IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 218/2016**

HOLDEN AT KABWE

(Civil Jurisdiction)

BETWEEN:

WOODGATE MOTORS ZAMBIA LIMITED **APPELLANT**

AND

FINSBURY INVESTMENTS LIMITED **RESPONDENT**

Coram: Hamaundu, Wood and Musonda, JJS
on 4th April, 2017 and 2nd June, 2017

For the Appellants:	Messrs Malambo and Company (No appearance)
For the Respondent:	Mr. M. M. Mundashi, S.C, and Mr. D. Chakoleka, Messrs Mulenga Mundashi and Kasonde, Legal Practitioners

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JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred to:

1. **In Re Fentem (Deceased).Cockerton v Fentem and Others [1950] 2 All E.R. 1073**
2. **Wilson Masauso Zulu v Avondale Housing Project Limited [1982]Z.R. 172**
3. **Holmes Limited v Buildwell Construction Company [1973] Z.R. 97**
4. **BOC Gases Plc v Phesto Musonda [2005] Z.R. 119**
5. **Re H. and Others (Minors) [1997] 2 All E.R. 225**
6. **Burton Constructions Limited v Zaminco Limited [1983] Z.R. 20**

Works Referred to:

1. **Chitty** on **Contract, 31st Edition, Para 12 - 027**

This is an appeal against the dismissal by the High Court of the appellant's claim for the sum of US$350,000.00. The facts that were before the court below were fairly straight forward and are these:

In 2005, the appellant sold its property, namely Sub-division 194 of Farm No.110a in Villa Elizabetha, Lusaka, to the respondent at the purchase price of US$1,500,000.00. According to a clause in one of the written contracts which the parties executed in relation to this sale, namely clause 8(ii), the purchase price was to be disbursed in the following manner:

(i) ***A deposit in the sum of US$150,000.00 was to be paid by the respondent to Hon. Enock P. Kavindele upon exchange of contracts:***

(ii) ***A sum of US$350,000.00 was to be paid by the respondent to Messrs Rathi and his legal advisors upon further instructions from the appellant: and***

(iii) ***A sum of US$1,000,000.00 was to be paid to Finance Bank (Zambia) Limited by the respondent upon completion.***

The dispute in this matter is based entirely on the payment of the sum of US$350,000.00 to Messrs Rathi and his legal advisors. It was not in dispute that Messrs Rathi ceded the sum of US$350,000.00 to

His Excellency Dr. Kenneth Kaunda's Foundation and directed the respondent to pay that sum directly to the foundation. It was not in dispute that the respondent did so. Among the correspondence that the parties exchanged with each other, two letters are worthy of mention as they were a vital component of the basis upon which the court below arrived at its decision. The first letter was written by Messrs Jacques and Partners, Messrs Rathi's Legal advisors. The letter was addressed to Hon. Enock P. Kavindele and dated the 25th April, 2006. In that letter, the legal advisors confirmed to Hon. Kavindele that the sum of US$350,000.00 which had been ceded to Dr. Kaunda had been paid to him. The following day, on the 26th April, 2006, the respondent also wrote to Hon. Kavindele. The letter stated that Hon. Kavindele had had a meeting earlier that day with Ms. Essa of the respondent who had handed to him the letter of confirmation of payment of the sum of US$350,000.00 to Dr. Kaunda. The letter further stated that the confirmation had earlier been requested for by Hon. Kavindele. The letter went on to state that it had been agreed that the appellant would yield vacant possession of the property on 29th April, 2006.

As indicated in the last letter, the appellant did indeed yield vacant possession. More than a year later, on 7th September, 2007, the

appellant commenced this action, charging that no instructions had been issued by the appellant, as required by clause 8(ii) of the agreement, to authorize the respondent to pay the sum of US$350,00.00 to Messrs Rathi, let alone directly to Dr. Kaunda. The appellant contended that the respondent was aware that the appellant had outstanding issues with Mr. Rathi concerning shareholding; and that, therefore, the respondent should not have paid Messrs Rathi the sum of US$350,000.00 without specific written instructions from the appellant.

After reviewing the two letters, among other evidence, the court below concluded that the appellant did give instructions for the payment of US$350,000.00 to Messrs Rathi who ceded it to Dr. Kaunda; and that, if not, then the appellant had acquiesced in the payment of US$350,000.00 because, had it not been so, the appellant would have immediately protested when he received the letter of the 25th April, 2006, confirming the payment to Dr. Kaunda. To fortify its conclusion, the court pointed out that the appellant even went ahead to yield vacant possession. Hence, the court dismissed the appellant's claim.

