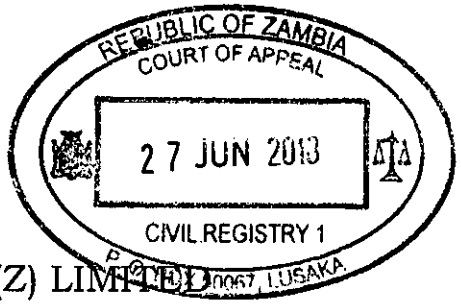
IN THE COURT OF APPEAL FOR ZAMBIA APPEAL No. 136/2017
HOLDEN AT NDOLA
(Civil Jurisdiction)

BETWEEN:



MSANIDE PHIRI	APPELLANT
AND	
BHB CONTRACTORS (Z) LIMITED	1ST RESPONDENT
STANSLOUS MUBANGA	2ND RESPONDENT
BRIAN CHILUMBA	3RD RESPONDENT

Coram: Makungu, Kondolo SC and Majula, JJA
This 20th day of February, 2018 and 27th June, 2018

For the Appellant: *Mr. N. Nchito SC, of Nchito and Nchito*
For the Respondents: *No Appearance*

J U D G M E N T

MAJULA, JA delivered the Judgment of the Court

Cases cited:

1. *Wilson Masauso Zulu vs Avondale Housing Project (1982) ZR 172 (SC)*
2. *Konkola Copper Mines Plc vs Jacobus Keune Appeal No 29 of 2005*
3. *Konfos vs C Czarnikow Ltd (The Heron 11) (1969) 1 A.C. 350*
4. *Hadley vs Baxendale (1854) 9 Ex Ch 341*
5. *Penarth Dock Engineering Co. Ltd vs Pound (1963) 1 Lloyd's rep 359*
6. *The Mediana (1900) AC 113*

7. *David Chiyengele & Others vs Scaw Limited SJ No.2 of 2017.*
8. *Barclays Bank Plc vs Patricia Leah Chatta Chipepa SJ No.16 of 2017.*

Other Authorities referred to:

1. *G.H. Trietel, The Law of Contract, 12th edition, (London: Sweet and Maxwell, 2007).*
2. *Harvey McGregor, McGregor on Damages, 15th Edition, (London: Sweet and Maxwell, 1988)*

The genesis of the dispute in this matter is an oral contract entered into between one Cynthia Kaoma Kampape now deceased with the respondents in or around January, 2014 to allow them use her Certificate of Title. The respondents had been awarded a contract by the Rural Electrification Authority (REA) and they required the Certificate of Title as performance security for the said contract.

The terms and conditions of the agreement between the parties were that the respondents would use the Title for a period of 4 months at a consideration of K100,000 after which the Certificate of Title would be returned. As fate would have it, the Certificate of Title was not returned after the agreed 4 months' period compelling the appellant to issue a demand for payment of the outstanding balance of forty thousand kwacha (K40,000/= as part of the initial contract.

The appellant proceeded to commence an action in the High Court demanding *inter alia* damages for breach of contract, payment of the K40,000 outstanding balance from the one hundred thousand

kwacha (K100,000) agreed on orally and payment of the sum of K25,000 for each month the Title was held over.

The respondent reacted to the writ of summons by filing a defence in which they admitted the existence of the oral contract. They, however, disputed that the Title Deed was to be returned after 4 months. According to the respondents, the Title was to be returned after the completion of the REA project.

The matter went for trial and the court below adjudged that the duration of the contract was not agreed upon and the plaintiff was not entitled to damages or compensation for the period that the Certificate of Title was held over.

Aggrieved with this decision of the court below, the appellant has appealed advancing two grounds as follows:

1. The court below erred in law and fact when it held that there was no meeting of the minds by the parties as to the duration of the use of the certificate of title between the parties when the evidence proved otherwise.

2. The court below erred in law and fact when it did not award damages to the appellant when there was evidence to the contrary to prove breach of contract by the respondents.

The appellant filed heads of argument on 25th October 2017. When the matter came up for hearing of the appeal on 23rd January 2018 the appellant indicated that on account of the fact that the respondents' Advocates had withdrawn from acting for the

appellants, they had applied for substituted service which was granted on 17th January, 2017. They applied for an adjournment in order to comply with the two clear days' notice for service on the respondents. The application was granted and the hearing of the appeal was adjourned to 12th February, 2018. On that date, counsel for the appellant Mr. Nchima Nchito, SC tendered an affidavit of service dated 31st January, 2018 confirming that he had served the respondents by way of substituted service on 29th and 30th of January 2018 in the Zambia Daily Mail. On that basis we allowed him to proceed with arguing the appeal.

