

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 1119 OF 1990



BETWEEN:

JAYSON MAINTENANCE.....PLAINTIFF

AND

HON. DR. NTABA.....DEFENDANT

CORAM: MKANDAWIRE, J
Ng'ombe counsel for the plaintiff
Msisha, Counsel for the defendant
Kadyakale, Law Clerk

JUDGEMENT

The plaintiff in this case seeks specific performance of an agreement for sale of land namely plot No. SW8/597/4A situated along Kenyatta drive in the city of Blantyre allegedly breached by the defendant. According to the statement of claim the agreement was made around 23rd December 1986. The defendant denies the existence of such an agreement.

The plaintiff's only witness is Mrs Veny Graceath Venichand Coelho. She and her late husband Mr Alfred Coelho, used to run a garage business in the name of Jayson Maintenance. At that time the business was not incorporated.



It was incorporated in 1985 when it became Jayson Maintenance Limited. The witness and her late husband specialised in panel beating and spray painting although they also did general welding and mechanical repairs. The defendant used to run a transport business in the name of Dziwe Transport and he used to take his trucks to Jayson Maintenance for repairs. The workshop of Jayson Maintenance were in Limbe. For certain reasons the witness and her late husband started looking for a plot of their own. The late Mr Coelho then applied for a plot at Chitawira along Kenyatta Drive. According to the witness the Malawi Housing Corporation refused to allocate them a plot on the basis that they were not Malawians. Since they were desirous of getting a plot they approached Dr. Ntaba to assist. They approached Dr. Ntaba because he was a regular customer and a friend of late Mr. Coelho. Their specific request was that Dr. Ntaba should get a plot from the Malawi Housing Corporation and when the plot was developed he should transfer it to Jayson Maintenance. According to the witness, Dr Ntaba was asked to get the plot for them, that is Mrs Coelho and her husband and then transfer it to them after developments. Dr. Ntaba did get a plot but he did so in his own name. Plans for the workshop were duly prepared in the name of Jayson Maintenance but there were rejected as the plot was in Dr. Ntaba's name. New plans in the name of Dr. Ntaba were prepared and these were duly accepted. Developments fees for the plot was paid by Jason Maintenance. Construction work on the plot started in 1986 and Jayson Maintenance provided the funds. Later the plaintiff requested the defendant to transfer the plot. Malawi Housing Corporation consented to the transfer. To this effect a deed of assignment was duly prepared and registered in Deeds Registry on 16th October, 1990. Later, however it was discovered that the wrong procedure was used as the plot in question was governed by the Registered Land Act so that registration in the Deeds Registry was invalid. On 26th October 1990, the Department of Lands and Valuation advised that if title

to the plot was to be conferred to the plaintiff the transfer of lease had to be registered in the Registry of Titles. When the defendant was asked to proceed under the Registered Land Act and complete the sale, he refused. In her evidence the witness said quite a number of things but the crux of the matter is that the defendant refused to transfer the plot to the plaintiff, thereby breaching the sale agreement.

The defendant told the Court that there was no sale agreement between him and Jayson Maintenance Ltd. He had acquired the plot in his own name and not on behalf of the plaintiff. He had a transport business and he started taking his trucks to Jayson Maintenance in 1982. All along he was dealing with Mr Alfred Coelho who was trading as Jayson Maintenance as the business had not been incorporated. They later became very good friends. Although such a relationship had developed, they were able to separate friendship from business so that the defendant was not aware of any special favours extended to him when he brought his trucks for repairs. The transport business went on up to about 1984 or 1985.

The agreement with Mr Coelho was that they would become partners in the garage business. The defendant had acquired a plot from Malawi Housing Corporation. The agreement then, was that he would pass on the plot to Jayson Maintenance once it was incorporated and in consideration thereof he would have 50 percent shareholding in the incorporated company. The other 50 percent would go to Mr Coelho. This agreement was made in about 1984., and it was between the defendant and Mr. Coelho. Mrs Coelho did not take part in the discussions. But when Jayson Maintenance was incorporated on 11th June 1985 the documentation did not reflect the 50 percent/50 percent partnership with Mr Coelho. When he queried, he was told the position would be

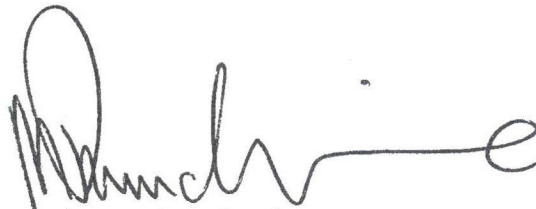
regularised later. In reply he said he would not transfer the plot to the Company unless the legal documents of the company reflected his 50 percent Shareholding. According to the agreement both parties would be responsible for developing the plot. For that reason he had left a 3 axiled trailer for repairs and the arrangement was that after repairing it should be sold and the proceeds thereof to go towards developing the plot. The defendant also gave a personal guarantee at the bank for an overdraft to build and run the garage. It is therefore not correct that the defendant contributed nothing to the development of the plot. Turning to the deed of assignment, he said the idea was that it should not be registered as his signature had not been witnessed. In other words, it was not going to be used to transfer the plot. At that time Mr Coelho was sick and he was under extreme pressure from family members. The document was prepared merely to ease pressure on Mr Coelho who most unfortunately passed away before the shareholding was normalised. Perhaps I should mention that Jayson Maintenance was a family business, and other members of the family were against extending shareholding to the defendant.

It appears to me that this alleged sale agreement cannot be enforced. To begin with the agreement was entered into between the defendant and Mr Coelho. That was before Jayson Maintenance was incorporated. Even Mrs Coelho admitted that the time the agreement was made Jayson Maintenance Limited did not exist. This was therefore a pre-incorporate contract. There is no evidence to show that when the company was incorporated it adopted the agreement. The incorporated company cannot therefore sue under the agreement - see Section 20 of the Companies Act. Secondly, there is also the problem of consideration. Paragraphs 1 and 2 of the Statement of Claim provide that the defendant had agreed to sell at a price of K80,000.00 and that the plaintiff had duly paid this amount to the defendant. The evidence however shows that the

K80,000.00 was not paid. Mrs Coelho came out very clear in cross-examination that the amount was not paid. There was therefore no consideration and a contract that lacks in consideration cannot be enforced. See the case of *Dunlop -vs- Selfridge* (1915) AC 847.

This action cannot therefore be sustained. In the result it is dismissed with costs.

PRONOUNCED in Open Court this 27th day of January, 1998 at Blantyre.

A handwritten signature in black ink, appearing to read 'M. P. Mkandawire', with a long horizontal flourish extending to the right.

M. P. Mkandawire

JUDGE