

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**

2011/HPC/0098

(Civil Jurisdiction)

B E T W E E N:

HOMENET ZAMBIA

PLAINTIFF

AND

DAVID VAN DER MERWE

DEFENDANT

**BEFORE HON. MRS. JUSTICE F. M. CHISHIMBA ON THE 7TH DAY OF
SEPTEMBER, 2011**

For the Plaintiff : Mr. L. Linyama – Messrs Eric Silwamba & Company
For the Defendant : Mr. Haimbe – Messrs Sinkamba Legal Practitioners

J U D G M E N T

CASES REFERRED TO:

1. *Theresa Kasonde Sefuke Vs Christoper Hapanti Chimanya (sued in his capacity as the Administrator of the Estate of S. Chimanya) 1993 S.J. 70 H.C.)*
2. *Zambia Export and Import Bank Limited Vs Mkungu Farms Limited and Ellias Andrew Spyron and Mary-Ann Langley Spyron (1993-1994) Z.R. 36 S.C.*
3. *Goss Vs Lord Nugent 1833 5B and Ad.*
4. *Morris Vs Baron & Company 1918 AC 1.19*
5. *Robinson Vs Harman 1848 1 Exch 850/855*
6. *Constantine Line Vs Imperial Smelting Corporation 1942 AC 154 at page 174*
7. *Lewanika and Others Vs Chiluba SCZ Judgment No. 14 of 1998*
8. *Anderson Kambela Mazoka and Others Vs Levy Patrick Mwanawasa and Others SCZ/EP/01/02/03 2002*
9. *Grey Vs Pearson (1857) 6 HL*
10. *Fisher Vs Bell (1961) 1 QB 397*
11. *Patridge Vs Chittenden 1982 2 ALL ER 421*
12. *Berry Vs Berry 1929 2 KB 316*
13. *Woodhouse A. C. Israel Cocoa Limited SA Vs Nigerian Produce Marky Company, 1972 A.C. 741*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *Chitty on Contracts General principles Volume 1, 28th Edition*
2. *Learned Authors of Phipson on Evidence 14th Edition paragraph 402*
3. *Halsbury's Laws of England Fourth Edition paragraph 568*

By a Writ of Summons filed on the 21st February, 2010, the Plaintiff is claiming the following from the Defendant;

- (i) The sum of US\$ 25,680.00 being the balance of commission payable for services rendered at his own request;
- (ii) Damages for loss of use of funds;
- (iii) Any other relief the Court may deem fit;
- (iv) Interest on sums payable at the current Bank of Zambia lending rate; and
- (v) Costs.

In accordance with the Statement of Claim, the Plaintiff is a Company carrying on the business of Real Estate Management and Sales. On or about the 22nd day of February, 2010, the Defendant entered into a contract of Agency with the Plaintiff for the sale of a property on the Defendant's behalf. A buyer Messrs P & G Farming was found for the purchase price of US\$ 1,600,000.00. The terms were that 10% of the purchase price would be paid within 30 days of the acceptance and the balance on completion of the transaction.

Further the Defendant was to pay the Plaintiff's Agent's professional fees being commission of three per cent of the purchase price plus Value Added Tax (VAT) amounting to the sum of US\$ 55,680.00.

In August, 2010 the Defendant approached the Plaintiff with an offer to pay two per cent plus Vat as Commission in the sum of US\$ 37,120.00 which was accepted by the Plaintiff on condition

that the same was paid on the 6th of August, 2010. An agreement was signed to that effect. The Defendant failed to pay the said sum and the special arrangement between the parties was terminated and reverted back to the original contract of three per cent plus Vat Commission.

On the 19th October, 2010, the Plaintiff was paid by the Defendant the sum of US\$ 30,000.00 leaving a balance of US\$ 25,680.00.

The Defendant in it's defence, averred that the condition of three per cent plus Vat in the sum of US\$ 55,680.00 as commission applied only in relation to the original agreement. In disputing liability, the Defendant claimed that the parties mutually and freely agreed to revise the commission to two per cent plus Vat making the total payable amount to US\$ 37,120.00. Further it was agreed that US\$ 30,000 would be paid upon payment of the ten percent purchase price and the balance of US\$ 7,120.00 upon full payment of the contract price. The balance of the purchase price in the sum of US\$ 240,000.00 is still outstanding and as such the action is premature.

