

**FELIX DZUMBUNU**

**v**

**(1) BATANDI MICHAEL MPOFU N.O. (2) CHIKOTI DORO  
(3) MASTER OF THE HIGH COURT OF ZIMBABWE**

**SUPREME COURT OF ZIMBABWE**

**GUVAVA JA, MAVANGIRA JA & CHITAKUNYE JA**

**BULAWAYO: 17 NOVEMBER 2022**

*G. Nyoni with J.B. Ndubiwa, for the appellant*

*S. Siziba, for the first respondent*

*D. Nyaningwe, for the second respondent*

No appearance for the third respondent

**Judgment No. 12/24  
Civil Appeal No. SCB 79/22**

**MAVANGIRA JA:**

1. This is an appeal against the whole judgment of the High Court of Zimbabwe handed down on 14 July 2022, under judgment number HB 188/22.
2. After hearing the parties, the court dismissed the appeal with costs. The reasons therefor appear hereunder.

## **FACTUAL BACKGROUND**

### **Statement of agreed facts**

3. The parties filed a statement of agreed facts before the court *a quo*. The statement was reproduced by the court *a quo* in its judgment and may be summarised, materially, to the following effect:

(a) Sometime in November 2014, the first respondent and the appellant entered into a written agreement of sale over stand number 6505 Bulawayo Township of Stand 6541 Bulawayo Township, situate in the district of Bulawayo. In their papers, the parties refer to it as “the initial agreement”. The appellant took occupation of the property immediately upon the signing of the agreement in accordance with the terms thereof. The terms of the agreement also provided that the appellant was to pay the purchase price of the property in the sum of USD105 000 as follows:

- A deposit in the sum of USD25 000 upon the signing of the agreement.
- The balance of USD80 000, by way of three equal instalments commencing on the 28<sup>th</sup> of February 2015, and subsequently on or before 28 April 2015 and finally on or before 31 July 2015.

(b) The said purchase price was as per the then prevailing fair market value of the property. The appellant paid a deposit of USD37 000, “by 12 March 2015.” The appellant however breached the agreement of sale by failing to pay the balance of the purchase price of USD 68 000 in the manner stipulated in the agreement. The notice of termination of the initial agreement of sale authored by the first respondent was, according to the sheriff’s return of service, served upon the appellant at No 43 Aberdeen Road, Fortunes Gate, Bulawayo on 12 August 2015, by handing a copy thereof to the appellant’s worker. In terms of the notice of termination, the initial agreement was cancelled on 4 September 2015.

(c) An action was instituted by the first respondent on 16 February 2017 under case number HC 446/17 seeking the following relief:

- An order confirming the cancellation of the initial agreement
- An order evicting the appellant and all those claiming occupation from the property in question.

- An order that the appellant pays “occupational damages” to the first respondent in the sum of USD800 per month or USD26.67 per day from the 4<sup>th</sup> of September 2015, being the date of the cancellation of the initial agreement to the date of eviction.

(d) A default judgment was granted on 19 May 2017, confirming the cancellation of the initial agreement and granting the relief as prayed for in the summons in HC 446/17. In terms of the writ of execution and ejection issued on 8 February 2018 pursuant to the default judgment, the appellant was evicted from the property in question.

(e) On 22 November 2018, the default judgment under HC446/17 was rescinded and set aside under HC 1576/18. On 26 November 2018, the appellant entered an appearance to defend the action under HC 446/17. On 18 February 2019, he filed a special plea but had not (as at the time of the filing of the statement of agreed facts) pleaded over to the merits.

(f) During the period when the order (in default) in HC 446/17 was extant, the first respondent entered into a written agreement of sale over the same property (second agreement) with the second respondent. In terms of the second agreement, the second respondent was to pay the full purchase price in respect of the property being the sum of USD130 000 as follows:

- A deposit in the sum of USD70 000 upon the signing of the agreement.
- The balance of USD60 000 to be paid between the 31 April 2018 and 31 July 2018.

(g) The purchase price prescribed in respect of the property in terms of the second agreement was also per the then prevailing fair market value. In accordance with the terms of the second agreement and by the 18<sup>th</sup> of July 2018, the second respondent had paid the full purchase price in the sum of USD130 000 to the first respondent.

