

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA

2016/HP/1295

(Civil jurisdiction)

BETWEEN:

THELMA NAMWINGA

AND

TITUS SONGWE



PLAINTIFF

DEFENDANT

Before the Hon. Mr. Justice M.D. Bowa on 31st of January 2024

For the Plaintiff: Miss. J. Mulenga of Isaac and Partners

For the Defendant: Mr. S. Mbewe of Keith Mweemba Advocates

JUDGMENT

Cases referred to

1. *Reliable Electrical Engineers Limited vs. Mantrac Kenya Limited (2006) Eklr*
2. *Holmes Limited vs. Buildwell Construction Company Limited (1973) Z.R 97*
3. *Crown Company (Zambia) Limited vs. Pamela Helen Jackson (Married Woman) (1988-1989) Z.R, 82*
4. *Sun Country Limited and Others vs. Rodgers Rodin Savory and Another Appeal No. 122 of 2006*
5. *Khalid Muhammad vs Attorney General (1982) Z.R 49(SC)*
6. *Wilson Masauso Zulu vs. Avondale Housing Project Ltd (1982) ZR 172 (SC)*
7. *Galunia Farms Limited vs. National Milling Company and National Milling Corporation Ltd (2004) Z.R. 1*
8. *Rodgers Chama Ponde and others vs Zambia State Insurance Corporation Limited (SCZ Judgement 16 of 2004)*
9. *Mobil Oil (Z) Ltd vs. Loto Petroleum Distributors Ltd (1977) Z.R. 336 (4)*
10. *Mundada v Mulwani and Others (1987) Z.R.*
11. *Mwenya and Randee v Kapinga (1998) S.J. 12 (S.C.)*
12. *Kasote Singogo vs. Lafarge Zambia Plc (Appeal No. 33/2012)*
13. *Jefford and Another vs. Gee (1970) 1 All ER 1202*

14. *Zambia Revenue Authority vs. Hitech Trading Company Limited* SCZ Judgment No. 40 Of 2000
15. *Richman Chulu v Monarch (Z) Ltd* (1983) ZR 33
16. *Gosden v Eldick* (1849) 4 Exch. 445.
17. *Sewell v National Telephone Co. Ltd* [1904-1907] All E.R. Rep. 4

Other works referred to:

1. *Chitty on Contracts 30th Edition* was cited at paragraphs 27-041
2. *Snell's Equity, 30th Edition* at paragraph 40-64
3. *Halsbury's Laws of England 4th Edition, Volume 9* at paragraph 548
4. *Winfield and Jolowitz on Tort, seventeenth edition* at p 515
5. *The White Book 1999 Edition*
6. *Black's law Dictionary*
7. (*legaldictionary.net*)

1.1. Background

1.2. The Plaintiff commenced this action by writ of summons and statement of claim dated 28th June, 2016 seeking the following reliefs:

- (i) *An order for specific performance for the contract of sale of land entered into between the Plaintiff and Defendant on the 4th of February, 2016.*
- (ii) *An order for an interlocutory injunction restraining the Defendant, his servants and/or his agents from selling or erecting buildings on the property at stand CHI/991 Chilanga.*

(iii) *In the alternative an order for the refund of the sum of K 10, 000.00 plus interest at the commercial banking lending rate from the 4th Day of February, 2016 until full payment of the sums due.*

(iv) *Damages for breach of contract*

(v) *Any other relief as the court may deem fit*

(vi) *Costs of and incidental to these proceedings.*

1.3. The Defendant filed into Court a defence and counter-claim dated 28th September, 2016 disputing all of the Plaintiff's claims or that she was entitled to any of the claims set out in the statement of claim. He counter-claimed the following reliefs:

I. *The sum of K 200,000.00 being damages for defamation*

II. *Exemplary damages for defamation*

III. *Damages for breach of contract*

IV. *Any reliefs that the Court may deem fit*

V. *Costs*

2.0 The Plaintiff's case

2.1. The Plaintiff was the sole witness that gave evidence in support of her case. It was her evidence that she entered into a contract with the Defendant for the sale to her of Plot No. Chila/991 in Chilanga. He availed her with an offer letter in his name and diagrams for the property from the Ministry of lands . She referred the court to pages 3 and 6 of the Plaintiff's bundles of documents exhibiting the diagram and the offer letter respectively. She testified further that the Defendant also gave her a copy of an invitation to treat for the same property addressed to him from the Ministry of Lands exhibited at page 1 of her bundle of documents.

