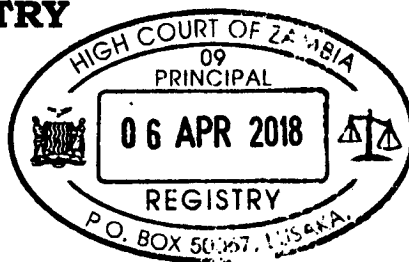


**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
AT LUSAKA**  
(Civil Jurisdiction)

**2008/HP/0560**



BETWEEN:

**TRENTYRE ZAMBIA LIMITED  
CATESBY INVESTMENTS LIMITED**

**1<sup>ST</sup> PLAINTIFF  
2<sup>ND</sup> PLAINTIFF**

AND

**NEDFIN LIMITED  
ERIC ROUTLEDGE  
GWENA LODGE ENTERPRISES LIMITED  
JAMES NORTH ZAMBIA LIMITED**

**1<sup>ST</sup> DEFENDANT  
2<sup>ND</sup> DEFENDANT  
3<sup>RD</sup> DEFENDANT  
4<sup>TH</sup> DEFENDANT**

**Before: E. M. Hamaundu, J.**

For the plaintiffs : Mr N. Makayi, Messrs Solly Patel, Hamir & Lawrence  
For the 1<sup>st</sup> defendant : Mr K. Chenda, Messrs Simeza Sangwa & Associates  
For the 2<sup>nd</sup> & 3<sup>rd</sup> defendant: Not present  
For 4<sup>th</sup> defendant : Messrs Magubwi & Associates

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**JUDGMENT**

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Case referred to:

**Wesley Mulungushi v Catherine B. M Chomba [2004] ZR 96**

Works referred to:

- 1. Chitty on Contracts, 30<sup>th</sup> edition, para 27 - 041**
- 2. M<sup>C</sup> Gregor on damages, 16<sup>th</sup> edition, paras, 968, 969**

This claim is essentially by the 2<sup>nd</sup> plaintiff and is for; damages for wrongful distress on premises known as Stand No.3722 Kitwe and consequential damages for loss of business.

According to the statement of claim, on or about December, 2006, the 2<sup>nd</sup> plaintiff took possession of Stand No. 3722 Kariba Road in Kitwe from the 1<sup>st</sup> defendant, with intent to purchase it. The 1<sup>st</sup> defendant was selling the stand as beneficial owner thereof. The two parties agreed that the 2<sup>nd</sup> plaintiff would pay rent to the 1<sup>st</sup> defendant in the sum of US\$3000 (presumably per month) from 1<sup>st</sup> January, 2007 until the conveyance was completed. Subsequently, the 2<sup>nd</sup> plaintiff discovered that the beneficial owner of the property was Gwena Lodge Enterprises Limited the 3<sup>rd</sup> defendant. The 2<sup>nd</sup> plaintiff then entered into a contract of sale with Gwena Lodge Enterprises Limited with respect to the property. The 2<sup>nd</sup> plaintiff then informed the 1<sup>st</sup> defendant that it would no longer pay rent to the latter because it was not the owner of the property. The 1<sup>st</sup> defendant, however, continued to demand rent and requested the 2<sup>nd</sup> plaintiff to vacate the property by 31<sup>st</sup> March, 2008. On 6<sup>th</sup> June, 2008, the defendant's agents came with a warrant of distress and

proceeded to lock up the premises. The 2<sup>nd</sup> plaintiff was thereby denied access to the premises. As a result of the distress, the 2<sup>nd</sup> plaintiff lost business on its service agreements with the major mines and contractors on the Copperbelt, amounting to US\$59,236.03 per day.

