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**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

2021/HP/1573

(Civil Jurisdiction)

IN THE MATTER OF: SECTION 81 OF THE LANDS AND DEEDS
REGISTRY ACT, CHAPTER 185 OF THE LAWS
OF ZAMBIA.

IN THE MATTER OF: ORDER 6, RULE 1(3) AND ORDER 30 RULE 11
OF THE HIGH COURT ACT, CHAPTER 27 OF
THE LAWS OF ZAMBIA.

AND

IN THE MATTER OF: THE REMOVAL OF CAVEATS REGISTERED
AGAINST SUBDIVISION NO. 70 OF FARM NO.
284A AND SUBDIVISION 'A' OF SUBDIVISION
NO. 71 OF FARM NO. 284A, BWINJIFUMU
ROAD, FAIRVIEW LUSAKA.

BETWEEN:

RASHMI ISHVERDATT JOSHI

APPLICANT

AND

GRANDVIEW PROPERTIES LIMITED

RESPONDENT

**BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
ON 15TH JANUARY, 2024 - IN CHAMBERS**

For the Applicant : *Mr. K. Daka & Ms. O. Kavannangu – Christopher, Russell
Cook & Company*

For the Respondent : *Mr. M. Chitambala – Lukona Chambers*

JUDGMENT

CASES REFERRED TO:

1. *Construction and Investment Holding Limited v William Jacks and Company Zambia Limited (1972) Z.R. 66*

AUTHORITIES & OTHER WORKS REFERRED TO:

1. *Phipson on Evidence, Seventeenth Edition (Thomson Reuters (Legal) Limited (2010)) paragraph 6-06 at page 151*
2. *Section 81(1)(2) of the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia.*

The applicant brought this matter on 10th December, 2021, by way of Originating Summons for the Subdivision for the removal of caveat registered against subdivision No. 70 of Farm No. 284a and subdivision A of subdivision No. 71 of farm No. 284a Bwinjimfumu road Fairview Lusaka.

The applicant seeks the following reliefs forthwith;

- 1. An Order that the caveat placed on subdivision NO. 70 of farm No. 284a and subdivision A of subdivision No. 71 of farm No. 284a should be removed*
- 2. An Order that the costs of and occasioned by this application should be borne by the respondent.*
- 3. Any further relief this Court may deem fit.*

Filed on the same day was an affidavit in support of originating summons deposed to by Rashmi Ishverdatti Joshi. He deposed as follows;

- 1. That I am the registered proprietor of subdivision No. 70 of farm No. 284a and subdivision 'A' of subdivision No. 71 of farm No. 284a both situate in 'Fairview' in the Lusaka Province of the Republic of Zambia (hereinafter called "the properties"). Now produced and shown to me as exhibit marked "**RIJ 1**" are true copies of the certificates of title for the properties aforesaid.*
- 2. That by a contract for sale dated 5th December, 2018 (hereinafter called "the contract for sale"), the respondent herein agreed to purchase the properties at the collective price of Five*

Hundred Thousand United State Dollars (US\$500, 000.00). now produced and shown to me as exhibit marked "**RIJ 2**" is a true copy of the duly executed contract for sale aforesaid.

3. That on 17th December, 2018, the respondent herein proceeded to register caveats against the properties on the ground that it was the intending purchaser of the same. Now produced and shown to me as exhibit marled "**RIJ 3**" are true copies of the excerpts from the Land Register printouts evidencing the foregoing at entries no. 22 and 32.
4. That the respondent, in breach of the Contract for sale, has only paid the sum of Two Hundred and Ninety-three Thousand Six Hundred and Ninety –one Kwacha (K293,691.00) leaving a balance of Two Hundred and Six Thousand Three Hundred and Nine United States Dollars (US\$206,309.00) (hereinafter called the completion amount).
5. That despite several reminder made to the respondent by Messrs. Christopher, Russel Cook & co, (hereinafter called "my Advocates") to pay the completion amount, followed by the respondent's commitments to pay the same, the respondent continues to refuse, neglect and/or fail to pay the completion amount. Now produced and shown to me as exhibit marked "RIJ 4" are true copies of the correspondences between my Advocates and Messrs. AB and David (hereinafter called "the respondent's Advocates") relating thereto.
6. That by a letter dated 30th September, 2021, my Advocates wrote to the respondent's Advocates demanding payment of the completion amount from the respondent by 31st October, 2021,

failing which the contract for sale would be rescinded. Now produced and shown to me as exhibit marked "RIJ5" is a true copy of the letter aforesaid.

- 7. That following the respondent's refusal, neglect and/or failure to pay the completion amount by 31st October, 2021, my Advocate, by a letter dated 4th November, 2021, informed the respondent's Advocates that the contract for sale was rescinded and demanded that the respondent withdraw the caveats it registered against the properties by 15th November, 2021, failing which I would commence Court proceedings against the respondent for the removal of the caveats. Now produced and shown to me as exhibit marked "RIJ 6" is a true copy of the letter of 4th November, 2021.*
- 8. That to date, neither myself nor my Advocates have received any response to our letter of 4th November, 2021.*
- 9. That on 17th November, 2021, my Advocates conducted computed – generated searches on the properties on the lands register at the Ministry of Lands and Deeds and discovered that the respondent had not withdrawn the caveats it registered against the properties. Now produced and shown to me as exhibit marked "RIJ 7" are true copies of the printouts from the Electronic Lands Register as evidence of this.*
- 10. That following the rescinded of the contract for sale, I verily believe that the respondent is not entitled to any interest in the properties and therefore has no caveatable interest, hence my humble application.*

Exhibited was a certificate of title number 108 381 of farm No. 284a, the certificate, is dated 16th December, 2010, under the Land and seal of the Registrar of Lands and Deeds registry of Zambia that Rashmi Ishverdatti Joshi of Lusaka Zambia is a tenant or lessee for the unexpired residue of a term of 100 years from the 1st day of July 1975.

