

**AUDREY WAFWA GONDWE v SUPA BAKING COMPANY LIMITED (IN LIQUIDATION)
AND V.U. AKUBAT**

Supreme Court

Ngulube, C.J., Sakala, Ag. D.C.J. and Chisakunda, J.S.

1st February, 2001, and 23rd May, 2001

(SCZ Judgment No. 9 of 2001)

Flynote

Contract – Vendor and purchaser - Vendor unable to pass good title – Effect of where vendor responsible for such failure.

Land law – Bona fide purchaser for value without notice - Damages for loss of bargain - When applicable.

Headnote

This is an appeal against the dismissal of the plaintiff's claim for an order that the defendant (the respondent to this appeal) do sell to her half of the semi-detached house occupied by her as an employee. There was evidence that the liquidator of the respondent offered to sell the semi-detached house to the appellant for K19 million. She wrote back asking that the price be reduced. The liquidator replied refusing to reduce the price but instead extended the deadline within which she must accept the offer and pay the required deposit. There was a dispute whether she had accepted the offer within the extended deadline or if she was late so that the offer had lapsed. The learned trial judge found that she was late and the offer had lapsed, so that there was no concluded contract. It transpired at the trial that the property had already been sold to the third party long before the first offer and the extended offer by the liquidator.

Held:

- (i) The third party was an innocent purchaser for value without notice of an adverse claim.
- (iii) The rule that where the non-performance of the contract resulted from the vendors inability to make a good title, the purchase could not recover damages for loss of the bargain; but only damages limited to expenses incurred by the purchaser in investigating title, cannot apply where the vendor has voluntarily caused his own inability, as was the case here.

Cases referred to:

- (1) *Bain and Others v Fothergill and Others* [1874- 1880] All E.R. Reprint 83;
- (2) *Ray v Druce* [1985] 2 All E.R. 482.

O. Dzekedzeke of Messrs Dzekedzeke and Company, for the appellant.
K. Makala of Makala and Company, for the respondent.
C.A.J. Njobvu of Messrs Christopher Russell Cook and Company, for the third party.

Judgment

NGULUBE, C.J., delivered the judgment of the court.

This was an appeal against the dismissal of the plaintiff's claim for an order that the defendant (the respondent to this appeal) do sell to her the half of the semi-detached house occupied by her as an employee. There was evidence that the liquidator of the respondent offered to sell the semi-detached house to the appellant for K19 million. She wrote back asking that the price be reduced. The liquidator replied refusing to reduce the price but extending the deadline within which she must accept the offer and pay the required deposit. There was a dispute whether she had accepted the offer within the extended deadline or if she was late so that the offer had lapsed. The learned trial judge found that she was late and the offer lapsed, so that there was no concluded contract. We heard much argument on this and quite clearly the documentary evidence produced on behalf of the liquidator showed that she had accepted the offer one day before the expiry of the deadline so that the finding to the contrary flew in the teeth of such evidence. She had not failed to comply with the conditions spelt out by the liquidator and the offer had in fact not lapsed unaccepted.

However, the crux of this matter was that, unbeknown to the plaintiff and the defendant, the same semi-detached house and its other half had been sold as a whole by the agents of the Zambia Privatisation Agency a year previously. It transpired at the trial that this property had already been sold to the third party long before the first offer and the extended offer by the liquidator.

The third party who had bought the property was not impleaded and we ordered that he be joined to this appeal since it would be unthinkable to make a decision which might have adversely affected the rights of the third party without affording him any opportunity to be heard. There is no dispute that the third party was an innocent purchaser for the value of the whole building at K57 million, half of which has already been paid, the other half only awaiting the decision in this appeal. He responded to an advertisement and he had no notice of any adverse claim. It seems obvious to us that the liquidator did not know that the same property was being disposed of by the Zambia Privatisation Agency but that he must have become aware at the time of the extended period for acceptance given to the plaintiff, which would explain the attempt to argue that the plaintiff's acceptance had arrived too late, long after the extended time had lapsed. The liquidator's predicament was understandable and it is not surprising that he immediately repented of the transaction he had committed himself to with the plaintiff.

Given the position of the third party, the many arguments and submissions which we heard between the plaintiff and the defendant based upon their own contract became irrelevant and immaterial. There is no way in which the third party can be deprived of this property. Indeed, at the time of the purported contract by the liquidator, he had no house which he could sell; it was already sold by the Zambia Privatization Agency. It is no wonder therefore that Mr Dzekedzeke urged us to consider any other relief in respect of the contract with the liquidator which could not be performed through no fault of the plaintiff. Both the liquidator and the Zambia Privatization Agency represented the vendors in this matter. Unwittingly, the vendor entered into successive contracts to sell the same property resulting in the non-performance of the contracts with the plaintiff resulting from the vendor's present inability to make a good title to the plaintiff. This was a situation brought about through the fault of the vendor and amounted to some form of deceit or misrepresentation and a breach of the agreement. We

are satisfied that the rule in *Bain & Others v Fothergill and Others* (1) should not apply. This is an ancient rule much disliked by many which provided that where the non performance of the contract resulted from the vendor's inability to make a good title, the purchaser could not recover damages for loss of the bargain; but only damages limited to expenses incurred by the purchaser in investigating the title. The rule cannot apply where the vendor has voluntarily caused his own inability, as was the case here: see also and contrast *Ray v Druce* (2), where the rule applied because, among other reasons, the purchaser was already aware of the difficulty the vendor had created prior to the contract.

In sum, we agree with Mr Njobvu that the transaction with the 3rd party should not be disturbed. Instead, the decision below should be reversed and varied to the extent that there will be judgment for the plaintiff appellant against the defendant respondent for damages for breach of contract on the footing of damages for loss of the bargain. The assessment of such damages is referred to the Deputy Registrar. The Deputy Registrar will also deal with any grace period to be given to the plaintiff to vacate the property. The appeal is allowed to the extent indicated. The costs follow the event and will be borne by the respondent in respect of both the appellant and the third party.

Appeal allowed to the extent indicated