

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2022/HP/1839



BETWEEN:

**POINT PRESENT INVESTMENT LIMITED
SASHA CHIZYUKA**

**1st PLAINTIFF
2nd PLAINTIFF**

AND

**WESLEY SIBANDA
FEENINESS SAKALA SIBANDA**

**1st DEFENDANT
2nd DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 22nd
DAY OF MARCH, 2024**

For the Plaintiffs : Ms. R.J Mutemi and Ms. Zulu, Theotis Mutemi Legal Practitioners

For the Defendants : Mrs Mary Mambepa Mukope, Messrs Shepande and Company and Mr. P. Chulu, Messrs Patrick Chulu Legal Practitioners

R U L I N G

CASES REFERRED TO:

1. *Dunlop v Selfridge Limited* 1915 AC 847
2. *Butler v Fairclough* 1917 23 CRL
3. *Wilson Masauso Zulu v Avondale Housing Project* 1982 ZR 172
4. *Leopold Walford (Z) Limited v Unifreight* 1985 ZR 203
5. *G.F. Construction (1976) Limited v Rudnap (Zambia) Limited and Unitechna Limited* 1999 ZR 134
6. *Twampane Mining Co-Operative Society Limited v E and M Storti Mining Limited* 2011 Vol 3 ZR 67
7. *Ubuchinga Investments Limited v Teklemichael Menstab and another* SCZ No 25 of 2014
8. *Corpus Legal Practitioners v Mwandanani Holdings* SCZ No 50 of 2014
9. *Kalusha Bwalya v Chadore Properties Limited* 2015 Vol 2 ZR 100
10. *Standard Chartered Bank (Z) Plc v John M.C Banda Appeal* No 94 of 2015

11. *Zambia National Commercial Bank Plc v Martin Musonda and 58 others Selected Judgment No 24 of 2018*
12. *Savenda Management Services Limited and others v Standard Chartered Bank Zambia Plc 2019/HPC/0440*
13. *Zambia Electronic Clearing House v James Kalengo Appeal No 239 of 2020*
14. *Megha Engineering and Infrastructure Limited & another v Marks Industries Limited Appeal No 270 of 2021*
15. *Bwalya Chishimba Kambwili v Great Wall Financial Services Limited CAZ No 28 of 2021*
16. *Josephine Mwiya Limataa v Bonanza Cash Express Limited Appeal No 302 of 2022*

LEGISLATION REFERRED TO:

1. *The Rules of the Supreme Court of England, 1999 Edition*
2. *The Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia*
3. *The Lands and Deeds Registry Act, Chapter 184 of the Laws of Zambia*
4. *The Housing (Statutory and Improvement Areas) Act Chapter 194 of the Laws of Zambia*
5. *The Urban and Regional Planning Act, No 3 of 2015*

OTHER WORKS REFERRED TO:

1. *Chitty on Contracts, Volume 1 Twenty-Ninth Edition, Sweet & Maxwell*
2. *Halsbury's Laws of England Vol 9 (2)*
3. *Halsbury's Laws of England, 4th Edition, Volume 44*

1. INTRODUCTION

1.1 In an application that was filed on 9th June, 2023, by Wesley Sibanda and Feeniness Sakala Sibanda, the Defendants herein, pursuant to **Order 14A Rules (1) and (2) of the Rules of the Supreme Court of England, 1999 Edition**, they seek the determination of the following questions:

1. *Whether or not, the contract of sale allegedly signed by Wesley Sibanda and Point Present Investment Limited is invalid for lack of consideration;*

2. *Whether or not the contract of sale and Deed of Assignment allegedly signed by Wesley Sibanda and Point Present Investment Limited are invalid for failure of registration as required by the law;*
3. *Whether or not the contract of sale and Deed of Assignment allegedly signed by Wesley Sibanda and Point Present Investment Limited are irregular and invalid for not being in the correct statutory form;*
4. *Whether or not the mode of commencement in this matter is correct for removal of a caveat placed on Plot No 15371 Kamwala South Lusaka;*
5. *Whether or not a transaction creating land as security for a debt can operate as a sale of the same land;*
6. *Whether or not the pleadings are irregular for failure to seal the statement of claim in this matter.*

1.2 The application was supported by an affidavit and a List of Authorities and Skeleton Arguments. In opposition to the application, an affidavit in opposition and a List of Authorities and Skeleton Arguments in opposition were filed on 17th July, 2023, by Point Present Investment Limited and Sasha Chizyuka. Wesley Sibanda and Feeniness Sakala Sibanda filed Skeleton Arguments in reply on 3rd August, 2023.

2. BACKGROUND

2.1 A review of the record, shows that Point Present Investment Limited and Sasha Chizyuka, as Plaintiffs, commenced these proceedings on 22nd November, 2022, by Writ of Summons

accompanied by a statement of claim and the other documents seeking:

- i. An Order for specific performance of the Contract of Sale dated 28th May, 2021 and the Deed of Assignment dated 28th May, 2021 relating to Plot No 15371/1080 Kamwala South as against Wesley Sibanda.*
- ii. In the alternative, damages for breach of contract.*
- iii. An Order for the removal of a caveat placed on Plot No 15371/1080 Kamwala South, as against Feeniness Sakala Sibanda.*
- iv. Costs of and incidental to this action; and*
- v. Any other relief that the Court may deem fit.*

2.2 Wesley Sibanda and Feeniness Sakala Sibanda on 6th December, 2022, entered appearance and filed their defence and the other documents. Orders for directions were issued on 9th February, 2023, with the date for a scheduling conference being set. An application for extension of time within which to comply with the Orders for Directions was made on 12th April, 2023, which was granted on 5th May, 2023.

