BRITAMAC DISTRIBUTORS (PVT) LTD
versus
SULEIMAN SSENYONGA KAKEMBO

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 10 & 11 October 2016 & 9 November 2016

Civil Trial

A. R. Chizikani, for the plaintiff
H. Nkomo, for the defendant

MUREMBA J: The plaintiff's claim is for the payment of US$180 000-00 by the defendant, interest at the rate of 5% per annum from 9 May 2013 to date of full payment and costs of suit.

The defendant is the registered owner of stand 1502 Salisbury Township measuring 499 square metres held under Deed of Transfer number 6305/80 which property is also known as 15 Jason Moyo Avenue, Harare. The plaintiff averred in its declaration that in 2010 the parties entered into an oral agreement in terms of which the plaintiff was at its own cost to develop the defendant's property by creating shops on it. On completion the plaintiff was to occupy the premises with the right to lease out the shops paying to defendant a monthly sum to be agreed upon until the plaintiff recovered its expenses and return on investment.

The plaintiff said that it developed the property by constructing 6 shops in terms of a plan approved by the City of Harare at a cost of US$180 000-00. The defendant engaged an estate agent, Gabriel Real Estate (Pvt) Ltd to collect agreed payments in terms of the agreement between the parties. Gabriel Real Estate (Pvt) Ltd also drafted the lease agreement between the parties but this lease agreement did not capture the full terms of the agreement between the parties. The plaintiff signed that agreement believing that it fully captured what the parties had agreed upon orally.

The plaintiff averred that in terms of the agreement it was supposed to pay to the defendant US$4000-00 per month and was supposed to occupy the premises until 3 May 2015. Due to low business the plaintiff failed to pay the agreed amount monthly. The defendant issued out summons in the Magistrates Court sitting at Harare under case number

3406/13 for the eviction of the plaintiff for failure to pay the agreed rental. Judgment was obtained in default and the plaintiff was evicted. It is the plaintiff's averment that the defendant was unjustly enriched as improvements were made on his property at a cost by the plaintiff without corresponding obligations by the defendant. The plaintiff therefore wants the defendant to pay it for the expenses it incurred in developing the property.

In his plea the defendant stated that the parties entered into a written agreement which regulated the relations of the parties. The defendant stated that he successfully sued the plaintiff for ejectment and also obtained an order for arrear rentals after the plaintiff had led to the termination of the agreement by committing a breach. The defendant further said that if the plaintiff claims that the defendant was unjustly enriched it should have raised that as a defence in the previous court proceedings that led to judgments against it. The defendant denied that he was unjustly enriched.

The parties agreed on the following 2 issues for trial.

(1) Whether or not an oral agreement with terms other than the ones encapsulated by the written agreement between the parties was ever entered into by the parties.
(2) Whether or not the defendant was enriched at the plaintiff's expenses hence making the defendant liable to compensate the plaintiff.

The onus was on the plaintiff to prove the 2 issues. It led evidence from Zenzo Ngondo who testified as follows. He is a contractor with a company called Mhondoro Construction. He was contracted by Christian the Managing Director of the plaintiff to construct 6 shops at the defendant's premises in 2010. He did the work from commencement to end. He raised an invoice of US$180 000-00 which was produced as an exhibit. He said that he was paid cash by the plaintiff for that invoice. The invoice is dated 23 January 2010. He said that he did the construction using a plan for SS Kakembo (the defendant). The plan was also produced. It shows that it was approved by the City of Harare on 24 March 2010. Zenzo Ngondo said that despite this he had commenced construction on the property on 25 January 2010 before the plan had been approved. He said that they had gone to an inspector of the City of Harare who told them to go ahead with construction saying that these days plans take long to approve.

During cross examination when it was put to him that the agreement between the parties was only signed on 11 March 2010 and that he could not have started construction in January 2010 before the agreement had been signed, Zenzo Ngondo said that Mr *Nkomo* should ask Christian about the agreement. Zenzo Ngondo also said that he was paid the

US$180 000-00 in the form of cash but he had nothing to show for it. He said that his company does not issue any receipts, as the invoice suffices.

