

REPORTABLE (160)

(1) TENDAYI WASHAYA

(2) CHIPO WASHAYA

v

(1) MAKEBREAK TRADING (PRIVATE) LIMITED

(2) THE SHERIFF OF THE HIGH COURT (N.O)

(3) THE REGISTRAR OF DEEDS

**SUPREME COURT OF ZIMBABWE
MALABA CJ, UCHENA JA, & CHIWESHE AJA
HARARE, 16 NOVEMBER 2020 & 13 DECEMBER 2021**

A.I Phulu, with him *Ms Dube-Tachiona*, for the appellants

E. Mubaiwa, for the first respondent

No appearance for the second and the third respondents

MALABA CJ: This is an appeal against the whole judgment of the High Court (“the court *a quo*”) holding that the first respondent had complied with the provisions of the Contractual Penalties Act [*Chapter 8:04*] (“the Contractual Penalties Act”) in sending a notice of cancellation of an agreement to the appellants by registered post.

The Court holds that the delivery of a registered mail slip at the appellants’ chosen *domicilium citandi* constituted due delivery as contemplated by s 8(3)(b) of the Contractual Penalties Act, and as provided for in the parties’ agreement. It was not necessary for the document containing the written notice to be delivered to the appellants. Once there was delivery of the registered mail slip then there was delivery of the notice in the same manner as when one is given keys to a house or motor vehicle.

FACTUAL BACKGROUND

On 24 February 2015 the appellants and the first respondent entered into an agreement of sale (“the agreement”), in terms of which the first respondent sold to the appellants a vacant piece of land described as stand number 321 being a subdivision of Marconi Farm of Kinvara, held under Deed of Transfer number 1136/2002 (“the property”).

The purchase price of the property was pegged at US\$30 000. A deposit of US\$15 000 was to be paid in instalments. The first US\$10 000 towards the deposit was to be paid upon the signing of the agreement. The balance of the deposit of US\$5 000 was to be paid in instalments of US\$1 666.67 for a period of three months starting from 30 April 2015. The remaining balance of the purchase price of US\$15 000 was to be paid over a period of eighteen months. That balance of the purchase price was to attract interest at the rate of 20% per annum. Possession of the property was to be given to the purchaser upon payment of 50% of the purchase price.

It was further agreed between the parties that if the purchaser failed to perform any of the obligations under the agreement and failed to rectify such breach within thirty days of dispatch by the seller of written notice of such breach by registered post or hand delivery, the seller would have the right to cancel the agreement. It was further agreed that in such circumstances the seller would regain possession of the property and claim damages by way of a cancellation fee in the sum of US\$2 000 subject to compliance with the provisions of the Contractual Penalties Act, or claim specific performance in terms of the agreement with interest at the rate of 20% per annum.

Pursuant to the agreement, the appellants took possession of the property. In breach of the terms of the agreement the appellants failed to pay some of the instalments of the

purchase price when they became due for payment. Consequently, the first respondent cancelled the agreement.

The cancellation resulted in the appellants instituting summons in the court *a quo*. They contended that, contrary to the terms of the agreement of sale, there was no thirty day notice given by the first respondent to enable them to rectify the breach. The allegation was that the first respondent's conduct was in violation of the terms of the agreement. The appellants sought an order from the court *a quo* declaring the cancellation of the agreement to be invalid. They also asked the court *a quo* to order the first respondent to accept payment of the arrear instalments together with interest thereon. Lastly, they sought an order compelling the first respondent to sign all documents necessary for the transfer to themselves of the property.

The first respondent filed a plea and a counter-claim in response to the appellants' claim. In the counter-claim, the first respondent averred that the appellants breached the agreement when they defaulted on the payment of instalments towards the purchase price for the property when the payment became due. As at 31 October 2017 they had accrued arrears in the sum of US\$24 194.04. The first respondent further contended that, acting in terms of clause 11 of the agreement, it notified the appellants of the breach through a letter which was served on them via registered mail on 20 November 2017. The allegation was that the appellants did not rectify the breach, leading to the first respondent cancelling the agreement on 30 October 2018 through a letter which was again served on the appellants via registered mail.

