SCZ JUDGEMENT NO. 10 OF 2013

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IN THE SUPREME COURT FOR ZAMBIA APPEAL NO. 89/2011
HOLDEN AT LUSAKA
SCZ/8/59/2011
(Civil Jurisdiction)

BETWEEN:
NATIONAL HOUSING AUTHORITY APPELLANT

AND

KELVIN MACWANI RESPONDENT

Coram: Chibesakunda, Ag. CJ, Chibomba and Wanki, JJS.

On 26th January, 2012 and 18th September, 2013

For the Appellant : Mr. G. Mhango of Nyangulu & Co.
For the Respondents : Mr. C. Nhari of Nhari Mushemi & Associates

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J U D G M E N T

Chibesakunda, Acting CJ., delivered the Judgment of the Court.

Cases referred to:

1. ***Wilson Masauso Zulu v. Avondale Housing Project Limited (1982) ZR 172;***
2. ***Central London Property Limited v. High Trees House Limited (1947) KB 130; and***
3. ***Walsh v. Lonsdale (1882) 2 Ch. D. 9.***

This is an appeal from a judgment of the High Court delivered on 23rd February, 2011, in an action commenced by the Respondent

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against the Appellant, by way of a writ of summons, accompanied by a statement of claim. The writ of summons and the statement of claim were filed on 21st March, 2000 but were later amended on 26th January, 2005.

By the said action, the Respondent claimed for an order of specific performance in relation to the sale of Plot No. 10423/184, damages, costs and any other relief the court could deem fit. In support of his action, the Respondent relied on his own evidence and also called one other witness.

The gist of the Respondent's evidence was that on 27th May, 1987, he lodged an application with the Appellant to buy a house. That he was advised by a Mr. Chimwanga, from the Appellant's Sales Department, that it was easier to buy a house if one was on the waiting list and on short lease. That on 29th May, 1987, the

Appellant wrote to him informing him that he had been put on the waiting list under reference number S-25161/GRE, Chainama. That on 13th August, 1987, the Appellant offered him a house, at

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House No. 10423/148, on short lease. That on 18th November, 1987, the Appellant moved him from House No. 10423/148 to House No. 10423/184. That earlier, on 20th June, 1987, he had signed a tenancy agreement under which he also paid K20, 000.00 as security deposit.

He went on to testify that in February, 1998, he was evicted from House No. 10423/184 on the basis that he had rental arrears amounting to K3.1 million. He denied owing the Appellant any arrears of rent. He told the trial court that the Appellant had earlier seized 7 pieces of his property whose value exceeded the amount of rent arrears claimed by the Appellant. That in addition to seizing the property, the Appellant did not refund him the K20, 000.00 security deposit, which he said had gained in value from the time the Appellant got it.

PW2 was **Amos Nakalonga**. The essence of his evidence was that he was employed by the National Housing Authority as Sales and Marketing Manager for a period of seven years during which

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time he was, *inter alia,* in charge of selling houses on behalf of the Appellant. He outlined the procedure relating to the purchase of a house from the Appellant. That at that time, the requirement for a person to buy a house from the Appellant was that that person had to apply for him or her to be put on a waiting list. That where a person was offered to buy a house and that person failed to purchase the house, that house would be offered to any person next on the waiting list and that the short lease tenant, occupying that particular house, would be given priority.

It was PW2's further testimony that the Respondent went to the Appellant to look for a house to buy but was advised that the Appellant did not have any house available for sale at the time. That because the Respondent also wanted a house to rent, the Appellant gave him a short lease for House No.10423/148, which

had already been offered to someone else for purchase. That when the buyer of that house completed payment, the plaintiff was moved to House No. 10423/184. That House No. 10423/184 was also on offer for sale to a Mr. Tanda, a Zimbabwean national. That the sale to Mr.

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Tanda could not, however, be completed because the Appellant failed to obtain state consent to assign. That Mr. Tanda consequently placed a caveat on the property. That as a result, the house could not be sold to anyone.

PW2 went on to testify that the Respondent qualified to buy House No. 10423/184 because he was already on the Appellant's waiting list and he was occupying that house as a short lease tenant. That by the time he left his employment with the Appellant, the house had not been sold to anyone.

The Appellant reacted to the Respondent's action by filing a defence on 4th March, 2000. The defence was later amended on 20th November, 2001. In the said defence, the Appellant denied

the Respondent's allegations and contended that the Respondent was not entitled to the reliefs he claimed in the writ of summons.

The Appellant called only one witness, a **Mr. Thomas Musonda Kufika**. This witness told the trial court that he was the Sales and Marketing Manager for the Appellant Company. That he

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had worked in that capacity for five and half years. That the Respondent occupied House No. 10423/184, Great East Road, until he was evicted for non-payment of rentals. That the Appellant seized some of the Respondent's goods with intention to keep it until the time the Respondent would settle his rent arrears. That the Appellant eventually sold the property to recover the rental arrears and the cost of storage.