(h) The third respondent was made aware of the second agreement of sale in terms of a report by the first respondent and he duly recorded such sale in his minutes in respect of a creditors' meeting held on 21 June 2018. The minutes of the said meeting are contained in the third respondent's final liquidation file under CRB 2/10.

I interpose at this juncture, for the sake of clarity, to explain that the first respondent acts in his official capacity as the liquidator of a company, Tabs Avon Lighting (Pvt) Ltd (in liquidation), the seller of the property in issue, hence the involvement of the third respondent.

(i) On 21 March 2018, the only secured creditor of Tabs Avon Lighting (Pvt) Ltd (in liquidation), being NMB Bank Limited, approved of the second agreement of sale and the third respondent was duly made aware of such approval. The letter by this sole creditor is also filed in the third respondent's final liquidation file under CRB 2/10.

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(j) In the aftermath of the granting of the order under HC 1576/18 and after the conclusion of the second agreement of sale and the payment by the second respondent of the full purchase price in respect of the property, the appellant took steps aimed at remedying his breach of the initial agreement of sale. He did so by depositing USD68 000 into the first respondent's legal practitioners' trust account, being the balance of the purchase price.

(k) The steps taken by the appellant aimed at remedying his breach of the initial agreement were not accepted by the first respondent. The first respondent's legal practitioners tendered back to the appellant the said amount of USD68 00 that had been paid into its trust account.

(l) By way of an order granted under HC 3144/18, the second respondent (being the purchaser in the second agreement) was joined to the main proceedings.

He duly entered an appearance to defend the action and filed his plea thereto.

(m) As at the date of the statement of agreed facts and following the appellant's eviction therefrom in terms of the writ of execution and ejection issued against him under HC 1576/18, neither of the parties were in physical or lawful occupation of the property nor had any party taken transfer thereof.

In the statement of agreed facts, the parties listed the following as the issues for determination by the court *a quo*:

(i) Whether the initial agreement of sale over stand 6505 Bulawayo Township of Stand 6541A Bulawayo Township, situate in the District of Bulawayo between the plaintiff (appellant) and first defendant (first respondent) was lawfully terminated. **Judgment No. 12/24**  
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(ii) Whether there existed any legal impediment to the conclusion of the second agreement of sale entered into between the plaintiff (first respondent) and the second defendant (second respondent) at the material time.

(iii) To whom should the property being stand 6505 Bulawayo Township of Stand 6541A Bulawayo Township, situate in the District of Bulawayo be transferred.

#### **SUBMISSIONS BEFORE THE COURT A QUO**

4. On the first issue, the appellant argued that the notice was not delivered in compliance with s 8 (3) of the Contractual Penalties Act [*Chapter 8:04*] ('the Act') in that it was not delivered to him personally or by registered post to his chosen address.

5. On the other hand, the first respondent submitted that the appellant was notified of the breach in a manner that complied with the provisions of s 8 of the Act, and that the agreement was lawfully cancelled.
6. The second respondent, on his part, contended that the agreement between the appellant and the first respondent was lawfully terminated. According to him, the question that arose was whether the service of the notice on the appellant by way of handing it to his worker was valid service in terms of s 8 of the Act.

### **THE COURT A QUO'S DETERMINATION**

7. In determining the matter, the court *a quo* found that it was “*required to tease out the intention, purpose or context of s 8 (3) (b)*” of the Act. It found that its purpose is to make provision for effective service of a written notice of breach of an instalment sale agreement. It stated that service of the notice of the termination of the agreement was served at the appellant’s given address of service and concluded that service on the appellant’s worker amounted to effective service of the notice.
8. The said court noted that the notice of cancellation clearly specified that the appellant had breached the agreement of sale by failing to pay the instalments. The appellant was given thirty days’ notice to remedy the breach by settling the amount due. The notice specified that failure to settle the amount within thirty days would lead to an automatic cancellation. The appellant unilaterally deposited into the first respondent’s legal practitioners’ trust account the balance of the purchase price almost three years after the deadline of 1 September 2015. Therefore, the issue whether the agreement between the appellant and the first respondent was lawfully terminated, was settled accordingly.

