IN THE SUPREME COURT OF ZAMBIA SCZ APPEAL NO.67/96

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N :

FINANCE BANK ZAMBIA LIMITED APPELLANT

AND

THE ADMINISTRATOR OF THE ESTATE OF JOHN WESLEY BILLINGSLEY RESPONDENT

Coram: Bweupe, DCJ; Sakala and Chaila, JJS

7th August, 1997 and 1st April, 1999

For the Appellant : Mr. Roberts, Legal Counsel - Finance Bank

For the Respondent: Mr. Nchito of Nchito & Company

J U D G M E N T

Chaila, JS, delivered the judgment of the court.

In this case there are two appeals against the ruling of the High Court. The first is the appeal by the appellant against the decision of the High Court ordering specific performance of the contract between the appellant and the respondent on the price to be determined by the Commissioner of Lands. The other appeal is a cross-appeal by the respondent against the decision of the High Court upholding the contract between the two parties.

Briefly, the facts as found by the learned trial commissioner were that there was a contract of sale entered between the two parties. The

contract was in respect of property known as S/D of Farm No. 737 Emmasdale, Lusaka. The contract of sale was entered between the Financing Company which later became Finance Bank and the Administrator of the estate of John Wesley Billingsley and the price agreed by the parties for the sale of property was K2,105,000.00. The contract was made in January, 1989. The learned trial commissioner on the validity of the contract ruled that since legallity of the contract had not been brought into question, the contract had been lawfully entered into by the Administrator General and that the contract was enforceable notwithstanding the subsequent revocation of his appointment thereof. The learned commissioner held that the amount of money at the time of delivering the judgment was far much lower as a result of the non-ending of the devaluation of the kwacha. He was of the view that the interest of the surviving spouse and young children of the family obviously needed to be protected. For that reason and in his absolute discretion, he ordered that the properties in question be valued again by the Commissioner of Lands to determine the current real monetary value of the properties and that the current market value thereof shall be the purchase price which the appellant's bank shall be liable to pay for the properties and that all the proceeds thereof would go to the beneficiaries of the estate.

The appellant not being satisfied with the order that the properties should be valued, appealed against

that order. The appellant has relied on two grounds of appeal and these are:

1. The court below erred in law by substituting the contract price of K2,105,000.00 for the current monetary value to be determined by the Commisioner of Lands as this had the effect of altering the terms of the contract and that the default and delay in performance was occasioned by the respondent.

2. The court below erred in law by substituting the contract price for the current monetary value as no evidence was in fact adduced in the proceedings by the respondent's advocates of hardships to the respondent's family and that this was based merely on viva voce submissions of counsel and that in any event the question of hardship should be determined at the date of the contract and not after.

Mr. Roberts, counsel for the appellant, has relied heavily on the written heads of argument to which we shall refer later in our judgment; but before he argued the appeal, the appellant's counsel raised a preliminary issue. This was in respect of the production of an affidavit of the respondent filed on 22nd November, 1996. He urged the court to disregard the affidavit on the following grounds:

1. The first ground was that the affidavit introduced new evidence. He argued that the proceedings were commenced in 1992 and no evidence was adduced whatsoever by way of contents. The contents of the affidavit never adduced any other evidence before the lower court. He argued that the effect of the affidavit was to raise a possible defence at this later hour so as to raise the possibility of a re-trial.

2. The second reason for his objection was that the memo alluded to no evidence that had been adduced. The affidavit was filed after their memo had been filed. He argued that this evidence should have been adduced in the lower court and urged the court not to encourage this practice. He argued further that the respondent had ample opportunity to raise the issues she wanted to raise in the Supreme

Court. The evidence she wanted to adduce was within her knowledge.

Mr. Roberts referred us to Section 25 of the Supreme Court Act Cap 52 which provides for the taking of "future evidence" in addition to evidence already adduced before the lower court. He further referred us to Order No. 59/1/10 of the Supreme Court Rules.