Christian Mgbemena the Managing Director of the plaintiff gave the following evidence. He is a Nigerian and his company is into property development. In 2010 he identified the defendant's property and got interested in developing it. He went to Gabriel Real Estates (Pvt) Ltd to get the contact details of the owner since it is the one which manages the property. Upon enquiries the real estate refused to give him the contact details of the defendant. He had to pay a certain employee of the estate agent in order to get the defendant's contact details. The defendant who is a Ugandan resides in the United Kingdom. When Christian Mgbemena wrote to him, he travelled to Zimbabwe and on or about 9 March 2010 the two met at Meikles hotel, Harare where the defendant was booked. Christian Mgbemena made the plaintiff's offer to the defendant to develop the defendant's property at its own cost. The defendant asked what was in for the plaintiff. Christian Mgbemena said that the defendant would give the plaintiff a long time lease so that it would recoup its money. In negotiating the parties agreed that initially the plaintiff would be given a 5 year lease and in those 5 years the plaintiff would be collecting rentals from tenants from the 6 shops. From the rentals collected, the plaintiff would be paying to the defendant US$4000-00 per month and keep the balance of the money. It is this balance which was supposed to make the plaintiff recoup its costs in developing the property. The parties agreed that after the first 5 years the lease could be further extended for another 5 years. The parties agreed that the agreement should be reduced to writing by the defendant's lawyers. On 11 March 2010 this agreement was reduced to writing. The written lease agreement was produced by consent. It has the following pertinent clauses.

(1) Clause 1.1. – The plaintiff was to develop the property by constructing shops in accordance with plans approved by the City of Harare.
(2) Clause 1.3. – The construction of shops was to be completed by 31st May 2010.
(3) Clause 2.1. Upon completion of construction of the shops the defendant or his agent Gabriel Real Estate (Pvt) Ltd was to let the shops to the plaintiff from 1 June 2010 to 31 May 2015.
(4) Clause 2.2. The rent payable by the plaintiff for the first 5 years of the lease would be US$4000-00 per month and in subsequent years it was to be determined by the defendant.

(5) Clause 3.1. In the event of the plaintiff failing to pay any amount in terms of the agreement the defendant would give it a written notice to remedy the breach. Upon failure to do so within 7 days the defendant had the right summarily to cancel the agreement, evict it and retake possession of the shops without prejudicing any right of action to recover any amount due to him arising out of the breach.

(6) Clause 3:4. It was stated that this agreement contained all terms and conditions of the agreement entered into by the parties and no alterations or variations would be of any force or effect unless reduced into writing and signed by both parties.

Christian Mgbemena said that after the parties had signed the agreement he had a plan prepared by an architecture and approved by the City of Harare. He then engaged Mhondoro Construction Company to construct the shops which it did and charged him US$180 000.00. He said that he paid the US$180 000-00 but he had no receipts to show for such payment. He said that the invoice that was issued by Mhondoro construction which Zenzo Ngondo produced was the proof. However, this is the invoice which bears the date of 23 January 2010. He said that Zenzo Ngondo must have made a mistake on the date because construction only started in March 2010 after the agreement of lease had been signed by the parties and not before that.

Christian Mgbemena said that after construction was complete he let out the shops and started paying US$4000-00/month to the defendant as per agreement. However, he reached hard times when his mother died in Nigeria and he failed to pay the money as agreed. This resulted in the defendant suing the plaintiff for eviction and for the payment of arrear rentals in the sum of $32 000-00. Default judgments were granted against the plaintiff because although summons was served at its *domicilium citandi executandi* it did not receive the summons since there are many shops there. It is common cause that the plaintiff did not challenge these judgments and they remain extant. As Christian Mgbemena testified he sought to dispute the 2 judgments and went to lengths trying to explain why they were not correct. I will however not touch on any of his evidence on these 2 issues because these are not the issues for determination in the present matter. I was not sitting to deal with their rescission and since they were not set aside or rescinded they remain extant and binding on the plaintiff.

Christian Mgbemena said that the agreement that the parties signed did not fully capture what the parties had agreed upon orally. He gave the example of the non-variation clause, Clause 3.4 which he said was just inserted by the defendant's lawyers who prepared the written agreement and made him sign. He said that he just signed the agreement without understanding it because he is illiterate. He said that he first became aware of the non-variation clause when the defendant evicted the plaintiff. He also said that as parties they never discussed what would happen in the event of the plaintiff being evicted from the property after failing to meet its obligations in terms of the contract before the expiration of the 5 years.