9. On the second issue, the first respondent contended that the second agreement was concluded after the cancellation of the first agreement and also at the time the default judgment confirming cancellation was extant. It was also submitted, on his behalf, that the fact that the default judgment confirming the cancellation was later rescinded was of no moment.
10. *Per contra*, the appellant argued that the preamble to the agreement between the first respondent and the second respondent described the property as Stand 6512 Bulawayo Township. It was submitted that it therefore followed that the parties in the second agreement had in mind Stand 6512 and not Stand 6505, the subject matter of the initial agreement. Furthermore, that there was thus no privity of contract between the first respondent and second respondent concerning the property the subject of this appeal.
11. The second respondent contended that the appellant breached the agreement by failing to pay the balance of the purchase price. Subsequently the appellant was notified of the breach and failed to rectify the breach. He stated that the sale to him (second respondent) was conducted during the period when the order confirming the cancellation of the initial sale was extant and that there were therefore no legal impediments to the conclusion of the said (second) agreement of sale.
12. The court found that the property referred to in the agreed facts was stand number 6505 Bulawayo Township, situate in the District of Bulawayo. It found that there was no factual dispute as to the identity of the property in issue, the subject matter of the agreement between the first and second respondents. Further, that in any event, the validity of the agreement of sale between the first and second respondents was not an issue that the appellant should have concerned himself with. His matter did not turn on

whether the second agreement was valid or not. His matter turned on whether he had breached the agreement of sale with the first respondent and whether his agreement was lawfully cancelled. The court ultimately found that the agreement of sale between the appellant and the first respondent was lawfully cancelled.

13. With regard to the third issue for determination, the first respondent submitted that since the agreement of sale was lawfully terminated, and that the only valid agreement was the one between the first and second respondents, it followed that the property ought to be transferred to the second respondent. It was further argued that ordering a transfer of the property to the appellant would be tantamount to creating a contract between the appellant and the first respondent where none existed. It was also contended that such an order to transfer to the appellant would be tantamount to ordering specific performance, which remedy was not available to the appellant because he had failed to fulfil his contractual obligations, a factor which eventually led to the cancellation of the agreement.

14. The appellant argued that the court ought to order transfer of the property to him, coupled with an order for specific performance as the appellant had paid the purchase price by depositing the balance into the account of the first respondent's legal practitioners' trust account.

15. The court found that by his own admission, the appellant breached the sale agreement and was not entitled to specific performance. It noted that the appellant's attempt at remedying the breach was not accepted by the first respondent and that a party cannot, after a breach, make a unilateral payment way outside the stipulated time frame, hoping

to remedy the breach. It found that the second respondent was entitled to specific performance for the reason that in terms of the agreed facts he (the second respondent) agreed and undertook to pay the full prescribed purchase price and proceeded to do so in compliance with the terms of the agreement. Therefore, transfer of the property was to be done in favour of the second respondent.

16. In the result, the court *a quo* issued an order in the following terms:

1. The cancellation of the agreement of sale entered into between the plaintiff (first respondent in this appeal) and the first defendant (appellant in this appeal) in respect of a property known as Stand number 6505 Bulawayo Township of Stand 6541A Bulawayo Township situate in the District of Bulawayo measuring 3109 square metres, D.T 2749/84 is confirmed.
2. The plaintiff shall transfer the property being Stand number 6505 Bulawayo Township of Stand 6541A Bulawayo Township situate in the District of Bulawayo measuring 3109 square metres, D.T 2749/84 to the second defendant (second respondent in this appeal) within thirty (30) days of this order.
3. First defendant pays the costs of suit for plaintiff and second defendant on a party and party scale.

17. Aggrieved by the decision of the court *a quo*, the appellant has noted this appeal on the following grounds of appeal.