In reply on this preliminary issue, Mr. Nchito, counsel for the respondent argued that the matter never went to trial. The documents which the respondent wanted to introduce were not available. He argued that the document in question was about the correspondences the juniors in the Administrator General's office and the Administrator General, advising the Administrator General not to sell the property because the beneficiaries had objected. He argued that the document was an internal matter which showed that the Administrator General had breached the trust. Mr. Nchito further argued that the search revealed that the case was decided on legal points.

We granted the application to adduce fresh evidence and reserved reasons for our decision in main judgment. We carefully considered the arguments of both counsel on the issue. We took note of the fact that the matter was not decided through a trial. The matter came before the Deputy Registrar on application through summons. The issues centred on the status of the plaintiff at the time.
Mr. Nchito was of the view that since the matter was purely legal, there was no need to file any affidavit

in opposition. The matter proceeded on the legal points and the Deputy Registrar decided to grant an application. They appealed to the judge at chambers and the judge granted specific performance but ordered a new price.

While the case was going on, the respondent came across letters or memoranda between the then Administrator General and members of staff in the Administrator General's office. These documents supported the new Administrator General's case that they did not consent or agree to the sale of the properties. This evidence, according to her, was not available at the time the matter was being dealt with by the Deputy Registrar. We considered this issue and we were in agreement with her that she was not in a position of knowing the existence of the internal memo at the time the matter proceeded to court. For that reason we exercised our discretion in her favour and allowed the document to be admitted.

Mr. Roberts, on the first ground submitted that the appellant was appealing against that part of the judgment delivered on 26th September, 1995 in which it was ordered that the properties known as Sub-divisions 24 and 46 of Farm 737, Emmasdale, Lusaka be revalued by the Commissioner of Lands and the Contract of Sale entered into on 18th January, 1989 between the appellant as purchaser and the Administrator General as vendor be specifically performed at the current monetary value instead of the contract price of K2,105,000.00. Mr. Roberts argued that the appellant

was perfectly happy with the judgment which held that this leasing Finance Bank Limited was one and the same bank as Finance Bank Zambia Limited. He further argued that the appellant was also perfectly happy with the substance of the judgment which granted an order of specific performance save for the question of the price. Mr. Roberts argued that the purchase price of the properties under the contract of sale was specifically and mutually agreed at K2,105,000.00 in January, 1989. The appellant as purchaser paid K1,052,500.00 representing 50% of the purchase price to the Administrator General prior to the execution of the contract. Mr. Roberts argued that although the price of K2,105,000.00 might not seem like a lot of money today for the two properties, that was a lot of money at the time the contract was entered into. He submitted that the purchase price in the contract of sale was a material term of the contract and which persuaded the appellant to enter into the contract. He cited, in favour of his argument, Halsbury's Laws Vol. 44 on Specific Performances paragraph 446 at page 308 which states:

> **"The price is a material term in every Contract of Sale, unless the price is ascertained by the contract, or machinery is provided for its ascertainment, the contract is incomplete and cannot be enforced."**

Mr. Roberts submitted further that the lower court exercised its discretion wrongly by ordering that the contract be specifically performed at the current market value of the properties. He maintained in his argument the effect of such an Order was to alter the terms of the original

Contract of Sale. The counsel further argued that it was the respondent who was in breach of the contract and the consequent seven years delay in completing the transfer was caused by the respondent. He argued further that the appellant on its part had always desired to complete the transaction and it could not be made to suffer the consequences of the respondent's breach by being made to pay a higher price. Mr. Roberts referred us to Halsbury's Laws Vol. 42 on the Sale of Land, paragraph 260 at page 180 where it is stated:

> **"The effect of an Order for specific performance. After an Order for specific performance the contract continues in existence, but the court controls the manner in which the contract will be performed."**

Mr. Roberts submitted further that the Order of Specific Performance ought to have been on the exact terms as was contractually agreed between the contracting parties and the lower court's jurisdiction was limited only to the manner in which it was performed.