Under cross examination Christian Mgbemena admitted that on 15 May 2013 the plaintiff's erstwhile legal representatives Muhonde Attorneys wrote a letter to the defendant's legal representatives asking them to suspend the eviction of the plaintiff and acknowledging the plaintiff's indebtedness to the defendant in the sum of $20 000.00 as at April 2013. In the same letter the plaintiff's legal practitioners stated that the plaintiff had constructed the building for US$92 000-00. Christian Mgbemena was asked to explain the disparity in the figures $92 000-00 and $180 000 which the plaintiff is now claiming. Christian Mgbemena did not give a meaningful answer. He said that the $92 000-00 was arrived at after deducting the $32 000-00 that the plaintiff was said to be owing to the defendant in arrear rentals. However, $32 000 plus $92 000-00 do not add up to $180 000, but $124 000-00.

In rebuttal, the defendant led evidence as the sole witness to his case. He is a Ugandan based in the United Kingdom. He owns the immovable property giving rise to the present proceedings. Just like what Christian Mgbemena said it is Christian Mgbemena who approached him offering to develop the property at his own expenses on or around 9 March 2010. The parties met at a city hotel and entered into a written agreement which was drafted by his lawyers and signed by both parties. He said that other than the written agreement the parties have no other agreement binding them.

The defendant said that after the agreement had been signed, the plaintiff went on to construct the building. Thereafter it took occupation of the property. The defendant had had the building inspected and it was confirmed that it had been built to satisfaction. The defendant said that the terms and conditions of the agreement were as per the written agreement that was produced during trial by the plaintiff. The defendant said that along the way the plaintiff breached the contract by falling into arrear rentals. This resulted in the defendant having the plaintiff ejected and making a claim for arrear rentals.

Under cross examination the defendant said that in terms of the agreement the plaintiff was to develop the property at its cost and lease it for a minimum period of 5 years. The defendant said that as parties they never contemplated that the plaintiff would be ejected from the premises before recouping its expenses and as such they did not discuss what was supposed to happen if such a scenario was to arise. He said that they never discussed how much the plaintiff was going to spend in the development of the property as it was not any of the defendant's business as the parties had not entered into a partnership agreement. The defendant said that before the parties entered into the agreement he was realising $5 000.00/month in rentals from the office that was on the property. He said that the office was acquired in 1980 and it had a tenant, British Council. The defendant said that he cannot even put value to the property that was developed by the plaintiff because it is of no concern to him. The defendant said that when Christian Mgbemena approached him he told him that he was a qualified Civil Engineer who was in the business of building and was the Managing Director of the plaintiff. The defendant said that after improvements had been made on the property by the plaintiff the parties never got a valuation report and neither did the plaintiff ever tell him of the money he had expended on the property.

Analysis of evidence

What is apparent is that the defendant and the plaintiff's representative Christian Mgbemena met around 9 March 2010 and negotiated on the agreement. They agreed that the agreement would be reduced to writing. The defendant's legal practitioners then prepared the written contract which the parties then signed on 11 March 2010, about 2 days later. After the written contract had been prepared, both the plaintiff's Managing Director Christian Mgbemena and the defendant signed the contract. From what Christian Mgbemena said, it is clear that he signed the contract freely and voluntarily. He however seeks to disown it on the grounds that, firstly, when he signed it he had not understood it because he is illiterate and secondly, that it was prepared by the defendant's legal practitioners. The doctrine of sanctity of contract provides that once a contract is entered into freely and voluntarily, it becomes sacrosanct and courts should enforce it[1].

[1] Innocent Maja *The Law of Contract in Zimbabwe* p 24; *Madoo (Pvt) Ltd* v *Wallace* 1979 (2) SA 957; *Old Mutual Shared Services (Pvt) Ltd* v *Shadaya* HH 15-2013.

One principle that underpins the doctrine of sanctity of contract is the principle of *caveat subscriptor*. It postulates that a signature appended on a written contract binds the signatory to the terms of the contract[2]. According to this principle a party to a contract is, in general, bound by his signature, whether or not he read and understood the document[3]. The effect of the signature is that once a person signs a contract, the contract becomes sacrosanct and binding. The *caveat subscriptor* rule is only flexible in limited circumstances, for example, in cases where it can be shown by evidence that a party mistakenly signed a document and made a reasonable mistake[4]. The rule will also not apply in cases where there is misrepresentation, fraud, illegality, duress, undue influence and influence[5]. In such cases the courts will not uphold the rule. So in appropriate circumstances courts will relax the rule so as to protect a signatory.

