

DEVELOPMENT BANK OF ZAMBIA AND LIVINGSTONE SAW MILLS LIMITED v JET CHEER DEVELOPMENT (Z) LIMITED

Supreme court
Ngulube, CJ, Muzyamba and Lewanika JJS
9th August, 2000 and 15th September, 2000
(SCZ Judgment No. 33 of 2000)

Flynote

*Land Law – Notice to Complete – Whether to take a particular form.
Civil procedure – Remedies – Specific performance – conditions of award.*

Headnote

This is an appeal against an order of specific performance by the High Court at Lusaka. The facts in this case are that Zambezi Sawmills [1968] Limited, a subsidiary of ZIMCO, in voluntary liquidation, owned Stands 2642 Livingstone, 4349A Mulobezi and 1524 Sesheke in Western Province. Stand 2642 was mortgaged to the first appellant for a loan of US \$1,064,000.00 and K11,600,000.00. The mortgage deed provided for appointment of a receiver in the event that Zambezi Sawmills [1968] Limited failed to repay the loan or the balance outstanding on demand. Zambezi Sawmills [1968] Limited failed to honour its obligations under the mortgage and first appellant appointed a receiver/manager. On 24th December 1988, the first appellant entered into a contract for the sale of Zambezi Sawmills [1968] Limited Stands with the respondent. The respondent then issued two cheques to the first appellant for US \$585,000.00 and US \$487,205.00 which were dishonoured by its bank. On 8th March 1999, the first appellant gave the respondent 14 days to complete the purchase.

The respondent did not comply with the notice and the first appellant rescinded the contract. After the contract had been rescinded, the receiver without the knowledge of his principal obtained duplicate certificates of title for the stands and executed the assignments for the conveyance of the stands to the respondent. The learned trial Judge in the court below ordered specific performance and hence this appeal.

Held:

- (i) A notice to complete need not be in any particular form. It is sufficient if it requires a party to the contract to perform part of his obligation by a certain date failing which the contract would be rescinded.
- (ii) Specific performance is an equitable relief and the maxim that applies in a case of this nature is "*He who comes to equity must come with clean hands.*"

L P Mwanawasa, SC, of Levy Mwanawasa and Company and A D Dudhia of Musa Dudhia and Company for the first appellant.

A M Wood of A M Wood and Company for the second appellant.

H H Ndhlovu of H H Ndhlovu and Company for the respondent.

Judgment

MUZYAMBA, JS, delivered the judgment of the court.

This is an appeal against an order of specific performance by the High Court at Lusaka. The facts in this case are that Zambezi Sawmills [1968] Limited, a subsidiary of ZIMCO, in voluntary liquidation, owned Stands 2642 Livingstone, 4349A Mulobezi and 1524 Sesheke in Western Province. Stand 2642 was mortgaged to the first appellant for a loan of US \$1,064,000.00 and K11,600,000.00. The mortgage deed provided for appointment of a receiver in the event that Zambezi Sawmills [1968] Limited failed to repay the loan or the balance outstanding on demand. Zambezi Sawmills [1968] Limited failed to honour its obligations under the mortgage and the first appellant appointed one Godfrey Mbulo receiver of the mortgaged property. Clause 3:1 of the Deed of Appointment reads:

"In the exercise of its statutory power in that behalf and in pursuance of the said provisions contained in the said legal mortgage and charge (the Charges") the Mortgagee HEREBY appoints the RECEIVER/MANAGER to be the Receiver/Manager of the income of the charged/mortgaged property and to exercise all the receivers/managers' power as hereby conferred by the charges."

On 24th December 1998, the 1st appellant and ZIMCO entered into a contract for the sale of Zambezi Sawmills [1968] Limited stands to the respondent. The Receiver signed on behalf of the 1st appellant and one Brian Musonda signed on behalf of ZIMCO in his capacity as Liquidator. On 28th April 1999, a second contract for the sale of the stands was signed between the Receiver on behalf of the 1st appellant and Arthur Ndhlovu on behalf of Brian Musonda and Wadi Al Rawda Trading of Dubai as purchaser. The 2nd appellant is a nominee of the latter.

We will hasten to say here that the proceedings in the court below and the appeal concerned the first contract. On 1st April 1999, the respondent, by power of Attorney, appointed one Germano Mutale Kaulung'ombe of Marshall Chambers its lawful attorney to execute all acts, documents, deeds for the purchase and completion of acquisition of Zambezi Sawmills [1968] Limited.

