

IN THE HIGH COURT FOR ZAMBIA

2015/HPC/0336

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN

GRACE CHAILA CHIMA

PLAINTIFF

AND

PHILLIP K. CHIBUNDI T/A

DEFENDANT

CHIBUNDI & COMPANY

Before the Hon. Lady Justice Irene Zeko Mbewe.

For the Plaintiff : Mr. Kamfwa of Messrs Cornhill and Wilson

For the Defendant : Mr. Mosho of Messrs Mosho and Company

J U D G M E N T

Cases Referred To:

1. *Midlands Bank v Hett Stubbs and Kemp* [1979] Ch 384
2. *Otter v Church Adams and Company* [1953] Ch 280
3. *Industrial Finance Company v Jacques and Partners* [1981] ZR 75
4. *Masauso Zulu v Avondale Housing Project Limited* [1982] ZR 172
5. *JZ Car Hire Limited v Malvin Cola and Scirrocco Enterprises SCZ Judgment*
No 26 of 2002
6. *Mohammed v Attorney-General* [1982] ZR 49

7. *Rondel v Worsley* [1967] 3 ALL E R 993
8. *Pentecost v London District Auditor* [1951] 2 KB 759
9. *Allen v Clark* [1883] LT 781
10. *Hill v Harris* [1965] 2 QB 601
11. *Edward Wing Finance Company Limited v Johnson Stokes and Master* [1984] 1 AC 296 (PC)
12. *Clark and Another v Wringleys Solicitors LLP* 2013 EWHC
13. *Wilsher v East Essex Area Health* [1988] AC 1074
14. *Clark and Another v Kirby Smith* [1964] 2 ALL E R 835
15. *Atheneon Engineering Company Limited v Danile Lufunda Luma SCZ*
Appeal No 67 of 2002
16. *Mhango v Ngulube and Others* [1983] ZR 61
17. *McCall v Abelesz and Another* [1976] 1 ALL E.R 727
18. *Attorney-General v Mpundu* [1984] ZR 61
19. *Weber v Titan Distributors* 8th Circuit [2001]

Legislation Referred To:

1. *High Court Rules, Cap 27 of the Laws of Zambia*
2. *Rules of the Supreme Court, 1999 Edition*

Other Works Referred To:

1. *Odgers on Civil Actions, 24th Edition*
2. *Clerk and Lindsell on Torts, 20th Edition*
3. *Charlesworth on Negligence 4th Edition*
4. *Jackson and Powell on Professional Negligence, 5th Edition*
5. *Garner's Black Law Dictionary, 8th Edition (Thomson: Reuters, London)*
6. *McGregor on Damages, 18th Edition, Sweet and Maxwell Thomson Reuters*

The Plaintiff commenced an action by way of Writ of Summons accompanied with a Statement of Claim for the following relief:

- (1) Recovery of the sum of ZMW800,000 paid as purchase price for subdivision No. 431 of Farm 401a Lusaka.**
- (2) Recovery of the sum of ZMW40,000.00 paid as legal fees by the Plaintiff to the Defendant for the conveyance of subdivision No. 3431 of Farm No. 401a Lusaka.**
- (3) Special damages for money spent on renovations and improvements of subdivision No. 431 of Farm No. 401a Lusaka.**
- (4) Damages for mental anguish and emotional distress suffered by the Plaintiff before, during and after the eviction of the Plaintiff from subdivision No. 431 Farm No. 401a Lusaka.**
- (5) Any other relief the Court may deem fit.**
- (6) Interest on any amounts found due.**
- (7) Costs.**

Plaintiff's Evidence

In the Statement of Claim, the Plaintiff averred that at the end of 2010, she was offered a property by John Nyondo acting under a

Power of Attorney executed in his favour by Eve Nanyangwe Nyondo. She then retained the services of the Defendant for the purpose of the conveyance of the property. The Defendant was also retained by the vendor in the same transaction. The Plaintiff averred that before she executed the contract of sale, she was informed by the Defendant that there was a mortgage in favour of Finance Building Society but that the Defendant advised and assured the Plaintiff that the mortgage would be discharged if she agreed to honour the payment terms proposed by the vendor, and on that basis she accepted the payment terms proposed by the vendor.