In casu Christian Mgbemena stated that he read the contract, did not understand it but went on to sign it. He knew that what he was signing was a contract, so he was not mistaken about the document he was signing. That he had not understood the document because he is illiterate cannot be an excuse warranting this court to relax the *caveat subscriptor* rule. Christian Mgbemena was not forced to sign the agreement that he had not understood. If he had not understood it he should have sought assistance in understanding it before signing it. By signing the lease agreement he signified his assent to the contents thereof. He thus agreed to the terms which are embodied in the agreement. He cannot now turn around and say that he did not understand the agreement and was not aware of its terms. His signature is sufficient proof that he was aware of the contract terms and that he agreed to them.

Christian Mgbemena alluded to an oral contract that the parties entered into whose terms and conditions were different in some respects from the one that was then prepared by the defendant's legal practitioners. Evidence by the parties shows that when they met for the first time on or about 9 March 2010, they discussed orally and agreed to reduce the agreement to writing, which they did about 2 days later. When parties have agreed to reduce their contract into writing what it means is that the parties intend the written contract to reflect all the express terms of the contract and courts should consider the written contract sacrosanct. In general, the written contract is regarded as the exclusive memorial of the

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[2] Innocent Maja *The Law of Contract in Zimbabwe* p 26.
[3] *Muchabaiwa* v *Grab Enterprises (Pvt) Ltd* 1996 (2) ZLR 691 (S).
[4] Van der Merwe & Ors *Contract of General Principles* 4th ed p 43.
[5] Innocent Maja *The Law of Contract in Zimbabwe* p 83.

transaction between the parties and its contents may not be contradicted, altered or varied by evidence outside its four corners[6]. *In casu* since the parties agreed to reduce the terms of their oral agreement to writing the plaintiff cannot seek to rely on the terms of the oral agreement that the parties discussed which terms were not later captured in the written contract. What now binds them is the written contract and not the initial oral contract. Consequently, I make a finding that the written agreement that the parties produced during trial is the only contract that binds them. I thus consider it sacrosanct. Over and above this, clause 3.4 of the agreement states that this agreement contains all the terms and conditions of the agreement entered into by the parties and that no alterations or variations shall be of any force or effect unless in writing and signed by both parties. This means that other than this written contract there cannot be an oral agreement binding the parties as Christian Mgbemena says.

In suing for the ejectment of the plaintiff from the property and for the payment of arrear rentals the defendant simply acted according to the dictates of clause 3.1 of the written agreement. The court orders remain extant and binding on the parties.

That the parties entered into a contract is not in dispute. That in terms of the contract the plaintiff developed the defendant's property at its own costs is not in dispute. That the plaintiff was to recover its costs from leasing out the premises for an initial 5 years paying rentals of $4000.00 per month to the defendant and that the lease agreement was going to be extended after the initial 5 years and new rentals were going to be pegged by the defendant is also not in dispute. As per their evidence, the parties said that they did not foresee or contemplate a situation whereby the lease agreement could be terminated before the plaintiff had recouped its expenses. As such they did not state in the lease agreement how the plaintiff would recover its costs in such circumstances. It is for this reason that the plaintiff has instituted the present proceedings for the recovery of its money on the basis of unjust enrichment. It argues that having been evicted without recovering the expenses it incurred in developing the property of the defendant, it is entitled to payment of these expenses by the defendant because the defendant has been enriched to its prejudice.

Mr *Nkomo* submitted that the remedy of unjust enrichment cannot be available to the plaintiff in this matter because the parties did not include this remedy in their agreement. I am not in agreement with Mr *Nkomo.* This is because by operation of law if a property is developed or improved by another person who is not the owner, whether legally or illegally,

[6] Innocent Maja *The Law of Contract in Zimbabwe* p 26.

that development or improvement has the effect of increasing or enriching the value of that property. Obviously such increase in value benefits the owner of the property to the prejudice of the developer or improver. If the developer is not compensated for the improvements by the property owner this results in unjust enrichment to the property owner. The remedy of unjust enrichment is therefore available to deal with such scenarios, the rationale being that no party should benefit unduly at the expense of another.

In a general unjust enrichment action the requisites for liability are[7]:

(a) the defendant must be enriched;

(b) the plaintiff must have been impoverished by the enrichment of the defendant;

(c) the enrichment must be unjustified;

(d) the enrichment must not come within the scope of one of the classical enrichment actions;

(e) there must be no positive rule of law which refused an action to the impoverished person.