The appellant has advanced two grounds of appeal as reproduced hereunder:

> ***"1.The court below erred both in law and in fact when it held that the appellant was not entitled to the payment of US$350,000.00 which was paid by the respondent to a third-party contrary to the provisions of clause 8(ii) of the contract dated 15th February, 2005.***
>
> ***2. The court below misdirected itself on a point of fact when it held at J18 - J20 of the judgement that the issue of shareholding had been resolved thereby neither Rathi nor his legal advisors nor Supersonic Holding Limited owed the appellant any money at the stage of entering into the contact of sale."***

The argument on behalf of the appellant in the first ground was anchored on the provisions of clause 8(ii) of the second contract of sale. In this regard, it was argued that the words *"Upon further instructions from the Vendor"* contained in that clause meant that a condition precedent had been set whereby the respondent was to pay the sum of UD$350,000.00 to Messrs Rathi and his legal advisors only after the appellant had issued instructions authorizing the payment. We were referred to the case **In Re Fentem (Deceased). Cockerton v Fentem and Others**[1] where it was held that where the performance of a condition precedent becomes impossible an estate or interest never vests in the devisee or legatee. We were also referred to the definition of a contingent condition, as defined by **Chitty** on **Contract, 31st Edition, Para**

12 - 027 which is that it is a provision that an obligation shall not come into force until some event happens.

Learned counsel pointed out that the minutes of a meeting of the appellant's Board of Directors specifically stipulated that the payment of US$350,000.00 to Supersonic Zambia Limited was to be made upon specific instructions to the bank under the hand of the Chairman of the Board. Counsel then argued that the inclusion of the expression *"Upon further instructions from the Vendor"* in clause 8(ii) of the contractwas a clear indication that the parties intended to give effect to the resolution of the appellant's Board of Directors. It was further submitted that there was evidence to support the appellant's contention that no instructions were given to the respondent to make the payment to Messrs Rathi and his legal advisors, or to Dr. Kaunda. As examples of that evidence, counsel pointed out the following; (i) the fact that the respondent's own witness at the trial did not make any reference to any express instructions given by the appellant; and, (ii) the fact that the appellant did on more than one occasion give instructions to the respondent to deposit the US$350,000.00 in an escrow account.

Coming to the correspondence on which the court below drew the inference that the appellant gave the instructions, learned counsel

submitted that the letter of 1st September, 2003, merely informed Dr. Kaunda of the decision by Messrs Rathi to cede US$350,000.00 to him. That the letter of 25th April, 2006, from Messrs Jacques and partners did not in any way confirm that the appellant had issued instructions to pay the US$350,000.00. That, nevertheless, the court below went on to draw erroneous inferences from the letters that the issue of shareholding had been resolved and that vacant possession of the property was to be yielded on the 29th April, 2006. Counsel argued that, if the issue of shareholding had been resolved, then Supersonic Holding Limited would have been a major shareholder in the appellant company and would have taken a leading role in the sale of the property. Counsel argued also that the appellant yielded vacant possession only because it had a good relationship with the respondent; and because the contract provided the yielding of vacant possession upon execution.

In the second ground the appellant's issue was with the lower court's finding of fact that the issue of shareholding between the appellant and Supersonic Holding Limited had been resolved before the parties had executed the contract. According to counsel, the finding was not supported by the evidence on record but was merely used by the court below to set the stage for the subsequent erroneous

inferences it made. To support his argument, counsel argued that, in its letter of the 22nd March, 2005 and 5th April, 2005 the appellant had requested the respondent to place the sum of US$350,000.00 in an escrow account pending its claim against Mr. Rathi over unpaid shares. Counsel argued that, against that evidence, the lower court's finding that the issues of shareholding had been resolved was wrong. We were, therefore, asked to reverse that finding on the authority of **Wilson Masauso Zulu v Avondale Housing Project Limited**[2].

With those arguments, counsel urged us to allow the appeal.

In response to the appellant's argument in the first ground of appeal, it was argued on behalf of the respondent that the appellant's contention that the sum of US$350,000.00 was only to be paid upon further written instructions as evidenced by minutes of the appellant's Board of Directors cannot stand, for two reasons: First, because the respondent was not privy to the minutes since the meeting was exclusively an internal arrangement of the appellant. Secondly, the contract of sale did not indicate the manner in which the further instructions were to be issued; consequently, the bringing into issue by the appellant of the minutes of its meeting amounted to introducing extrinsic evidence.

We were referred to the cases of **Holmes Limited v Buildwell Construction Company**[3] and **BOC Gases Plc v Phesto Musonda**[4] for the principle that extrinsic evidence is not generally admissible to vary or contradict the terms of a written document.

Rebutting the appellant's argument that the non-reference by the respondent's witness to any instruction having been given by the appellant was evidence that no instructions were given, counsel for the respondent submitted that since the contract did not state that instructions were to be express, it meant that they could be inferred from conduct as well; and that, in fact, the court's decision was based on the inference drawn from the conduct of the appellant upon being informed that the sum of US$350,000.00 had been paid to a third party, which conduct was not consistent with that of a person who had not issued the requisite instructions.