2.3 Then on 9th June, 2023, Wesley Sibanda and Feeniness Sakala Sibanda filed the application which is subject of this Ruling.

3. SUBMISSIONS AT THE HEARING

SUBMISSIONS BY COUNSEL FOR WESLEY SIBANDA AND FEENINESS SAKALA SIBANDA

- 3.1 Counsel for Wesley Sibanda and Feeniness Sakala Sibanda, Ms. Mukobe, in making the application, stated that they relied on the affidavit that was filed in support of the application together with the List of Authorities and Skeleton Arguments in support, as well as the List of Authorities and Skeleton Arguments in reply.

RESPONSE BY COUNSEL FOR POINT PRESENT INVESTMENT LIMITED AND SASHA CHIZYUKA

- 3.2 It was submitted in response, by Ms. Mutemi, that they opposed the application, and relied on the affidavit in opposition as well as the List of Authorities and Skeleton Arguments in opposition. By way of augmenting, Counsel stated that in relation to the first question, whether the contract of sale was invalid for lack of consideration, it was their response that it was not a question that could be determined at this stage, but at trial.
- 3.3 It was further Counsel's submission, that to support that position, they referred to paragraph 6 (iii) of the statement of claim, which stated that completion and payment of the purchase price was to take place Seven (7) days after Wesley Sibanda handed over States' Consent to assign, the property transfer tax certificate, the original land record, and the duly executed assignment to the advocates for Point Present Investment Limited and Sasha Chizyuka.

- 3.4 Counsel contended that it was clear from that averment, that the said clause which was in the contract, that payment would only arise when the conditions set out in the clause were met. Thus, at trial, both parties would have to prove that those conditions were met, and such proof could not be satisfied by affidavit evidence.
- 3.5 Further in submission, it was stated that secondly, the Court would have to scrutinise the contents of the Assignment, which was executed between the parties, which bears a receipt and consideration clause. Therefore, the view taken, was that the contract of sale was not invalid, more so because in the Skeleton Arguments in opposition, they had shown that consideration can be executory.
- 3.6 It was also submitted that in the case of ***Dunlop v Selfridge Limited*** ⁽¹⁾, it was held inter alia, that an act of forbearance of one party of the promise thereof, is the price for which the promise of the other is bought. Counsel went on to state that therefore, the promise thus given for value is enforceable.
- 3.7 She also referred to the reply that was filed on 8th May, 2023, and the statement of claim, stating that they showed that in addition to relying on the statement of claim and the assignment, there was reliance on the promise moving from Wesley Sibanda to Point Present Investment Limited and Sasha Chizyuka, particularly, Sasha Chizyuka.
- 3.8 It was further, submitted that as a consequence of that promise, there was forbearance to sue by Point Present Investment Limited and Sasha Chizyuka. Counsel still in

submission, stated that, that was further evidence of consideration, for which evidence would be led at trial, of the promise.

3.9 As regards the fifth question that had been posed, Counsel's submission was that it was whether a transaction securing land as security for a debt can operate as a sale of the land. She stated that their response to that question, was that the transactions between the parties was not one which is foreign in this jurisdiction.

3.10 In that regard, Counsel stated that the Courts have had occasion to consider such similar transactions, giving examples of cases like ***Josephine Mwiya Limataa v Bonanza Cash Express Limited*** ⁽¹⁶⁾, ***Bwalya Chishimba Kambwili v Great Wall Financial Services Limited*** ⁽¹⁵⁾ as well as ***Kalusha Bwalya v Chadore Properties Limited*** ⁽⁹⁾.

3.11 It was also submitted that the above cases involved situations where the parties had executed contracts of sale and loan agreements, and in determining those matters, the Courts had deciphered the intentions of the parties based on the documents, being the contracts of sale and the Deeds of Assignment.

3.12 Ms. Zulu, also in augmenting, stated that on the question of whether the contract of sale was irregular and invalid for not being in the statutory form, reliance had been placed on ***Regulation 7 (1) of the Housing (Statutory and Improvement Areas) Act Chapter 194 of the Laws of Zambia***. Counsel submitted that it was notable that the

parent Act, was repealed in 2015 by the **Urban and Regional Planning Act No 3 of 2015**, even though the Statutory instrument issued pursuant to the Act may still be in force.

3.13 It was stated that **Regulation 7** specifically referred to **Section 7 of the Act** which was repealed. Therefore, reliance could not be placed on that Regulation. The continued submission was that further reliance had been placed on **Section 22 of the Housing (Statutory and Improvement Areas) Act Chapter 194 of the Laws of Zambia** which had equally been repealed. Counsel stated that the statutory form of documents which purported to transfer land, are no longer regulated by **Section 7 of the Act or Regulation 7 (1)**.

3.14 Further in submission, Counsel contended that there are triable issues in this matter, and the case of **Ubuchinga Investments Limited v Teklemichael Menstab and another** ⁽⁷⁾ was relied on as authority. It was stated that in that matter, the Court held that it is not part of the Court's duty, at this stage, to determine questions of law which call for detailed arguments and mature considerations, and neither is it the function of the Court at this stage, to try and resolve conflicts of evidence on affidavits as to facts, on which the claims of either of the parties may ultimately depend, nor to decide difficult questions of law which call for detailed and mature argument.