On ground two, Mr. Roberts submitted that the respondet did not adduce any evidence either by way of affidavit or viva voce evidence to rebut the appellant's evidence. Neither was there any evidence adduced to substantiate the respondent's allegations of hardship. He submitted that the lower court erred by relying on the verbal submissions of the counsel for the respondent in determining the question of hardship. Mr. Roberts further submitted that the question of hardships should always be determined at the date of contract, i.e. January 1989 and not at the date of the Order of Specific

Performance. He relied on Halsbury's Laws on Specific Performance, Vol. 44 paragraph 467 at page 320. He further submitted that the question of inadequacy of consideration should also be determined at the date of contract and not after. He relied on Halsbury's Laws Vol. 44 paragraph 471 which provides:

> **"Inadequacy of consideration - whenever the question of inadequacy of consideration is raised it must generally be determined as at the date of the contract."**

He further submitted that in exceptional cases such as where the change in conditions resulting in the hardship arises out of the conduct of the appellant then hardship subsequent to the date of contract may be a ground for refusing Specific Performance. He referred us again to Halsbury's Laws paragraph 473. He submitted that in this case the conduct of the appellant did not create any hardship on the respondent.

Mr. Nchito, counsel for the respondent gave brief response to the two grounds appeal. He decided to deal with the other issues in the cross appeal. In reply to the frist ground Mr. Nchito submitted that the court below (assuming it was right in ordering specific performance) acted properly by requiring that the contract be enforced at today's values, since all the court was doing was requiring the amount to be paid at today's equivalent levels. The court was exercising its discretion in settling the matter equitably, and that must be born in mind that specific performance is a discretionary remedy which the court

may apply as it deemed fit. Mr. Nchito further submitted that the effect of the court's decision was to give the contract performance on similar terms as it would have been performed in 1989 since it was assumed that two million in 1989 was the market value and to sell the properties at market price today was in keeping with an equitable performance of the contract, especially that the deposit paid to the Adminstrator General was paid back.

In response to the second ground (assuming the High Court was right in granting specific performance), the counsel submitted that the court had a right and duty to determine the matter in a manner that would be in keeping with the norms of justice; if the decision to sell the properties at today's values taking into account all surrounding circumstances such as the matters raised in the cross appeal is not atrocious then the judge acted properly because the alternative was to grant the respondent unconditional leave to defend and he submitted that it was not atrocious.

From Mr. Nchito's submission it is clear that some issues touching on appellant's grounds of appeal are considered in the cross appeal. It is necessary, therefore, for us to refer now to the cross appeal, then later we shall conclude the two appeals. There are mainly three grounds in the cross appeal. These are:

1. **The Administrator General had no authority to deal with the land because the beneficiaries had put a caveat on it and the purchaser should have inquired as to the reason for the caveat.**

2. The contract was entered in an illegal name contrary to the Registration of Business Names Act.

3. The foregoing notwithstanding the court exercised its discretion wrongly by granting specific performance which would lead to a breach of trust.

Mr. Nchito argued grounds 1 and 3 together and later proceeded to ground 2. On grounds 1 and 3 Mr. Nchito submitted that:

> It was quite clear from the record that the Administrator General acted arbitrarily without consulting the beneficiaries and when the beneficiaries learnt of his intention to sell the properties they put in a caveat because they did not want him to sell; this caveat notwithstanding the Administrator General still insisted on trying to sell until he was removed as Administrator; although the Administrator General may have had the legal right to sell by virtue of his office he had no authority to sell because of the objection of the beneficiaries. This being the case any sale would have been in breach of trust. He maintained that it was a settled principle of law that courts will not grant the remedy of specific performance where to do so would lead to a breach of trust for this would be contrary to the norms of equity. This is discussed in Halsbury's Laws of England 3rd Edition Vol. 44. The learned writers state at paragraph 466 that,
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> > "the courts discretion to grant specific performance is not exercised if the contract is not equal and fair. Even though no fraud, duress or undue influence such as to justify rescission is shown, the court may still not enforce the contract if it would be consistent with equity and good conscience not do so."
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> Further in paragraph 468,
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> > "Specific performance may be denied because the plaintiff has suppressed some relevant facts even though he is under no duty to disclose them and the suppression does not amount to an actionable fraudulent, negligent or innocent misrepresentation."

