

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

APPEAL NO 218/2020

BETWEEN:

HABUCE FARMS LIMITED

APPELLANT

AND

**TABISBHAI GULAM ISAP HOLA
ANEELA MUHAMED ASLAM**

**1ST RESPONDENT
2ND RESPONDENT**

CORAM: MULONGOTI, NGULUBE AND SIAVWAPA JJA

On 19TH JANUARY AND 29th APRIL, 2021

FOR THE APPELLANT: MR. M. C. HAMACHILA OF MESSRS M. C.
HAMACHILA LEGAL PRACTITIONERS

FOR THE RESPONDENTS: MISS M. MWAPE AND MISS M. MULENGA
BOTH OF MESSRS LUNGU SIMWANZA
AND ASSOCIATES

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

Cases referred to:

1. *Homenet Zambia v David Van Der Merwe* 2011/HPC/0098
2. *Engen Petroleum Zambia Limited v Willis Muhanga and Another*
SCZ Appeal No. 117 of 2016
3. *Esquire Roses Farms v Zega Limited* Appeal No. 37 of 2009

Other Authorities referred to

1. *Law Association of Zambia General Conditions of Sale 1997*

1.0. INTRODUCTION

- 1.1. This appeal is against the Judgment of the High Court presided over by the Hon. Mrs. Justice Irene Z. Mbewe dated 17th August 2020 ordering specific performance of the sale of land against the Appellant.
- 1.2. The order of specific performance was made following a finding by the learned Judge that the initial contract of sale had been varied by the parties with the Appellant being in breach of the varied contract.

2.0. FACTS

- 2.1. By contract of sale, the Respondents contracted to purchase and the Appellant to sell sub-division No.6 of sub-division B of Farm 396a Lusaka at the purchase price of K1, 800,000.00.
- 2.2. The contract of sale was executed on 18th April 2018 with vacant possession set to be given in fourteen days.
- 2.3. The Respondents paid the sum of K900,000.00 with the balance payable upon the Appellant providing an approved survey diagram for sub-division F earlier sold to a third party and due for marking off.

- 2.4. The Appellant however, failed to provide the survey diagrams marking off sub-division F but instead provided evidence of the commencing of the process to sub-divide and mark off sub-division F.
- 2.5. On that account the parties agreed that the Respondent pays a further K600, 000.00 after which the Respondents would be given vacant possession of the property on 29th June, 2018 and the balance payable upon production of the survey diagram for sub-division F.
- 2.6. On 28th June 2018, the Appellant wrote to the Respondents purporting to rescind the contract but the Respondents rejected the move to rescind and instead demanded that the transaction be completed as agreed in the letter dated 4th June 2018.

3.0. **IN THE HIGH COURT**

- 3.1. The Respondents commenced the action on 22nd August 2018 principally seeking an order of specific performance for the sale of the hereinbefore stated property and the yielding of vacant possession thereof by the Appellant.
- 3.2. The learned Judge, upon considering the evidence before her made some findings of fact namely;

- *That the Respondents had on 30th May 2018 demanded vacant possession failing which they would rescind.*
- *That the balance would be paid upon production of approved survey diagrams of sub-division F.*

3.3. The learned Judge was then left with the questions whether the contract of sale had been varied or that in fact, the Appellant had rescinded the contract by letter dated 28th June 2018.

3.4. After considering the correspondence passing between the parties between 30th May and 9th July 2018, the learned Judge came to the conclusion that there was a variation of the contract of sale.

3.5. It was her firm view that the contract was varied as regards the yielding of vacant possession and the terms of paying the purchase price by mutual consent of the parties.

4.0. **THE APPEAL**

4.1. The Appellant was unhappy with the outcome in the Court below and lodged an appeal containing three grounds of appeal attacking largely the learned Judge's findings of fact.

4.2 The following are the grounds of appeal as set out in the Memorandum of Appeal.

1. *The learned trial Court erred in law and in fact when she found that the Appellant was not entitled to rescind the contract of sale with the Respondents in this matter.*
2. *The learned trial Court erred in law and in fact when she held that the Law Association of Zambia General Conditions of Sale in respect of rescission of contract of sale did not apply in the present matter.*
3. *The learned trial Court erred in law and in fact when she held that there was a variation to the contract of sale by the parties in this matter.*

5.0. **ARGUMENTS IN SUPPORT**

- 5.1. The Appellant argued grounds 1 and 2 together on the basis that LAZ General Condition of Sale No. 7, provides for rescission of contract if a party refuses to be bound by its provisions.
- 5.2. The Appellant also seeks to rely on the Respondents' letter of 30th May 2018 in which they threatened to rescind if the Appellant did not give vacant possession.
- 5.3. In grounds 3, the Appellant's argument is that by its letter dated 28th June 2018, it had indicated its failure to provide

consideration, which amounted to failure to meet the requirements for formation of a contract.

