IN THE SUPREME COURT OF ZAMBIA **Appeal No. 184/2004**

HOLDEN AT LUSAKA **SCZ/8/117/2004**

(CIVIL JURISDICTION)

IN THE MATTER BETWEEN:

JONAS AMON BANDA **APPELLANT**

VS.

DICKSON MACHIYA TEMBO **RESPONDENT**

Coram: Sakala, CJ., Mumba, Silomba, JJS
16th May 2006 and 20th May 2008

For the Appellant: Mr M. Mwenye of Messrs Sharpe Howard & Mwenye Legal Practioners

For the Respondent: Mr H. Silweya of Silweya and Company

JUDGMENT

Mumba, JS, delivered the Judgment of the court.

CASES REFERRED TO:

1. Steadman Vs Steadman (1974) 2 AII E.R 977
2. Amalgamated Investment and Property Co Ltd (in liq) Vs Texas Commerce International Bank Ltd (1981) 3 AII E.R 577
3. Maddison Vs Alderson (1883 8 APP CAS 467
4. Actionstrength Ltd (trading as Vital Resources) Vs International Glass Engineering IN.GL.EN SpA and Another (2003) AII E.R 615
5. In Timmins Vs Moreland Street Property Co Ltd (1957) 3 AII E.R 265
6. Hillas & Co. Ltd Vs Arcos Ltd (1932) 147 L.T 503
7. Harvey Vs. Pratt (1965) 1 WLR 1025

This is an appeal against the judgment of the High Court whereby the appellant's claim for specific performance was dismissed.

The appellant and the respondent entered into an oral agreement whereby the appellant was to purchase a part of the respondent's Farm No. 1655, Chisamba. The purchase price was agreed upon and was paid in installments. The price agreed was witnessed by written pieces of receipts in which payment was described as being for 60 hectares of part of the respondent's property described as sub-division "V". Before finalisation and before the land was surveyed, the Commissioner of Lands re-entered the respondent's farm. The respondent sued and obtained judgment against the Commissioner of Lands whereby his whole Farm No. 1655, Chisamba, was restored.

According to the respondent, the re-entry of the farm by the Commissioner of Lands was prompted by persons, including the appellant, who claimed to have paid the

respondent for various portions of the farm intending to purchase those portions and who were awaiting completion as the farm land had not yet been surveyed and subdivided. After regaining the farm, the respondent pleaded frustration, the appellant demanded a refund of the money paid, the respondent declined to proceed with the sale of any portion of his farm to the appellant, instead, he refunded the money by paying it into court.

The learned trial Judge found that there was no valid contract because the subject matter referred to as subdivision ‘V’ of the farm was not surveyed and was not ascertained. The learned trial Judge examined the authorities cited by both parties and came to the conclusion that the claim for specific performance could only succeed where material particulars of a contract were agreed upon or, were ascertained. He found that in the agreement relied upon by the appellant, the size of the land or part of the farm to be sold was not ascertained because the survey had not been done.

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The learned trial Judge analysed the evidence and found that the respondent had offered the appellant an unsurveyed piece of land to purchase even though money was paid. The learned trial Judge found that the dispute lay in the number of acres to be sold. Although the appellant referred to the portion to be sold to him as subdivision 'V' amounting to 60 hectares, no such subdivision 'V' had been surveyed, he held that negotiations on the size of the portion to be sold were still ongoing. The learned trial Judge found that although the agreed price was paid, as the acreage was not agreed upon and subdivision 'V' had not been surveyed, the claim for specific performance could not succeed, he dismissed it with costs. Since the respondent had paid all the monies into court, the learned trial Judge declined to order interest.

The other claim by the appellant was for a refund of money paid for another subdivision of the respondent's farm referred to as subdivision 'L' & 'K', which comprised a total of 670

acres. The respondent paid into court money comprising the refund. The court below awarded no interest on it.

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The appellant appealed and filed five grounds of appeal.

The **first ground** was that the learned Judge in the court below erred in law and fact when he held that there was no agreement between the appellant and the respondent as to specific acres of the property.

The **second ground** was that the learned Judge in the court below erred in law and fact when he held that the parties were still negotiating the terms of the contract

The **third ground** was that the learned trial Judge erred in law and fact when he refused to consider the developments made by the appellant on the land.

The **fourth ground** was that the learned trial Judge erred in law and fact when he refused to grant interest upon the K5,300,000.00 ordered to be refunded by the defendant to the plaintiff.

The **fifth ground** was that the learned Judge in the court below erred in law and fact when he ordered that the plaintiff bear the costs of the action.