Certificate of title No, 108 382 subdivision A of subdivision No. 71 of the farm no 284a was also exhibited. The certificate of title is dated the 16th December, 2010, where **RASHMI ISHVERDATT JOSHI** is a tenant or lessee.

Exhibited and marked RIJ 2 is the Law Association of Zambia contract and condition of sale document. The document states that there was an agreement made between **RASHMI ISHVERDATT JOSHI** of Lusaka (the vender) and **GRANDVIEW PROPERTIES LIMITED** a company (the purchaser).

The vendor signed in the presence of a witness Kanti K. Patel and Mr. Bokani Soko signed for and on behalf of the purchaser in the presence of Twaambo Phiri.

The description of the properties are pieces of land in extent of 0.2048 hectare subdivision No. 70 of farm No. 284a Fairview Lusaka secondly land in extent of 0.0198 hectare being subdivision No. A of subdivision No. 71 of farm No. 284a Fairview in Lusaka the special conditions were as follows:

1. *The properties are sold subject to the Law Association of Zambia General Conditions of Sale 1997 so far as the same are not inconsistent with or varied by these special condition*
2. *The vendor's Advocates are Christopher, Russell Cook & Co., of the Office at 4658/A Chikwa Road, P.O. Box 34091, Lusaka and the Purchaser's Advocates are AB & David of Ground Floor, MANCO House, Madison office complex, Plot No. 3168, Independence Avenue, P.O. Box 38704, Lusaka.*
3. *The period fixed for obtaining state's consents and any other necessary licences to assign shall be 4 weeks from the date of the contract.*
4. *The date fixed for completion in respect of each property shall be within 14days of receipt of the tax clearance certificate issued by Zambia Revenue Authority and which Certificate for each property shall be applied for within 7 days of receipt of the respective state's consent to assign for each property.*
5. *The vender is selling as Beneficial Owner.*
6. *The title shall commence with the certificates of title relating to the respective pieces of land.*
7. *The properties are sold subject to the properties firstly hereinbefore described:*

- i. *The rent convents and conditions prescribed under the land (conversion of titles) Regulations 1975 as amended from time to time.*
- ii. *The exception (other than the perpetual yearly rent charge or any part thereof) restriction restrictive covenants and conditions contained in an Indenture of Grant of Final Title dated the 11th day of April, 1918, made between the British South Africe Company of the one part and Henry William Percy Morton and Florindo Bosazza of the other part so far as the same are still subsisting and affect the said land.*

AND as to the property secondly hereinbefore described;

- i. *The rent covenants and conditions (Conversion of titles) Regulation 1975 as amended from time to time.*
- ii. *The exceptions (other than the perpetual yearly rent charge or any part thereof) restrictions restrictive covenants and*

conditions contained in the said indenture of grant of final title so far as the same as still subsisting and affect the said land.

iii. The restrictive covenants and conditions (with the exception of those conditions which are contrary to Public Policy) contained in an Indenture of Conveyance dated the 18th day of August, 1949, made between Robert Simon of the one part and James Scott Prentice of the other part so far as the same are still subsisting and affect the said land.

8. The properties are also sold subject to the following tenancies;

- i. With Goodfellow Distributors Limited which comes to an end on 19th January, 2019.*
- ii. With mobitel Zambia limited.*

9. The total purchase price of Five Hundred Thousand United States Dollars (US\$500,000.00) shall be paid as follows;

- i. Ten per cent (10%) of the purchase price in the sum of fifty thousand united states Dollars (US\$50, 000.00) on execution of contract.*
- ii. Fifty per cent (50%) of the purchase price in the sum of Two Hundred and Fifty Thousand United states Dollars (US\$ 250, 000.00) upon the vendor obtaining state's consent to assign.*
- iii. The balance at completion.*

10. Each party shall bear its own costs relating to this transaction but the purchaser shall bear the property transfer tax payable to Zambia Revenue Authority for this transaction.

Exhibited was '**RIJ3**' four print outs of Ministry of Lands register. Among other entries was an entry No. 22 the date of the documents and date of registration was 17th December, 2018. The caveator was Grandview Properties Limited. The nature of the document

was a caveat placed claiming interest or estate namely, intending purchaser as per attached contract and condition of sale.

Exhibit '**RIJ4**' was a letter to AB and David from Christopher, Russell Cook and Company. In this letter Counsel for the applicant informed Counsel for the respondent that the client was treating the contract of sale dated 5th December, 2019, as rescinded. Reason given was that no payments were forth coming despite innumerable promises. Further that the caveat be withdrawn for any refunds of any funds paid. The letter was dated 16th March, 2021.