2.2 She testified that she was convinced that the documents presented to her by the Defendant were genuine and that it was on that basis that she proceeded to sign an agreement with him for the sale. The agreement was signed on the 4th of February, 2016, and the purchase price for the property was K 40, 000.00. She paid K 10, 000.00 as a deposit towards the purchase price. The acknowledgment of payment to this effect was dated the 4th of February, 2016.

2.3 She testified further that it was also agreed that the balance would be paid after the Defendant gave her the certificate of title for the property in her name which she was assured would be ready within 2 weeks. At page 7 of her bundle of documents is the contract of sale. She waited for the Defendant to perform his end of the bargain but he failed to give her the certificate of title within the agreed 2 weeks. She made follow ups with the Defendant but he did not return her calls.

2.4 It was her evidence that the Defendant's evasive conduct led to her decision to report the matter to the police. This was with a view of having him summoned to avail himself to conclude the agreement. She stated that the report was made on the 19th of February, 2016. After a week, the Defendant turned up at the summoning police station where he indicated that he would refund the Plaintiff the K10, 000.00 deposit that he had received. She declined to accept the refund. As far as she was concerned, there was a binding agreement between her and the Defendant that she wanted performed.

2.5 She testified that after that encounter she did not hear from the Defendant or the Police. She later discovered that some works were being carried out at the plot in issue. A wall fence had been built and a gate erected. She called the Defendant to inquire about this development but he did not pick her calls. On the 12th of May 2016, she engaged lawyers who wrote a letter of demand to the Defendant to complete the sale. The letter was exhibited at page 10 of the Plaintiff's bundle of documents.

2.6 It was her evidence that the Defendant did not respond to the letter and that it was at that point that she instructed her lawyers to commence this action seeking an Order for specific performance of the agreement. Further that in the alternative, her prayer was for a refund of the money paid as a deposit with interest at commercial bank lending rate from the date of the writ as well as for the grant of other reliefs set out in the originating process.

2.7 When cross examined, the Plaintiff acknowledged that the contract of sale did not state that the certificate of title would be out in two weeks from date of agreement. She asserted that this was a verbal representation and agreement. Further that as at the date of

contract, the Defendant had showed her the offer letter he received from the Ministry of Lands. She stated that she was also taken to and showed the plot which was not developed at the time.

2.8 It was her evidence that she was aware that the plot was not on title. Further that she did not know how long it takes to process title deeds. She confirmed the document at page 7 of the Defendant's bundle of documents to be a call out requesting the attendance of the Defendant at the Police station. She confirmed that it was issued after she filed a complaint to the police against the Defendant.

2.9 Pressed further, she testified that she engaged the police because she could not get a hold of the Defendant. She did not personally write to the Defendant giving him notice to complete before she went to the police but that as far as she was concerned her lawyers gave the Defendant 14 days' notice to complete the transaction. That the notice appears at page 8 of her bundle of documents.

2.10 When crossed examined further, it was her evidence that there was no notice to complete from her lawyers addressed to the Defendant on record. She testified that she did not state how the

complaint was resolved at the police because she took the matter up with her lawyers.

2.11 She agreed that she had included an alternative prayer for the refund of the money paid to the Defendant. Further that she had not paid the full purchase price for the property.

3.0 The Defendant's case

3.1 The Defendant was the sole witness that testified in support of his defence and counterclaim. It was his evidence that he entered into an agreement for the sale of property with the Plaintiff on the 4th of February, 2016. The Plaintiff made a down payment of K10, 000.00 out of the agreed purchase price of K 40, 000.00.

3.2 He testified that he informed the Plaintiff that he would be out on duty in Mfuwe and that he had engaged a surveyor to do a survey using the K10, 000.00 that she had paid. That his expectation was that by the time he was coming back from duty, the surveyor would have been done with the survey. To his surprise, on the 16th of February, 2016, he received a phone call from Zambia Police

headquarters summoning him to report himself at the Fraud department for allegedly swindling the Plaintiff of K10, 000.00.