On 7th February 2011, the Defendant prepared the contract of sale which was duly executed by both parties. That according to its terms, the purchase price was agreed at ZMW800,000.00 with the sum of ZMW200,000.00 in cash to the Defendant in his capacity as vendor's Advocates upon exchange of contract and the balance of K600,000.00 less the sum due for property transfer tax and ground rent in the vendor's named account within 48 hours from taking possession of the premises. That the Defendant assured the Plaintiff

that upon paying the agreed deposit of ZMW200,000.00 he would ensure that the mortgage on the property was discharged. That the Defendant informed the Plaintiff in the presence of the vendor that the mortgage had been discharged and the Defendant proceeded to apply for State consent to assign and paid the property transfer tax after the Plaintiff made available monies for this purpose from the outstanding balance of the purchase price.

In March 2011, the Plaintiff took possession of the property after paying the full purchase amount. Thereafter contrary to the Defendant's advice and assurance, she came to learn that the mortgage had not been discharged and that Finance Building Society had obtained Judgment for foreclosure and sale of the property. That the Defendant breached the professional duty of care owed to the Plaintiff. The Plaintiff tried to seek protection of the law by joining the proceedings between Finance Building Society and the Vendor so that she could be declared a bonafide purchaser for value without notice but was unsuccessful and her claim was dismissed, and was subsequently evicted from the property by Finance Building Society. The Plaintiff averred that the Defendant

owed the Plaintiff a professional duty of care to ensure that the property was free from encumbrances before she paid the full purchase price. The Plaintiff contends that she has suffered loss as a result of the Defendant's professional negligence and she itemised the negligence and particulars of loss as follows:

- (a) advising the Plaintiff to pay the full purchase price before ensuring that the mortgage on the property has been discharged.
- (b) failing to contact Finance Building Society to confirm whether the mortgage has been discharged.
- (c) failing to request for certificate of title from Finance Building Society as proof that they had no further interest in the property.

The Plaintiff contends that as a result of the Defendant's negligence, she has suffered loss and claims the sum of ZMW800,000.00 paid as purchase price and loss of ZMW40,000.00 paid as legal fees to the Defendant.

At the trial, the Plaintiff relied on her witness statement and reiterated that towards the end of 2010, she was offered a property

known as Subdivision No 431 of Farm 401a by one John Nyondo who was acting pursuant to a power of attorney executed in his favour by Eve Nanyangwe Nyondo. That the purchase price of the property was ZMW800,000.00 and she retained the services of the Defendant who was practicing under the name Messrs Chibundi and Company.

She testified that the Vendor also retained the Defendant and before she signed the contract of sale, the Defendant informed her of a mortgage on the property in favour of Finance Building Society. According to the Plaintiff, the Defendant assured her that the mortgage was going to be discharged if she honoured the terms and conditions upon which the vendor was offering the property. She testified that she was made to pay ZMW200,000.00 to the Defendant upon signing the contract of sale so that the Vendor could settle the outstanding amount on the mortgage. That the Defendant prepared the contract of sale (pages 1-4 of the Plaintiff's bundle of documents) and the issue of the existing encumbrance was not included in the contract of sale following assurances by the Defendant that they mortgage would be discharged.

It is averred that the Plaintiff signed the contract of sale on 7th February 2011 on the understanding that the Defendant would ensure that the mortgage was discharged and the Defendant acknowledged receipt of the deposit of ZMW200,000.00 (page 5 of the Plaintiff's bundle of documents). That the Defendant informed her that the mortgage had been discharged and she was shown the Memorandum of Discharge of Mortgage and a copy of the print out from the Lands and Deeds Registry. She testified that the Defendant obtained consent to assign and paid property transfer tax (pages 6-7 of the Plaintiff's bundle of documents). She stated that she signed the deed of assignment of the property and was given vacant possession and embarked on making improvements to the property which included putting the electric fence and gate, changed toilets and bath tubs, replaced geysers. That she inquired from the Defendant as to why the whole transaction was protracted and the Defendant assured her that he was attending to the matter. That she became suspicious of the transaction and engaged Messrs Imasiku and Company to conduct some investigations on the property and found that there was an action in the Commercial

Court by Finance Building Society for foreclosure of the property wherein the vendor was joined to the proceedings for recovery of KR503,169,801.70. Consequently Judgment was entered in favour of Finance Building Society. The Plaintiff then demanded a refund of the full purchase price and that the Defendant and Vendor agreed to refund her, and an agreement to that effect was signed (page 9-11 of the Plaintiff's bundle of documents). That this agreement was never honoured. The Plaintiff testified that she was evicted from the property and in the process lost a lot of household effects due to breakages.