5.4. That argument was anchored on the holding in the case of Homenet Zambia v David Van Der Merwe¹. In that case the High Court held that for a variation of a contract to be enforceable, it must meet the requirements governing the formation of a contract; namely; that there must be an offer, acceptance and consideration.

6.0. **ARGUMENTS IN OPPOSITION**

6.1. The Respondent's short response to the arguments in grounds 1 and 2 is that the effect of the correspondence passing between the parties amounted to a variation and not rescission of the contract. They also maintain that LAZ General Condition 7 did not apply.

6.2. In response to the arguments for ground 3, the Respondents state that their letter of 30th May 2018 was an offer to take vacant possession in seven days while the Appellants' letter of 4th June 2018 constituted acceptance to yield vacant possession on 29th June 2018.

7.0. **OUR CONSIDERATION AND DECISION**

7.1. We have carefully considered the record, the arguments and the Judgment from the Court below as well as the grounds

upon which it is sought to impugn the decision of the Court below.

7.2. It is clear to us that the dispute revolves around the two principles of rescission and variation of contract.

7.3. The argument for rescission as advanced by the Appellant is based on the Law Association of Zambia General Condition of Sale No. 7 which states as follows;

(a) If a purchaser continues to make any requisition or objection as to title which the vendor shall be unable or on the grounds of unreasonable expense unwilling to remove or comply with and does not withdraw the same within ten days of being required in writing so to do, either party may rescind the contract.

(b) Upon such rescission the vendor shall return the deposit but without interest and the purchaser shall return the abstract and all papers belonging to the vendor and shall have no claim against the vendor for costs, compensation or otherwise.

7.4. The Law Association of Zambia General Conditions of Sale apply to the contract of sale pursuant to special condition 1 of the contract of sale at page 136 of the Record of Appeal.

- 7.5. We note that for either party to rely on that general condition to rescind, it must be shown by the party seeking to rely on it that the purchaser has made and continued to make requisition or objection to title which the vendor is unable or unwilling to remove or comply with for being unreasonable. Further the party seeking to rely on the same must also demonstrate that they did demand in writing to the other party to do as requested and they have failed to comply within ten days.
- 7.6. In its defence in the Court below occurring at page 167 paragraph 8 line 18 of the Record of Appeal, the Appellant pleaded as follows;

“Paragraphs 10 and 11 of the statement of claim are partially admitted only to the extent that the Defendants indeed terminated the contract of sale. The Defendants shall, at trial, aver that the termination to the contract of sale has been prompted by the various correspondences with the Plaintiff in particular the email dated 22nd June 2018 which indicated the Plaintiffs’ impatience with the delays in hand over vacant possession. Therefore, the Defendant saw to it that rather than inconveniencing the Plaintiff furthermore, opted to rescind the contract of sale and refund the

Plaintiffs' money pursuant to the Plaintiffs' letter dated 30th May, 2018".

- 7.7. A close look at this pleading shows that it is the basis upon which the Appellant seeks to rely upon Clause 7 of the Law Association of Zambia General Conditions of Sale to the extent that the Respondents insisted on requisitions that the Appellant could not meet.
- 7.8. The issue here was that the Respondents had initially attached the final payment of the purchase price to the availability of approved survey diagrams for sub-division F for the purposes of marking it off.
- 7.9. There is however, no dispute that in the letter dated 30th May 2018, the Respondent only demanded for vacant possession within 7 days and that the balance would be paid upon production of the survey diagram.
- 7.10. By letter dated 4th June 2018, the Appellant conceded to the demand by the Respondents to yield vacant possession and to receive the balance upon production of the survey diagram. (See paragraph 2 of the letter at page 218 of the Record of Appeal).

7.11. On 20th June 2018, the Appellant sent an email to the Respondents requesting that the handing over of the property be postponed to 29th June 2018 for reasons stated and on 22nd June 2018, the Respondents responded via email accepting to postpone the handover to the 29th June, 2018 (see p. 226 Record of Appeal).

7.12. However, on 28th June 2018, a day before the agreed date for the handover, the Appellant sought to rely upon its failure to complete the process of obtaining the survey diagram to invite the Respondents to rescind the contract in line with their intimation in the letter of 30th May 2018.

7.13. From the above stated correspondence passing between the parties, there is no question that the parties re-negotiated the terms of their contract of sale and reached an agreement to alter it accordingly.

7.14. As at 4th June 2018, the Appellant had firmly agreed to surrender vacant possession by 22nd June 2018. However, at the Appellant's request, the Respondents agreed to shift the handover from 22nd to 29th June and that was the agreed position from 22nd June until 28th June when the Appellant sought to avoid the contract.