- 3.15 Also relied on, was the case of ***Wilson Masauso Zulu v Avondale Housing Project*** ⁽³⁾ stating that it was held in that matter, that the Court has a duty to adjudicate every aspect of a suit, so that all the issues in controversy are determined with finality.
- 3.16 On that basis, the position taken, was that the questions that had been raised by Wesley Sibanda and Feeniness Sakala Sibanda, including whether consideration was provided, and that the documents required to be registered, as well as whether the transaction which created land as security for a debt, were difficult questions that could only be determined at trial, after all the evidence was adduced.
- 3.17 In respect of the question of whether the contract was invalid for lack of consideration, reference was made to ***Halsbury's Laws of England Vol 9 (2) paragraph 733*** which speaks to executory and executed consideration. Counsel stated that consideration is executory, when it consists of a promise to do or to forbear from doing some act in the future. She went on to submit that consideration is executed, when it consists in some act of forbearance completed at the earliest, when the promise becomes binding.
- 3.18 Thus, it was stated that valuable consideration may be provided be either mutual promises, which will give a rise to a bilateral contract or a promise in return for another, in which there will be a unilateral contract.

REPLY BY COUNSEL FOR WESLEY SIBANDA AND FEENINESS SAKALA SIBANDA

- 3.19 It was stated in reply, by Ms. Mukobe, that they reaffirmed that there was no consideration that was provided in the purported contract of sale, as no money was actually exchanged. The submission was that reliance was placed on the *Law Association of Zambia (LAZ) General Conditions of Sale*, which had rightfully been replaced by the *General Conditions of Sale 2018*.
- 3.20 Counsel noted that the contract in issue was subject to the repealed general conditions of sale. The case of ***Butler v Fairclough*** ⁽²⁾ was said to have held that forbearance to sue, where there is no liability, is no consideration. Therefore, their argument was that forbearance to sue can only amount to consideration if a party has accrued a right to sue the other party.
- 3.21 The view taken, was that no right to sue had accrued in this matter, as no valid contract to sue had been entered into.
- 3.22 Mr. Chulu, also in reply, submitted that on the question of whether there was consideration being determinable at trial, the Court would note from the Skeleton Arguments that had been filed by Wesley Sibanda and Feeniness Sakala Sibanda, that the purpose of ***Order 14A of the Rules of the Supreme Court of England 1999 Edition***, is to determine questions of law and fact, which are not in dispute, or issues that are so evident that they can be construed from a document that is on record.

- 3.23 He contended that the question of consideration could be construed from paragraph 8 of the statement of claim that had been filed by Point Present Investment Limited and Sasha Chizyuka. The case of **Zambia Electronic Clearing House v James Kalengo** ⁽¹³⁾ was stated as having held that parties are bound by their pleadings.
- 3.24 It was also submitted that on the question of forbearance to sue amounting to consideration, if the consideration was forbearance to sue Aaron Zulu, who were they to dispute? Thus, this Court should take it that the question of consideration was not in dispute.
- 3.25 In respect of the fifth question, Mr. Chulu submitted that the cases that had been relied on by Point Present Investment Limited and Sasha Chizyuka did not apply, as in the **Bwalya Chishimba Kambwili** and **Kalusha Bwalya** cases, the appellants had challenged the contracts of sale on the ground that the underlying transactions were mortgages, while the Respondents disputed those assertions, alleging that they were contracts of sale.
- 3.26 Thus, on appeal, it had to be determined whether mortgages or contracts of sale were executed, and it was found that they were contracts of sale. He contended that however, in this matter, paragraph 8 of the statement of claim alleged that the transaction was a mortgage.
- 3.27 In respect of the repealed **Housing (Statutory and Improvement Areas) Act**, Counsel stated that they had addressed that issue in reply. It was noted that the case of

Zambia National Commercial Bank Plc v Martin Musonda and 58 others ⁽¹¹⁾ dealt with a similar issue, and in that case, reference was made to **Section 15 of the Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia** which states that a statutory instrument survives the repeal of a statute.

- 3.28 It was also submitted that the question of forbearance to sue amounting to consideration, had been addressed in the skeleton arguments in reply, and that it is only applicable to a party to a contract, and not a third party. Counsel also submitted that in paragraph 8 of the statement of claim, it had been stated that Aaron Zulu who was not a party to the contract had given forbearance not to sue.

4. DECISION OF THIS COURT

- 4.1 I have considered the application. It was made pursuant to **Order 14A Rules (1) and (2) of the Rules of the Supreme Court of England, 1999 Edition** which provides that:

“(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that –

(a) such question is suitable for determination without a full trial of the action, and

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or Judgment as it thinks just.”

- 4.2 A reading of the above provision, shows that this Court is empowered at any stage of the proceedings, once notice of intention to defend is given, to determine any question of the law or the construction of a document, where it considers that the same is suitable for determination without a full trial of the action.
- 4.3 In this matter, notice of intention to defend was given by entering appearance and filing a defence and the other requisite documents. Therefore, the requirements of ***Order 14A/2/3 of the Rules of the Supreme Court of England, 1999 Edition*** have been satisfied. I will thus proceed to consider the questions that have been raised.

WHETHER OR NOT THE CONTRACT THAT WAS EXECUTED BY WESLEY SIBANDA AND POINT PRESENT INVESTMENT LIMITED IS INVALID FOR LACK OF CONSIDERATION?

- 4.4 As can be seen from the affidavit filed in support of the application, together with the List of Authorities and Skeleton Arguments, Wesley Sibanda and Feeniness Sakala Sibanda's contention was that the cause of action in this matter, hinges on the validity of the contract of sale and the assignment, which were executed by Point Present Investment Limited and Sasha Chizyuka on the one hand and Wesley Sibanda on the other.