In cross-examination in respect to the aspect of the payment of ZMW200,000.00 for the discharge of the mortgage, she testified that this amount was paid in cash through the Defendant and a receipt was issued. That the contract of sale was executed after assurance that the mortgage had been cleared. The Plaintiff reiterated that it was her first time to meet with the vendor John Nyondo at the Defendant's office. That she paid a further ZMW500,000.00 to the Defendant by way of bank transfer to an account given by the Defendant. There was no re-examination.

Defendant's Evidence

In defence, the Defendant averred that he was retained by Bentley Chima, the husband to the Plaintiff who was aware of the encumbrance on the property and had made arrangements for its discharge direct with John Nyondo. That it is known by the Plaintiff that the Defendant and Bentley Chima were victims of an elaborated fraud and forgery by John Nyondo which the Defendant cannot be held liable for in negligence. The Defendant did not file a witness statement.

Plaintiff's Submissions

It is submitted that it is not in dispute that the Defendant accepted instructions from the Plaintiff for the conveyance of the subject property. That the Plaintiff's claim is based both in contract and tort. The concurrent nature of contractual and tortious duty for a legal practitioner is stated in **Midlands Bank v Hett Stubbs and Kemp**¹. It is argued that for the Defendant's tortious liability to the Plaintiff to succeed, three conditions have to be met namely that the Defendant owed her a duty of care, that the Defendant breached that duty of care and as a result of the breach of duty, the Plaintiff

has suffered damage and loss. The case of **Otter v Church Adams and Company²**, and **Industrial Finance Company Limited v Jacques and Partners³** were cited in support of the argument on the duty of care for legal practitioners. In respect to the Plaintiff's damage or loss, Counsel for the Plaintiff cited the learned authors of **Jackson and Powell on Professional Negligence**, 5th Edition paragraph 10-310. The Court is urged to award damages for mental anguish and emotional distress before, during and after her eviction, and that the Defendant is liable for professional negligence.

Defendant's Submissions

In its written submissions, the Defendant argues that the burden of proof is on he who alleges (**Masauso Zulu v Avondale Housing Project Limited⁴**, **JZ Car Hire Limited v Malvin Chola and Scirrocco Enterprises⁵**, **Mohammed v Attorney General⁶**). The function of pleadings was stated and in the current case, the case pleaded is one for damages for professional negligence as specified in the Statement of Claim. That the evidence required from the Plaintiff should be tangible and reliable and for a professional

negligence claim to be successful, the claimant needs to establish the existence of a duty of care and that it has been breached. The Defendant argued that aside from there being a breach of duty of care, the Plaintiff must prove that the breach is the proximate cause of injury or loss and for losses that are reasonably foreseeable are recoverable.

The thrust of the Defendant's submission is that monies were given to John Nyondo to deal with the discharge of the mortgage and that the Defendant only became aware of the fraud after lodging the executed assignment for registration. That the claim should fail for lack of proof of key elements and that no proof has been tendered by the Plaintiff that she paid ZMW800,000.00 as the purchase price and ZMW40,000.00 as legal fees nor has any proof been tendered to support the claim for special damages for money spent on the renovations and improvements of the property.

It is common cause that the Defendant was engaged by the Plaintiff to provide conveyancing services for the purchase of Subdivision 431 of Farm 401a Lusaka. It is not in dispute that the Defendant

proceeded to prepare a contract of sale which was executed by both parties wherein the Plaintiff and vendor's Advocate was the Defendant. It is not in dispute that it was a term of the contract that the purchase price would be paid as follows: ZMW200,000.00 in cash to the Vendor's Advocates who are the Defendant, and the balance of ZMW600,000.00 less property transfer tax and ground rent to the account of John Nyondo within 48 hours from taking possession. That the Plaintiff would take vacant possession at exchange of contracts. It is not in dispute that ZMW24,000.00 was paid as property transfer tax. It is common cause that the subject property was encumbered.

Issues for determination

After assessing the pleadings and evidence on record, the issues for determination are as follows:

- (a) whether the Plaintiff is entitled to a refund of ZMW800,000.00 from the Defendant being the full purchase price arising from the failed conveyance by the Defendant.
- (b) whether the Defendant was professionally negligent and owed a duty of care to the Plaintiff, breached his duty of care to the

Plaintiff, and as a consequence whether the Plaintiff is entitled to damages for negligence.