The first respondent prayed for the confirmation of the cancellation of the agreement, eviction of the appellants from the property, the payment of US\$2 000 as cancellation fee, payment of holding over damages of US\$600 per month, and costs of suit.

In response to the counter-claim, the appellants denied all the averments made by the first respondent. They alleged that the notice of breach of the agreement given by the first respondent did not comply with the requirements of the contract between the parties. The appellants accepted that they had breached the agreement by failing to pay the instalments when they became due and payable.

The matter proceeded by way of a stated case. The agreed facts were that the appellants had defaulted in the payment of the instalments and had fallen into arrears in the amount of US\$24 194.04. It was agreed that, consequent upon the breach of the agreement between the parties, the first respondent dispatched a letter by registered post to the appellants' *domicilium citandi* on 20 November 2017 giving them thirty days' notice of intention to cancel the agreement.

The parties also agreed that on 15 December 2017, and prior to the expiration of the thirty days' notice period, the first respondent dispatched another letter by registered post, purportedly cancelling the agreement. The appellants had moved from the *domicilium citandi* without notifying the first respondent. As a result, the registered mail remained unclaimed at the Post Office until it was returned to the first respondent on 11 April 2018.

The parties were in agreement that on 26 October 2018 the first respondent sent another letter to the appellants, advising them to disregard the letter of 15 December 2017 and to consider the letter of 26 October 2018 as the final cancellation letter. Notwithstanding the letter of 26 October 2018, and in an attempt to remedy the breach of the agreement, the appellants paid into the first respondent's bank account the sum of US\$12 960 on 20 November 2018. They subsequently made payments of US\$14 138.20 and US\$3 780 on 7 and 9 January 2019 respectively. The payments were not received because the first respondent had closed the bank account.

The parties agreed that there was one issue for determination. They couched it as being:

“Whether or not the provisions of the Contractual Penalties Act [*Chapter 8:04*], in particular section 8(2) as read with section 8(3)(b) that entitles a debtor to a written notice before a credit provider institutes action, requires the debtor to actually receive the notice.”

The court *a quo* found that in sending by registered post the notice to the appellants to rectify breach of the agreement within the prescribed period the first respondent had complied with the legal obligation under the agreement of sale. It held that there was compliance with s 8(3)(b) of the Contractual Penalties Act. The appellants’ claim was dismissed with costs.

Aggrieved by the decision of the court *a quo*, the appellants noted the present appeal. The issue for determination is whether the holding by the court *a quo* that the delivery of the registered mail slip at the *domicilium citandi* was service on the appellants of the notice of breach of the agreement of sale in terms of s 8(3)(b) of the Contractual Penalties Act was correct.

The appellants argued that what was delivered at the *domicilium citandi* was not the package containing the written notice itself. As regards the legal consequences of the delivery, counsel referred the Court to s 40(1) of the Interpretation Act [*Chapter 1:01*] (“the Interpretation Act”).

Counsel for the appellants argued that s 40(1) of the Interpretation Act regulates the interpretation of s 8(3)(b) of the Contractual Penalties Act, which deals with the delivery of registered mail. It was further submitted that s 40(1) of the Interpretation Act envisages a situation where the document with the written notice is delivered rather than the registered mail slip. He further asserted that the provisions of s 8(3)(b) of the Contractual Penalties Act

do not depart in principle from those of s 40(1) of the Interpretation Act. He also submitted that s 8(3)(b) of the Contractual Penalties Act must be read together with s 40(1) of the Interpretation Act. The argument was that there was no compliance with s 8(3)(b) of the Contractual Penalties Act.

Counsel for the first respondent argued that it was common cause that the registered mail slip was delivered at the appellants' *domicilium citandi*. He argued that the obligations under s 8(3)(b) of the Contractual Penalties Act were discharged by the first respondent. Counsel further asserted that the first respondent did not have the additional obligation to ensure that the appellants collected the registered mail from the Post Office.