- 4.5 The averment was that there was no consideration that passed, as no money was actually paid under the contract of sale. It was also argued that forbearance to sue is not consideration, when the contract is not valid, and that forbearance to sue only applies to a party to a contract and not a third party.
- 4.6 In opposing the application, the argument was that forbearance to sue is valid consideration as provided in ***Chitty on Contracts, Volume 1 Twenty-Nineth Edition, Sweet & Maxwell at page 242*** which provides that:
- “Promise not to sue is a valid claim. A creditors’ promise not to enforce a valid claim is normally good consideration for a promise given in return. For example, a creditor to whom a sum of money has become due may promise to give the debtor extra time to pay, in return for a debtor’s promise to give additional security or to pay higher interest. In such a case, there is good consideration for the debtor’s promise: the creditor suffers a detriment in that he is at least kept out of his money, while the debtor benefits by getting extra time to pay.”***
- 4.7 The argument was that in this matter the contract is valid as consideration may be executory or executed. It was also argued that in this case, the consideration was executory, as it depended on the fulfilment of certain conditions.

- 4.8 The arguments in reply reiterated that **Order 14A of the Rules of the Supreme Court of England, 1999 Edition** empowers the Court to determine a question of law or the construction of a document, where it considers that the same is suitable for determination, without a full trial of the action. It was contended that the lack of consideration once determined, would resolve the matter in favour of Wesley Sibanda and Feeniness Sakala Sibanda, as all the reliefs that are sought by Point Present Investment Limited and Sasha Chizyuka are based on the contract of sale.
- 4.9 Therefore, once the contract of sale was held to be invalid, the entire case would collapse. It was also reiterated that no money was paid under the contract of sale, but rather the contract of sale was executed because of a debt that was owed by a third party, Aaron Zulu, to Point Present Investment Limited and Sasha Chizyuka.
- 4.10 The case of **Butler v Fairclough** ⁽¹⁾ was relied on, as having held that forbearance to sue when there is no liability, is not consideration.
- 4.11 It is true as can be deciphered from paragraph 8 of the statement of claim, that the cause of action arises from execution of a contract of sale for the property, Plot No 15371/1080 Kamwala South to Point Present Investment Limited and Sasha Chizyuka, as security for repayment of a debt in the sum of ZMW555, 282.00, which was owed by Aaron Zulu to Sasha Chizyuka for over a year, from May

2020, and as consideration for Point Present Investment Limited and Sasha Chizyuka not to pursue Aaron Zulu.

- 4.12 The case of ***Butler v Fairclough*** ⁽¹⁾ was relied on, as having held that forbearance to sue where there is no liability is not consideration.
- 4.13 The case of ***Ubuchinga Investments Limited v Tecklemichael Menstab and another*** ⁽⁷⁾, was relied on by Point Present Investment Limited and Sasha Chizyuka to argue that at this stage, the Court should not determine difficult questions of law or fact on affidavit evidence, which results in the rights of the parties being determined.
- 4.14 That case involved an appeal from a Ruling of the High Court, dated 12th December, 2011, which granted an interim injunction to the Respondents, who were the Plaintiffs in the Court below) restraining the Appellant, who was the 1st Defendant in the Court below) from evicting or interfering with the Respondents' possession of Stand No. 12158, Mumbwa Road, Lusaka or tampering or removing improvements relating to the same property pursuant to ***Order 27 Rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia.***
- 4.15 The Supreme Court in that matter stated as follows:

“On account of what we have stated above we find no basis to interfere with the learned trial Judge’s finding that although the balance of convenience tilted in favour of the Appellant, there was a still a serious question to be decided.

Of course, we emphasise, here, that it is not for us, and neither was it in the lower Court's place, to determine the Respondents' rights at interlocutory stage. That is a matter to be determined at trial. Suffice to say that in this particular case, the structures or improvements on the property are the main subject matter for which a Court can order that the status quo remains as it is until final determination. We are fortified in our position by what we stated in Shell and BP v Conidaris and Others

Further, that it is not necessary that the Court should find a case which would entitle the Plaintiff to relief at all events, it is quite sufficient for it (the Court) to find a case which shows that there is substantial question to be investigated. Furthermore, in some cases, even where the injury is capable of compensation in damages, an injunction may be granted if the act in respect of which relief is sought is likely to destroy the subject matter in question (Halsbury's Laws of England at paragraphs 853 and 826 at pages 448 and 431).

It is also trite law that it is no part of the Court function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately

depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.”

- 4.16 It is noteworthy from the above, that the context in which the Supreme Court stated that at that stage, it was not their function to determine the rights of the parties, but that this could only be done at trial, was on the basis that the appeal before them, related to an injunction, which is a relief that is granted pending determination of the matter.
- 4.17 In this matter, what is in issue is the construction of documents, as regards whether forbearance to sue can be consideration. Such a question would ultimately determine the matter without a full trial of the action, if successful.
- 4.18 It is trite that consideration as a requisite for the enforceability of a promise, requires a detriment incurred by the promisee, or a benefit received by the promisor which has been bargained for as the agreed exchange. It is also well settled, that forbearance or an agreement to forbear prosecution or institution of legal or equitable proceedings to enforce a legal or equitable demand, either absolutely or for a certain time or for a reasonable time, is sufficient consideration.
- 4.19 Jurisprudence shows that over time, the principles that govern forbearance to commence legal proceedings have evolved with different considerations being applicable with regard to the validity of such. Therefore, while Wesley

Sibanda and Feeniness Sakala Sibanda relied on the case of ***Butler v Fairclough*** to argue that forbearance to sue where there is no liability is no consideration, that rationale is only one of the considerations, and there are other considerations.