All the requirements for this action have been satisfied in relation to the plaintiff's claim notwithstanding the breach by the plaintiff' in failing to pay the agreed rentals and falling into arrears resulting in its eviction from the property. The breach that was committed by the plaintiff cannot entitle the defendant to repossess his property without paying any compensation at all for the expenses the plaintiff incurred in constructing 6 shops for him. These shops were built from a mere one office that used to be on the property. That the plaintiff constructed 6 shops in the period that parties had agreed upon in the lease agreement is not disputed. The agreement having been signed on 11 March 2010, construction of the 6 shops was complete by 31 May 2010, a period of less than 3 months. That the shops were built to standard and in accordance with an approved plan by the City of Harare is not in dispute. There cannot be any doubt therefore, that the plaintiff expended its money on the defendant’s property. The enrichment is unjustified in the general sense of justice.

With regards to the quantum of damages, I agree with Mr *Nkomo* that the evidence that the plaintiff’s witnesses Christian Mgbemena and Zenzo Ngondo led was discredited. The two witnesses said that the shops were built at a cost of US$ 180 000.00. Zenzo Ngondo had an invoice to show for it, but the problem with that invoice is that it is dated 23 January

[7] Industrial Equity Ltd v Walker 1996 (1) ZLR 269 (H).

2010, yet at that time no construction work had commenced. According to Christian Mgbemena and the defendant, construction of the shops only commenced after the agreement had been signed on 11 March 2010, the parties having met for the very first time on or about the 9th of March 2010. There is therefore no way construction of the shops could have started in January 2010.

Another issue that discredits the invoice of US$180 000.00 is the letter of 15 May 2013, which was written by Muhonde Attorneys, the erstwhile legal practitioners of the plaintiff. These attorneys wrote the letter to Mr. *Nkomo*, the legal practitioner for the defendant asking the plaintiff to be indulged after the defendant had obtained an eviction order against it. In that letter Muhonde Attorneys said,

> "In view of the relationship between the owner of the premises and our client, more specifically that it is our client who constructed the building in the sum of US$92 000.00 under the terms of the cancelled lease agreement, it is only fair that our client be given an opportunity to clear the arrears on a reasonable payment plan while current rentals are paid when due."

If the shops were built at a cost of US$180 000.00 as Zenzo Ngondo's invoice is saying, then the letter of Muhonde Attorneys would have reflected the same amount. This therefore shows that the invoice of US$180 000.00 is fictitious.

I am in agreement with Mr. *Nkomo* that what the plaintiff ought to have done is to get the property valuated to show its value before the improvements and its value after the improvements. The difference between the two quotations would be the value of the improvements effected by the plaintiff and this is what the plaintiff would be entitled to in terms of damages. Unfortunately, the plaintiff did not present such evidence before the court. However, it is my considered view though that it will be unjust to dismiss the plaintiff's claim or to order absolution from the instance on the basis that the plaintiff failed to prove the quantum of damages. I am inclined to award damages to the plaintiff in the sum of US$92 000.00 as reflected in the letter which was written by Muhonde Attorneys, this amount being the lesser of the two amounts, i.e. US$ 92 000.00 and US$180 000.00. I have taken this approach because the defendant chose not to give a figure to the court as to what he says is the value of the improvements to his property, yet he does not dispute that his property was improved by the plaintiff. The defendant should also have had the property valuated in order to get the value of the improvements made by the plaintiff. His submission that the expenses that were incurred by the plaintiff in developing his property are of no concern to him is wrong. It should be of concern to him because in all fairness he cannot expect to reap where

he did not sow. He cannot expect to benefit from the property which was developed by the plaintiff at its own cost without paying any compensation to it. It does not matter that it is the plaintiff that breached the agreement resulting in its cancellation. The defendant did not give any evidence to dispute the amount of US$92 000.00 that was stated in the letter of Muhonde Attorneys. It is for this reason that I award this amount to the plaintiff.

In the result, it be and is hereby ordered that the defendant pays to the plaintiff the following.

1. US$92 000.00 together with interest at the rate of 5% per annum from 9 May 2013 to date of full payment.
2. Costs of suit.

A.R. Chizikani Legal Practitioners, plaintiff's legal practitioners
Mhishi Legal Practitioners, defendant's legal practitioners