

G.F. CONSTRUCTION (1976) LIMITED AND RUDNAP (ZAMBIA) LIMITED AND UNITECHNA LIMITED

SUPREME COURT
CHAILA, MUZYAMBA AND LEWANIKA, JJ.S.
22ND JUNE AND 22ND JULY, 1999.
(S.C.Z JUDGMENT NO. 18 OF 1999)
S.C.Z. APPEAL NO. 150 OF 1998

Flynote

Land Law - Contract of Sale - Specific Performance .

Headnote

The first respondent was the registered owner of Stand Number 1864, Chingola and the appellant was a foreign owned company. Sometime in December, 1986, the 1st respondent and the appellant entered into some negotiations for the sale and purchase respectively of the stand and following those negotiations the appellant paid the agreed purchase price of K55,000 and took possession of the premises. At the time, there was only a dividing wall fence. Upon taking possession of the premises the appellant made some improvements which were put at K5,127,000 at the time of the trial. Later, the first respondent sold the stand to the second respondent. The appellant then entered a caveat on the property and sued for specific performance of the contract. In refusing to order specific performance, the learned trial judge held that the contract was illegal and void as the appellant held no Investor's Licence in terms of Section 13A subsection (2) (a) of the Land (Conversion of Titles) (Amendment) (No.2) Act No.15 of 1985 (hereinafter call the 'the Act') On appeal,

Held:

- (i) That the absence of an Investor's Licence does not render a contract illegal, null and void but merely unenforceable and that it is an irregularity which is curable.

Cases referred to:

1. Gideon Mundanda v Timothy Mulwani and Agricultural Finance Company Limited and S.S.S. Mwiinga 1987 Z.R. 29
2. Hilary Benard Mukosa v Michael Ronaldson 1993 Z.R. 25
3. Mahmoud v Ispahani 1921 2 K.B. 716

For the Appellant: W. Mubanga, Permanent Chambers
For the Respondent: J.H. Adams, J.H Adams and Company

Judgment

MUZYAMBA, J.S.: delivered the judgment of the court.

This is an appeal against a High Court refusal to order specific performance of a contract of sale of land. There is a cross appeal against the order of refund of the purchase price and refusal to order mesne profits.

The facts of this matter are that the first respondent was the registered owner of Stand Number 1864, Chingola and the appellant is a foreign owned company. Sometime in December 1986 the 1st respondent and the appellant entered into some negotiations for the sale and purchase respectively of the stand and following those negotiations the appellant paid the agreed purchase price of K55,000 and took possession of the premises. At the time there was only a dividing wall fence. Upon taking possession of the premises the appellant made some

improvements which were put at K5,127,000 at the time of the trial. Later the first respondent sold the stand to the second respondent. The appellant then entered a caveat on the property and sued for specific performance of the contract. In refusing to order specific performance the learned trial Judge held that the contract was illegal and void as the appellant held no Investor's licence in terms of Section 13 A Subsection (2)(a) of the Land (Conversion of titles) (Amendment) (No.2) Act No. 15 of 1985, hereinafter called the Act.

On behalf of the appellant, Mr. Mubanga filed and argued five grounds of appeal. We propose to deal with ground 1 first and depending upon what we say on this ground we may turn to other grounds and the cross appeal.

Mr. Mubanga argued that the learned trial Judge erred in law and fact by holding that the contract was illegal, null and void because the absence of an Investor's licence at the time of the agreement was a curable irregularity which was in fact cured when the appellant obtained the licence on 11th April, 1990. To support his argument he cited a number of cases, two of which we shall be referring to shortly. In response Mr. Adams argued that Section 13 A of the Act was prohibitive and not contemplative and therefore that a licence was a pre-requisite to any agreement for the sale of land to a non-Zambian. In support of his argument he cited the case of *Ispahani* (3) where it was held that as the defendant had no licence under the Seeds, Oils and Fats Order 1919 made under the Defence of the Realm Regulations to buy Linseed Oil from the plaintiff the contract of sale was illegal and no Claim could be made under it. That the learned trial Judge was therefore right in holding that the contract was illegal and void.