To this effect Mr. Nchito SC informed the court that he would rely entirely on the heads of argument.

On ground 1, the arguments by State Counsel Nchito is that, the court should take an objective approach to determine the existence of a contract. It was not in dispute that the parties entered into a contract for the use of the Certificate of Title and the dispute arose as a result of the respondent's failure to return the Title on time.

According to state counsel, contrary to the determination of the court below, there was evidence on record to prove the period of use and return of the Certificate of Title. Counsel submitted further that DW admitted in cross-examination that the REA was to run for twenty-six (26) weeks which would place the return of the Title at June, 2014 having run from December, 2013. However, the

Certificate of Title was only returned to the appellant in August 2015 which the 2nd respondent admitted was well over fifty weeks.

Further, on 2nd October, 2014 the respondent wrote to the appellant to inform him that the completion date of the project will be at the month end of November, 2014. It was counsel's argument that the evidence objectively proves the parties were in agreement that the Certificate of Title would be returned not beyond twenty–six months. Regrettably, the respondents retained the Title for well over fourteen months and continued to shift the completion date. It is against this background that we are being urged to reverse the findings of the court below. Counsel has called in aid the case of ***Wilson Masauso Zulu vs Avondale Housing Project***[1] which outlines the circumstances under which an appellate court can reverse findings of fact by a trial court.

It was held *inter alia* that:

> *"The appellate Court will only reverse findings of fact by a trial court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts."*

Similar observations were made in the case of ***Konkola Copper Mines Plc vs Jacobus Keune***[2]. State Counsel further argued that the Court below ought to have found that the certificate of Title was

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1 *Wilson Masauso Zulu vs Avondale Housing Project (1982) ZR 172 (SC)*

2 *Konkola Copper Mines Plc vs Jacobus Keune Appeal No 29 of 2005*

retained beyond the agreed time period. That court below ought to have made a finding that there was in fact an agreed period for the use of the Certificate of Title.

We now turn to consider ground 2. The appellant's bone of contention is that the 2nd respondent's own admission, the Certificate of Title was to be returned at the conclusion of the project that was to be 26 weeks. It was argued that the reasons for the delay in returning the Certificate of title were not the concern of the appellant and returning the Title 14 months after it was due, was a breach of the contract between the parties entitling the appellant to damages.

The learned authors of **Treitel on the Law of Contract 12th Edition, in paragraph 17-049 at page 832** has been referred to us which states as follows:

> *"A breach of contract is committed when a party without lawful excuse fails or neglects to perform what is due from him under the contract....the breach may entitle the injured party to claim damages, the agreed sum, specific performance or an injunction."*

And further at paragraphs 20 – 002 and 20 – 003, page 992, it provides that:

> *"The action for damages is available, as of right, when a contract has been broken..... As a general rule damages are based on loss to the claimant and not on gain to the defendant."*

It has been forcefully argued that the contract as agreed to was for a specific sum and duration. In holding over the Title beyond the

contract period, the respondents breached the contract and deprived the appellant of the use of the Title Deed for over 14 months. The respondents gained an advantage at the expense of the appellant who should be entitled to damages or compensation for loss of use.

In relation to the principle on damages, the appellant has adverted to Lord Reid in ***Konfos vs C. Czarnikow Ltd***[3] who reformulated the principle laid down in ***Hadley vs Baxendale***[4] as follows:

> *"The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realized that such loss was sufficiently likely to result from the breach of that contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation."*

In addition, the learned authors of **Treitel on the Law of Contract**[1] have been referred to in determining the compensation to be paid. Specifically, page 994 paragraph 20 -005 citing the case of ***Penarth Dock Engineering Co. Ltd vs Pound***[5] which states that:

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[3] *Konfos vs C Czarnikow Ltd (The Heron 11) (1969) 1 A.C. 350*

[4] *Hadley vs Baxendale (1854) 9 Ex Ch 341*

[5] *Penarth Dock Engineering Co. Ltd vs Pound (1963) 1 Lloyd's rep 359*

"Lord Denning rejected the argument saying that the test of measure of damages is not what the [Claimants] have lost but what benefit the defendant obtained by having the use of the berth." But the actual award was based on the fair rental value of the berth, and can be explained on the basis that the claimants lost the chance of renting it."