Counsel for the first respondent further stated that, contrary to the terms of the agreement, the appellants had vacated their chosen *domicilium citandi* without informing the first respondent. He argued that, while the appellants claimed not to have seen the registered mail slip, they had admitted receipt of a process sent in the same way subsequent to the delivery of the registered mail slip.

THE LAW AND THE FACTS

The question is whether the court *a quo* was correct in holding that the delivery of the registered mail slip at the appellants' *domicilium citandi* constituted service of the written notice of breach of the agreement between the parties in terms of s 8(3)(b) of the Contractual Penalties Act. The court *a quo* said at pp 9 and 10 of the judgment:

“The first defendant served the notice in terms of the parties' agreement. Paragraph 15 of that agreement gave either party's chosen *domicilium citandi* and 268/64 Chiltern Road, Waterfalls was the plaintiffs' chosen *domicilium*.

The parties had also indicated in the agreement that any variations or changes to the contract should be in writing and signed by both parties. It is in that same contract that the parties agreed on their respective *domicilium* for the purpose of receiving any correspondence. There was no variation or change to this.

...

A chosen *domicilium citandi* denotes where a party to a contract desires to receive whatever communication that is in relation to issues to do with such contract. It follows therefore that one's residential address need not be one's chosen *domicilium*. A party may choose such *domicilium* based on where they regard as the most convenient place to receive legal notices and, should that change, it is to be expected that such party will duly notify those likely to be sending such notice, otherwise the whole concept of choosing a *domicilium citandi* loses meaning.

It is in this context that one must interpret the provisions of s 8(3)(b) of the Act. I am therefore persuaded by *Mr Nyahuma's* argument that when the notice dated 17 November 2017 was sent by registered post to the purchaser's chosen *domicilium citandi*, the first defendant was complying with the exigencies of the provisions of s 8(3)(b)."

Choosing a *domicilium citandi* has specific legal consequences such as -

- The party who elected the *domicilium citandi* should be ready to receive any legal notice that is delivered to that address;
- If a change in address occurs, a party should notify the other contracting party, preferably in writing, of such a change in address; and
- Delivery of a legal notice or document to the *domicilium citandi* chosen by a party to a contract will be considered sufficient for the purposes of legal action and such party would be deemed to have received the legal notice or document.

Section 8 of the Contractual Penalties Act provides as follows:

“8 Restriction of sellers’ rights

(1) No seller under an instalment sale of land may, on account of any breach of contract by the purchaser —

- (a) enforce a penalty stipulation or a provision for the accelerated payment of the purchase price; or
- (b) terminate the contract; or
- (c) institute any proceedings for damages;

unless he has given notice in terms of subsection (2) and the period of the notice has expired without the breach being remedied, rectified or discontinued, as the case may be.

- (2) Notice for the purposes of subsection (1) shall —
 - (a) be given in writing to the purchaser; and
 - (b) advise the purchaser of the breach concerned; and
 - (c) call upon the purchaser to remedy, rectify or desist from continuing, as the case may be, the breach concerned within a reasonable period specified in the notice, which period shall not be less than —
 - (i) the period fixed for the purpose in the instalment sale of the land concerned; or
 - (ii) thirty days;

whichever is the longer period.

(3) Without derogation from section 40 of the Interpretation Act [*Chapter 1:01*], a notice shall be regarded as having been duly given to the purchaser for the purposes of subsection (1) —

- (a) if it has been delivered to the purchaser personally or to an agent chosen by the purchaser for the purpose of receiving such notices; or
- (b) if it has been posted by registered post to the address chosen by the purchaser for the delivery of correspondence or legal documents relating to the instalment sale of land concerned or, in the absence thereof, to the purchaser's usual or last known place of residence or business.”