Lynette Young a Manager in the Plaintiff Company filed a witness statement on behalf of the Plaintiff. According to her witness statement, the Defendant engaged the Plaintiff to find a purchaser for a property known as Carolina Farm located in Kabwe and an agreement dated 22nd March, 2010 was executed. The sum of US\$ 55,680,000.00 was to be paid as finder's fee.

The Plaintiff secured a buyer Messrs P & G Farming Limited at a purchase price of US\$ 1,600,000.00 and an invoice of three per cent fee was sent.

On the 4th August, 2010, the Plaintiff agreed to discount the finder's fee with a reduction to the sum of US\$ 37,120.00 on condition that the said sum was paid by 6th of August, 2010. This undertaking was in the presence of the Defendant's Advocate Mr. Haimbe. The Defendant failed to pay the reduced amount by the 6th August, 2010 resulting in the re-instated finder fee of the initial sum of US\$ 55,680.00. A sum of US\$ 30,000.00 was paid by the Defendant leaving a balance of US\$ 25,680.00.

In cross-examination, PW1 admitted that there was a reduction agreement entered into on the 4th of August, 2010, without a clause providing for the outcome in the event of default of payment by the said date. It was verbally agreed that in the event of default, the original amount would be reverted back to.

When she was re-examined, she told the Court that the reduced amount was not paid by the 6th August, 2010. The ten per cent deposit was paid to the Defendant who in turn paid the Plaintiff the sum of US\$ 30,000.00 and the balance was to follow later.

David Nicholas Van Der Merwe the Defendant herein filed a Witness Statement on record. He stated that in 2006 he and his late wife Katherine Van Der Merwe signed an agreement with the Plaintiff to find a buyer for his Farm in Kabwe.

In February, 2010 the Plaintiff informed him a prospective buyer had been found namely Messrs P & G Farming Limited. A contract dated 22nd March, 2010 was signed wherein it was agreed that the Plaintiff would be paid the total sum of US\$ 55,680.00 as finder's fee

Thereafter a meeting was held where the Plaintiff agreed to discount the finder's fee by one per cent to the sum of US\$ 37,120.00. It was envisioned by the parties that the buyer would have paid the purchase price by 6th August, 2010. The buyer paid the sum of US\$ 1,100,000.00 in September, 2010 leaving a balance of US\$ 500,000.00.

He stated that he paid the sum of US\$ 30,000.00 and informed the Plaintiff that the balance would be paid upon the buyer's paying the full purchase price which to date has not been paid. He denied that it was ever agreed that the finder's fee would revert to three per cent in the event of failure to pay by the 6th of August, 2010 and denies owing the sum of US\$ 25,000.00 but admitted owing US\$ 7,120.00.

In cross-examination the Defendant admitted that he did not pay the sum of US\$ 37,120.00 on the 6th August, 2010 and only paid the sum of US\$ 30,000.00 in September, 2010. He further admitted that he breached the condition of the contract between the parties. Further that he was supposed to pay the Plaintiff upon receipt of the deposit and not after having received the full purchase price. He stated that he was not sure that he would be paid by 6th of August, but that there was no clause in the variation in the event of default. He admitted that the Plaintiff

agreed to vary the terms of contract on condition that he paid them by 6th August, 2010.

The Learned Advocates for the parties filed in Skeleton Arguments, List of Authorities and written submissions which are on record.

It is submitted by the Plaintiff that it had the right to rescind the subsequent conditional contract as time was of the essence. The Case of ***Theresa Kasonde Sefuke Vs Christoper Hapanti Chimanya (sued in his capacity as the Administrator of the Estate of S. Chimanya) 1993 S.J. 70 H.C.)*** ⁽¹⁾ was referred to which dwelt with a contract made conditional upon some act being done within a reasonable time and time being of the essence.