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At the hearing of the appeal, Mr Mwenye, on behalf of the appellant, informed the court that the appellant was abandoning ground four of appeal and that grounds one and two would be argued together and then grounds three and five separately. Written heads of argument were filed by both parties. Counsel for both parties augmented their written heads of argument with oral submissions.

In the main, submissions on behalf of the appellant in support of grounds one and two were that the evidence on record showed that the parties had entered into a contract even though the piece of land was not correctly described. Counsel submitted that the full purchase price for the piece of land agreed upon was paid and vacant possession was yielded by the respondent and improvements were made on the piece of land occupied by the appellant and his family. It was submitted that there was documentary evidence executed by both parties to indicate that indeed there was an agreement to sale a piece of land being part of the respondent's farm at an agreed purchase price. Counsel referred to a document on

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page 96 of the record of appeal, which reads, **"Received from Mr Jones A Banda the sum of K1,000,000=00 (one million kwacha) only being part payment for a total sum of K4,800,000=00, but K3,200,000=00 so far paid**

- balance K1,600,000=00 to be paid for the purchase of 60 hectares of farm No. 655 in Chisamba." The document was signed by both parties. Counsel also pointed out the receipts indicating part payment of the purchase price on pages 96, 97 and 98 of the record of appeal. These receipts were signed by both parties. Counsel also pointed out the evidence of the respondent at page 227 of the record of appeal to the effect that he had allowed vacant possession after payment of about K4,000,000=00. Counsel submitted that having sufficiently shown that the piece of land was 60 hectares of land, of the respondent's farm, together with receipt of the full purchase price, it could not be said that the terms of the contract were still being negotiated.

Counsel further submitted that there was part performance by the appellant when he paid the full purchase price and that the respondent should be stopped from denying that there was a contract between the parties to sell part of his land. In support of the submissions for grounds one and two,

Counsel relied on the cases of **Steadman Vs Steadman(1) Amalgamated Investment and Properties Co Ltd (in liq) Vs Texas Commerce International Bank Ltd(2), Maddison Vs Alderson(3)** and **Actionstrength Ltd (trading as Vital Resources) Vs International Glass Engineering IN.GL.EN SpA and Another(4)** and a particular citation at page 622 that;

“ The reconciliation thus draws a distinction between the executory contract, not performed on either side, and the effect of subsequent acts of performance by the plaintiff. The former attracted the full force of the Statute of Frauds while the latter could create an equitable rather than purely contractual right to performance. The Statute of Frauds and the doctrine of part performance could co-exist in this way because contracts for the sale of land almost start by being executory on both sides and usually remain executory until completed by mutual performance.”

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On this authority of **Actionstrength Ltd (trading as Vital Resources) Vs International Glass Engineering IN.GL.EN SpA and Another(4)**, Counsel submitted that because there was part performance of the contract by the appellant, in equity, it raised a right to specific performance

of the contract. The case of **In Timmins Vs Moreland Street Property Co Ltd(5)**, was relied on, in particular the passage that:

"…it is still indispensably necessary, in order to justify the reading of documents together for this purpose, that there should be a document signed by the party to be charged which, **while not containing in itself all the necessary ingredients of the required memorandum, does contain some reference, express or implied, to some other document or transaction. Where any such reference can be spelt out of a document so signed, then parol evidence may be given to identify the other document referred to, or, as the case may be, to explain the other transaction, and to identify any document relating to it. If by this process a document is brought to light which contains in writing all the terms of the bargain so far as not contained in the document signed by the party to be**

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charged, then the two documents can be read together…"

This passage was relied on to buttress the submission that various documents signed by the parties should be read together to work out what the contract entailed. Finally,

Counsel submitted that although the agreement between the parties wasn't tidy in that the piece of land was not correctly described, the agreement could be clearly discerned from the various documents that the parties signed which appear on the record of appeal and the case of **Hillas & Co. Ltd Vs Arcos Ltd(6)** was cited, in particular the passage which reads;

" Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete and precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects."

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It was submitted that for these reasons in grounds one and two, the judgment of the court below should be set aside.

In response to the submissions on grounds one and two, Mr Silweya, on behalf of the respondent, submitted that the

learned trial Judge did not err when he concluded that the parties had not agreed on the contract itself. He submitted that the learned trial Judge relied on the case of **Harvey Vs. Pratt(7)**, where it was decided that it was not for the court to interpret or decide on the terms and conditions of the contract. Mr Silweya submitted that what was pointed out in that case was to the effect that where fundamentals were not clear and where there were gaps in the agreement, one could not say what the contract was because it was normally for the parties to agree and define the bargains. Further, he submitted that basing on the submission of Mr Mwenye that there were glaring errors in the agreement, the learned trial Judge was therefore correct in deciding that in fact there was no contract. Mr Silweya pointed out the document referred to at page 98 of the

record of appeal, was signed by the respondent and possibly by the appellant as far back as February 1996, whereas the Law Association of Zambia contract at pages 93 to 95 was

signed about 28th May 1995, a good 7 months in between yet the appellant argued that the two documents should be read as one. Mr Silweya submitted that it was explained in the court below that the respondent was receiving money on a typed sheet with little attention as to the mistakes at page 98 of the record of appeal. It was submitted that although the respondent was given money, there was no agreement yet on the subdivision of the farm to be purchased. Thus the contract was executory as the survey was yet to be done.