- 4.20 As such, at this stage, it would not be prudent to determine on the basis of the decision in that case, that there was no consideration. Consequently, the construction of the documents is not suitable for determination at this stage of the proceedings, and the preliminary issue on the question of whether the contract of sale was invalid for want of consideration fails, and it is dismissed.

WHETHER OR NOT THE CONTRACT OF SALE AND DEED OF ASSIGNMENT ARE INVALID FOR FAILURE OF REGISTRATION AS REQUIRED BY LAW?

- 4.21 In respect of the contention that the contract of sale and assignment are invalid for failure of registration as required, Ms. Zulu in the affidavit in opposition, stated that the validity of a contract of sale and an assignment are not determined by registration, and that the law relied on, in contending that the contract of sale and assignment are irregular and invalid for not being in the statutory form was repealed.
- 4.22 In the List of Authorities and Skeleton Arguments, ***Section 4 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia*** was referred to, and the case of ***G.F.***

Construction (1976) Limited v Rudnap (Zambia) Limited and Unitechna Limited ⁽⁵⁾ was relied on as having held that:

“We take judicial notice of the fact that a Contract of Sale of Land does not per se transfer ownership of land to the buyer. Much more is required. There must be a deed of assignment executed by the parties which must be lodged with Registrar of Lands together with the necessary consents or licences.”

- 4.23 The argument was further that under **Section 6 of the Lands and Deeds Registry Act**, time to register documents that are required to be registered may be extended. Therefore, the preliminary issue raised on that basis lacks merit.
- 4.24 In reply, Wesley Sibanda and Fenniness Sakala Sibanda in the List of Authorities and Skeleton Arguments submitted that while reliance had been placed on **Section 6 of the Lands and Deeds Registry Act**, to state that time can be extended to register documents that are required to be registered under the Act, their contention was that the said provision suggests that an application for such extension must be made.
- 4.25 However, no such application was ever made by Point Present Investment Limited and Sasha Chizyuka.
- 4.26 The case of **Standard Chartered Bank (Z) Plc v John M.C Banda** ⁽¹⁰⁾ was cited as having held that:

“We have stated in a number of case authorities that rules of Court ought to be complied with and a party who breaches them does so at his or her own peril.....

In this regard, our approach regarding a party in breach of a rule - which is curable by an order following an appropriate application - is the same as that we have adopted in regard to failure to meet set time lines. A party who sits back until there is an application by the innocent party to set aside process does so at his or her own peril.”

4.27 *Section 4 of the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia* provides that:

“4. (1) Every document purporting to grant, convey or transfer land or any interest in land, or to be a lease or agreement for lease or permit of occupation of land for a longer term than one year, or to create any charge upon land, whether by way of mortgage or otherwise, or which evidences the satisfaction of any mortgage or charge, and all bills of sale of personal property whereof the grantor remains in apparent possession, unless already registered pursuant to the provisions of "The North-Eastern Rhodesia Lands and Deeds Registration Regulations, 1905" or "The North-Western Rhodesia Lands and Deeds Registry

Proclamation, 1910", must be registered within the times hereinafter specified in the Registry or in a District Registry if eligible for registration in such District Registry:

Provided that if a document creating a floating charge upon land has been registered under the provisions of section ninety-nine of the Companies Act or section thirty-two of the Co-operative Societies Act, it need not be registered under the provisions of this Part unless and until such charge has crystallised or become fixed."

4.28 Then **Section 6 of the Lands and Deeds Registry Act of the said Act** states that:

"6. Any document required to be registered as aforesaid and not registered within the time specified in the last preceding section shall be null and void:

Provided that-

(i) the Court may extend the time within which such document must be registered, or authorise its registration after the expiration of such period on such terms as to costs and otherwise as it shall think fit, if satisfied that the failure to register was unavoidable, or that there are any special circumstances which afford ground for giving relief from the

results of such failure, and that no injustice will be caused by allowing registration;

(ii) the probate of a will required to be registered as aforesaid, and not registered within the time specified in the last preceding section, shall be null and void so far only as such will affects land or any interest in land.”

4.29 The above Section provides for extension of time for registration of documents. Wesley Sibanda and Feeniness Sakala Sibanda argued that no application to extend time to register the documents was made.

4.30 In the case of **G.F. Construction (1976) Limited v Rudnap (Zambia) Limited and Unitechna Limited** ⁽⁵⁾ the Court stated that:

“It is quite clear from this Section that no land should be granted, alienated, transferred or leased to a non-Zambian after 2nd April, 1985, the date of assent, except to an approved Investor. We take judicial notice of the fact that a Contract of Sale of Land does not per se transfer ownership of land to the buyer. Much more is required. There must be a deed of assignment executed by the parties which must be lodged with Registrar of Lands together with the necessary consents or licences. We do not therefore agree with Mr. Adams that an Investor’s licence is a re-requisite to an agreement for the sale of land to a non-Zambian.

Indeed, in Mundanda case (1) at page 34 this court said:

“The application for permission to subdivide and presidential consent are not matters which are usually expected to be the subject of litigation, uncertain or otherwise, and the need to obtain such consent is not in itself a ground for refusing to grant an order of specific performance. Since the Court will not make orders which it cannot enforce parties applying for the specific performance of contracts for the sale of land should come to court with evidence that if the order they seek is made in their favour, all necessary consents will be granted.”