The main gist of the Plaintiff's argument is that there was a variation in the contract based on a condition which was defaulted on thereby resulting in the reversion of the original contract and they cited the Learned Authors on ***Chitty on Contracts General principles Volume 1, 28th Edition*** who state that;

“A condition is precedent if it provides that the contract is not binding until the specified event occurs. It is subsequent if it provides that a previously binding contract is to determine on the occurrence of the event”.

The Case of ***Zambia Export and Import Bank Limited Vs Mkungu Farms Limited and Ellias Andrew Spyron and Mary-Ann Langley Spyron (1993-1994) Z.R. 36 S.C.*** ⁽²⁾ was cited in submission where it was held *inter alia* that;

“an agreement is signed freely if it is signed in the course of the business practice and the Respondent had a choice to not sign”.

The Case of **Goss Vs Lord Nugent 1833 5B and Ad. 58** ⁽³⁾ in reference to effecting of a variation of the contract was cited. The Case of **Morris Vs Baron & Company 1918 AC 1.19** ⁽⁴⁾ where it was held that;

“... if the changes do not go to the root of the contract there is merely a variation”.

As regards the claim of damages it submitted that the Plaintiff is entitled to damages for loss of use of funds as it was not able to use the funds. The Case of **Robinson Vs Harman 1848 1 Exch 850/855** ⁽⁵⁾ was cited in support of the above.

It is further submitted that the burden of proof lies upon the party who substantially asserts the affirmative of the issue and the **Learned Authors of Phipson on Evidence 14th Edition paragraph 402** was referred.

The Cases of **Constantine Line Vs Imperial Smelting Corporation 1942 AC 154 at page 174** ⁽⁶⁾, **Lewanika and Others Vs Chiluba SCZ Judgment No. 14 of 1998** ⁽⁷⁾ and **Anderson Kambela Mazoka and Others Vs Levy Patrick Mwanawasa and Others SCZ/EP/01/02/03 2002** ⁽⁸⁾ relating to the burden of proof were referred to.

The Defendant submitted on the other hand that it was never agreed or intended that the finder's fee would revert to three per cent in the event of failure to pay by the agreed date of 6th August, 2010.

It is submitted that the only way to settle this matter is to interpret the meaning of the words *consisting's* the variation dated 4th August, 2011.

The Court was referred to the words of **Lord Wensleydale** in the Case of **Grey Vs Pearson (1857) 6 HL** ⁽⁹⁾ where he stated that;

“In Construing Statutes and written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or inconsistency with the rest of the instrument, in which case the grammatical and ordinary words may be modified as to avoid that absurdity or inconsistency but no further”

It is contended that the variation in its ordinary and grammatical sense does not give the Plaintiff the right to revert to the original contract of three per cent plus Vat.

The Cases of ***Fisher Vs Bell (1961) 1 QB 397*** ⁽¹⁰⁾ and ***Patridge Vs Chittenden 1982 2 ALL ER 421*** ⁽¹¹⁾ was referred to.

It is submitted that to avoid an absurdity being caused, the variation of 4th August, 2010 should be given its ordinary and grammatical meaning, that is the finder's fee was mutually reduced to two per cent and the balance owing is US\$ 7,120.00.

I have considered the matter together with the Witness Statements, Case Authorities and Written Submission by Counsel for the respective parties. The facts of the case are very clear and not in dispute. These are that the parties entered into a contract for the Plaintiff to find a purchaser for a piece of land situated in Kabwe belonging to the Defendant on a finder's fee of three per cent plus Vat totalling US\$ 55,680.00. A buyer was secured for the Farm Messrs P & G Farming Limited at the price of US\$ 1,600,000.00. An invoice was sent in the said sum on the 4th of August, 2010. On the 4th August, 2010, the parties executed a varied contract where the Plaintiff agreed to discount the finder's fee with a reduction down to the sum of US\$

37,120.00 provided that the said sum was paid by the 6th of August, 2010.

It is the Plaintiff's case that the Defendant neglected to pay even the reduced fee which invariably rein-stated the finder's fee to the initial sum of US\$ 55,680.00.