3.3 He stated that he could not report to the police immediately as he needed someone to replace him at work. That after he was given permission ,he reported to Central Police where he was interrogated and he explained what transpired. He stated that the Police gave him a week to look for the Plaintiff's money and refund her.

He managed to find money and took it to the police station where the Plaintiff was called to pick it but that she refused to do so and insisted that she wanted a 100% interest. He refused to pay such interest.

3.4 The police informed the Plaintiff that if she wanted profit or interest then she would have to go to court and not hope to receive it through them. He was later called by the Plaintiff's lawyers to sign a document that they had prepared to take him to court. It was his evidence that he filed a counter-claim against the Plaintiff claim because she breached the contract of sale. That the Plaintiff breached the contract by reporting the matter to the police.

3.5 Further, that she defamed his character by alleging that he swindled her of K 10, 000.00 and that he was a fraudster. He prayed that the court grants him the reliefs as outlined in the counter-claim. He further disputed that he assured the Plaintiff that title to the property in her name would come out in 2 weeks from date of agreement as claimed by her. It was his evidence that the Plaintiff had told him that she would make sure that he would be fired from his employment. That true to her threat this came to pass as he was fired. He added that he paid the Plaintiff's money into court. He asserted that he borrowed the money from a third party whom he eventually sold the property to.

3.6 In cross examination, it was the Defendant's evidence that it was a term of the contract that the Plaintiff would pay the sum of K10, 000.00. He did not bring any proof before court to show that he travelled out as asserted in his evidence in chief. He stated that he understood the process of conveyance very well. In this regard, that once diagrams are prepared the diagrams are sent to the customer care at Ministry of Lands for the lease to be processed. However, that in this case, he did not show any proof that this was done.

3.7 He maintained that he did not breach the contract. He however did not have proof to show that he completed the terms of the agreement. When referred to the contract of sale at page 8 of the Plaintiff' bundle of documents, it was his evidence that the 3rd paragraph of the contract provided that the balance of the purchase price was to be paid upon obtaining the title deed in the Plaintiff's name. He agreed that in terms of the contract, the K 30, 000.00 was not paid because the title was not issued in the Plaintiff's name.

3.8 It was his position that the evidence in support of his counter-claim was overwhelming and that he was fired from his employment as a Captain in Zambia Air Force on the basis of the Plaintiff's allegations that he was he swindler or fraudster. He agreed that there was nothing in his bundle of documents to show that he had been defamed.

3.9 In re-examination, it was his evidence that the K 30, 000.00 was not paid because the contract was breached and the case was in court.

4.0 Submissions

4.1 Only the Defendant filed into Court written submissions. It was submitted that specific performance is a discretionary remedy and that as such the court should in deciding whether or not to grant the order, look at the merits of the case before it. It was submitted that in the present case, the grant of an order for specific performance is impossible as severe hardship will be occasioned to the Defendant which would not be perfect justice.

4.2 It was submitted that the Court cannot compel one to do the impossible. An extract from the learned authors of **Chitty on Contracts 30th Edition at paragraphs 27-041** was cited wherein the authors write that:

“specific performance will not be ordered against a person who has agreed to sell land which he does own and cannot compel the owner to convey to him because the court does not compel a person to do what is impossible”

4.3 Further reference was made to the learned authors on **Snell’s Equity, 30th Edition at paragraph 40-64** wherein the authors state that:

“As the remedy of specific performance is equitable and discretionary, the Court will not grant it where it would inflict great hardship on the Defendant.”

- 4.4 The Defendant further referred to a Kenyan case of **Reliable Electrical Engineers Limited vs. Mantrac Kenya Limited**¹, in which it was held that:

“Specific performance, like any other equitable remedy, is discretionary and the Court will grant it on well laid principles... specific performance may still be refused on grounds of undue influence or where it will cause severe hardship to the defendant.”

- 4.5 It was submitted that it has been brought out in the Defendant’s evidence, that the Defendant borrowed the sum of K10, 000.00 from a third party to pay back to the Plaintiff at the time when he was summoned at the Police. Further that the third party has now developed the land in question. That these were the developments which the Court saw when it visited the site at Plot CHILA/991.