4.31 Therefore, the question of registration of the contract of sale and the deed of assignment are not questions that would dispose of the matter once determined, in view of the fact that time can be extended to register such documents, and that limb of the application fails.

WHETHER THE CONTRACT OF SALE AND DEED OF ASSIGNMENT ARE IRREGULAR FOR NOT BEING IN THE STATUTORY FORM

4.32 Wesley Sibanda and Fenniness Sakala Sibanda argued that the contract of sale and deed of assignment are irregular, as they were not in the statutory form as required by ***Regulation 7 of the Housing (Statutory and***

Improvement Areas) Act Chapter 194 of the Laws of Zambia.

- 4.33 In opposition, as submitted at the hearing, the ***Housing (Statutory and Improvement Areas) Act, Chapter 194 of the Laws of Zambia*** was repealed and replaced by the ***Urban and Regional Planning Act No 3 of 2015***. The provisions of ***Section 14 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia*** was also relied on, to argue that where a written law repeals in whole or in part any other written law, the repeal shall not revive anything not in force or existing at the time at which the repeal takes effect.
- 4.34 Thus, as the contract of sale and assignment were executed by the parties on 28th May, 2021, long after the ***Urban and Regional Planning Act No 3 of 2015*** had come into force, the provisions of the repealed ***Housing (Statutory and Improvement Areas) Act, Chapter 194 of the Laws of Zambia*** in respect of the statutory forms for the transfer of land did not apply to the contract of sale and assignment in this matter.
- 4.35 In the List of authorities and Skeleton Arguments in reply, it was stated that the regulations that were passed under the repealed ***Housing (Statutory and Improvement Areas) Act Chapter 194 of the Laws of Zambia*** still apply pursuant to ***Section 15 of the Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia***.

- 4.36 Further reliance was placed on case of **Zambia National Commercial Bank Plc v Martin Musonda and 58 others** ⁽¹¹⁾ stating that the said case held that a Statutory Instrument that is passed under any law that is repealed remains in force, unless it is repealed by another statutory instrument issued under or made under the provisions of such repealing law.
- 4.37 From the arguments that were advanced, it can be seen that the principal Act that was relied on, in making the application is the **Housing (Statutory and Improvement Areas) Act, Chapter 194 of the Laws of the Zambia**. That Act, was repealed and replaced by the **Urban and Regional Planning Act No 3 of 2015**.
- 4.38 **Regulation 7 of the Housing (Statutory and Improvement Areas) Act, Chapter 194 of the Laws of the Zambia**, provided as follows:
- “(1) A transfer executed pursuant to section seven of the Act shall be in accordance with Form 3 of the First Schedule. Such transfer shall be executed by the transferor in original only, and shall refer to the grant, lease, or certificate of title of such land, and shall contain a description of the land by reference to the plot number of the relevant Statutory Housing Area Plan.**
- (2) Upon the registration of any transfer of land, the interest of the transferor as set forth in such instrument and all rights, powers and privileges**

thereto belonging or appertaining shall vest in the transferee and such transferee shall thereupon become subject to and liable for all and singular of the same requirements and liabilities to which the transferor shall have been subject and liable if such transfer had not been made.”

- 4.39 The argument by Wesley Sibanda and Feeniness Sakala Sibanda was to the effect that pursuant to **Section 15 of the Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia**, a Statutory Instrument that is promulgated under a repealed law, remains in force when the principal Act is repealed, unless it is revoked by a statutory instrument that is passed under the new legislation.
- 4.40 However, Point Present Investment Limited and Sasha Chizyuka argued that this was not the position in this case, as in line with the provisions of **Section 14 of the said Interpretation and General Provisions Act** which provides that a repeal does not revive the repealed law, **Section 7 of the Housing (Statutory Improvement Areas) Act** having been repealed, **Regulation 7** which was promulgated pursuant to that provision, no longer applies.
- 4.41 **Section 33 of the Urban and Regional Planning Act No 3 of 2015** states that:
- “33. A registrar shall not register any document purporting to transfer, deal in or affect any land unless the local authority in whose jurisdiction the*

land is situated is a party to the transaction recorded in the document or has signified its consent to the transaction.”

4.42 Further, the provisions of **Section 14 of the Interpretation General Provisions Act** are:

“14. (1) Where in any written law a reference is made to another written law or the Constitution, such reference shall be deemed to include a reference to such last-mentioned written law or the Constitution as the same may from time to time be amended.

(2) Where a written law repeals and re-enacts, with or without modification, any provision of a former written law or the Constitution, references in any other written law to the provisions so repealed shall be construed as references to the provisions so re-enacted.

(3) Where a written law repeals in whole or in part any other written law, the repeal shall not-

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any written law so repealed or anything duly done or suffered under any written law so repealed;

or

- (c) *affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed; or*
- (d) *affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any written law so repealed; or*
- (e) *affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceedings, or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.”*

4.43 Then **Section 15 of the said Act** states that:

- (i) *“15. Where any Act, Applied Act or Ordinance or part thereof is repealed, any statutory instrument issued under or made in virtue thereof shall remain in force, so far as it is not inconsistent with the repealing written law, until it has been repealed by a statutory instrument issued or made under the provisions of such repealing written law, and shall be deemed for all purposes to have been made thereunder.”*

4.44 I have noted the above provisions and the question of whether **Regulation 7** which was passed under the **Housing**

(Statutory and Improvement Areas) Act, Chapter 194 of the Laws of the Zambia survived the repeal of the said Act, is in my view, not a question that is suitable for determination at this stage, in light of my Ruling as regards the first question that has been raised.