Mr. Nchito complained that the appellant never disclosed

that the Administrator General, at the time Mr. Chaturvedi, was working for them and that his wife always worked for them. He further referred to Halsbury's Laws of England Fourth Edition, Vol. 44 where it stated:

> **"A species of unfairness which may stay the hand of the court is that the contract, if enforced, would be injurious to third persons, including members of the public or would involve a breach of trust or a breach of a prior contract with a third person....."**

The counsel for the respondent argued further that this same position is repeated in Sir Edward Fry's 'Specific Performance' 6th Edition 1921 at page 194 paragraphs 407 and 408.

Counsel for the appellant Mr. Roberts on cross-appeal submitted that the Administrator General had every right to deal with the property as the said property was vested in the Administrator General pursuant to Section 13 of the Administrator General's Act Cap 200 of the Laws of Zambia. The Administrator General therefore had statutory rights to sell the property and distribute the assets of the Estate pursuant to Section 21 of the Act. He further argued that the Administrator General had no legal obligation under the statute to obtain the consent of the respondent as beneficiary. On the caveat, the counsel argued that the caveat was placed on the property by the respondent on 21st November, 1988 and that was placed six months after the Administrator General had accepted the appellant's offer to purchase the property. There was a valid contract entered into by offer and acceptance on 5th May, 1988 at which time the property was unencumbered.

Mr. Roberts argued further that the respondent as caveator at law should have had an enforceable interest in land supported by a valid document to justify placement of the caveat. He drew our attention to the case of **Construction and Investments Holdings Limited vs William Jacks (1972) ZR 66**. Mr. Roberts argued that the respondent obtained High Court Order revoking the Administrator General's grant on 25th July, 1990 in the case of **Florence Mwanamwale Billingsley vs Administrator General and Reverend Ernest Gerald Billingsley 1990/HP/442**. He submitted that the respondent's application was granted Ad Colligenda Bona to administer the property of the Estate was refused by the High Court on 8th October, 1991 in the case of **Florence Billingsley vs the Estate of Late Dr. John Wesley Billingsley 1991/HP/1563**. The counsel argued that the respondent had at no time adduced evidence of her entitlement as a beneficiary to the property either at the time of placement of the caveat or at the time the case was being argued in the Supreme Court. He further argued that the appellant had to obtain an Order of Appointment of Administrator Pendete Lite in cause number 1991/HP/433 for the purpose of the present litigation and according to the counsel, that did not entitle her to the property. Counsel further argued that Section 18(2) of the Administrator General's Act Cap 200 of the Laws of Zambia clearly provides that upon revocation and new grant all liabilities of the Administrator General under any contract entered into by him was vested in the Administrator General obtaining such new grant subject to all lawful contracts made relating to the estate. He

maintained that the lower court was therefore right in holding that the revocation did not invalidate the contract and neither was the Administrator General an agent of the respondent.

On ground two, Mr. Roberts argued that the lower court was correct in holding that Leasing Finance Bank Limited was one and the same entity as Finance Bank Zambia Limited. That this Leasing Finance Bank Limited merely changed its name pursuant to Section 13 of the Companies Act Cap 686 to Finance Bank Zambia Limited. He further argued that as a limited company the appellant was not bound by the requirements of the registration under Section 2(1) and 3 of the Registration of Business Names Act.

On grounds three and four, Mr. Roberts argued that the lower court exercised its discretion correctly by granting specific performance as in fact no evidence whatsoever was ever adduced by the respondent to impugn or invalidate the contract of sale. No evidence of impropriety on the part of the Administrator General, unfairness or oppression of the contract was ever adduced which could have moved the lower court to decide otherwise. Mr. Roberts further argued that there was no breach of trust at all by the Administrator General. No evidence whatsoever was adduced to establish such trust or any alleged impropriety on the part of the Administrator General. He urged the court to disregard the allegations made in the respondent's affidavit as they raised issues which were never before the lower

court and in any event Section 25 of the Supreme Court Act relates to the taking of "further evidence" in addition to the evidence already adduced in the lower court.