- 4.6 It was submitted that specific performance is not available to the Plaintiff not only on the grounds of impossibility but also

that the granting of such an order would inflict great hardship on the Defendant as a third party is in possession of the property. Further that the Defendant has already lost his formal employment in the Zambia Army as Captain on account of this matter.

4.7 It was further submitted that the Plaintiff should not benefit from her own wrongful conduct of repudiating the contract by reporting the Defendant to the police for an unsubstantiated offence when in fact the contract was valid at the time. It was argued that the Plaintiff cannot be permitted to take advantage of her own breach or wrongful conduct.

4.8 Reliance was placed on an extract from learned authors of *Snell's Equity* (supra) at paragraph 3-09 who comment that:

“He who comes to equity must come with clean hands: the claimant not only must be prepared now to do what is right and fair, but also must show that his past record in the transaction is clean; for he who has committed iniquity... shall not have equity.”

4.9 It was argued that in casu, it is on record that the Plaintiff reported the Defendant to the Zambia Police on grounds that he

had swindled her of K 10, 000.00 when the alleged offence related to the contract dated the 4th of February, 2016. It was submitted that Plaintiff's conduct of reporting the Defendant to the police when the contract was valid was not right as such her past record in the transaction cannot be said to be clean.

4.10 It was submitted that the evidence of the Plaintiff that the parties agreed that the title in her name would come out in two weeks should be discounted as the same amounts to extrinsic evidence. Reference was made to the case of **Holmes Limited vs. Buildwell Construction Company Limited**² in which it was held that:

“Where the parties have embodied the terms of their contract in a written document, extrinsic evidence is not generally admissible to add, vary, subtract from or contradict the terms of the written contract...”

4.11 It was submitted that the contract of sale at pages 4-6 of the Defendant's bundle of documents only has two terms. That there is no proof on record that the Plaintiff was promised that the certificate of title in her name would be issued within two

weeks of the agreement. That the court has no discretion to create a new contract for the parties.

4.12 It was argued that the act of the Plaintiff filling a complaint against the Defendant with the police amounted to implied repudiation of the contract. Reference was made to an extract from **Halsbury's Laws of England 4th Edition, Volume 9 at paragraph 548**, wherein the learned authors state that:

“ A party seeking to rely on repudiation implied from conduct must show that the party in default has so conducted himself as to lead a reasonable man to believe that he will not perform or will be unable to perform at the stipulated time...”

4.13 Further reliance was placed on the case of **Crown Company (Zambia) Limited vs. Pamela Helen Jackson**³ to emphasis the basis upon which a court can hold that a contract has been repudiated by conduct of a party.

4.14 It was submitted that the conduct of the Plaintiff of reporting the matter to the police that she had been swindled of her K 10, 000.00 was conduct that could only lead a reasonable person to believe that she had terminated the contract. Further in

response to the Plaintiff's alternative prayers, reliance was placed on the case of **Sun Country Limited and Others vs. Rodgers Rodin Savory and Another**⁴ in which the Court held that:

“... where parties are seeking a main relief and some alternative reliefs, the Court is not bound to consider alternative reliefs. This is especially in cases where the Court has granted the main relief. In such cases, it ought to look no further. The rationale behind alternative reliefs is that if the main relief fails, the Court can consider granting the alternative reliefs. This does not, however, mean that if the main relief fails, then the alternative reliefs should automatically succeed.”

4.15 It was submitted that the Plaintiff sought an alternative relief of payment of the sum of K 10,000.00 with interest. Further that the Plaintiff refused to receive the refund when the Defendant took the money to the police. In addition, that the Plaintiff cannot seek interest on the amount claimed as the Defendant already paid the money into court on the 16th of October, 2020.

It was submitted that the Court should only grant the Plaintiff a refund of K 10, 000.00 without interest.

4.16 It was further submitted that the relief for damages for loss of use of funds should equally not be granted as the Plaintiff did not lead evidence to prove the loss particularly that she had refused to receive the money at the police following the ultimatum given to the Defendant by the Police.

5.0 Court's consideration

5.1 I have carefully considered the evidence before me and the parties submissions. The undisputed facts in this case are:

- I. That the parties entered into a contract of sale of Stand CHI/991 Chilanga at the sum of K40,000.00.
- II. That the Plaintiff paid a deposit of K 10, 000.00 as per agreed terms of the contract.