Another letter exhibited dated 8th September, 2021, was an acknowledgement from Counsel to the applicant to Counsel for the respondent. Counsel was acknowledging that their client informed them that their client telephoned him on 2nd September, 2021, and stated that the completion monies would be paid within 21days. That their client was not prepared to wait. Again, Counsel for the respondent was informed that the applicant was willing to extend period for this to 30th September, 2021 and not October, 2021. That the amount due was USD229, 160.00. That if payment is not received the applicant will proceed to treat the contract of sale dated 5th December, 2019 between their respective clients as rescinded. Further that in the event that the contract becomes rescinded the respondent should withdraw the caveats.

The letter from Counsel to the respondent dated 3rd September, 2021, was also exhibited. This was the letter, in which the

respondent proposed to complete the transaction by end of October, 2021.

Exhibited was a letter from Counsel to the respondent to Counsel for the applicant dated the 28th September, 2021. In this letter Counsel to the applicant was informed that the deadline of 30th September, 2021, was unattainable due to the challenges in the letter of 3rd September, 2021. These challenges were that the respondent's business operations have been hampered due to the COVID pandemic. Exhibit '**RIJ5**' is a letter from the applicant's Counsel to the respondent Counsel in which they expressed their client's willingness to extend the period of settlement of the completion monies to be 31st October, 2021, that the amount was USD231,129.00. This was the final extension. That they anticipate delivery to them of the registered withdrawal of the caveat covering both properties by 15th November, 2021.

Exhibit '**RIJ6**' is a letter from Counsel to be applicant to Counsel to the respondent. Counsel in their letter stated that the respondent has failed to fulfill its obligation under the contract of sale dated 5th November, 2019. That their client now treats the said contract as rescinded. They sought proof of the withdrawal of caveat among other things.

Exhibit '**RIJ7**' are extracts from the land register bearing entries from number 16 to 32 in respect of properties, certificate of title number 55659 and 55660 as well as certificate of title number 108, 382. The nature of documents includes the placement of caveat

where the caveator was Grandview Properties Limited of property covering an area of 0.2040 hectares, as well as the caveat covering an area of 0.0190 hectare. The nature of the documents were placed by the caveator claiming estate or interest namely, as an intending purchaser as per attached contract and conditions of sale.

What followed was the filling of originating summons, affidavit in support of originating summons, the exhibits and the applicant's list of authorities and skeleton arguments in support of originating summons. On the 17th March, 2022, the respondent filed an affidavit in opposition to originating summons. This was following the filing of a notice of appointment of Advocates by Messrs. Lukona chambers on the 9th February, 2022. The affidavit in opposition was deposed to by Mundia Mukelabai a Legal officer in the respondent firm. He deposed that:

1. *That the contents of paragraphs 1-6 are not in dispute.*
2. *That the contents of paragraph 7 of the Affidavit in support are false. To the contrary, the respondent has paid the sum of US\$389,600.00 towards the purchase price and not the sum of K293, 691.00 (Two Hundred and Ninety – Three Thousand Six Hundred and Ninety –one Kwacha) stated therein.*
3. *That the contents of paragraph 8 of the Affidavit in support are not entirely true. That the contract entered into between the applicant and respondent dated 5th December, 2018, was subject to the Law Association of Zambia General Conditions of Sale 1997, which required the applicant to obtain the Property Tax Clearance Certificate in respect of the transaction and deliver the same to the purchaser on completion. That at no time did the vender ever notify the purchaser of having obtained the said property tax clearance certificate or an application for the said certificate or at all.*

4. That further to that which is stated under paragraph 6 above, at no time prior to the date of completion did the applicant or indeed anyone on his behalf notify the respondent to the effect that an application had been lodge to the Zambia Revenue Authority for property transfer tax clearance or at all.
5. That consequent to matters referred to under paragraph 6 and 7 above, the applicant has never been in a position to complete the sale of the property subject of the contract dated 5th December, 2018, as he had not complied with the terms thereof.
6. That contrary to the contents of paragraph 9 of the affidavit in support, while it is true that the applicant has been demanding for settlement of the completion amount, the sum of which the respondent disputes, he (the applicant) has never given notice of application to obtain the property transfer tax certificates for purposes of completion or at all.
7. That in response to the averment under paragraph 10 of the affidavit in support, I repeat my assertions under paragraph 7, 8 and 9 above to the effect while demanding payment for the completion amount, the applicant has never prior to the date set for completion notified the respondent of having applied for and obtained the property transfer tax certificate or at all for purpose of completion.
8. That further in response to the contents of paragraph 10 of the affidavit in support, the applicant purported to communicate rescission of the contract of sale when he had not as at the date of purported rescission secured the necessary property transfer tax clearance certificate for purposes of completion in breach of clause 3(c)(v) of the Law Association of Zambia general condition of sale, 1997.
9. That in response to paragraph 12 of the affidavit in support, it is true that the caveats lodged in respect of subdivision No. 70 farm No. 28a and subdivision No. 71 of farm No. 284a, Lusaka have not been removed. That the reasons for their non removal are the following;
 - i. That the date fixed for completion of the contract of sale was within 14 days of receipt of the tax clearance certificate issued by Zambia revenue authority applied for within 7days of receipt of the respective state's consent to assign for each property. That although all the event s referred to in clause 1 of the contract of sale should have occurred in or about January, 2019, the application has never given notice to the respondent or either having applied for the