4.45 Therefore, it cannot be determined as a preliminary issue, and the question therefore fails.

WHETHER THE MODE OF COMMENCEMENT OF THE ACTION IS CORRECT FOR REMOVING A CAVEAT?

4.46 Wesley Sibanda and Feeniness Sakala Sibanda contended that a wrong mode of commencing this action had been employed, as Point Present Investment Limited and Sasha Chizyuka seek the removal of a caveat that was placed on the property. It was their position, that the correct mode of commencement should have been by Originating Summons.

4.47 In opposing the application, Ms. Zulu, Counsel with conduct of the matter on behalf of Point Present Investment Limited and Sasha Chizyuka, deposed that multiple reliefs are sought in this matter, hence the commencement of the matter by Writ of Summons.

4.48 It was further argued, that as multiple reliefs are sought in this matter, the case of **Corpus Legal Practitioners v Mwandanani Holdings** ⁽⁸⁾ applies, where the Supreme Court held that the reliefs that were sought in that matter, were not only for removal of a caveat, whose proceedings are commenced by Originating Summons, and to insist that a

claim for removal of a caveat should have been brought by a separate action, would amount to a multiplicity of actions.

- 4.49 Therefore, commencing the matter by Writ of Summons was the correct mode, in view of the fact that multiple reliefs are sought in this case.
- 4.50 The Writ of Summons and statement of claim reveal that other than claiming for removal of the caveat that was placed on Plot No 15371/1080 Kamwala South, Point Present Investment Limited and Sasha Chizyuka, also claim specific performance of the contract of sale and the Deed of Assignment relating to the property Plot No 15371/1080 Kamwala South. In the alternative, the claim is for damages for breach of contract.
- 4.51 Therefore, there are multiple reliefs that are sought. It is only where a claim for removal of the caveat is the only relief that is sought, where a matter should be commenced by Originating Summons.
- 4.52 In that regard, the Supreme Court in the case of **Corpus Legal Practitioners v Mwanandani Holdings Limited** ⁽⁸⁾ held that:

“In the Rural Development Corporation Limited case, we discussed the procedure under Section 81 of the Lands and Deeds Registry Act when we held that:

“Although S. 81 of the Lands and Deeds Registry Act ... provides no procedure for the removal of a caveat, an originating summons is the proper

form for commencing proceedings for removal of a caveat.”

From the above, it is clear that the correct mode of commencing proceedings, seeking an Order for the removal of a caveat, is by Originating Summons. However, we must hasten to mention here that the Rural Development Corporation Limited Case¹ is distinguishable from the present case in the sense that the relief sought by the Appellant, for the removal of the caveat in this case, is not the only claim which the Respondent is seeking in the Court below. In our view, the position of the law, as stated in the Rural Development Corporation Limited Case envisages a situation and is only applicable where the sole claim in an action is for an Order for the removal of a caveat.

We take the further view that, looking at the circumstances of this case, to insist that the claim for the removal of the caveat must be brought in a separate action, commenced by way of Originating Summons, would amount to asking that the different claims in this case, although involving the same parties and arising from the same set of facts, be severed and brought in separate actions. In turn, this would amount to multiplicity of actions, a practice which we have always frowned upon.”

4.53 Therefore, the question raised is without merit, as multiple reliefs are sought in this matter, and it was correctly commenced by Writ of Summons accompanied by a statement of claim. The question fails, and it is dismissed.

WHETHER A TRANSACTION CREATING LAND AS SECURITY FOR A DEBT CAN OPERATE AS A SALE OF THE SAID LAND

4.54 As to whether or not, a transaction creating land as security for a debt can operate as sale of the said land, it was argued in opposition that *Regulation 12 of the Housing (Statutory and Improvement Areas) Act Chapter 194 of the Laws of Zambia* which had been relied on by Wesley Sibanda and Feeniness Sakala Sibanda was non-existent.

4.55 Moreover, the said *Housing (Statutory and Improvement Areas) Act Chapter 194 of the Laws of Zambia* had been repealed by *the Urban and Regional Planning Act No 3 of 2015*. The provisions of *Section 14 of the Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia* on the effect of repeal of a statute was reiterated.

4.56 Further reliance was placed on *Halsbury's Laws of England, 4th Edition, Volume 44* which states that:

“The general principle is that except as to transactions past and closed, an enactment which is repealed is to be treated as if it had never existed.”

4.57 The argument was also that the Courts have dealt with transactions such as the one before Court. Therefore, the

transactions are not strange in this jurisdiction. In reply, it was contended that the cases that were relied on, were distinguishable from this case, as in those cases, the Appellants had argued that they had executed mortgages, yet they were made to sign contracts of sale, while in this case paragraph 8 of the statement of claim was clear that a contract of sale and an assignment were executed.

4.58 From the submissions that were made by the parties, and the cases that were cited by Point Present Investment Limited and Sasha Chizyuka, the Courts have indeed dealt with transactions such as the one in issue in this matter. It is clear from those cases, that the intentions of the parties in executing those agreements, have to be determined.

4.59 As such, the question cannot be determined at a preliminary stage, on affidavit evidence, but only after evidence is led at trial. That question therefore fails, and it is dismissed.

WHETHER FAILURE TO SEAL THE STATEMENT OF CLAIM IS IRREGULAR.

4.60 On the failure to seal the statement of claim in this matter, Counsel for Point Present Investment Limited and Sasha Chizyuka deposed that failure to seal the statement of claim is curable, and cannot be determined as a point of law.