The Law

For the Plaintiff to succeed in a claim in tort of negligence against the Defendant, it is incumbent to establish that -

- (1) the Defendant owes the Plaintiff a duty of care
- (2) there is a breach of that duty of care
- (3) the client has suffered damage
- (4) the damage is not too remote a consequence of the breach of duty.

Negligence

It is trite that where negligence is alleged it must be pleaded. The learned authors of **Odgers on Civil Actions, 24th Edition**, have stated the following in paragraph 8.32 at page 181:

"Pleadings must always be given of any negligence, showing in what respects the defendant was negligent, The statement of claim should state the facts upon which the supposed duty is founded, the duty to the plaintiff with the breach of which the defendant is charged, the precise

breach of that duty of which the plaintiff complains and lastly; particulars of the injury and damage suffered."

Generally, the nature of an Advocate's contractual duties depends on what he is engaged to do. It encapsulates the implied obligations to devote attention to the client's business with the reasonable care and skill to be expected of a normally competent and careful practitioner. An Advocate in the performance of his duties or mandate holds out as possessing adequate skill, knowledge and learning for the purpose of conducting all business he undertakes. The learned authors of **Clerk and Lindsell on Torts, 20th Edition** in paragraphs 10-109 puts it this way:

"When a solicitor is engaged for reward, there is no doubt as to the existence of a contractual duty to exercise care and skill on behalf of his client."

The extent of an Advocate's liability to his client for negligence has been considered at various times by Courts. Instructive is the following passage by Lord Denning in the case of **Rondel v Worsley**⁷:

"Finally it must be remembered that Counsel is not liable in negligence merely because he expresses an opinion which ultimately turns out to be wrong nor merely because he overlooks one of a number of relevant authorities.

I agree with Russell J, that the liability of an advocate to his client for negligence in performing his professional duties must generally arise from some really elementary mistake and not be an error of judgment on some complicated point or one of doubtful construction. Each case must depend on its particular facts".

In **Pentecost v London District Auditor**⁸, Lyneskey J held as follows:

"That I remain of the opinion that Counsel will only be guilty of crassa negligentia or gross negligence by some really elementary blunder."

In **Fletcher and Sons v Jubb Booth and Helliwell**⁹, Scrutton LJ stated as follows:

"And moreover, I accept the opinion of Tudal C.J on Godefroy v Dalton 6 Bing 460 that it would be extremely

difficult to define the exact limit by which skill and diligence which a solicitor undertakes to furnish in the conduct of a case is bounded, or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that crassa negligentia, or lata culpa mentioned in some of the cases, for which he is undoubtedly responsible. It is a question of degree and there is a border line within which it is difficult to say whether a breach of duty has or has not been committed”.

Thus, professional negligence is the failure of an Advocate to act with the competence reasonably expected of ordinary members of the Advocate's profession. An Advocate must be meticulous, accountable and must serve his client faithfully. The standard of care and skill which can be demanded from an Advocate is that of a reasonably competent and diligent Advocate.

In determining this matter, I shall proceed to use these guidelines as to whether the Defendant acted with skill and diligence exercised

by a member of his profession in the conduct of a conveyancing transaction.

Duty of Care

Black's Law Dictionary, 5th Edition describes a duty of care and skill as follows:

"the duty to act with the diligence and the prevailing standards for the locality for the kind of work performed and to use any special skills the actor has to perform the work"

In establishing a duty of care owed to the Plaintiff, it is important to first determine the scope of mandate the Defendant was entrusted with. The Plaintiff contends that she engaged the Defendant as her Advocate for purpose of the conveyance relating to subdivision 431 of Farm 401a Lusaka (hereinafter referred to as the "subject property"). This is confirmed by the contract of sale (on page 1 of the Plaintiff's bundle of documents) wherein the Purchaser is Grace Chaila the Plaintiff herein. Paragraph 2 of the contract of sale states as follows:

**"2. The Vendor and Purchaser's Advocates are Messrs
Chibundi and Company of Plot 3515/4, Great East
Road, Lusaka.**

The Defendant acted as Advocate for both parties and as such was obliged to protect the interests of both parties by ensuring that he conducted a proper due diligence in respect to the transaction. What amounts to due diligence by an Advocate in a conveyancing transaction? I am of the considered view that as part of his due diligence, an Advocate should conduct a detailed search at the Lands and Deeds Registry and verify the authenticity of the title deed in his possession relating to the property in issue. In addition, an Advocate should obtain a photocopy of the Vendor's national registration card for purposes of obtaining property transfer tax clearance and consent to assign. This would also assist the Advocate to verify the true identity of the vendor. The Advocate should ensure that there are no encumbrances on the property or if they are, how these encumbrances will be discharged and these should be brought to the attention of the parties. I opine that the

duty of an Advocate in a conveyance transaction is to ensure that the client's money is protected at all times up to completion.