- property tax clearance certificate or making of the application for the said certificate thereof. The applicant in this regard has failed to comply with the term for completion.*
- ii. *That the respondent has made payments towards the purchase price for the properties agreed to be sold as follows;*
- a. *The deposit of US\$50, 000 on exchange of contract;*
 - b. *The sum of US\$100,000 paid on or about 4th November, 2019;*
 - c. *The sum US\$50, 000 on or about 27th November, 2019;*
 - d. *The sum US\$190, 000 paid on or about 8th September, 2020; that therefore, the respondent has paid the total sum of US\$ 389,600 towards the purchase price.*
- iii. *That other than the deposit paid on exchange of contracts, all other instalment payments were made to the applicant o duties way after the period within which the transaction should have been completed; that the parties had therefore waived the conditions providing to the effect that time for completion is of the essence.*
- iv. *That the purported balance in the sum of US\$206, 309.00 alleged to be due but not paid by the respondent is inconsistent with the amount claimed as outstanding in the completion statement dated 15th December, 2020, issued by the applicant which shows the balance as US\$211,289. Now produced and shown to me marked "MM 1" is a copy of the letter dated 8th December, 2020, and statement by the applicant's advocates as at 15th December, 2020.*
- v. *That the statement dated 15th December, 2020, and referred to under paragraph (iv) above includes a claim for loss of rent in the purported sum of US\$34,500.00 when there was no agreement for payment of such loss and in any case the applicant had never fully complied with the terms of completion, he cannot therefore seek to benefit from his own default.*

- vi. That prior to completion, the applicant did not at any time give notice of having obtained the property tax clearance certificate to warrant a claim of preparedness to complete.*
 - vii. That there was not basis for the claim for interest relating to alleged delay to complete as the applicant has never given notice of having obtained the property tax clearance certificate, a condition precedent to completion.*
- 10. That the respondent retains an interest in the property subject of the application herein since the decision to rescind by the applicant was premised on grounds not support by the contract and the general condition of sale.*
- 11. That if this Honourable Court orders the removal of the caveats subject of this action, the respondent will be prejudiced as it has already paid a substantial sum towards the purchase price and the applicant has not given to the said respondent a legally compliant notice to complete to warrant this action.*

Exhibited as '**MM 1**' was a letter from the applicant's Counsel to the respondent's Counsel in which the revised completion statement reflecting that the amount due by 15th December, 2020 is US\$211,289.00. The same was dated the 8th December, 2020. Exhibited was the statement referred to in the letter were the amount reflected balance due was 211.289.00 UD Dollar. Other amounts reflected were interest due for delayed completion for a balance of purchase price from the 1st February, 2019 to 4th November, 2019, all the way to 7th September, 2020 to 15th December, 2020. This included loss of rent from 1st February, 2019 to 31st December, 2019 and from 1st January, 2020 to 31st October, 2020 and legal costs.

Also reflected was part purchase price paid of 389.600.00 USD. An affidavit in reply to affidavit in opposition deposited to by **RASHMI**

ISHVERDATT JOSHI was filed on the 6th June, 2022. It was deposed that:

1. *That I have read what purports to be the respondent's affidavit in opposition to my affidavit in support of originating summons for the removal of the caveats registered against subdivision No. 70 of farm No. 284a and subdivision 'A' of subdivision No. 71 of farm No. 284a, (hereinafter called "the properties") filed on 17th March, 2022 (hereinafter called "the respondent's affidavit").*
2. *That I make no comments to the averments contained in paragraph 1 and 2 of the respondent affidavit as the veracity of the averments contained therein are within the respondent peculiar knowledge.*
3. *That I admit the averments contained in paragraph 5 of the respondent's affidavit that the respondent has paid the sum of Three Hundred and Eighty – Nine Thousand Six Hundred United State Dollars (US\$389,600.00) towards the purchase price and not the sum of Two Hundred and Ninety- Three Thousand Six Hundred and Ninety One Kwacha (K293, 691.00) as erroneously indicated in my affidavit in support of originating summon filed on 10th December, 2021 (hereinafter called "my affidavit in support")*
4. *That I admit the averments contained in paragraph 6 of the respondent's affidavit **only to the extent** that the contract of sale dated 5th December, 2018, (hereinafter called "the contract") was subject to the Law Association of Zambia general conditions of sale 1997 which required me to make the property transfer tax applications relating to the properties (hereinafter called "the PTT applications") but clarify as follows:*
 - i. *That even through the contract required me to make PTT applications, the parties agreed that the respondent would bear the cost of the property transfer tax (hereinafter called "the PTT) payable to Zambia revenue Authorities (hereinafter called "the ZRA"). Now produced and shown to me as exhibit marked "RIJ 1" is a true copy of the contract evidencing this at special condition 10.*
 - ii. *By a letter dated 8th January, 2019(hereinafter called "the first letter"), Messrs. Christopher, Russell Cook & Co, (hereinafter called "my Advocates") informed the respondent of my intention to make*

the PTT application and requested the respondent to confirm whether the PTT payable to the ZRA would be available as soon as the respondent was availed with the property transfer tax assessment notice issued by the ZRA. The respondent was further informed that this confirmation was required in order to avoid the ZRA from imposing penalties, which would be paid by the respondent, in the event of a delayed payment. Now produced and shown to me as exhibit marked "RIJ 2" is a true copy of the said first letter evidencing this.