We have considered the arguments advanced by both learned Counsel. Section 13 A (1) and (2)(a) of the Act provides:

- "13A. (1) No land in Zambia shall, as from the 1st April 1985 be granted, alienated, transferred or leased to a non-Zambian: provided that nothing herein shall be so construed as to affect any interest or right acquired by any person prior to that date
- (2) Subject to complying with any other provisions and procedures relating to the alienation of land or the obtaining of the consent of the President, a non-Zambian shall be exempt from the provisions of subsection (1) under the following circumstances:
- (a) If it is a person who has been approved as an investor in accordance with the Industrial Development Act or any other law relating to the promotion of investment in Zambia."

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."

In that case the first respondent agreed to sell part of his farm to the appellant. The agreed purchase price was K20,000 but there was no State Consent to sell as required by Section 13 (1) of the Land (Conversion of Titles) act 1975. In *Mukosa* case (2), a case in point with the present case this court said at page 28:

"In the case at present before us what is required is not the type of consent which is required of and normally available to everyone, such as the presidential consent required by s.13 of the Land (Conversion of Titles) Act or the consent required in the *Kulamma* case. The respondent requires a special exemption without which is debarred

from purchasing the property. The respondent applied for an injunction and, although he swore affidavits in support of his application averring that he was of Malawian nationality, at no time did he aver that he was a person who had been approved or who had even applied to be approved as an Investor in accordance with the Industrial Development Act or any other law. Nor did he give any other reason for exemption.

An injunction will be granted only to a plaintiff who establishes that he has a good arguable claim to the right he seeks to protect. We accept that the respondent is presumed to intend to proceed legally, but in order to establish a good arguable case he must show at least that he is eligible for exemption under 13A (2). There can be no presumption about this. On the evidence before the Court below and ourselves the respondent is prima facie prohibited from purchasing land in Zambia and no injunction restraining the appellant from parting with possession of the land should have been granted."

In that case the respondent, a Malawian national occupied the appellant's farm in Makeni and when he learnt that the appellant intended to part with possession of the farm to a third party he commenced an action against the appellant for a declaration that he was a protected tenant and obtained an injunction restraining the appellant from parting with possession of the farm.

In the instant case the first respondent knew that the appellant was a foreign owned company and that they needed an investor's licence in order to conclude the sale. This is evident from document No. 51 of the record of appeal. Paragraph 2 thereof reads:

"Kindly note also that if the company is not wholly owned Zambian company, you have to obtain a letter on their behalf from the Ministry of Commerce certifying that your clients are registered as Investors under the Investment Act."

There was evidence at the trial that the appellant had not only applied for but obtained the exemption under Section 13 A (2) (a) of the Act. This case is therefore distinguishable from *Mukosa* case (2). We would therefore agree with Mr. Mubanga that the absence of an Investor's licence does not render a contract illegal, null and void but merely unenforceable and that it is an irregularity which is curable. The appeal would therefore succeed on this ground and in view of what we have said here we do not intend to consider the other grounds.

As regards the cross appeal Mr. Adams argued that the learned trial Judge erred in ordering refund of the purchase price to the appellant because in law any money paid under an illegal contract is not refundable but forfeitable.

We have already found that the contract was not illegal and therefore the cross appeal must necessarily fail on this ground. On mesne profits, these are damages awarded to a landlord for holding over a tenancy by a tenant. In this case there was no relationship of Landlord and Tenant between the appellant and first respondent. Nor was there an agreement between them that before completion the appellant would pay rent to the first respondent. The cross appeal would fail on this ground too. It is dismissed.

The main appeal having succeeded we order specific performance of the contract of sale between the appellant and first respondent and to facilitate this we order cancellation of the Certificate of Title, if any issued in the name of the second respondent and a refund of the purchase price paid by the second respondent and we grant the appellant vacant possession of the stand. In the event that the first respondent refuses to sign the deed of assignment the same shall be signed on their behalf by the Registrar of the High Court.

The appellant will have costs of the appeal and cross appeal to be taxed in default of agreement.
