It is clear in our present case that Soman Technical Services Limited is a family business but it is not clear from the evidence as to who was the majority shareholder if any or the Defendant and his wife held equal shares. The evidence however clearly reveals that the Defendant took company money and gave it to the Plaintiff and upon taking possession of the property the Defendant started running the company business on the premises. From the facts of the present case it is clear that the Company and the Defendant were the same person, he was running the Company as a personal entity and we hold the view that the Defendant was not wrongly sued.

We will now consider the meaning and effect of the agreement in issue. We agree with the law as stated in Chitty on Contracts, 23rd Edition paragraph 582 that:-

> "Where the agreement of the parties has been reduced to writing and the document containing the agreement has been signed by one or both of them, it is well established that the party signing will be bound by the terms of the written agreement whether or not he has read them and whether or not he is ignorant of the precise legal effect."

The agreement refers the Plaintiff as "the intending vendor" and the Defendant as the "intending purchaser". The money given to the Plaintiff is referred to as "purchase price". The intending purchaser, i.e. the Defendant is given the "option' to purchase the property in issue. There is no time limit within which to exercise this option but it had to be exercised in writing. We have no doubt in our minds that reading this agreement as a whole and giving the words their natural meaning we conclude that the parties had agreed upon a sale of this property. The purchase price was paid and there is evidence that the Defendant moved onto the property and started developing it and the Plaintiff was aware of it. If the Plaintiff did not acquiesce to the Defendant's presence on the property he could have taken steps to remove the Defendant from the property as a trespasser. The learned trial judge therefore misdirected herself when she held that the agreement was not a contract for the sale of the stand in issue and that it was merely an option to purchase the stand at any date from 8th March 1982. In view of the stand we take in this matter, we need not go into a search of what is an option and it does not matter whether we accept that the agreement in issue was an option. An option, just as a contract of sale, is an interest in land and in terms of Section 4(1) of the Lands and Deeds Registry Act, Cap 287, this ought to be registered and in terms of Section 5(2)(a) of the same Act must be registered within thirty days of its execution. Failure to do so makes the document null and void as provided under Section 6 of the Lands and Deeds Registry Act and makes the contract unenforceable. In our present case there is no evidence that the sale agreement or "option" was registered in the Lands and Deeds Registry as required within the stipulated time or at all. Further

8..Further there is

Further there is no evidence that an application is pending before the High Court for it to be registered out of time. The effect of this failure is that the document is null and void. The proven facts in this case show that the appellant and the respondent entered into an agreement for sale of the property, full purchase price was paid and the appellant was given possession of the property which he started to develop immediately. The payment made to the respondent was made in respect of an identified property and although the written agreement cannot be enforced by reason of failure to register under the Lands and Deeds Registry Act., the appellant acquired equitable interest in the property and beneficial owner of the property. This conclusion is supported by our decision in the case of TURNKEY PROPERTIES v LUSAKA WEST DEVELOPMENT COMPANY LIMITED of SCZ Judgment No. 3 of 1984 ZLR at page 85. As we have held the agreement was a complete and outright sale and not an option to purchase, the learned trial judge misdirected herself in finding that there was an option to sale. The is allowed. As the appellant paid full purchase price and is in possession of the property, we give him liberty to apply to the High Court in order for him to register his interest in the land outside the stipulated period of 30 days. The costs follow the event.

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E.L. Sakala
SUPREME COURT JUDGE

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M.S. Chaila
SUPREME COURT JUDGE

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D.K. Chirwa
SUPREME COURT JUDGE