The respondent then issued two cheques to the 1st appellant for US \$585,000 and US \$457,205 which were dishonoured by its bank. On 8th March 1999, the 1st appellant gave the respondent 14 days notice to complete the purchase. The notice read:

"Zambezi Sawmills [1968] Limited; DBZ And ZIMCO in Liquidation to Jet Cheer Development Company Limited – Notice of Rescission of Contract of Sale Please refer to the above matter and to your clients letters in the above matter dated 15th February 1999, and their last facsimile message dated 3rd March 1999, all which confirm your client's failure to complete the above sale transaction by way of

payment of US \$585,000 payable on completion, notwithstanding the Bank depositing the cheque for the said US \$585,000 twice upon your clients express instructions. As a result of the aforesaid default, the Bank would like to advise that it has decided to give your clients fourteen (14) days within which to pay the completion amount from the date of this letter after which they should consider the contract cancelled and further be advised that your clients shall also forfeit the 10 percent deposit paid upon execution of contracts. Finally, but not the least interest of thirty percent (30 percent) per annum is payable on the completion amount of US \$585,000 from 5th February 1999, to date of full payment as per this our final notice."

The respondent did not comply with the notice and the 1st appellant rescinded the contract. After the contract had been rescinded, the receiver, without the knowledge of his principal and with fraudulent concurrence of Mr Kaulung'ombe obtained duplicate certificates of title for the stands and executed assignments for the conveyance of the stands to the respondent. On these facts the court below still ordered specific performance of the contract and hence this appeal. Various grounds of appeal were filed and detailed heads of argument were filed on behalf of all the parties for which we are indebted.

We propose to deal with only two grounds, namely, whether or not the notice to complete was valid and the contract properly rescinded and whether or not the relief of specific performance is available to a party who comes to court or equity with dirty hands.

The learned trial Judge held that the notice to complete was not valid because it did not satisfy the 'requirements of a notice to complete' and because it was given by the 1st appellant who had no right to give the notice. It was argued by Mr Mwanawasa that this holding was wrong because there was no format for a notice to complete and that the 1st appellant, as vendor was the right party to issue the notice to complete. We entirely agree with Mr Mwanawasa that a notice to complete need not be in any particular form. It is sufficient if it requires a party to the contract to perform part of his obligation by a certain date failing which the contract would be rescinded. The notice in this matter required the respondent to pay the purchase price by 22nd March 1999, failing which the contract would be rescinded and it was so rescinded after the respondent failed to pay the purchase price. We also agree with Mr Mwanawasa that the 1st appellant, as vendor had the right to issue the notice to complete. The contract was therefore properly rescinded and the 1st appellant was in a perfect position to enter into another contract with a third party. The appeal succeeds on this ground.

As regards the second ground, the letter at pages 372 to 377 of volume II of the record of appeal by the Registrar of Lands and Deeds Registry to Marshall Chambers clearly exposes the fraudulent activities of Mr Mbulo, the receiver and Mr Kaulung'ombe, the respondent's lawful Attorney. The letter, which is common cause reveals that Mr Kaulung'ombe prepared and swore a false affidavit that the certificates of title for the stands could not be traced at the 1st appellant's offices when in fact this was not true. This was to obtain duplicate certificates. The letter also reveals that Mr Kaulung'ombe prepared assignment for the conveyance of all the stands in the name of Mr Mbulo for and on behalf of the 1st appellant knowing that Mr Mbulo's authority was limited only to the mortgaged property. These were no doubt fraudulent acts on the part of Mr Kaulung'ombe and as lawful Attorney of the

respondent they soiled the respondent's hands. We condemn such behaviour, especially when committed by an Advocate as it tarnishes the image of the legal profession which is noble and to which we also belong. Specific performance is an equitable relief and the maxim that applies in a case of this nature is: "*He who comes to equity must come with clean hands.*"

As we have demonstrated above, the respondent in seeking specific performance did not come to court or equity with clean hands. The relief or specific performance was therefore not available to it. The appeal succeeds on this ground too.

We therefore set aside the order of specific performance and order refund of all monies paid in pursuance of the contract. We also order vacant possession of the properties. For this purpose the respondent is at liberty to apply to the Deputy Registrar for the time within which to vacate, if it so requires. We award costs in this court and in the court below to the appellants and they are to be taxed in default of agreement.

Appeal allowed