DW1 went on to testify that there was no formal offer given to the Respondent for the purchase of House No. 10423/184. That the K20, 000.00 which the Respondent paid was security deposit against possible rent arrears and damage to the house. That at the time the Respondent paid the security deposit that amount

was equivalent to four months' rentals. That the appellant applied the security deposit towards the Respondent's rent arrears of K3 million.

On the evidence before him, the learned trial Judge found, at page J18, that the Respondent had proved his case against the

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Appellant. He accordingly ordered the Appellant to offer the Respondent House No. 10423/184, at the price he should have been offered in 1998 when he was wrongfully evicted. The learned trial Judge also ordered the Appellant to pay damages to the Respondent and that the damages must take into account the security deposit that was paid by the Respondent to the Appellant and the Respondent's goods that were seized and auctioned by the Appellant."

Dissatisfied with the judgment of the learned trial Judge, the Appellant has appealed to this Court on the following grounds:

1. **That on the evidence adduced and the facts as found by the lower court the lower court erred and**

misdirected itself in ordering that the Appellant should offer for sale to the Respondent House No. 184 on Plot No. 10423, Lusaka for, as per evidence, there was no offer or agreement between the Appellant and the Respondent to offer House No. 184 for sale to the Respondent. A court cannot order one to offer for sale to another it can only move in and enforce a contract which is the product of offer and acceptance between parties.

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2. **That on the evidence and facts before it the lower court erred and misdirected itself in ordering that the Appellant pays damages to the Respondent which damages must take into account security deposit paid by the Respondent to the Appellant, for it is evident that as per tenancy agreement between the Appellant and the Respondent security for deposit was paid in case of the Respondent falling into arrears of rent or having to foot the repairs on leaving the house and indeed it is evidence that the Respondent fell into arrears of rent and his goods were distressed. The fact of the Appellant not accounting for proceeds of sale of the distressed goods to the Respondent or the Appellant illegally evicting the Respondent is another and separate issue.**

In support of the two grounds of appeal, Counsel for the Appellant, Mr. Mhango, entirely relied on his filed written heads of argument.

The gist of Mr. Mhango's submissions, on ground one, was that there was no evidence to support the learned trial Judge's finding that when the Respondent moved from House No. 184 of Plot No. 10423, Lusaka, there was an existing promise that the

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Respondent would be offered that house. That the evidence before the learned trial Judge was that what existed between the Appellant and the Respondent, in relation to that house, was a tenancy agreement and not "a promise" by the Appellant to sell the house to the Respondent. Counsel, therefore, urged this Court to reverse the finding of the learned trial Judge on the authority of our decision in ***Wilson Masauso Zulu v. Avondale Housing Project Limited***[(1)]***.***

Coming to ground two, Counsel contended that the learned trial Judge misdirected himself when he ordered that the

Appellant should pay damages to the Respondent and that the damages should take into account the security deposit wrongly appropriated by the Appellant without accounting to the Respondent. Counsel submitted that the evidence before the learned trial Judge was that the K20, 000.00 security deposit was paid as security in case of default in the payment of rentals or in the event of dilapidation of the property at the end of the tenancy. That the K20, 000.00 was, therefore, rightly applied to the settlement of the Respondent's rent arrears.

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With regard to the Respondent's goods that were seized by the Appellant, Counsel argued that the Respondent accepted the seizure of his property as a payment for the rent arrears. That when he was asked to pick some items from his seized property, the Respondent only picked the television set because he knew that the value of his other property did not exceed the amount of rent arrears he owed the Appellant.

Counsel further submitted that the Respondent was, and is, still on the waiting list to be offered a house in the Great East

Road area of Lusaka. That the learned trial Judge, therefore, erred when he ordered the Appellant to offer House No. 184 of Plot No. 10423 to the Respondent when there was no agreement or contract between the Appellant and the Respondent that the Appellant would offer the house to the Respondent. That the case of ***Central London Property Trust Limited v. High Trees House Limited*** [(2)]***,*** cannot be applied to the instant case as that case could only apply when there was no written intention of the parties.

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In response to the arguments advanced by Mr. Mhango, Counsel for the Respondent, Mr. Nhari, also filed written heads of argument. Counsel made very brief oral submissions to amplify his heads of argument. The essence of Counsel's submissions, on ground one, was that the High Court was empowered by section 13 of the High Court Act to administer both law and equity. That the learned trial Judge, accordingly, properly directed himself when he arrived at the decision that the Respondent should be offered the property in dispute. That this was because **'equity**

treats as done that which ought to be done'. He cited the cases of ***Walsh v. Lonsdale***[3]***,*** and the ***High Trees Case***[2]***,*** to support his arguments.

Coming to ground two, Counsel submitted that there was sufficient evidence for the learned trial Judge to order the Appellant to pay damages to the Respondent. That the Respondent gave uncontroverted evidence that the Appellant did not give him back the security deposit that they got from him in 1987. That in addition, the Appellant seized goods from the Respondent and that

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the value of the said goods exceeded the amount of rent arrears that were due from the Respondent to the Appellant.