The 1<sup>st</sup> defendant filed a defence and counter-claim. According to that pleading, the 2<sup>nd</sup> plaintiff in fact sublet the premises to the 1<sup>st</sup> plaintiff without obtaining permission from the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant had informed the 2<sup>nd</sup> plaintiff that it (the 1<sup>st</sup> defendant) had bought the property from Gwena Lodge Enterprises Limited who had also bought it from James North(Z) Limited but that Gwena Lodge Limited could not give the 1<sup>st</sup> defendant title deeds because James North(Z) Limited had misplaced the original title deeds. Hence, the 3<sup>rd</sup> defendant Gwena Lodge Enterprises Limited was no longer the beneficial owner of the property and could not purport to sell it to the 2<sup>nd</sup> plaintiff.

According to the counter-claim, the 1<sup>st</sup> defendant had entered into an agreement with the 3<sup>rd</sup> defendant for the purchase of the said stand 3722 on or about 20<sup>th</sup> January, 2006. By 16<sup>th</sup> February, 2006,

the 1<sup>st</sup> defendant had paid the full purchase price of US\$40,000. The 1<sup>st</sup> defendant then made repeated requests to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to complete the sale. The two defendants always gave the excuse that James North (Z) Limited had not yet given them the title deeds. To-date the 1<sup>st</sup> defendant has been waiting for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to complete the sale. Consequently the 1<sup>st</sup> defendant now seeks an order of specific performance against the 3<sup>rd</sup> defendant and also damages for breach of contract.

At the hearing, the only party that was present was the 1<sup>st</sup> defendant. Upon being satisfied that the notice of the hearing had been published in a newspaper, I dismissed the 2<sup>nd</sup> plaintiff's claim for want of prosecution, with costs to the 1<sup>st</sup> defendant in particular. I then proceeded to hear the 1<sup>st</sup> defendant on its counter-claim.

The 1<sup>st</sup> defendant's only witness was Johannes Hendrikus Jonck. The following was his testimony:

He had been the 1<sup>st</sup> defendant's Chief Executive Officer from 1<sup>st</sup> January 2005 to 31<sup>st</sup> December, 2008. In January 2006, the 1<sup>st</sup> defendant entered into a contract with Gwena Lodge Enterprises Limited for the sale to the 1<sup>st</sup> defendant of stand 3722. The witness

signed the contract on behalf of the 1<sup>st</sup> defendant while Ian Routledge signed on behalf of the 3<sup>rd</sup> defendant. The purchase price was US\$40,000. The 1<sup>st</sup> defendant paid a sum of US\$5,000 upon exchange of contract. The balance of US\$35,000 was paid in February, 2006 by direct bank transfer. However, to-date, the 3<sup>rd</sup> defendant has not transferred title to the 1<sup>st</sup> defendant.

The witness referred the court to the contract of sale and also bank statements showing proof of payment.

From the testimony of the witness and the documents produced, I find as a fact as follows:

- (i) that the 1<sup>st</sup> defendant and 3<sup>rd</sup> defendant signed a contract for the sale of stand 3722 in Kitwe;
- (ii) that the 1<sup>st</sup> defendant paid the full purchase price of US\$40,000
- (iii) that, to-date, the 3<sup>rd</sup> defendant has never taken any further step to transfer title to the 1<sup>st</sup> defendant; and,
- (iv) that it is not in dispute that the title deeds to the property in issue are still in the names of James North Zambia Limited.

I have looked at one of the grounds upon which specific performance may be refused; that is on grounds of impossibility. On this issue the learned author of **Chitty on Contracts (30<sup>th</sup> edition)** provides:

***“Impossibility. Specific performance will not be ordered against a person who has agreed to sell land which he does not own and cannot compel the owner to convey to him ‘because the court does not compel a person to do what is impossible’.”*** Para 27 – 041.