Responding to the appellant's argument that the court below drew wrong inferences from the three letters, counsel pointed out that the letter of 26th April, 2006 addressed to the appellant's Chairman was confirming what had transpired at a meeting held between the appellant's Chairman and the respondent. That the letter disclosed that the appellant's Chairman had requested for proof that the sum of

US350,000.00 was paid; and that as proof of the confirmation he was given the letter of the 25th April, 2006 confirming that indeed the said sum had been paid in accordance with the contract. Counsel argued that, in the light of what the two letters were revealing, the appellant still went on to hand over vacant possession and raised no protest over the next one year and four months, only to resurface with a writ of summons. It was submitted that such conduct was not consistent with that of a person who had not given instructions. Therefore, counsel argued, the court below drew the correct inference when it held that the appellant either did give instructions or acquiesced in the payment to Mr. Rathi. We were referred to the cases of **Re H. and Others (Minors)**[5] and **Burton Constructions Limited v Zaminco Limited**[6] for the principle as to what constitutes acquiescence.

Responding to the appellant's argument that it surrendered vacant possession merely because it had a good relationship with the respondent, counsel submitted that the appellant's argument was extrinsic to the contract of sale which contained an express provision as to when vacant possession of the property was to be surrendered.

We were urged to dismiss this appeal.

The resolution of this dispute rested entirely on the letter from the respondent's Group Legal Counsel to the appellant's Executive Chairman dated the 26th April, 2006; and the appellant's reaction thereto. We reproduce the letter hereunder:

"FINSBURY INVESTMENTS LIMITED

P.O. Box 70238
Tel: 610273/4/5
Fax: 615245
Ndola, Zambia

Strictly Private & Confidential

26th April, 2006

Hon. E. P. Kavindele, MP
Executive Chairman
Woodgate Holdings Limited
P.O. Box 30970
LUSAKA

Dear Sir,

Sale relating to Subdivision No. 194 of farm No. 110 'a' Lusaka

We refer to your meeting with our Ms. Essa and yourself held at Finsbury Park early this afternoon, wherein Ms. Essa handed over to you the letter as requested by yourself confirming payment of the United States Dollars 350,000.00, in accordance with the Contract of Sale herein.

It was agreed at the said meeting that vacant possession shall now be given on Saturday, 29th April, 2006 at 10:00 hours. Our Ms. Essa and

or her representative shall be on site on the appointed day and time to take possession of the keys in your entrusted custody.

We hope this protracted matter has now been concluded to mutual satisfaction.

Yours truly,

For FINSBURY INVESTMENTS LIMITED,

Zaheeda Essa (Ms.)

Group Legal Counsel"

As we have said earlier, it is clear that this letter was putting it to the appellant's Executive Chairman that he had requested confirmation of payment of the sum of US$350,000.00 in accordance with the contract of sale. The letter went on to put it to the Chairman that, at a meeting held that afternoon, he had been given the letter confirming that payment. The letter further went on to put it to the appellant's Chairman that, at the same meeting, the parties had gone on to set the 29th April, 2006 as the date on which vacant possession would be yielded. The letter concluded by expressing the hope that the protracted matter had now been concluded, to the mutual satisfaction of the parties.

It should be noted that this letter was written against the following background: A year before, in March and April, 2005, the appellant's Chairman had written to the respondent directing that the

said sum of US$350,000.00 should be kept by the respondent in an escrow account because he had a claim against Messrs Rathi over unpaid shares.Therefore, in 2006, if the appellant still had objection to the sum of US$350,000.00 being paid to Messrs Rathi this should have been reflected by its Chairman's reaction to the respondents' letter of 26th April, 2006. As we have shown, the letter not only alleged that he had requested confirmation of payment of the money, it also expressed hope that the matter had now come to a mutually satisfactory end. This obviously called for a reaction from the appellant. The reaction from the appellant was one of silence, for more than one year. What this signified was that the appellant agreed with the letter that its Chairman had indeed requested for confirmation of payment of the sum of money to Messrs Rathi and that, upon that confirmation, the appellant considered the matter to have come to a satisfactory end. In our view, therefore, the court below was on firm ground when it held that, by its conduct, the appellant either give instructions for the money to be paid to Messrs Rathi or acquiesced in the payment.

Coming to the second ground of appeal, the court below reviewed whatever evidence there was of the dispute concerning the shareholding. After that review, the court found that the provision for the payment of US$350,000.00 in the contract originated from the

resolution of the dispute over shareholding. That is why the court held that the shareholding issues had been resolved by the time of the execution of the contract of 2005. It cannot, therefore, be said that the finding was not supported by the evidence.

We, therefore, find no merit in this appeal in both grounds. We dismiss it, with costs to the respondent.

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E. M. HAMAUNDU
SUPREME COURT JUDGE

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A. M. WOOD
SUPREME COURT JUDGE

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M. MUSONDA
SUPREME COURT JUDGE