Section 40(1) of the Interpretation Act provides as follows:

“40 Service of documents

(1) Where an enactment authorises or requires a document to be served by post, and where the word ‘serve’ or any of the words ‘give’, ‘deliver’ or ‘send’ or any other word is used, the service of the document may be effected by prepaying, registering and posting an envelope addressed to the person on whom the document is to be served at his usual or last-known place of abode or business, and containing such document, and, unless the contrary is proved, the document shall be deemed to have been served at the time at which such envelope would have been delivered in the ordinary course of post.” (the underlining is for emphasis)

Parties to a contract are allowed the discretion to choose different forms of delivery of documents or legal notices that relate to the contractual relationship. The parties elected to use the registered mail system as a mode of delivery. Because they chose this mode of delivery of documents relating to the contractual relationship, it meant that they agreed to be bound by it.

The law of service of documents by registered post prescribes a procedure for ensuring effective service. The procedure entails that the registered article, such as an envelope containing the document concerned and bearing the name of the addressee and place where the mail is to be delivered, be deposited by the originator or sender at a Post Office. The registered article must be accepted and its receipt as a registered item acknowledged.

Using the internal system of ensuring the security of registered mail, the Post Office concerned conveys the registered article to the branch nearest to the address on the registered item. The branch of the Post Office in possession of the registered item issues out a registered mail slip directed at the address on the registered article, notifying the person whose name appears as the addressee of the availability of the registered item at the Post Office for collection. The registered item becomes capable of retrieval by the addressee from the Post Office. Delivery of the registered mail slip at the address appearing on the registered article constitutes effective service of the registered mail. The collection of the registered item from the Post Office is the responsibility of the addressee.

The South African case of *Kubaya v Standard Bank of South Africa Ltd* [2014] ZACC 1 sets out at para 48 a standard practice of the Post Office on the conveyance and delivery of registered mail similar to that prevailing in Zimbabwe. The court said:

“It is so that section 96(1) requires that notices be delivered ‘at the address’ provided by the recipient. However, this requirement must be understood with due regard to the practical aspects of dispatching a notice by way of registered mail. When a credit provider dispatches a notice in that manner, the notice is sent to a particular branch of the Post Office. That branch then sends a notification to the consumer, indicating that a registered item is available for collection. It is never the case that an item dispatched by registered mail will physically be delivered to an individual – such delivery only occurs if the item is sent by ordinary mail, which does not suffice for purposes of sections 129 and 130 of the Act. If a consumer elects not to respond to the notification from the Post Office, despite the fact that she is able to do so, it does not lie in her mouth to claim that the credit provider has failed to discharge its statutory obligation to effect delivery.”

Where a party to a contract has chosen an address as a *domicilium citandi* where service of documents or correspondence on matters relating to the contract should be effected and has selected the registered mail as the preferred mode of service of documents or correspondence, compliance by the other party with the procedure prescribed under the law of service by registered post would constitute effective service of any such document or correspondence upon delivery of the registered mail slip at the chosen *domicilium citandi*. The procedure prescribed by the law of service of documents or correspondence by registered post does not require delivery of the registered item itself at the chosen *domicilium citandi*.

In *Munien v BMW Financial Services (SA) (Pty) Ltd and Another* 2010 (1) SA 549 WALLIS J stated the following at p 558E-G:

“It follows that in my judgment, provided the credit provider delivered the notice in the manner chosen by the consumer in the agreement and such manner was one specified in s 65(2)(a), it is irrelevant whether the notice in fact came to the attention of the consumer. As the consumer has the right to choose the manner in which notice is to be given it is for the consumer to ensure that the method chosen will be one that is reasonably certain to bring any notice to his or her attention. In the present case the applicant was presumably aware of the deficiency in the postal services at the address chosen in the agreement. He was certainly aware that he had moved. In terms of clause 15.1 of the contract he was perfectly entitled to give notice of that fact to the first respondent and to alter his *domicilium*. He did not do so. His right to alter his address was reinforced by s 96 of the NCA. In addition, he was obliged under s 97 of the NCA to inform the first respondent that the location of the motor vehicle had changed, but it does not appear that he did so. The fact that he did not receive either the notices or the summons appears to follow very largely from his own actions rather than those of the first respondent.”

It is common cause that the parties had agreed under clause 15 of the agreement that the *domicilium citandi* would be as stated in the agreement. It is also common cause that under clause 14 of the agreement the parties had agreed that any variation or change to the contract would be in writing and agreed on by both parties.