The Defendant argues that no proof has been tendered by the Plaintiff showing that the Defendant was retained to offer "*transaction advice*" as the statement of claim in paragraph 4 shows that he was retained for purpose of "*conveyance of the property*". I do not accept the Defendant's line of argument. The Defendant is trying to bring in semantics to the evidence on record. I opine that by retaining an Advocate to undertake conveyancing, this includes rendering what the Defendant terms as transaction advice. According to Black's Law Dictionary the word "conveyancing" means:

" the voluntary transfer of a right or property."

In undertaking this activity of a transfer of a right or property, a number of steps have to be taken in order to achieve the desired result. It is apparent that the Defendant is trying to give his scope of work the narrowest of interpretation so as to exclude a number of incidental activities that form part of the process of conveyancing.

The Defendant basically denied the version of events given by the Plaintiff in respect to the conveyancing transaction. The Defendant averred that the Defendant and the Plaintiff's husband, Bentley Chima were victims of an elaborate fraud and forgery by John Nyondo the vendor in the transaction for which the Defendant cannot be liable in negligence. The Plaintiff testified that at all times she acted on the advice of the Defendant and made payment to John Nyondo the vendor, on the Defendant's advice. Counsel for the Plaintiff argues that there is a contractual relationship between the parties as the Defendant undertook to provide legal services to the Plaintiff for the conveyance of Subdivision 431 of Farm 401a Lusaka. I find that the Defendant owed the Plaintiff both a contractual and tortuous duty of care to conduct the Plaintiff's conveyancing transaction with requisite skill and expertise expected from a competent and diligent lawyer.

Discharge of Mortgage

It is not in dispute that the subject property had a mortgage which the Plaintiff and Defendant were both aware of. It is not in dispute that the arrangement was for the vendor John Nyondo and not the

Defendant, to directly deal with the discharge of the mortgage with Finance Building Society. It is not in dispute that the Plaintiff paid a sum of ZMW200,000.00 through the Defendant for purposes of the discharge of the mortgage. The facts show that the mortgage was never discharged and Finance Building Society ended up foreclosing and evicting the Plaintiff from the subject property after she took possession. The Defendant argues that as far as he was concerned and going by the undertaking by John Nyondo, the Defendant was not expected to request for the certificate of title from Finance Building Society as the vendor was to attend to this.

The question then is, did the Defendant owe a duty of care to the Plaintiff in any way in respect to the discharge of the mortgage? I find that the Defendant as Advocate for the Plaintiff failed to make the necessary inquiries directly with Finance Building Society on the subject property. Counsel for the Plaintiff argues that where an Advocate fails to make customary inquiries and searches on behalf of a client in a conveyancing transaction, such an Advocate is liable for negligence and in support of this argument relied on the case of

Allen v Clark⁹ and **Hill v Harris**¹⁰. I concur with the principles in those cases.

I agree with Counsel for the Plaintiff that acts of negligence on the part of the Defendant was failure to advise the Plaintiff not to pay the full purchase price before ensuring that the mortgage on the property had been discharged. In my considered view, this falls within the scope and mandate of the Defendant. I find that the Defendant did not fulfill specific obligations inherent to the representation of a seller and purchaser of property. The Defendant in accepting the mandate to undertake the conveyance on behalf of both parties, was still expected to ensure that the mortgage is discharged in his capacity as Advocate for the Purchaser even though the vendor was to personally attend to the discharge of the mortgage. Instead of giving John Nyondo a cash payment towards the discharge of the mortgage, a prudent Advocate would have issued a cheque directly to Finance Building Society. In my considered view, the conduct of the Defendant was below the standard of care required in protecting the Plaintiff's interest in the

conveyance when he did not make inquiries expected of him as an Advocate acting for the Plaintiff herein.