Counsel conceded that moving on the land by the appellant was done but the size of the land was yet to be agreed upon. The geographical positioning of the piece of land to be purchased was not ascertained conclusively. Mr Silweya submitted that the delay in having the subdivision surveyed was on account of the appellant's conduct as is demonstrated in the affidavit of the Registrar in the proceedings produced on

the record of appeal between the Commissioner of Lands and the respondent, whereby the Commissioner attempted to re-enter the farm of the respondent. Counsel submitted that the re-entry by the Commissioner of Lands amounted to frustration of the contract with the appellant. After the state

left the scene the respondent agreed with other persons, including Honourable Judge Chileshe, to sell some portions of his farm.

Counsel submitted that there were mistakes in the description of the piece of land to be purchased by the appellant. The contract of sale on page 94 and the documents on pages 93 and 95 describe different pieces of land, the mistake even goes to the size of the portion of the land whether it was acres or hectares. Mr Silweya submitted that the parties were not agreed on the piece of land to be sold and that the appellant came to court with dirty hands so that even equity could not save him. Mr Silweya pointed out that the judgment of Judge Muyovwe, in setting aside the re-entry of the respondent's farm by the Commissioner, blamed the appellant

and others for going to the State to try and get the respondent's land.

In reply, on grounds one and two, Mr Mwenye submitted that whereas the contract maybe said to be executory on the part of the respondent, it was executed on the part of appellant in that he had paid full purchase price and occupied the land which was generally agreed upon to be sold to him. He pointed out that in fact the respondent was using his own

default to try and avoid the contract and set up a defence that was not tenable. Further that there is clear evidence on record on page 226 of the record of appeal lines 30 to 36, where the respondent admitted signing the documents. Emphasis was laid on page 98, second paragraph, that in fact there was specific agreement between the parties. After the time lapse between February 1996 and the time that the contract of sale was signed, it shows that the parties, on page 17 of the record of appeal, re-affirmed the contract and expressed their intention in clear terms.

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We are indebted to counsel for both parties for their submissions and the cases cited. We have considered all the written heads of argument as well as the evidence on record and the judgment of the court below.

As we see it and upon consideration of all the submissions, this appeal is basically centred on the question whether, given the evidence accepted by the court below and the conduct of the parties, what transpired amounted to a valid

agreement to sale a portion of Farm No. 1655, Chisamba, to the appellant and, if so, how many hectares were agreed upon to be sold.

On grounds one and two of the appeal, we find that upon scrutiny of the evidence on record there are receipts for the money paid by the appellant to the respondent those receipts were signed by the respondent as per evidence in the court below, although he added, on page 86 of the record of appeal, lines 15 and 16 that, **"…the plaintiff added a zero to the figure six thus to read 60 when typing."** We are at a loss to

verify that because at page 99 of the record of appeal, the final receipt, dated 5th April 1996, which is in long hand and which was signed by DW2, the respondent's wife in the court below, actually shows "60" in long hand, this was the number of hectares intended to be sold and to be paid for by the appellant. The evidence of DW2 also shows that when she received the sum of K1.0 million from the appellant, she

handed it over to the respondent who, from the record, did not query the purpose of the payment. The respondent did not identify which of the receipts had a '0' added to '6' to make it '60' hectares, among those found on the record of appeal and dated 31st October 1995, on page 96; 15th January 1996, on page 97; 28th February 1996 on page 98; and a typed copy of the receipt dated 5th April 1996 on page 100. The evidence of the respondent on page 86 of the record of appeal, to the effect that these receipts were not directly referable to Farm No. 1655 is untenable in the face of the rest of the evidence.

Further, the evidence shows that the appellant's relatives occupied that portion of the farm intended for sale in 1995 and

have remained there since. There is no evidence that the respondent had resisted the occupation of the farm by the appellant's relatives at any time. We find that there is sufficient evidence that the portion of 60 hectares of the plaintiff's farm was agreed upon to be sold to the appellant at

the purchase price of K4.8 million, which sum of money was paid in installments. What remained was to have the portion surveyed in order to complete the sale. We are satisfied that a portion of the plaintiff's farm, in extent 60 hectares, was agreed between the parties to be sold to the appellant. The portion of the farm to be sold was also identified, that was why it was occupied by the appellant's relatives without objection by the respondent.