We have considered the evidence on record, the submissions by Counsel for both parties and the judgment appealed against.

We will start with deciding ground one. The holding of the learned trial Judge, which has been attacked by the Appellant in ground one, was in the following terms:

> **"…I have no doubt therefore that when the (Appellant) moved the (Respondent) from House No. 148 to House No. 184, he was on the Waiting List to buy the (Appellant's) house and that he moved with that intention and hope on the promise that he would be offered House No. 184 which Mr. Tanda failed to purchase. There was, therefore, an existing promise by the (Appellant) to sell House No. 184 to the (Respondent).**

After considering the evidence on record, we entirely agree with the above holding by the learned trial Judge. In our view, the said holding was well founded on the evidence on record. There was no dispute that on 27th May, 1987, the Respondent applied to buy a

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house from the Appellant. That at that time the Appellant did not have any house for sale and so the Respondent was given a short lease of House No. 10423/148 and was also put on a waiting list for the purchase of any of the Appellant's houses. At that time PW2 was the Appellant's Sales and Marketing Manager. PW2's evidence establishes that the prerequisite, for anyone who

wanted to buy a house from the Appellant, was to apply to be put on the waiting list. That where the person offered to buy a given house failed to purchase that house, that house would be offered to anyone on top of the waiting list. That in a case where there was a willing buyer who was occupying that house as a short lease tenant, the short lease tenant would be given priority to buy the house. This evidence was not discredited in cross-examination.

It is our considered view that, on the evidence on record, the Appellant was bound to sell House No. 10423/184 to the Respondent. This is because the evidence establishes that the

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Respondent was qualified to buy the said house. The house was offered to Mr. Tanda with whom the Appellant could not complete the sale transaction as it failed to obtain state's consent to assign due to the fact that Mr. Tanda was not a Zambian but a Zimbambwean. The Respondent was staying in that house as a

short lease tenant. There was no evidence from the Appellant that the Respondent had been withdrawn from the waiting list. As per PW2's and DW1's evidence, since the original offeree of the disputed house, Mr. Tanda, failed to buy the house, that house should have been offered to the Respondent who was the next person on the waiting list and had occupied the house, as a sitting tenant, for about 11 years.

For the foregoing, we agree with the learned trial Judge that the Respondent had an accrued right to be offered the house. We also agree that when the Respondent was moved from House No. 10423/148 to House No. 10423/184, he had legitimate expectation that he would be offered to buy the later house if Mr. Tanda failed to buy it. Our conclusion is buttressed by the Appellant's practice

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and procedures which are to the effect that since Mr. Tanda could not buy the house, as the Appellant could not be given state consent to assign to him, the Appellant was required to give

priority to the Respondent as the person occupying that house on short lease.

We rely on the principle established by Lord Denning in the ***High Trees Case*** [2], namely that-

> **"There has been a series of decisions over the last fifty years which, although said to be cases of estoppel, are not really such. They are cases of promises which were intended to create legal relations and which, in the knowledge of the person making the promise, were going to be acted on by the party to whom the promise was made, and have in fact been so acted on. In such cases the courts have said these promises must be honoured."**

In the instant case, it is common ground that there was a promise, by the Appellant to the Respondent, that if he applied to buy a house from the Appellant; was put on the waiting list; and was given a house on short lease, he would be offered to buy that

house in the event that the first offeree failed to buy the house. The Appellant knew or ought to have known that the Respondent would rely on the prevailing practice.

Accordingly, we are of the view that a promise existed that the Appellant would offer House No. 10423/184 to the Respondent if the original offeree failed to purchase that house. The Respondent relied on that promise as he stayed in the disputed house for 11 years in the hope that, if Mr. Tanda failed to purchase it, he would be offered to buy it.

For the foregoing reasons, and in applying the principle established by Lord Denning in the ***High Trees Case***[(2)], we hold that when the sale to Mr. Tanda failed, the Appellant should have offered the house to the Respondent.

We, therefore, hold that ground one must fail.

Coming to ground two, which relates to the award of damages, we do not agree with the learned trial Judge’s order that the Respondent should pay the Appellant damages. In our view, what

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the Respondent is entitled to is an account for his goods which were seized by the Appellant and for the K20, 000.00 security deposit. Ground two, therefore, partially succeeds.

On the totality of the evidence in this matter, we order the Appellant to give the Respondent an offer to purchase House No. 10423/184, Great East Road, Lusaka, at the price he should have been offered in 1998 when he was wrongfully denied the said offer. We also order that the Appellant must render an account to the Respondent for the K20, 000.00, security deposit and the Respondent's goods which were seized and auctioned by the Appellant without accounting to the Respondent.

Since this appeal has partly succeeded on ground one, we order each party to bear their own costs both in this Court and in the court below.

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L. P. CHIBESAKUNDA
ACTING CHIEF JUSTICE

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H. CHIBOMBA
SUPREME COURT JUDGE

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M. E. WANKI
SUPREME COURT JUDGE