In my mind and after examining the correspondence between the parties, the Defendant owed a duty of care to the Plaintiff to ensure that the conveyance was properly undertaken leading to the perfection of title to the Plaintiff. I do not subscribe to the Defendant's argument that any other Advocate would have fallen victim to the fraud and therefore there is no breach of duty. In support of my findings, persuasive is the case of **Edward Wing Finance Co Ltd v Johnson Stokes and Master**¹¹ (a firm) where the clients instructed the solicitors to act in a mortgage transaction. In that case, the solicitors carried out a land search against the property which revealed charges in favour of a bank. The solicitors forwarded the purchase price to the vendor's solicitors on the understanding by the vendor's solicitor to forward to the purchaser's solicitors within a specified period, the relevant documents of title duly executed. On the basis of the undertaking the purchaser's solicitors sent to the vendor's solicitors cheques drawn by the Plaintiffs in his favour.

Without honouring his undertaking, the vendor's solicitor left Hong Kong with the money. The Supreme Court held that the risk of loss to the Plaintiffs by placing the money at the disposition of the vendor's solicitors was a foreseeable risk of embezzlement by him; the risk would have been avoided by taking precautions to ensure that the Plaintiffs would have an unanswerable claim against the other side for specific performance of that party's obligations, and in the case of property already subject to a mortgage which was to be discharged so much of the purchase price as needed to discharge, the prior mortgage could have been paid by cheque in favour of the mortgage or its duly authorised agent and not by cheque in favour of the vendor's solicitor; without taking precautions, when they knew the property was subject to an existing mortgage the purchaser's solicitors had failed to exercise the standard of care which they owed to the Plaintiffs and, accordingly were negligent. In the case in casu, I have come to the inescapable conclusion that the Defendant owed the Plaintiff a duty of care.

Breach of duty

Having established that the Defendant owed the Plaintiff a duty of care, was that duty of care breached? It is trite that an Advocate's failure to carry out some necessary step is normally treated as a breach of the general duty to exercise reasonable care and skill as espoused by the learned authors **Jackson & Powell on Professional Negligence, 5th Edition** and the case of **Midland Bank v Hett, Shibt & Kempt¹**. I find that the Defendant owed a duty of care to the Plaintiff and breached the duty of care, which resulted in a loss to the Plaintiff when it turned out that the mortgage was never discharged and consequently the subject property was foreclosed and the mortgagee took possession resulting in the eviction of the Plaintiff. Arising from that breach of duty, the Plaintiff has suffered damages and loss.

Damages arising from breach of duty

It is trite that damages arise from a breach of duty. According to the learned authors **Charlesworth on Negligence 4th Edition, paragraphs 1032-42**, if therefore an Advocate causes loss or damage to a client owing to a want of such knowledge, or want of

such care the Advocate ought to have exercised, the Advocate is then guilty of negligence giving rise to a claim of damages against him as held in the case of **Clark and Another v Kirby Smith**¹² which is persuasive. In the case of **Industrial Finance Company v Jacques and Partners**³ cited by Counsel for the Plaintiff, where it was held that where a lawyer has instruction, he has a professional duty to protect his client so that where it is shown that the Advocate has failed to exercise his duty to the cost of his client, the Advocate must make good and pay damages.

The Plaintiff bears the onus to show that the Defendant is liable for the damages she has suffered as a consequence of the Defendant's breach of his contractual duty by failure to exercise due care and skill. The Plaintiff is required to establish not only that her damages were the Defendant's breach of duty pursuant to such contract to act on her behalf, but also that the breach of such duty was reasonably foreseeable for liability to result. **(See Wilsher v East Essex Area Health Authority**¹³.)

The Defendant contends that the Plaintiff must prove that the breach is the proximate cause of injury or loss. The Plaintiff has to

establish that there is a degree of proximity between her and the Defendant that is, closeness or directness of the relationship necessary to impose tortious liability. The Defendant relied on the case of **Clack v Wringleys Solicitors LLP** ¹⁴ where the Court held that if loss would have occurred in any event had the professional not been negligent, the professional will not be responsible for that loss.

In the case in casu, was the advice or lack of advice the reason for the loss occasioned to the Plaintiff? The Plaintiff has to show and satisfy the Court as to what action, if any, she would have taken to obtain the benefit or avoid the loss if proper advice had been given. I opine that had proper advice been given and had the Defendant exercised due care and skill, on a balance of probability, the Plaintiff would have avoided the loss by not surrendering the ZMW200,000.00 to the Defendant for direct payment to John Nyondo for the discharge of the mortgage. Further, the Defendant advised the Plaintiff to pay the balance of the purchase price despite the failure to conduct an inquiry as to whether the mortgage had been discharged. I opine that the Defendant ought to have known

that in his position any advice or lack of it would have an inevitable detrimental effect on the Plaintiff's interest.