At first glance, this rule would appear to operate so as to prevent me from granting an order of specific performance in this case. However, learned counsel for the 1<sup>st</sup> defendant referred me to the case of **Wesley Mulungushi v Catherine B. M Chomba<sup>(1)</sup>** where the Supreme Court held that the lack of a certificate of title cannot be a bar to the conclusion of a legally binding contract. In this case the 3<sup>rd</sup> defendant did not come forward to put up a defence that an order of specific performance would be impossible to comply with on account that the certificate of title was in the name of James North Zambia Limited. Instead, the evidence on record is that the 3<sup>rd</sup>

defendant had been in possession of the property in issue before it gave it to the 1<sup>st</sup> defendant. There is a letter on record, dated 21<sup>st</sup> March, 2008, in which the 3<sup>rd</sup> defendant was instructing its advocates to transfer the property directly from James North (Z) Limited to the 2<sup>nd</sup> plaintiff as opposed to transferring the title first to the 3<sup>rd</sup> defendant and then to the 2<sup>nd</sup> plaintiff. These facts at least show that the 3<sup>rd</sup> defendant has such an interest in the property as would entitle it to compel James North (Z) Limited to transfer title to it. In fact, in another letter produced on record, the 3<sup>rd</sup> defendant did threaten James North (Z) Limited with court proceedings for specific performance. James North Zambia Limited applied for and was granted an order to join to these proceedings. However, it filed no defence to dispute the 3<sup>rd</sup> defendant's interest in the property. This leaves me with no other option but to accept that the 3<sup>rd</sup> defendant is in a position to compel James North (Z) Limited to transfer title to it and, consequently, the 3<sup>rd</sup> defendant is cable of complying with an order of specific performance to transfer title to the 1<sup>st</sup> defendant. I, therefore, grant an order of specific performance against the 3<sup>rd</sup> defendant in favour of the 1<sup>st</sup> defendant and order that the 3<sup>rd</sup>

defendant do take all the steps necessary to convey title in stand no. 3722 Kitwe to the 1<sup>st</sup> defendant.

As regards the claim for damages, counsel for the 1<sup>st</sup> defendant has argued that where specific performance has been decreed, damages for delay in completion may also be awarded. I agree.

The learned author Harvey M<sup>c</sup>Gregor in his works "*M<sup>c</sup>Gregor on Damages*" (16<sup>th</sup> edition) provides:

**"(c ) DELAY IN COMPLETION**

**If the seller delays in effecting a conveyance of the property in circumstances which allow the purchaser to regard the breach as discharging the contract and justifying him in refusing the property, then, since he will not have the property transferred to him, the situation is the same as with a failure to complete as far as the measure of damages is concerned. More often he will have the property transferred to him late, either because the delay does not discharge the contract or he elects not to treat the delay as a discharge, or because he forces the seller's hand by successfully suing for a decree of specific performance. In such a situation the measure of damages is properly regarded as damages for delay. (para 968)**



(1) Normal Measure

**The normal measure of damages is the value of the user of the land, which will generally be taken as its rental value, for the period from the contractual time for completion to the date of actual completion. This is so whether the delay is brought to an end by the voluntary action of an indolent seller or by a decree of specific performance against a recalcitrant seller” (para 969).**

In this case, it is not in dispute that the 1<sup>st</sup> defendant was in possession of the property even at the time of exchange of contracts. This is evidenced by clause 11 of the contract. There is evidence that the 1<sup>st</sup> defendant let out the property to the 2<sup>nd</sup> plaintiff and that it was receiving rent as a result thereof. In fact, this action commenced as a result of the 1<sup>st</sup> defendant having issued a warrant of distress in its capacity as the landlord. Since the normal measure of damages in the case of delay in completion is the rental value for the period of the delay, I would say that the 1<sup>st</sup> defendant has suffered no such damage as it has had and continues to have the benefit of the user of the property. In the premises, I decline to grant the 1<sup>st</sup> defendant its claim for damages for breach of contract.

All in all, the 1<sup>st</sup> defendant has succeeded in its action for a decree of specific performance against the 3<sup>rd</sup> defendant. The 3<sup>rd</sup> defendant is condemned in costs in favour of the 1<sup>st</sup> defendant.

Delivered at Lusaka the ..... 5<sup>th</sup> ..... day of ..... April ..... 2018

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E. M Hamaundu  
**JUDGE**