8.0. **VARIATION**

- 8.1. The key requirement for a Contract to be varied or modified in terms is that the parties thereto ought to mutually agree to the variations. The variations should however, be consummated by the fulfilment of the three basic foundations of a Contract namely; offer, acceptance and consideration.
- 8.2. In the case of Engen Petroleum Zambia Limited v Willis Muhanga and Another² the Supreme Court of Zambia emphatically stated that parties to a contract were at liberty to vary it by modifying or altering its terms.
- 8.3. In Homenet Zambia v David Van Der Merwe, the Supreme Court set out a number of principles governing variation of Contract namely;
- *That it alters legally enforceable obligations which previously bound the parties.*
 - *It can be either oral or in writing.*
 - *Can be effected by modifying or altering by mutual agreement.*
 - *Must contain offer, acceptance and consideration.*
 - *Once varied it applies as varied to the exclusion of the original terms which cannot be relied upon by either party.*
- 8.4. We have earlier noted that the Appellant offered to yield vacant possession on 29th June, 2018 which offer was accepted by the

Respondents on 22nd June 2018. The only element left is that of consideration.

- 8.5. In the case of Esquire Roses Farms v Zega Limited³ the Supreme Court of Zambia had occasion to define what amounts to consideration in a varied contract as stated as follows;

“The variation must be supported by consideration such consideration can also be found in the mutual abandonment of existing rights, or in the Conferment of new benefits by each party to the other”.

- 8.6. In this case the parties abandoned or deferred certain benefits under the original agreement and gained some benefits under the varied terms. Notably, the Appellant gained more time to obtain the survey diagram for the sub-division but deferred full payment until the survey diagram was provided. On the other hand the Respondents would gain vacant possession without paying the full purchase price. They would also have to wait longer before the conveyancing process could be concluded.

- 8.7. In our considered view, the above effects of the variation on the parties constitute consideration thereby fulfilling all the three elements of a valid contract. The variation was therefore

effective and neither party could rely on the terms of the original contract.

- 8.8. We accordingly uphold the learned trial Judge's finding that the parties had varied the contract of sale by mutual agreement.

9.0 **RESCISSION**

- 9.1. In the law of contracts, rescission is the cancellation of a contract so that the parties assume positions as existed before the contract was entered into. Once rescinded the contract is treated as though it never existed and neither party can claim on it. A party will be entitled to rescind a contract entered into by misrepresentation, mistake, duress or undue influence.
- 9.2. In our view, based on the facts of the case, the Appellant could not rescind as none of the vitiating factors had occurred. The Appellant has not alleged any of the factors in the variation of the contract. It cannot therefore rescind on any of the stated grounds.
- 9.3. There is an attempt by the Appellant to rely on the intimation by the Respondents in their letter of 30th May 2018 that they would rescind the contract if the Appellant did not yield vacant possession within 7 days of the letter.

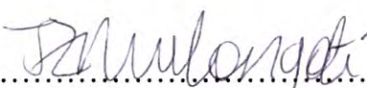
- 9.4. In essence the Appellant did not rescind the contract but requested the Respondents to effect their earlier intimation to rescind the contract on account that the Appellant had failed to obtain the survey diagram before the date fixed for yielding of vacant possession.
- 9.5. Having already established that once varied a party cannot rely on the original terms of the contract; the Appellant cannot rely on a term contained in a letter whose terms had been altered by the subsequent correspondence which contained no such intimation. As at the 28th June 2018, the agreed term of the contract was that the Appellant was to give vacant possession on 29th June 2018 without any option to rescind upon default as was the case in the agreement as at 4th June 2018.
- 9.6. Secondly, the Appellant ought to have rescinded the contract if it had valid grounds upon which to do so. We know of no principle in the law of contract that empowers a party to invite the innocent party to rescind the contract.
- 9.7. On the other hand, it is trite law that an aggrieved party has the right and mandate to exercise the rights conferred upon that party by law or the provisions of the contract. The Appellant in this case missed the mark.


10.0. **CONCLUSION**

10.1. The Appellant has endeavoured to find an avenue through which it could reverse the Contract of Sale for reasons best known to it. We say so because we find no substance in the reasons advanced to the effect that the Respondents had sought requisitions impossible to meet when in fact it was a reasonable and attainable demand by the Respondents that the sub-division sold earlier to a third party be marked off.

10.2. We also find, as did the learned Judge below, that Law Association of Zambia General Condition of Sale No. 7 was not applicable.

10.3. We therefore find no merit in this appeal on all the grounds and we dismiss it with costs to the Respondents here and in the Court below.


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J. Z. MULONGOTI
COURT OF APPEAL JUDGE


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P. C. M. NGULUBE
COURT OF APPEAL JUDGE


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M. J. SIAVWAPA
COURT OF APPEAL JUDGE