4.61 Point Present Investment Limited and Sasha Chizyuka in the List of Authorities and Skeleton Arguments argued that the procedure that had been adopted by Wesley Sibanda and Feeniness Sakala Sibanda to challenge the same was incorrect. Their contention was that an application to set

aside the said statement of claim should have been made pursuant to **Order 2 Rule 2 of the Rules of the Supreme Court of England, 1999 Edition**, and not to apply to dispose of the matter on a point of law.

4.62 The case of **Savenda Management Services Limited and others v Standard Chartered Bank Zambia Plc** ⁽¹²⁾ was cited as having held that the High Court has power to Order for the amendment of pleadings to ensure fair trial, and identify the real questions in controversy. Also relied on, was the case of **Leopold Walford (Z) Limited v Unifreight** ⁽⁴⁾ which held that:

“As a general rule, breach of regulatory rule is curable and not fatal, depending upon the nature of the breach and the stage reached in the proceedings;

4.63 In the List of Authorities and Skeleton Arguments in reply, Wesley Sibanda and Feeniness Sakala Sibanda argued that Point Present Investment Limited and Sasha Chizyuka slept on their rights, by not making a formal application to amend the statement of claim. The case of **Twampane Mining Co-Operative Society Limited v E and M Storti Mining Limited** ⁽⁶⁾ was stated as having held that:

“Those who choose to ignore Rules of Court do so at their own peril.”

4.64 Also relied on as authority, was the case of **Standard Chartered Bank (Z) Plc v John M.C Banda** ⁽¹⁰⁾.

- 4.65 The contention that the statement of claim in this matter was not sealed on being filed was not disputed. Point Present Investment Limited and Sasha Chizyuka argued that the issue should not have been raised as a point of law under **Order 14A of the Rules of the Supreme Court of England**, but rather, an application to set aside the Writ of Summons and statement of claim should have been taken out, pursuant to **Order 2 Rules 2 of the said Rules of the Supreme Court**.
- 4.66 On the other hand, Wesley Sibanda and Feeniness Sakala Sibanda contended that Point Present Investment Limited and Sasha Chizyuka slept on their rights by not taking out an application to amend.
- 4.67 **Order 6 Rule 4 of the High Court Rules as amended by Statutory Instrument No 58 of 2020** provides that:
- “(4) The proper officer shall-**
- (a) seal with the official seal, the writ of summons and statement of claim where that statement of claim is on a separate sheet;**
 - (b) stamp the accompanying documents with the official stamp; and**
 - (c) return the copies of the writ of summons, statement of claim and accompanying documents to the person commencing the action.”**

- 4.68 A perusal of the record shows that the statement of claim which is on a separate sheet from the Writ of Summons, is not sealed by the proper officer.
- 4.69 In the case of ***Megha Engineering and Infrastructure Limited & another v Marks Industries Limited*** ⁽¹⁴⁾ the Court of Appeal, as regards the provisions of ***Order 11 of the High Court Rules, as amended by Statutory Instrument No 58 of 2020*** which governs the entering of appearance and filing a defence held as follows:

“We have considered the arguments and the Ruling of the learned Judge in the court below. The first ground attacks the finding of fact by the learned Judge, that at the time of making the application to strike out the action, the 1st Appellant had not entered conditional appearance as required under Order 11/1 (4) HCR.

It is evident that at the time the 1st Appellant was making the application to strike out the action, on 28th June 2021, the learned Judge was not aware that Statutory Instrument No. 58 of 2020 which came into effect on 19th June 2020, had amended Order 11 by deleting Order 11/1 HCR and substituting it with a new provision in respect to the mode of entering appearance.

Under the current Order 11/1, there is no requirement for entering of a conditional appearance. What that entails, is that, if a party wishes to apply to court for

setting aside the writ on grounds that the writ is irregular or that the court has no jurisdiction, has to do so, by entering a memorandum of appearance and defence in accordance with the current Order 11 (1) (a) and (b) and promptly, make the necessary application to challenge the writ. It follows therefore, that for purposes of challenging the writ for irregularity, the filing of the defence will not amount to a "fresh step" taken to waive the irregularity, as the law now requires that there must be a defence on the record before an application to challenge the writ may be made."

- 4.70 Therefore, after having entered appearance and filed the defence and the other documents, Wesley Sibanda and Feeniness Sakala Sibanda, should have filed an application to set aside the Writ of Summons and statement of claim for irregularity, and not raise the question of the failure to seal the statement of claim as a point of law under **Order 14A of the Rules of the Supreme Court of England**.
- 4.71 By not doing so, they waived their right to challenge the irregularity. In any event, the irregularity is curable by way of amendment, and would not determine the proceedings, the responsibility to seal the said statement of claim being placed on the proper officer, who is a Court official, and not Point Present Investment Limited and Sasha Chizyuka.
- 4.72 I have noted earlier, that breach of procedural rules is not fatal, depending on the nature of the breach, and the stage

of the proceedings. The breach alluded to, is one that could have been rectified very early in the proceedings when Wesley Sibanda and Feeniness Sakala Sibanda had entered appearance and filed their defence, and thereafter filed the application to set aside the Writ of summons and statement of claim for irregularity. As such, that question fails.

5. CONCLUSION

- 5.1 The questions raised for determination all fail, and the net result is that matter has not been determined with finality at this stage. The parties having complied with the Orders for Directions the matter shall come up for trial on 8th August, 2024 at 09:00 hours for trial. Costs shall be in the cause and leave to appeal is granted.

DATED AT LUSAKA THE 22nd DAY OF MARCH, 2024

S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE

