**SIBONGO v SHANKANGA (1969) ZR 149 (HC)**

HIGH COURT

MAGNUS J 40

17th OCTOBER 1969

**Flynote and Headnote**

[1]   **Equity - Relief - Breach of confidence - Plaintiff without clean hands - Relief cannot be granted.**

   An officer of a public organisation, in a position of trust with regard to confidential information received by him in the course of his

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   duties, does not come "with clean hands" if he has utilised that information for his own ends, and cannot be granted equitable relief.

[2]   **Equity - Breach of trust - Public servant - Gain from breach - No resulting trust.**

    5 An officer of a public organisation who gains as a result of a breach of confidential information obtained in the course of his duties does not hold those gains on a resulting trust for the person from whom the information was obtained.

[3]   **Civil procedure - Pleadings - Claim for further relief - Extends only to**10 **ancillary orders.**

   A claim for further relief only extends to ancillary orders and does not admit a major claim, which must be separately and specifically claimed.

*Mwisiya,* for the plaintiff. **15**

*Shamwana,* for the defendant.

**Judgment**

**Magnus J:** The plaintiff in this case claims to be the owner of Farm 916 Lusaka which he alleges he purchased from the Administrator -General as personal representative of the late Alan Cary Berrington in December, 1967, for the price of K2,000. The agreement for the sale 20 according to the statement of claim was executed on 21st February, 1968 but on the 31st January, 1968 the defendant lodged a *caveat* claiming to be himself entitled to possession of this land for reasons which are set out in the defence to which I will refer later. As a result of this *caveat* the conveyance from the Administrator -General to the plaintiff cannot be 25 registered and the plaintiff claims:

   1.   A declaration that the defendant whether by himself or by servants or agents or otherwise is not entitled to remain on Farm 916 for any purpose whatsoever;

   2.   An injunction restraining him from remaining on the land;

   3.    An order that the defendant withdraw the *caveat;*

   4.   Damages;

   5.   Further or other relief.

The defendant by his defence disputes the claim of ownership made by the plaintiff and says that he entered upon the land in October, 1967, 35 that he informed the Administrator -General of his presence there; that he had applied for permission to sell opaque beer thereon and that the Administrator -General validly permitted the defendant to remain on the farm and trade thereon. He goes on to say that he maintained his beer garden on the farm till the end of 1967 and that in November of that year 40 he asked the Administrator -General to sell him the farm. The Administrator -General having indicated that the farm was for sale and that the defendant could buy the farm, he applied to the Credit Organisation of Zambia for a commercial loan to buy it. He was there interviewed by the plaintiff who was at the time a servant of the Credit Organisation. He 45 furnished the plaintiff with particulars of the farm and at the request of

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the plaintiff under the pretext of viewing the property, the defendant actually took the plaintiff to the farm where he was assured that his application would be referred to the Board for consideration. The defendant alleges that the plaintiff as a servant of the Credit Organisation of Zambia promoted his own interests by making use of the information 5 which was given to him in his confidential capacity by the defendant; that his act of paying the sum of K2,000 to the Administrator -General and entering into the subsequent contract was fraudulent and that the defendant lodged a *caveat* in order to protect his existing interests. The defendant proceeds to counter - claim for damages for loss of profits of 10 K24,000 on the ground that, on the strength of the plaintiff's fraudulent purchase the plaintiff procured the District Secretary to refuse him a valid licence, although apparently one was issued after a delay of about eight months in August. It is for the loss of profit during these eight months that the defendant counter - claims and apart from damages also claims "further 15 appropriate relief". The reply, apart from joining issue, states that the District Secretary never had authority to grant licences or to permit the defendant to trade on the plaintiff's farm without his authority and repeats that the defendant had and still has no authority whatsoever to remain on the said property for any purpose whatsoever. 20

This is the case on the pleadings. (The learned judge then considered the evidence in detail).

The following facts emerge. The defendant had been operating a beer hall on this farm since October, 1967. The defendant, the plaintiff and three other persons were invited (by the Administrator -General) to 25 tender for the sale of this farm. The plaintiff's tender was successful and I have little doubt that in law the plaintiff is the legal owner of the farm The question arises, however, whether there is any equitable reason why he should be prevented from exercising his rights as owner. First of all, I should point out that the relief claimed by the plaintiff is throughout 30 equitable relief, and it is a well established maxim that "he who comes to equity must come with clean hands" and "he who seeks equity must do equity". There is no doubt here that at the material time the plaintiff was an officer of the Credit Organisation of Zambia and as such was in a position of trust. If he abused this position by making use of information 35 acquired by him in confidence in the course of his duties in order to obtain a personal advantage for himself he cannot be said to be coming to this court "with clean hands or to have done equity". I have, however, to decide whether this in fact did happen. Again it is clear on the evidence of the plaintiff that for some time at least during 1967 he had been looking 40 round for some farm property on which he says he wished to establish his father - in - law. These properties, he said, were all too expensive and the offer of the sale of Farm 916 at the low price of £1,000 would appear to have been providential in the circumstances. However, he says that his appearing as one of the tenders to the property together with the 45 defendant was purely coincidental and had nothing whatsoever to do with any information which he may have gathered from the defendant. With regard