On the other hand the Defendant contends that at the time of varying the agreement. It was envisioned that the buyer would have paid the purchase price by 6th of August, 2010 and further that it was never agreed or intended that the finder's fee would revert to three per cent in the event of failure to pay by the said date as aforestated.

I have perused the agreement of 4th August, 2010. The exact wordings are that; ***"I Dave Van Der Merwe agree to pay Homenet Zambia the sum of US\$ 37,120.00 two per cent plus Vat. If Homenet Zambia agree to this: amount will be paid by Friday 6th August, 2010"***.

It is not in dispute that there was a valid contract between the parties which was varied on the 4th August, 2010 by agreement. What is in dispute however is whether the agreement of 4th August, 2010 to discount the finder's fee upon default entailed reversal to the original contract of a finder's fee of three per cent plus Vat.

In my considered view the cardinal issue is whether there was a variation to the contract and if so what the rights of the parties are upon default.

In order to address the above issues it's pertinent to look at the law relating to variation of contract as the contract dated 4th August, 2010 is in my considered view a variation.

Chitty on Contracts Volume 1 General Principles (2008) states that parties to a contract may effect a variation by modifying or altering it's terms by mutual agreement. A mere unilateral notification by one party to the other in the absence of any agreement does not constitute a variation of contract.

Variation can be oral or written. A variation of a contract is an alteration to the legally enforceable obligations which previously bound the parties. In order to be enforceable a variation must fulfil the requirements governing the formation of contracts, that is *inter alia*, offer acceptance and consideration.

The agreement for variation may provide that in the event of default or certain events, the contract takes effect in it's original form. In the Case in *Casu* there was no provision in event of default.

The parties in the Case at hand consented to the variation. The Defendant offered to pay lesser sum which was acceptable by the Plaintiff. The variation was valid and enforceable.

Having found that there was a variation, the main issue that remains is the effect of the said variation on the rights of the parties upon default.

According to ***Halsbury's Laws of England Fourth Edition paragraph 568***, when a contract is varied, it operates according to the

variation and the original terms cannot be set up by one of the parties against the other. The principle of the rules of variation is that after the agreed variation, the contract of the parties is not the original contract but that contract as varied.

I have considered the circumstances of the case at hand.

It is my considered view that upon execution of the varied contract dated 4th August, 2010, in the event of default, the Plaintiff is not entitled to revert to the original contract and claim the balance thereof in the sum of US\$ 25,680.00.

I am fortified in the above by the holding in ***Berry Vs Berry 1929 2 KB 316*** ⁽¹²⁾. The facts of the Case where that a husband and wife entered into a separation deed where the husband covenanted to pay the wife a certain sum each year for her support. His earning proved insufficient to meet his obligations, so they agreed in writing to vary the financial provisions. It was held that;

“this variation was valid and enforceable and that it could be set up by the husband as a defence to an action against him on the original Deed”.

Further in the Case of ***Woodhouse A. C. Israel Cocoa Limited SA Vs Nigerian Produce Marky Company, A.C. 741*** ⁽¹³⁾ it was held that an alteration of money of account in a contract made by one party and accepted by the other is binding on both parties since either may benefit from the variation.

On the balance of probabilities the Plaintiff has failed to prove that is entitled to the balance in the sum of US\$ 25,680.00

For the foregoing reasons, I hereby hold that the Plaintiff is only entitled to claim the sum of US\$ 7,120.00 being balance of the commission on the varied contract and it is hereby adjudged that the Defendant do pay the Plaintiff the outstanding sum of US\$ 7,120.00 together with interest at eight per cent from date of writ until paid. This is payable forthwith and not dependent on the payment of the balance of the purchase price but on the ten per cent deposit paid.

As regards the claim for damages for loss of use of funds I am of the considered view that the interest awarded will suffice.

As regards the claim for costs, the ordinary rule is that where a Plaintiff has been successful he ought not to be deprived of his costs or made to pay costs of the other side. The Plaintiff's success in this matter is nominal. Therefore each party is to bear it's own costs.

Leave to appeal is granted.

Dated the 7th day of September, 2011

F. M. Chishimba
HIGH COURT JUDGE