- iii. That following the first letter, the respondent and I agreed that the PTT applications would only be made upon my advocates' receipt of the PTT amount from the respondent. Despite this agreement, the said PTT amount was never received by my advocates. Now produced and shown to me as exhibit marked "RIJ 3" are true copies of the correspondences between the respondent and my advocates evidencing the agreement aforesaid, as well as the respondent's failure, refusal and/or neglect to transfer the said PTT amount to my advocates client account together with the balance of the purchase price, my advocates legal fees relating to the conveyance, interest due for delayed completion and the refund for loss of rent as agreed.
- iv. That corollary to the foregoing, it was not possible for me to make the PTT applications and obtain the property transfer tax clearance certificates, because of the respondent's failure to transfer the PTT amount to my advocates bank account as agreed.

5. That I repeat the contents of paragraph 7 above in response to the averments contained in paragraph 7 of the response to the averments contained in paragraph 7 of the respondent's affidavit.
6. That I deny the averments contained in paragraph 8 of the respondent's affidavit and repeat the averments contained in paragraph 7 and 8 above and further aver that I have complied with the terms of the contract and that it is the respondent who has continually refused, neglected and/or failed to perform his obligation under the contract as evidenced by exhibit marked "RIJ 3".

7. *That I repeat the contents of paragraph 6 above in response to the averments contained in paragraph 6 of the respondent's affidavit and clarify that the contract was rescinded as a result of the respondent's failure to comply with its obligations under the contract. I further clarify that by special condition 10 of the contract, the respondent agreed to pay the PTT amount relating to the properties and further agreed as evidenced by exhibit marked "RIJ 3" to transfer the said PTT amount to my Advocates' client account before the PTT applications were made. Despite the agreement aforesaid, the respondent in breach of its obligation never transferred the PTT amount to my Advocates' client account making it impossible for me to deliver the PTT Clearance Certificate which would only be issued by the ZRA after the property transfer tax amount was paid.*
8. *That I repeat the contents of paragraph 4 above in response to the averments 12(i) of the respondent's affidavit and further aver that the respondent and I agreed that the PTT application would only be made once the respondent had transferred the said PTT amount to my advocates' client account, which amount was never transferred by the respondent in breach of its obligations.*
9. *That the averments contained in paragraph 12(ii)(b) and (c) are true, however the averments contained in paragraph 12(ii)(a) and (d) are false and I aver in response thereto as follows:*
 - i. *That the respondent paid the sum of Forty-Nine Thousand Eight Hundred and Fifty Thousand United States Dollars (US\$49,850.00) and not the sum of Fifty Thousand United States Dollars (US\$50,000) on exchange of contracts as averred; and*
 - ii. *That the respondent paid the sum of Forty-Nine Thousand Seven Hundred and Fifty United States Dollars (US\$49,750.00) and not the sum of Fifty Thousand United States Dollars (US\$50, 000.00) on or around 27th November, 2019 as averred by the respondent.*
10. *That in response to the averment contained in paragraph 12(iii) of the respondent's affidavit, I repeat the averments contained in paragraph 7 of my affidavit and further aver that I have been reliably informed by my advocates, which advise I verily believe to be true, that where time is of the essence of an agreement and at the end of the stipulated period one of the parties demands performance of the agreement thereby waiving the initial time stipulated, he is entitled, if there is a*

continued delay to give the other notice demanding he performs his part of the agreement at a particular time thereby reinstating the condition that time is of the essence of an agreement. If the party given notice fails to perform his obligations, the agreement may be rescinded. Based on the foregoing, I have been advised that the condition on time being of the essence was reinstated by a letter dated 4th November, 2021, written to the respondent by my advocates. Now produced and shown to me as exhibit marked "RIJ 4" is a true copy of the letter aforesaid.

11. That in response to the averments contained in paragraph 12(iv) of the respondent's affidavit, I aver that the balance due as at 8th December, 2020 was US\$211,289.00 and not US\$206,309.00 as erroneously indicated in my affidavit in support.
12. That further to the contents of paragraph 16 above, and in further response to the averments contained in paragraph 12(iv) of the respondent's affidavit, I have been advised by my advocates, which advise I verily believe that the contract relating to the balance of the purchase price has been rescinded and that the said contract is not the subject of the proceeding herein.
13. That the averments contained in paragraph 12(v) of the respondent's affidavit are false and I aver that the respondent and I agreed that the respondent would compensate me for the rent that would have been realised from the properties had the respondents not delayed completion of the transaction. Now produced and shown to me as exhibit marked "RIJ 5" are true copies of the correspondences between the respondent and my advocates evidencing the agreement aforesaid.
14. That further to the contents of paragraph 13 above, and in further response to the averments contained in paragraph 12(v) of the respondent's affidavit, I dispute the respondent's averments that I never fully complied with the terms of the agreement and repeat the averments contained in paragraph 4,5,6,7,8,9 and 10 above.
15. That I deny the averments contained in paragraph 12(vi) of the respondent's affidavit and repeat the contents of paragraph 4 above.
16. That I deny the averment contained in paragraph 12(vii) of the respondent's affidavit and repeat the contents of paragraph 4 above. I further aver that the parties had agreed that the balance of the purchase price would accrue interest owing to the respondent's delay in performing its obligations. Now produced and shown to me as exhibit marked "RIJ 6" are true copies of the correspondences between the respondent and my advocates' evidencing the agreement aforesaid.