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to the defendant approaching him, it is common ground that they were old acquaintances and he says that the defendant's visit to him at what I will for convenience call the "Land Bank" (the former name of the Credit Organisation of Zambia) had nothing whatsoever to do with the defendant 5 seeking a loan from the Credit Organisation of Zambia. The only loan which, according to the plaintiff, the defendant was seeking was a personal loan of £50 which the plaintiff refused and the main purpose of the defendant coming to see him was to invite him to enter into partnership with him in an unspecified enterprise upon which the defendant proposed 10 to embark. The plaintiff denies that he went with the defendant to view the property or that he went anywhere near the property until after his tender was accepted in late December. On these points the plaintiff is in direct conflict with the defendant who says that he did go together with another person, the 4th defence witness, Mr Mwananyau, to obtain forms 15 for a loan from the Credit Organisation of Zambia. He and Mr Mwananyau both affirm that this was the purpose of the visit, that the defendant asked the plaintiff for forms, that the plaintiff asked him what the forms were required for and that the defendant gave him full details of his purpose. Both the defendant and his witness affirm that the forms were 20 handed over and that the defendant was asked to come back at 4.30 p.m. which presumably would be after the office of the Land Bank would be closing. The defendant says that he came back with these forms duly completed, that he handed them over to the plaintiff who then said that, before his application could be considered, it would be necessary for the 25 plaintiff to view the property, which they proceeded there and then to do in the plaintiff's car. The defendant described this visit in some detail including a view of the well which the defendant said he intended to develop to ensure that all the inhabitants of the compound would have adequate water supplies. This visit, denied by the plaintiff, would seem to be 30 borne out by the first witness for the defence who, although he was not sure of dates, was adamant that it was well before Christmas and put it at some time after the end of October but probably sometime in November and this witness particularly remembered the parties inspecting the well. This particular witness struck me as being an honest witness and I have no 35 reason to disbelieve him. Nor, for that matter, have I any reason to disbelieve the defendant himself. My view of the evidence seems to be strengthened when I look at the correspondence. The letter of the 9th December, 1967 written on behalf of the Administrator -General to all interested parties contains the phrase "if you are *still* interested in buying 40 the property". This would seem to imply a previous inquiry about *this* property and an approach by the plaintiff to the Administrator -General with regard to this particular property, an approach which the plaintiff denies having made. Then on the 9th January, 1968 the defendant writes to the plaintiff: "You very well know that I came to see you at your office 45 as a public servant who is in charge of loans and not only that, I wished to be directed by you how forms for loans could be obtained" and then sets out that, having seen him twice and after telling him all the particulars "then you got a loan to yourself after telling me to see you later." This is a clear allegation of what the defendant has at all times alleged took place

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and one would have expected that, if this were a false allegation, the plaintiff would have sent an indignant denial either through himself or his solicitors; instead of which he did nothing except try to get the defendant ejected and his licence cancelled. Coupled with the fact that the plaintiff, on his own evidence, was interested in getting just such a property as this 5 at just such a price as this one makes it probable to my mind that what happened was precisely what the defendant said happened. [1] That being so, I am quite clear that the plaintiff took advantage of his position as an officer of the Credit Organisation of Zambia and acted on the confidential information given to him by the defendant to steal a march on him and bid 10 for the property himself. The plaintiff has himself admitted that an officer of the Organisation acting in this manner would be doing something wrong and I come to the conclusion therefore that the plaintiff, not having come with clean hands, is not entitled to the equitable remedy which he seeks and I dismiss his claim accordingly with costs. There is, however, the 15 question of the defendant's counterclaim. This is a claim for damages for having been kept out of his business for about eight months and "further appropriate relief". I have considered very carefully the question of whether there might not have been a resulting trust in favour of the defendant arising out of the plaintiff's conduct in this matter, There is no 20 doubt that on the authorities relating to resulting trusts, the defendant does not come within the recognised principles so far laid down. [2] There has, however, been a move in this direction in the development in recent years of the law relating to confidential communications but I do not think that it is quite developed far enough to include resulting trusts 25 arising as a result of a breach of  confidential communication, most of the law on the subject being confined to the exploitation or revelation of business secrets and to take this any further would to my mind, amount to the creation of new case law. Were it necessary or permissible I would have no hesitation in doing so but I cannot see where on the pleadings I can so 30 find in favour of the defendant. Mr Shamwana has suggested that the term "further appropriate relief" in his counter - claim would open the door to my so finding in favour of his client. [3] It is however, well settled that a claim for further relief only extends to ancillary orders and does not admit a major claim of this nature so that I regret that if Mr Shamwana 35 wishes to create new law on the subject he will have to begin fresh proceedings for the purpose, setting out the relief claimed clearly in a formal statement of claim. With regard to the general claim for damages, as I have said the legal ownership in this property undoubtedly vests in the plaintiff and in order to establish a claim for damages the defendant would 40 have to go further than he has done so far and establish a right on his part to reside in the property. My decision in this case does not establish such right. It is, in the terms used by Lord Denning in another case and in a different connection, "a shield and not a spear". I have merely refused the plaintiff the equitable relief which he seeks, thereby preventing the 45 plaintiff in these proceedings from ejecting him. This is a far cry from saying that the defendant, is entitled to remain on the premises and he is not, therefore, entitled at this stage to claim damages. The counter - claim is therefore dismissed, but as I do not think that has in any way affected the

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costs of this action I will dismiss the counter - claim without any order as to costs.

*Claim dismissed*