Counsel for both parties have referred us to various authories and statutes in support of their arguments. We are agreatly indebted to them and thank them for the efforts they have made in bringing to our attention the authorities. We have read them and we have taken them into account in our decision. Counsel for the appellant in his response to the cross-appeal has argued greatly on the rights of the caveator. He has submitted that the respondent did not have an interest in the matter and should not have placed a caveat. In the court below, two issues arose on the main application for review. The application was for an order for the removal of the caveat placed by the beneficiary of the properties and for an order of the specific performance of the contract entered between the bank and the respondent. The learned commissioner decided to deal with the question of specific performance of sale first as he considered it to be of greater importance and ruled that if he found for the plaintiff's bank the issue of the caveat would automatically fall away. The learned commissioner then proceeded to deal with the question of specific performance and ordered that there be specific performance. There was, therefore, no need for him to consider the merits and demerits of the caveat but later in his judgment he talked about the caveat in question

when he dealt with the validity of the contract. The evidence through the affidavit of the appellants showed that the respondent was one of the beneficiaries of the estate. It could not be questioned that a beneficiary to a deceased estate would not have an interest in the estate. We are of the view that a beneficiary has sufficient interest in the deceased estate and may take steps to protect that interest. Since the caveat was not given priority by the trial commissioner and since it automatically fell away by the granting of the specific performance, we do not find it necessary to consider arguments of both counsel on this issue; the whole matter rests on the specific performance and the learned commissioner's decision.

Both counsel have vigorously submitted on the issue of Registration of Business Names and on the change of the name from Leasing Finance Bank to Finance Bank. We have seriously considered the authorities cited by the counsel in their arguments, particularly Registration of Business Names Act Section 2(1) and 3 Cap 687 of the Laws of Zambia. This matter was fully argued in the court below and the learned commissioner gave it a very serious consideration and he came to the conclusion that the Leasing Finance Bank was one and same as the Finance Bank Limited. We entirely agree with the learned commissioner's conclusion and hold that he never erred in coming to that conclusion.

This case went to the learned commissioner as an appeal from the District Registrar. The District Registrar

had given a ruling in favour of the respondent that the Finance Bank was a different entity from the leasing Finance Bank and had therefore no capacity to enter into contract of sale. It can be seen that the appeal to the learned Commissioner centered around legal provisions regarding the legality of the appellant's company or bank. The learned Commisioner did not have the advantage of reading the fresh affidavit produced before us. The affidavit before the court shows -

(i) that the respondent and other beneficiaries objected to the sale of the properties and the Administrator General was informed of the objections;

(ii) that there was no cause to sell the properties and that these properties were required to raise money for childrens' education in the United States of America;

(iii) that the Administrator General and his wife had close relationship with Finance Bank; and

(iv) that Finance Bank was prepared to pay more money than what was stated in the contract.

On the evidence available before him, the learned Commissioner could not be found to have erred in concluding that there was a serious challenge to the validity of the contract. We are wondering whether the learned trial Commissioner would have come to the same conclusion if the facts disclosed in the affidavit and internal memoranda had been placed before him. The appeal before the learned trial Commissioner

was mainly on the capacity of the parties to the contract in that the appellant had not registered the business name and that it was a new entity. The facts before this court have raised serious triable issues which would in normal circumstances lead this court to order a retrial. The facts however show that before the parties entered into contract, the beneficiaries were completely opposed to the sale of the properties and that the Administrator General and his wife had very close relationships with the Finance Bank. For these reasons we are unable to send the case back for rehearing.