The Defendant argues that the alleged particulars of negligence cannot be held to be the proximate cause of the injury or loss. That the Plaintiff had covenanted with the Vendor to pay ZMW600,000.00 within 48 hours of taking possession (page 4 Plaintiff's bundle of documents) and it was therefore clear that the trigger to effecting the payment was not the advice on the state of the encumbrance and how it could be discharged, but the negotiated terms to taking possession. In my considered view, the Defendant is pushing the boundaries of such an argument too far. As earlier stated, the Defendant owed a duty of care to the Purchaser to ensure that the mortgage on the subject property was discharged even before vacant possession. A prudent Advocate acting on behalf of any purchaser of a property would have done so despite any negotiated terms.

Refund of ZMW800,000

The Plaintiff claims for the recovery of ZMW800,000.00 paid as the purchase price for the subject property. The Defendant argues that there is no proof that the Plaintiff paid ZMW800,000.00 as the purchase price. The difficulty with this argument is that it is inconsistent with the documentary evidence. There is proof at page 5 and 8 of the Plaintiff's bundle of documents which are acknowledgement slips from Messrs Chibundi and Company Legal Practitioners which states as follows:

"We Chibundi & Company do hereby acknowledge receipt of K200,000,000.00 from Grace Chaila being part payment towards purchase of Subdivision No 431 of Farm No 401a, Lusaka. Received and signed by Phillip Chibundi on 8th February 2011."

We Chibundi and Company Legal Practitioners do hereby acknowledge receipt of K75,000.00 cash and proof of transfer of the sum of K500,000,000.00 to our Stanbic Account being the final payment from Grace Chaila being

payment for purchase of Plot 4019 from Eva N. Nyondo signed on 15th February 2011 by a Melody C. Mwale.”

The evidence on record shows that the Plaintiff paid a total of ZMW775,000.00 through the Defendant towards the purchase price of the subject property. I have taken note that the receipt dated 15th February 2011 describes the property as "Plot 4019/431" instead of 401a/431. A perusal of the two receipts dated 8th February 2011 and 15th February 2011, leaves me to draw an inference that the description of the subject matter an error in the receipt dated 15th February 2011.

The receipt dated 15th February 2011 (page 8 of Plaintiff's bundle of documents) further shows that this was the final payment from the Plaintiff in relation to the purchase of the subject property. The record further shows a payment of property transfer tax in the sum of ZMW24,000 and according to the contract of sale this amount was to be deducted from the purchase price.

In my considered view, the Plaintiff has demonstrated that not only did she make payments through the Defendant, but that due to the Defendant's breach of duty in the manner he handled the conveyancing transaction, the direct consequence is that the Plaintiff suffered loss of the purchase price. I find that the Defendant cannot be absolved from liability.

The Defendant argues that the Plaintiff testified in cross-examination that she followed the conditions of the contract which provided for payment to be made directly to the vendor. It is argued that there is no basis for the Court to therefore hold the Defendant liable. The Defendant cited the case of **Atheneon Engineering Company Limited v Danile Lufunda Luma**¹⁵ as authority in support of the proposition that failure to bring critical evidence is detrimental and can oust a claim.

For the reason advanced in the preceding paragraph, the Defendant owed the Plaintiff a duty of care, breached his duty of care and is liable in negligence. On the totality of the evidence, and for the reasons stated aforesaid, the Plaintiff's claim for the recovery of the

sum of ZMW800,000.00 paid as the purchase price of the subject property succeeds. The full amount is to be recovered without deduction of any statutory fees paid as property transfer tax, consent to assign, and ground rent.

Counsel for the Defendant relies on the defence of estoppel, which I find was not pleaded. There is a plethora of case law, which the Defendant cited that a case must be decided as pleaded, as the parties are guided by their pleadings to which I fully concur with. The record shows that the Plaintiff, Defendant and John Nyondo on 21st March 2013, executed an agreement wherein the Defendant made an undertaking to pay the Plaintiff a maximum of ZMW500,000.00 in the event that John Nyondo failed to refund the Plaintiff the full purchase price for the subject property. Even if I were to have considered this defence, I find that the Defendant cannot limit its liability to ZMW500,000.00 as the Court will not aid a wrongdoer to avoid liability. A party in breach cannot be allowed to benefit from its transgressions.