5.2 The facts that I find to be in dispute are as follows:

- i. Whether there was breach of contract by the Defendant as claimed by the Plaintiff

- ii. Whether the Plaintiff is entitled to an order for specific performance or the other reliefs as claimed.
- iii. Whether or not the Plaintiff repudiated the contract and defamed the Defendant as counter claimed by the Defendant.

5.3 It is trite that it the duty of a Plaintiff or claimant to prove his/her case. In the case of **Khalid Muhammad vs Attorney General**⁵ the Supreme Court held that:

“A Plaintiff must prove his case and if he fails to do so the mere failure of the opponents defence does not entitle him to judgment.”

5.4 Further in the case of **Wilson Masauso Zulu vs. Avondale Housing Project Ltd**⁶ Ngulube DCJ as he was then observed that:

“I think it is acceptable that where a Plaintiff alleges that he has been wrongfully or unfairly dismissed as indeed in any other case where he makes any allegations, it is generally for him to prove these allegations. a Plaintiff who has failed to prove his case cannot be entitled to judgment whatever may be said of the opponent’s case.”

5.5 The Supreme Court reaffirmed this position in the latter case of **Galunia Farms Limited v National Milling Company and National Milling Corporation Ltd**⁷ and concluded:

“We re-affirm that position. The burden to prove any allegation is always on the one who alleges.”

5.6 I proceed to consider each of the questions in turn below.

➤ ***Whether there was breach of contract by the Defendant.***

5.7 The Plaintiff in her evidence testified that the Defendant breached the contract by his failure to deliver to her the certificate of title for the property within two weeks of the contract and payment of the deposit as agreed. The Defendant’s evidence on the other hand was that there was no such agreement and that what the Plaintiff was trying to do by insisting on such term was to introduce extrinsic evidence.

5.8 A perusal of the contract of sale exhibited at page 8 of the Plaintiff’s bundle of documents in particular paragraph 3 shows that what the parties agreed to was that the Plaintiff would pay

the sum of K 10, 000 upon signing of the contract and that the balance of K 30, 000 would be paid after obtaining the title deeds in the Plaintiff's name. The contract did not state the period within which the title deeds were to be obtained.

5.9 In the absence of any express term between the parties relating to the period in which the title was to come out , I would agree with the Defendant that the asserted oral agreement evidencing the existence of such term as advanced by the Plaintiff amounts to inadmissible extrinsic evidence.

5.10 The learned authors of **Black's law Dictionary** describe the applicable and settled legal principle in the following terms.

“The common law principle that a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence of earlier or contemporaneous agreements that might add or vary, or contradict the writing. This rule...operates to prevent a party from introducing extrinsic evidence of negotiations that occurred before or while the agreement was being reduced to its final written form”

5.11 (legaldictionary.net) opines that:

“The parol evidence rule exists in common law for contract cases. It bars a party to a written contract from bringing up outside evidence that illustrates an ambiguity, seeks to clarify, or adds to the written terms of the agreement. The purpose behind this rule is that, as the parties went to the trouble to put their agreement in a single, written contract, evidence of past agreements or terms that are not in the written contract should not be considered in interpreting that contract.”

5.12 The Supreme court in the case of **Rodgers Chama Ponde and others vs Zambia State Insurance Corporation Limited**⁸ summed up the rule by holding that:

“parol evidence is inadmissible because it tends to add, vary or contradict the terms of a written agreement validly concluded by the parties”

5.13 I accordingly hold inadmissible the evidence of the oral agreement allegedly entered into between the parties regarding the period the title deed was going to come out. However despite the exclusion of the Plaintiff's evidence of the supposed oral agreement, there is still I find, evidence to show that that the Defendant breached the contract. I find credible the evidence

from the Plaintiff that the reason she reported the matter to the police was on account of the Defendant's unavailability to perform his end of the bargain. She asserts that he had been elusive and her intention was always to have the contract performed.

5.14 She did not accept the deposit money on the purchase price that the Defendant offered to pay back and left at the police station. I am not persuaded to accept that her conduct of reporting the matter to the police amounted to a repudiation of the contract for this reason.