We now turn to the order made by the learned Commissioner that the properties should be sold at market value. It is a settled principle of law that order for specific performance has a discretional limit. The court's discretion to make an order for specific performance was amply dealt with by this court in the case of **Gideon Mundanda vs Timothy Mulwani and Agriculture Finance Company Limited and S.S.S. Mwiinga, SCZ Judgment NO. 10 of 1987**. The Supreme Court said in that case:

> **"We will deal first with the question of the learned trial judge's discretion to make an order for specific performance. In this respect we are quite satisfied that the majority of the authorities cited to us related to specific performance of contracts other than contracts for the sale of land. The law concerning specific performance of contracts relating to the sale of land is quite clearly set out in paragraph 1764 of Chitty on Contracts 25th Edition, which reads in part:**
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> **LAND**
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> **The law takes the view that damages cannot adequately compensate a party**

> for breach of contract for the sale of an interest in a particular piece of land or of a particular house (however ordinary).....
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> This authority is supported in countless other instances and in this case it is quite clear that the learned trial judge did not have his attention drawn to the fact that his discretion in relation to specific performance of contracts for the sale of land was decidedly limited."

This issue was again dealt with by this court in the cases of Vincent Mijoni vs Zambia Publishing Company Limited, SCZ Appeal No. 10 of 1986 and Denny Mushiko Liuwa vs Zambia Cold Storage Board, SCZ Appeal No. 4 of 1992. In the Liuwa's case, the case of Mijoni and Gideon were fully discussed and orders for specific performance were made in the following terms:

(1) The appellant was made to pay all rates on properties and was made to reimburse the respondent companies any rates paid by them.

(2) The appellants were made to pay interest at a certain rate on the purchase price from the date of the contract to the date of completion.

(3) The appellants were also made to pay in equal shares any tax payable on the transfer of property for costs of loss payable on the purchase price.

In the recent case of Zambia Industrial & Mining Corporation and Lishomwa Muuka, SCZ Appeal No. 1 of 1998 this court again considered orders for specific performance and reaffirmed the principles laid down in the cases already referred

to. The approach taken in the Liuwa's case was followed in the ZIMCO case and similar orders were made by this court.

These authorities we have just referred to have affirmed the approach on the exercise of the discretionary remedy regarding selling of land. The authorities have further shown that in making orders for specific performance, the question of fairness has been brought into play by making orders referred to in the case discussed. The court has however fallen short of doing away with the agreed contract price. In the present case, the learned Commissioner made a direct order, bearing the contract price, directed that the property be sold at the market value. This order is not supported by our decided cases. The learned Commissioner should have followed the approach laid down in the Liuwa's and Mijoni's cases. The learned counsel was on the firm ground when he argued that the learned Commissioner misdirected himself when he ordered specific performance on current market price. The order made by the learned Commissioner is hereby set aside. Can this court now order specific performance on the price stated in the contract? The learned Commissioner found that the price of K2 million for the properties in question was unreasonable and unconscionable. He found that if the properties were sold for that price, it would cause hardships to the widow and the other beneficiaries.

The learned counsel for the appellant has argued that there was no evidence from the respondent that they would

suffer hardships. It is true that the lower court did not have any evidence on the hardships. The learned trial Commissioner based his findings on the inflation and the value of the Kwacha. This court has now received fresh evidence from the respondent. She has deposed in her affidavit that she has children among the beneficiaries who are going to schools in the United States of America and that the properties raise money to meet their fees. She has maintained that if the properties are sold at K2 million the beneficiaries will suffer hardships. It is a fact that there has been a lot of inflation. The widow would need a constant flow of cash to meet her childrens' financial needs in the United States of America. Today K2 million is ridiculously unrealistic. It would completley be unreasonable and unrealistic to sell a block of flats at K2 million. This in our view is a case where a remedy of specific performance at the contract price would cause unfairness and hardships to the respondent and other beneficiaries. We are unable to make an order of specific performance. We agree with the learned trial Commissioner to the extent that he refused to order specific performance on the contract price of K2 million. But on the fresh evidence before us, which evidence we accept, this contract of sale cannot be supported on any ground. Indeed, on the fresh evidence which the learned trial Commissioner had no opportunity to consider, it would still be more unconscionable to enforce the sale agreement.

We also therefore refuse to order specific performance whether on contract price or market value. This means the whole appeal is dismissed. We make no order as to costs.

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B.K. BWEUPE

DEPUTY CHIEF JUSTICE

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E.L. SAKALA

SUPREME COURT JUDGE

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M.S. CHAILA

SUPREME COURT JUDGE