The written notice, drawing the attention of the appellants as purchasers to breach of the contract and calling upon them to rectify the breach within thirty days of service of the notice on them failing which cancellation of the contract would follow, was sent by registered post to the branch of the Post Office nearest to the address the appellants had chosen as the *domicilium citandi*. The Post Office issued out a registered mail slip to the *domicilium citandi*, notifying the appellants of the availability of the registered item for collection. The registered mail slip was delivered at the *domicilium citandi*. The act of delivery of the registered mail slip at the *domicilium citandi* completed the process of effective service of the notice by registered post contemplated under s 8(3)(b) of the Contractual Penalties Act.

Section 8(3)(b) of the Contractual Penalties Act does not require actual receipt of the registered mail itself by the addressee. It does not require the seller under an instalment sale of land to bring the contents of the notice of breach to the subjective attention of the purchaser. Section 8(3)(b) of the Contractual Penalties Act is to the effect that the notice shall be regarded as having been duly given to the purchaser if it has been posted by registered post to the address chosen by the purchaser for the delivery of correspondence or legal documents relating to the instalment sale of land concerned.

The seller discharged its obligation to the appellants as purchasers in terms of the contract, as read with s 8(3)(b) of the Contractual Penalties Act, regarding the mode of service of the notice of breach of the contract. The fact that the appellants no longer resided at

the chosen *domicilium citandi* was of no consequence to the determination of the question whether delivery of the registered mail slip at the *domicilium citandi* constituted effective service of the notice of breach of the contract for purposes of s 8(3)(b) of the Contractual Penalties Act. The risk of non-receipt of the registered item lay with the appellants once the registered mail slip was delivered at the *domicilium citandi*. The obligation to notify the seller in writing that they were no longer residing at the chosen *domicilium citandi* was theirs.

In *Van Niekerk and Another v Favel and Another* 2006 (4) SA 548 (W) at p 561C-D it was held that the requirement of notifying the purchaser of breach of contract and making demand of the purchaser to rectify the breach was satisfied provided that the letter had in fact been sent to him by registered post, whether or not it was received by the purchaser.

The contention advanced on behalf of the appellants was that the service of the written notice of breach by the seller on the purchaser by registered mail required under s 8(3)(b) of the Contractual Penalties Act was the delivery of the written notice itself in a registered envelope at the chosen *domicilium citandi*. That meaning of s 8(3)(b) of the Contractual Penalties Act was said to be derived from the application of s 40(1) of the Interpretation Act on the interpretation of enactments providing for service of documents by registered post.

The contention advanced on behalf of the appellants overlooked the principle contained in s 2(1)(a) of the Interpretation Act, to the effect that the application of the provisions of the Interpretation Act to the construction of any enactment must be consistent with the intention, purpose or context of the enactment.

The purpose of s 8(3)(b) of the Contractual Penalties Act is to make provision for effective service of a written notice of breach of the instalment sale of land by the seller to the purchaser where it has been posted by registered post to the address chosen by the purchaser

for the delivery of correspondence or legal documents relating to the instalment sale of land. Section 8(3)(b) of the Contractual Penalties Act expressly provides that the notice shall be regarded as having been duly given to the purchaser for the purposes of subs (1)(b) (termination of the contract) if it has been posted by registered post to the address chosen by the purchaser as the *domicilium citandi*.

Given the provisions of s 2 of the Interpretation Act, s 40(1) of the same Act may not be relied upon to contradict the purpose of s 8(3)(b) of the Contractual Penalties Act. Section 8(3)(b) of the Contractual Penalties Act does not need the application of s 40(1) of the Interpretation Act because its provisions are clear and unambiguous.

DISPOSITION

Accordingly, it is ordered as follows -

“The appeal is dismissed with costs.”

UCHENA JA: I concur

CHIWESHE AJA: I concur

Dube-Tachiona and Tsvangirai, appellants’ legal practitioners
Nyahuma’s Law, first respondent’s legal practitioners