5.15 On the other hand, there is evidence on record that the Defendant took steps in open breach of the contract and or to frustrate the performance of the contract. By his own evidence he disclosed that he has since disposed of the property in dispute to a third party he named as one Charles Siwili from whom he borrowed the K10,000 to pay back the Plaintiff. He defied an interim injunction granted to the Plaintiff in the infancy of the matter that led to committal proceedings being undertaken against him.

5.16 A view at the site during those proceedings confirmed that from what was an undeveloped structure at the time of the granting of the interim injunction stood a completed dwelling structure that was even connected to electricity. This resulted into the committal of the Defendant though later discharged by order of the court dated 17th September 2018 pursuant to order 52/8/4 of the RSC.

5.17 I am prepared to conclude that the Defendant had no intention of living up to his end of the bargain and decided very early to either keep the property for himself and or dispose of it to a third party. He was unquestionably in breach of the agreement no matter what can be said of how onerous the agreed terms operated against him.

➤ ***whether the Plaintiff is entitled to an order for specific performance or the other reliefs as claimed;***

5.18 The Supreme Court in the case of **Mobil Oil (Z) Ltd v Loto Petroleum Distributors Ltd**⁹ observed that:

“ a Court will not grant a decree for specific performance of a Contract if the party seeking the decree can obtain a sufficient remedy by a Judgment for damages and such a decree will not be made when it would be unpracticable to secure compliance to it...”

5.19 The subject matter in the present case is land. In the case of **Mundada v Mulwani and Others**¹⁰ the Supreme court stated:

"We will deal first with the question of the learned judge's discretion to make an order for specific performance. In this respect we are quite satisfied that the majority of the authorities cited to us related to specific performance of contracts other than the contracts for the sale of land The law concerning specific performance of contracts relating to the sale of land is quite clearly set out in paragraph 1764 of contracts 25th Edition which reads in part:-

Land

The law takes the view that damages cannot adequately compensate a party for breach of contract for the sale of an interest in a particular piece of land or of a particular house (however ordinary).... This authority is supported in countless other cases and this case it is quite clear that the learned trial judge did not have his attention drawn to the fact that his discretion in relation to specific performance for the sale of land was decidedly limited."

The court restated this principle in **Mwenya and Randee v Kapinga**¹¹

5.20 The Question is, would specific performance be an appropriate remedy in the circumstances of this case?. As stated earlier the evidence on record from the Defendant reveals that he disposed of the property in question to a third party who had at the date of this judgment built a complete house and connected electricity. The development of the property as I have said, was discovered at the time this Court viewed the land during contempt proceedings against the Defendant. It would therefore be impossible to grant an order for specific performance in this regard as compliance of the order would be impracticable.

5.21 I note that the Plaintiff prayed in the alternative for an order for a refund of the sum of K10, 000. 00 plus interest at the commercial banking rate from the 4th of February, 2016 until final payment. The Defendant's position is that he paid the sum of K10, 000.00 into court on the 16th of October, 2020 and as such that the Plaintiff cannot seek interest on the said amount.

5.22 The Supreme Court in the case of **Kasote Singogo v Lafarge Zambia Plc**¹² held that:

“The basis of an award of interest is that the defendant has kept the plaintiff out of his money and has had the use of it himself and should therefore, compensate the plaintiff for the period that he has kept the plaintiff out of the use of his money. Once money has been paid into court by a defendant, there can be no basis for requiring such defendant to pay interest on that money from the date that it is paid into court The payment of money into court is intended to promote settlement of the matter, and also to protect the defendant from incurring interest on that money.”

5.23 Further in the case of **Jefford and Another vs. Gee**¹³, the Court of Appeal had the following to say:

"We must mention, however, one significant thing about money paid into the High Court. It carries no interest unless the Court orders it to be placed to a deposit account or to a short term investment account."

5.24 Additionally the Supreme Court in the case of **Zambia Revenue Authority vs. Hitech Trading Company Limited**¹⁴, stated that:

"the money paid into Court does not earn interest",

5.25 Further, **Order 22/ 1/8 of the RSC**, provides that:

"Any interest that may be awarded on the debt or damages recovered should be calculated up to the date of payment into Court."

5.26 The law as demonstrated above is very clear. Money paid into court does not earn interest. It is on this basis I award the Plaintiff the sum of K 10, 000.00 that was paid into Court by the Defendant. The said amount shall only carry interest from the date of commencement of the action until date of payment into Court at average short deposit rate.