17. That I deny the averments contained in paragraph 13 of the respondent's affidavit and aver that I have been reliably informed by my advocates, which advise I verily believe, that following the rescission of the contracts for Sale, the respondent's beneficial interest as the intending purchaser of the properties ceased to exist thus disentitling the respondent from the protection offered to a caveator and by virtue of which the respondent no longer has a caveatable interest in the properties. That I have further been informed by my advocates, which advise I verily believe, that the contract was rescinded in accordance with the law.

18. That in response to the averments contained in paragraph 14 of the respondent's affidavit, I repeat the averments contained in paragraph 22 of my affidavit and further aver that I will be prejudiced if this honorable court does not grant me an order for the removal of the caveats as this will prevent me from dealing with my property freely.

Exhibit was '**RIJ1**' Law of Association of Zambia contract and conditions of sale. The agreement was made on the 5th day of December, 2018, between the applicant and the respondent. The same was duly signed by the parties and witnesses. The Court has noted the special conditions.

More letters were exhibited '**RIJ2**' was a letter confirming that states consent to assign relating to the two properties had been issued. The copies of the same was enclosed. The respondent's Counsel were referred to special conditions 9(ii) in the contract of sale. Mention was made of the plaintiff's intention to apply to Zambia Revenue Authority for assessment of property transfer payable in respect of the transaction. Exhibit '**RIJ3**' was another letter from counsel to the plaintiff to Counsel for the defendant expressing their willingness to complete the transaction notwithstanding the default.

On the 5th May, 2019, Counsel to the defendant proposed that an addendum to the contract of sale be drafted to reflect.

- i. *Balance of the purchase price is the sum of US\$450,150.00 price interest payable in two (2) equal instalments effective 15th June, 2019.*
- ii. *Property transfer tax in the sum of US\$25,000.00 shall be paid upon property transfer tax assessment being used.*

The letters from the 9th May, 2019 from both sides addressed requests to extend payment, proposals for resolving this matter amicably, confirmation of the amount required at completion, acknowledgment by the defendant of not fully complying with the terms of the contract etc. The last letter was dated 30th September, 2021 from the plaintiff's Counsel. The applicant filed their submission on the 27th October, 2022.

The submission began with a summary of the applicant's case against the respondent. The Court is grateful to Counsel for the summary. It addressed the main points and every detail necessary to assist the Court. On whether or not the respondent is beneficially interested therein, I was referred to **section 81(1)(2) of the Lands and Deeds Registry Act**. It was submitted that section 81 reveals that there is a reversal of the burden of proof with respect to applications for the removal of a caveat. The case of **Sobek Lodges Limited V Zambia Wildlife Authority 2008/HP/668** was referred to.

I was also referred to what the learned author of ***Phipson on Evidence, Seventeenth Edition (Thomson Reuters (Legal) Limited (2010)) paragraph 6-06 at page 151*** stated that is-

“So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons.”

It was submitted that **section 81 of the Lands and Deeds Registry Act** should be understood in light of the nature and essence of a caveat as provided for by **Section 76 of the Lands and Deeds Registry Act**. That from this provision a person is only entitled to lodge a caveat on property if they have an enforceable interest in the land or if they are an intending purchaser or mortgagee or if they are transferring an interest in land to another person to be held in trust. That the above criteria is strict and limited because a caveat prevents even the owner from dealing with their own property.

It was submitted that it is important to put into perspective the grounds upon which the caveats were registered against the properties. I was referred to paragraph 4 of the affidavit in support of subparagraph 2.1 of the list of Authorities and Skeleton Argument where it was stated that he is the registered proprietor of the properties and therefore has the requisite locus standi to move this Honourable Court for an order to remove the caveats registered against the properties.

I was further referred to paragraph 6 of the affidavit in support and subparagraph 2.3 of the skeleton arguments that the respondent registered the caveat against the properties as the intending purchaser of the same. That it was not the intention of the framers of the law (**section 76(d)**) for protection to exist in perpetuity. That the protection offered to an intending purchaser is therefore only an interim measure based on the intending purchaser's real existing interest.

That the applicant has testified in paragraph 10 of the affidavit in support that the respondent continuously defaulted on the obligations under the contract of sale and that this continuous default led to the rescission of the contract for sale in the applicant on 4th November, 2021.