The respondent's plea of frustration on account of the failed re-entry of the farm by the Commissioner of Lands cannot succeed because the agreement with the appellant had already been concluded. **Harvey Vs Pratt(7)** relied upon by the respondent does not apply because in that case a lease agreement claimed by one party did not even have a

commencement date; in this appeal, it was not a lease agreement, it was a contract to sale land, the land was ascertained, the purchase price was agreed upon and paid to the respondent who accepted it. The appellant's family

moved onto the land with the consent of the respondent. A claim of forced entry cannot be sustained, as there was no evidence of such. Respondent's evidence is that Appellant's relatives moved on the land without objection. Clearly, the conduct of Respondent is that of acceptance that Appellant will stay on the land. We accept the principle in **Halsbury's Laws of England** that a court will enforce a contract which, had all formalities been observed, would be binding at law, in which case it would be specifically enforced.

In **Steadman and Steadman(1),** though the facts are so different from the case on appeal, the principle laid is settled law that where a party demonstrates part performance in reliance on the oral agreement consistent with the contract alleged, the court will enforce the contract.

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The paragraph relied on by the appellant in **Hillas & Co. Ltd Vs Arcos Ltd(6)**, that parties to a business may have a rough or untidy agreement which, for the people in similar

business can be understood, is also supportive of appellant's case in that the case on appeal relies not only on what was said but also what was done by both parties. Signing receipts for payment of the purchase price, accepting the purchase price demanded and paid in installments, allowing occupation of the portion of the land identified as the portion to be sold to the appellant. For all the reasons discussed above, grounds one and two succeed.

The submission in support of ground three was that the learned trial Judge erred in law and fact when he refused to recognize and consider the developments made by the appellant on the land occupied by his family. The evidence shows that there is a dwelling house built by the appellant and his family. For the trial court to conclude that the contract was not valid would amount to enriching the respondent unjustly, yet, the respondent had allowed the appellant and his family to

move and occupy the land which the parties had agreed upon

and for which the respondent had received the full purchase price.

In response to ground three, Mr Silweya submitted that in terms of developments on the land, the appellant was told that he was only an intending purchaser and not the owner of the land, not even a licencee. In any case, according to the Law Association of Zambia Contract, the appellant was a mere licencee, who should not have embarked on developments of the land. Mr Silweya submitted that developments were done at the risk of the appellant.

On the submissions by both parties on ground three, we have already dealt with some of the points raised in that there was occupation of the land without any resistance from the respondent, there was receipt of the full purchase price and developments were embarked on by the appellant and his family, again without resistance from the respondent. This ground of appeal succeeds.

In support of ground five on costs, Mr Mwenye submitted that the learned trial Judge erred in law and fact when he ordered the appellant to bear costs. The judgment shows that the appellant was partially successful in that the court ordered a refund of K5,300,000=00 paid in respect of the other pieces of land, subdivision ‘K’ and ‘L’. Even if, admittedly, the trial court had discretion to grant costs, that discretion is fettered in respect of costs granted against a successful party. It was

submitted that in any event, costs should have been in the cause

On costs, Mr Silweya submitted that those were in the discretion of the court. The court having ruled that there was no contract, there was no partial success. Mr silweya pointed out that the refund of K5,000,000=00 was made at the conclusion of yet another action before Judge Chibomba, which action had failed in that the appellant had failed to prove another claim. The respondent did not want to keep the money for the appellant and he paid it into court. The party was

successful and got the costs. It is trite law that a successful party carries the costs, unless there is a determinant cause against such practice.

In the court below, the learned trial Judge found that the claim had not been proved and therefore refused to order specific performance. As far as that went, the appellant had failed in his claim against the respondent. Having found that monies were paid into court before trial, even after ordering the refund for the other subdivisions ‘L’ and ‘K’, the claim in the court below was on the piece of land, being 60 hectares, for which the full price was paid by the appellant. It was therefore in that regard that costs were ordered as was done by the court below. The learned trial Judge was therefore in order. This ground of appeal therefore fails.

In sum, grounds one, two and three have succeeded, the

appeal is therefore allowed to that extent. The appellant is entitled to specific performance. In view of the circumstances

of this case, we order interest on the K5,300,000=00 at short term deposit rate from the date of the writ to the date of payment into court.

As there is partial success on appeal, we order that each party shall bear its own costs.

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E.L. SAKALA
CHIEF JUSTICE

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F.N.M MUMBA
SUPRME COURT JUDGE

.....**..**
S.S. SILOMBA
SUPREME COURT JUDGE