The appellant concluded by arguing that since the contract sum was K100,000/= for a period of 4 months, this translated into K25,000 per month for each month the Certificate of Title was held over.

Alternatively, even if it were to be considered that the duration of the contract was 26 weeks, based on the respondent's own admission this would translate to approximately K15,000 per month for the duration of the project.

The appellant beseeched us to award damages for holding over the Certificate of Title by the respondents with pre and post judgment interest.

Pertaining to ground 2, our understanding of the appellant's argument is that the contract was for a fixed time and duration. Lamentably the specified period was breached by the fact that the respondent held over the title deed. The appellant has cited various authorities on consequences that befall a party who breaches a contract. The appellant is now seeking what we would perhaps describe as the rental value of the Title. In a nutshell the grievance

stems from the fact that the respondent gained some commercial value from use of the Title at the expense of the appellant. The failure to return the title was a breach and therefore entitles the Appellate to compensation. The appellant has given us a formula which he considers to be a fair 'rental value' of the Title Deed.

We have carefully scrutinized the arguments and authorities referred to us by Mr. Nchito SC. Having examined the evidence on record, we are of the well-considered view that there was in fact in existence a contract between the parties. The terms of the oral contract were that the appellant would give the respondents the Certificate of Title as security or collateral for the Bank. This is undisputed. It is however the duration of the agreed contract period that is in contention.

After carefully analyzing the evidence before us, we are of the considered view that the Title was given for the duration of the contract. The duration of the contract was 26 weeks. Having found that the contract was for a determinable period of 26 weeks, we come to the irresistible conclusion that any period beyond the agreed time frame would amount to a breach of the contract. The fact that the Title was given to a 3rd party was a matter between the respondent and the Lender. The appellant was entitled to rely on the assurance by the respondent and if the contract was to go beyond the agreed period it was up to the respondent to renegotiate an extension. The failure to return the Title within the agreed period amounts to a breach of the contract.

In light of what was have stated in the preceding paragraphs, we find merit in ground 1.

Moving to ground 2 we must at once state that any breach of contract commands damages. Ground 2 therefore turns on our finding in ground 1 that the contract was breached by the respondents. In order to award damages, the party claiming must prove the damage suffered. Mr. Nchito SC, has implored us to award damages for the time that the Title was held over and has proposed a formula to guide the court. This formula has been extracted from the amount that was agreed for four months which was K100,000, translating into K25,000.00 a month.

It has been expressed that the respondent did gain commercial value from the use of the Title Deed at the expense of the appellant. The extent of the actual loss suffered by the appellant as a result of being put out of use of the title has however not been articulated. We are therefore left to speculate, which is undesirable.

This prompts the question as to what amounts to appropriate damages. The learned author of **McGregor on Damages,**[2] Professor Harvey McGregor has stated the following at paragraph 396.:

> *"Technically, the law requires not damage but an injuria or wrong upon which to base a judgment for the plaintiff, and therefore an injuria, although without loss or damage, would entitle the plaintiff to judgment."*

Although the appellant failed to prove the actual loss or damage, there was a wrong committed by the respondent entitling him to judgment for the legal injury or wrong. Having found that there was an infraction of the appellant's legal right, it is our contemplation that the relief available to the appellant is nominal damages.

We are fortified by the words of Lord Halsbury, L.C. in ***The Mediana***[6] where he expressed himself as follows:

> *"Nominal damages" is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all yet gives you a right to the verdict or judgment because your legal right has been infringed."*

In light of what we have stated in the preceding paragraphs we find the appellant is only entitled to nominal damages. This is also in light of the cases of ***David Chiyengele & Others vs Scaw Limited***[7] ***and Barclays Bank Plc vs Patricia Leah Chaka Chipepa***[8]***.***

The sum of K5,000.00 in our view is sufficient with interest at the short term deposit rate from the date of Judgment and thereafter at the current bank rate until full settlement.

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[6] *The Mediana (1900) AC 113*

[7] *David Chiyengele & Others vs Scaw Limited SJ No.2 of 2017.*

[8] *Barclays Bank Plc vs Patricia Leah Chatta Chipepa SJ No.16 of 2017.*

We award costs to the appellant in this court and the court below to be taxed in default of agreement.

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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M.M. KONDOLO
COURT OF APPEAL JUDGE

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B.M. MAJULA
COURT OF APPEAL JUDGE