It was submitted that following the rescission of the contract of sale, the respondent's beneficial interest as the intending purchaser of the properties ceased to exist thus disentitling the respondent from the protection offered to a caveator and by virtue of which the respondent no longer has a caveatable interest in the properties. On whether the respondent is using the caveats placed on the properties nearly 4 years ago as a final measure as opposed to an interim measure the applicant drew the court's attention to the fact that a caveat is not meant to be a final remedy but an interim measure used by a person to protect his enforceable interest in the land pending further steps or actions. Three reasons were advanced in support of their position:

1. That a caveat in registered ex-parte or without the hearing of the registered owner of the property. It is trite law that a final order or Judgment cannot be made against a party without the party being heard. The Court held to referred to the case of **Mulenga v Mumbi Ex- parte Mhango (1975) Z.R 78 and Bank of Zambia (As Liquidator of credit Africa Bank limited (in liquidation) v Al Shams Building Material Trading company Limited Appeal No. 16/2017)**.
2. Secondly, that according to the learned author **Halsbury Laws of England 4th Edition Volume 36(2)** paragraph 871, a caveat cannot remain in force for more than 6 months. The learned authors opine, “the judge may overrule any caveat, but no caveat in any case remains in force for more the six months from the date upon which it was entered” that although the said authority is persuasive, it can be seen that in England (a common law country from which we derive most of our legal principles from) a caveat cannot exist in perpetuity as it is meant to be interim measure.
3. That from a reading of the case of **Sobek Lodges Limited v Zambia Wildlife Authority 2008/HP/668**, it can be seen that Dr. Justice Matibini SC (as he was then) in ordering the removal of the caveat seemed to agree with the applicant’s submission that the lodging of the caveat was not a final remedy but an interim measure and frowned upon the respondent’s inertia since lodging the caveat in 1993.

It was submitted that the caveats placed on the properties 4 years ago should not be used as a final remedy against the applicant as that will result in injustice and an abuse of process.

On whether the respondent is interfering with the applicant right as the registered proprietor of the properties. That the adverse effects of a caveat being lodged on a property were aptly put by Scott J in **Construction and Investment Holding Limited v William Jacks and Company Zambia Limited (1972) Z.R. 66¹**, who observed as follows:

“The effect of a caveat is that the registrar of Lands and Deeds is forbidden to make any entry on the register having the effect of charging or transferring or otherwise affecting the estate or interest protected by the caveat. The registered proprietor is therefore prevented from showing a clear title ... This means that the registered proprietor is prevented from showing a clear title and dealing with his property as he might wish to do and would be able to do but for the caveat”

The respondent in their final submission referred the court to what they termed as the salient terms of the contract of sale entered into between the applicant and respondent date 5th December, 2018 as follows:

1. *The properties are sold subject to the Law Association of Zambia General Conditions of sale 1997 so far as the same are not inconsistent with or varied by these special conditions.*
2. *The period fixed for obtaining state’s consent any other necessary licences to assign shall be 4 weeks from the date of the contract.*
3. *The date fixed for completion in respect of each property shall be within 14 days of receipt of the Tax Clearance Certificate issued by Zambia Revenue Authority and which certificate for each property shall be applied for within 7 days of receipt of the respective state’s consent to assign for each property.*
4. *The total purchase price of Five Hundred Thousand United States Dollars (US\$ 500,000.00) shall be paid as follows;*
 - i. *Ten percent (10%) of purchase price in the sum of Fifty Thousand United States Dollars (US\$50,000.00) on execution of contract.*
 - ii. *Fifty percent (50%) of the purchase price in the sum of Two Hundred and Fifty Thousand United state Dollars (US\$ 250,000.00) upon the vendor obtaining stat’s consent to assign.*
 - iii. *The balance on completion.*

5. *Each party shall bear its own costs relating to this transaction but the purchaser shall bear the property transfer tax payable to Zambia Revenue Authority.*

From the evidence before me there is no doubt that there was a contract of sale between the plaintiff Rashmi Ishverdatt Joshi (the Vendor) and Grandview Properties Limited (the Purchaser). That the sale was for property at the price of United States Dollars \$500,000.00. The properties in question are a piece of land in extent of 0.2048 hectares (subdivision No. 70 of farm No. 284a Fairview Lusaka) and another piece of land in extent 0.0198 hectares (subdivision No. "A" of subdivision No. 71 of farm No. 284a Fairview Lusaka).

The agreed terms were that the purchase price of five hundred thousand United States Dollars shall be paid as follows:

- I. *Ten percent of purchase price in the sum of fifty thousand United States Dollars (US\$50,00.00) on execution of contract.*
- II. *Fifty percent (50%) of the purchase price in the sum of two hundred and forty thousand United States Dollars (US\$250,000.00 upon the vendor obtaining State's consent to assign.*
- III. *The balance at completion.*

According to the plaintiff's evidence the defendant owes the amount of USD229,160.00 and wants to treat the contract of sale dated 5th December, 2019 as rescinded.

The defendant has not disputed that there is an amount owed. That what was paid was US\$389,600,000 towards the purchase price and not Two hundred and ninety-three thousand six hundred and ninety (293,691,00) as stated.

According to the defendant the reason for the delay is based on the fact that the contract was subject to the Law Association of Zambia General Conditions of Sale 1997, which required the applicant to obtain the property tax clearance certificate in respect of the transaction and delivery of the same to the purchase on completion.

That not only was the vendor notified of obtaining the property tax clearance certificate, he was notified that an application had been lodged to the Zambia Revenue Authority for property transfer tax clearance.

From the evidence before me it is a fact that the applicant demanded for settlement of the completion amount, as well as an Order that the caveat placed on subdivision No. 70 of farm No. 284a and subdivision a of subdivision No. 71 of farm on 284a should be removed.

It is a fact that the exhibited certificate of title number 108 381 of farm No. 284a and certificate title No. 108 382 subdivision A of

subdivision No. 71 of farm 284a is in the name Rashmi Ishverdatti Joshi as the tenant or lessee.