5.27 Having also found the Defendant liable for the breach of the agreement and the remedy of specific performance inappropriate in the present circumstances, I award the Plaintiff damages for breach of contract to be assessed by the Deputy Registrar.

➤ ***Whether or not the Plaintiff repudiated the contract and defamed the Defendant as claimed in the counterclaim.***

5.28 The question of whether the Plaintiff repudiated the contract as asserted by the Defendant has been sufficiently dealt with above. I was unprepared to find that her act of reporting the Defendant to the police amounted to a repudiation as argued by the Defendant as I accept her intention was always to complete the contract.

5.29 I also found that it was in fact the conduct of the Defendant that amounted to the repudiation. Time was not expressed to be of the essence in the agreement nor was there a provision for notice to complete. The circumstances of this case were such that the Plaintiff having duly performed her end of the bargain by paying the deposit should have seen the Defendant issuing such notice once he had taken steps to obtain the title deed. He therefore had no basis to rescind the contract.

5.30 Turning to the Defendant's counter-claim, the Defendant contends that the Plaintiff defamed him when she reported him to the police on an allegation that he had defrauded her of the sum of K 10, 000.00. Further that the Defendant appeared at

Central police to answer to allegations of fraud and was cleared of having committed any offence.

5.31 The Defendant further contends that the Plaintiff went ahead and reported him to his employers the Zambia Air Force where he was employed as Lieutenant. That as a result of the said report the Defendant was fired from his employment. He contended that the allegations that he had obtained money from the Plaintiff by false pretence and also defrauded the Plaintiff were published to the police and his employers. He contended that the allegations were not only malicious but false. He argued that as a result of the Plaintiff's action, his name was brought into dispute, scandal and odium.

5.32 The question arising in this counterclaim for determination is simply whether or not the Defendant was defamed by the report made by the Plaintiff to the police; and if the Defendant is entitled to damages for defamation and the other reliefs being sought.

5.33 The learned authors of **Winfield and Jolowitz on Tort, seventeenth edition at p 515** defined defamation as:

311 6 42

“The publication of a statement which reflects on a person’s reputation and tends to lower him in the estimation of right-thinking members of society generally or tends to make them shun or avoid him.”

5.34 However the cases of **Richman Chulu v Monarch (Z) Ltd**¹⁵ and **Gosden vs Elshick**¹⁶ are support for the proposition that the mere giving of information to a police officer although it may lead to arrest does not make the giver of the information liable for the imprisonment. In **Sewel v National Telephone Co Ltd**,¹⁷ an action for false imprisonment the Court held that:

“The fact that while the Plaintiff was in custody of the police, the Defendant signed at the police station the charge sheet containing the charge against him is not evidence sufficient to support an action of false imprisonment by the Plaintiff against the Defendant, for the Defendant did not commit a trespass against the Plaintiff but merely set in motion the machinery of Law.”

5.35 As stated earlier, it is not in dispute that the Plaintiff reported the allegations of fraud to the police. By so doing, she did set the wheels in motion for an investigation that led to the Defendant being called upon to answer to the allegations. Such

report did not amount to a publication. Based on the reasoning in the above cited cases, I find that the mere reporting of a matter to the police of an alleged offence does not amount to defamation. The police are mandated by law to receive complaints from members of the public of the commission of crimes and to conduct the necessary investigations.

5.36 Further the Defendant has not led any evidence of the alleged publication to his employers, nor was any evidence lead of the grounds for his alleged discharge from the Zambia Air Force. This assertion was made in the submissions and I cannot as such treat this factual representation as evidence. I would for these reasons dismiss the counter-claim in toto.

6.0 Conclusion

6.1 The upshot of my Judgment is that I award the Plaintiff the sum of K 10, 000.00 which was paid into court with interest from the date of commencement of the action until date of payment into Court. As specific performance becomes an inappropriate remedy in the circumstances of this case I award the Plaintiff damages for breach of contract to be assessed by

the Deputy registrar. The Defendant's counter claim is dismissed for lack of merit. Costs to the Plaintiff to be taxed in default of agreement.

Leave to appeal is granted.

Dated at Lusaka this 31st day of January 2024.



JUDGE