Legal Fees

The Defendant argued that there is no proof that the Plaintiff paid the legal fees of ZMW40,000.00. Conversely, the Plaintiff claims for the recovery of the sum of ZMW40,000.00 paid as legal fees to the Defendant for the conveyance of the subject property. A perusal of the record shows an undated letter from the Defendant to the Plaintiff (page 1 of Defendant's bundle of documents) stating inter alia that:

"the balance of the purchase price less ZMK40million to be paid to the writer thereof will have to be transferred to the account of John Nyondo once we have informed you that the Assignment has been registered."

This letter makes reference to a ZMW40,000.00 to be paid by the Plaintiff to the Defendant without specifying its purpose. The Plaintiff argues that the legal fees paid to the Defendant was ZMW40,000.00. In this respect, I find that the Plaintiff has not adduced any evidence showing that she paid the legal fees to the Defendant. This would have come in the form of a fee note

supported by a receipt showing proof of payment. In the absence of tangible evidence, the Plaintiff's claim for legal fees in the sum of ZMW40,000 lacks merit.

Special Damages

The Plaintiff claimed for special damages for renovations and improvement she carried out at the subject property. It is trite law that any party claiming loss must prove that loss and do so with evidence that makes it possible for the Court to determine the value of that loss with a fair amount of certainty. This principle was echoed by the Supreme Court in the case of **Mhango v Ngulube and Others**¹⁶. In the circumstances of this case, I decline to make any award for special damages as the Plaintiff did not adduce any evidence showing what renovations and improvements she made to the subject property. It is not the duty of this Court to go on a guessing spree on behalf of the Plaintiff as to what was expended in this respect. This claim fails.

Damages for mental anguish and emotional distress

The Plaintiff claimed for damages for mental anguish and emotional distress suffered before, during and after the eviction of the Plaintiff from the subject property. It goes without saying that these damages are highly subjective and not easily calculated in economic terms. It is trite that the Plaintiff should offer specific facts as to the nature of the claimed emotional distress and mental anguish, and the connection to the Defendant's breach. In the case of **McCall v Abelesz and Another**¹⁷, Lord Denning M.R stated that :

"It is now settled that the Court can give damages for mental upset and distress caused by the Defendant's conduct in breach of contract."

Instructive is the Supreme Court case of **Mpundu v Attorney-General**¹⁸. In the case of **Weber v Titan Distribution**¹⁹, it was held that a Plaintiff's testimony alone can prove injury caused by a Defendant. I find that the inconvenience suffered by the Plaintiff is a direct consequence of the Defendant's conduct by his direct failure to exercise due care and skill in the conveyance of the

subject property. The Plaintiff testified that following her eviction from the subject property she suffered mental anguish and emotional distress. In my considered view, the evidence of the Plaintiff's own testimony together with the circumstances of this case suffice to sustain the Plaintiff's burden of proving damages suffered. The evidence shows that the Plaintiff was evicted and I opine that this kind of action can cause mental anguish and emotional distress coupled with the fact that the Plaintiff had paid monies for the purchase of the said subject property. She suffered a double blow following the foreclosure and subsequent eviction by Finance Building Society. On this basis I award damages to the Plaintiff for mental anguish and emotional distress to be assessed by the Registrar.

The upshot of the Plaintiff's claim is as follows:

1. The Defendant shall pay the Plaintiff the sum of ZMW800,000.00 paid as the purchase price for the failed conveyance of Subdivision 431 of Farm No 401a, Lusaka. This amount shall attract interest at the short term deposit rate as determined by Bank of Zambia from date of the writ to

date of Judgment and thereafter at the commercial lending rate as determined by Bank of Zambia from date of writ until full payment.

2. The Plaintiff is awarded damages for mental anguish and emotional distress to be assessed by the Registrar.
3. The claim for special damages for money spent on renovations and improvements of Subdivision No 431 of Farm 401a, Lusaka is without merit and fails.
4. The claim for recovery of legal fees of ZMW40,000 is without merit and fails.
5. Costs awarded to the Plaintiff to be taxed in default of agreement.

Leave to appeal granted.

Delivered in Lusaka this 17th day of August, 2017


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HON. IRENE ZEKO MBEWE
HIGH COURT JUDGE