It is a fact that exhibit '**R1J2**' the Law Association of Zambia contract and condition of sale is clear that there was an agreement made between Rashmi Ishvedatt Joshi of Lusaka (the vendor) and Grandview Properties Limited a company (the purchaser) for the sale of the properties. There was no dispute that the properties were sold subject to the Law Association of Zambia General Conditions of Sale 1997.

It was not disputed that on the 5th December, 2019 Counsel for the applicant informed Counsel for the respondent that their client was treating the contract of sale dated 5th December, 2019 as rescinded.

What followed was a promise to pay within twenty-one (21) days after the 2nd September, 2021. When the extension was rejected Counsel for the respondent was informed that the applicant was willing to extend the period to 30th September, 2021 and not October, 2021. Again, the respondent was informed that if payment is not received the applicant will proceed to treat the contract of sale dated 5th December, 2019 between their respectively clients as rescinded. For the second time the applicant stated that the caveats be withdrawn.

The period of settlement of completion was extended to the 31st October, 2021 the amount owed was USD231,129.00. The anticipated delivery to them of the registered withdrawal of the

caveat covering both properties was given as the 15th November, 2021.

It is a fact that in yet another letter Counsel for the applicant wrote to Counsel for the respondent that their client had failed to fulfill its obligation under the contract of sale that their client now treats the said contract as rescinded. That what should follow is proof of the withdrawal of caveat among other things.

The law relating to removal of caveats is the **Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia** and in particular **section 81** which provides as follows:

1. *Such Registered Proprietor or other interested person may, if he thinks fit, summon the caveator, or the person on whose behalf such caveat has been lodged, to attend before the Lands Tribunal, Court or a Judge thereof to show cause why such caveat should not be removed.*
2. *Such Lands Tribunal, Court or Judge, upon proof that such person has been summoned, may make such Order in the premises either ex-parte or otherwise, as to such Lands Tribunal, Court or Judge seems fit.*

Section 81 reveals there is a reversal of the burden of proof with respect to applications for the removal of a caveat. The learned author of ***Phipson on Evidence Seventh Edition (Thomson Reuters (Legal) Limited (2010) Paragraph 6-06 at Page 151*** states as follows:

So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. It is an ancient rule founded

on considerations of good sense and should not be departed from without strong reasons.

In the case of ***Sondashi v Daily Nations 2015 ZMCH 122*** the court made it clear that a closer reading of the Lands and Deeds Registry Act reveals that there is a reversal of the burden of proof with respect to applications of removal of a caveat.

That although the application for the removal of the caveat is at the instance of an applicant section 81 of the above Act places the burden of showing cause why a caveat should not be removed at the doorstep of the respondent.

Based on the grounds upon which the caveat was registered against the company there is no doubt in my mind that the applicant is the registered proprietor of the properties.

What this means is that he has the requisite locus standi to move this court for an Order to have the caveats registered against the properties removed. Further it has been shown that the respondent registered the caveats against the properties as the intending purchaser of the same. An intended purchaser is just that, that is a person with the intent to buy something expected to be such in the future.

I also agree that it was not the intention of the framers of the law that is ***section 76(d) of the Land and Deeds Registry Act*** to offer protection in perpetuity. That the protection offered to an intended purchaser

is therefore only an interim measure based on the intending purchaser's real existing interest.

The continuous default on the obligations under the contract of sale has led to the rescission of the contract for sale. What this has done is it has led the respondent's beneficial interest as the intending purchaser of the properties' case to exist. This in turn disentitles the respondent from the protection offered to a caveator and by virtue of which the respondent no longer has a caveable interest in the properties.

It is not intended that a caveat should be a final remedy but an interim measure used by a person to protect his enforceable interest.

For the reasons stated to allow the respondent maintain the caveat that was entered on the 17th December, 2018 in respect of subdivision No. 70 of farm No. 284a and subdivision A of subdivision No. 71 of farm No. 284a Bwinjimfumu road Fairview Lusaka would be unjust.

I order that that the caveats placed on subdivision No. 70 of farm No. 284a and subdivision A of subdivision No. 71 of farm No. 284a should be removed.

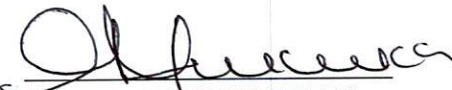
In the Law of Contract, rescission is the cancellation of a contract so that the parties assume positions as existed before the contract was entered into. Once rescinded the contract is treated as though

it never existed and neither party can claim on it. In the case before me the reason given was that no payments were forth coming despite numerable promises. Having ordered the removal of the caveat it follows that the contract is cancelled and the parties assume positions as existed before the contract was entered into. In the matter before me the remedy of rescission is available to the applicant. I say so because the underlying basis for making a contract was fundamentally tainted. The conduct of the respondent undermined the very reason that the parties entered into the contract. The applicant has the right and has indeed exercised his right to rescind the contract. What this means is that the entire contract is set aside. The outcome of the rescission is-

- 1. Whatever was done by the applicant and the respondent when they entered the contract is reversed.*
- 2. The applicant and respondent are put back in the position they would have been in as if the contract was never made.*

I further order that the cost of and occasioned by this application should be borne by the respondent.

DELIVERED AT LUSAKA THIS 15TH DAY OF JANUARY, 2024.


G.C. CHAWATAMA
HIGH COURT JUDGE