## **GROUND OF APPEAL**

1. The court *a quo* erred in law in finding that the agreement of sale in instalments over stand 6505 Bulawayo township of Stand 6541A Bulawayo Township (the property) between appellant and first respondent was lawfully terminated.
2. The court *a quo* misdirected itself in law in finding that service of notice to remedy a breach in the instalment sale of land over the property on one Mr.Ncube, a gardener was competent service as contemplated in s 8 (2) (3) of the Contractual Penalties Act [Chapter 8:04].
3. A fortiori, the court *a quo* erred in law in finding that the appellant was properly placed in *mora* by the respondent.
4. The court *a quo* erred in law in finding that the first respondent as seller in the instalment sale, clearly and unambiguously communicated its election to cancel the sale to the appellant as purchaser.
5. The court *a quo* erred in law in finding that the rescission of judgment granted in appellant's favour in HC 1576/18 on the 22<sup>nd</sup> of November 2018 was of 'no moment'.  
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6. The court *a quo* erred in law in finding that the appellant was not entitled to the relief of specific performance.
7. The court *a quo* erred in law in ordering transfer of the property into the second respondent's name in circumstances where a clear material dispute of fact existed as to the identity of the property sold to him by the first respondent.

## **RELIEF SOUGHT**

**WHEREFORE** the appellant prays for the following relief:

1. The instant appeal succeeds.

2. The judgment of the court *a quo* is set aside in its entirety and in its place substituted the following-
  - a. The plaintiff's claims be and are hereby dismissed.
  - b. The plaintiff is ordered to transfer into first defendants' names stand number 6505 Bulawayo township of Stand 6541A Bulawayo Township situate in the district of Bulawayo measuring 3109 square meters held under deed of transfer 2749/84 within 30 days of this order.
  - c. The plaintiff and second defendant are to pay the cost of suit, jointly and severally the one paying the other to be absolved on an attorney and client scale.
3. The first and second respondents are to pay the costs of this appeal, jointly and severally the one paying the other to be absolved.”

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#### **SUBMISSIONS BEFORE THIS COURT.**

##### **Appellant's Submissions:**

18. Mr. Nyoni, for the appellant, submitted before this Court, *inter alia*, that it is now accepted that courts interpret the provisions of s 8 strictly and in that regard, cited *Washaya & Anor v Makebreak Trading (Pvt) Ltd* SC 163/21 where a shortfall of one day in the notice period was ruled to amount to non-compliance with the requirements of the section. He further submitted that the Act requires personal service on the purchaser and that in *casu*, there was no personal service on the appellant as the purchaser. The appellant's gardener was not a nominated person and service on him was therefore not in compliance with s 8 of the Act. He further submitted that s 40 of the Interpretation Act only becomes relevant and applicable where the provisions of an Act are not clear or the Act does not stipulate how service of documents is to be

effected. Section 8 of the Contractual Penalties Act being clear in its provision, it follows that s 40 of the Interpretation Act has no role to play.

19. It was also contended by Mr *Nyoni* that there was “*a serious dispute of fact*” in that the initial and the second agreements related to two different properties. Thus, the appellant purchased a different property from that purchased by the second respondent.
20. Counsel conceded that the appellant did not make payments in accordance with the agreement of sale. To be specific, counsel’s response to the court’s question as to whether the appellant had paid in accordance with the agreement, was “*He defaulted. That is why he was given the notice, but subsequently he tendered the payment.*”
21. Note may be taken at this juncture that the notice given to the appellant to remedy the breach was in August, 2015 and that it afforded him 30 days to do so. **Judgment No. 12/24  
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22. Counsel also conceded that the appellant did not rectify the breach within the given period. He further confirmed that the appellant had subsequently received the summons issued by the first respondent for the confirmation of the cancellation of the agreement of sale and for his eviction. When asked whether the appellant had “reacted” to the summons, counsel made reference to the payment of the outstanding balance that the appellant purported to make in 2018 and stated that the said payment was rejected. Notably, the summons was issued on 16 February, 2017 while the purported payment was made in December of 2018.
23. It was also counsel’s submission that the reflected or implicit position in the statement of agreed facts that the property the subject matter of the initial agreement was the same

property sold in the second agreement, was agreed to by mistake on the appellant's part because the two agreements related to two different properties. He submitted that the issue of the two agreements relating to two different properties was brought to the attention of the court *a quo* which ought to have asked for an explanation why it was being asked to award to the second respondent property that had been bought by the appellant. He submitted that the court *a quo* ought to have advised that the matter should go to trial.

### **First Respondent's Submissions:**

24. For the first respondent, Mr *Siziba*, submitted that s 8 of the Act should not be read to be doing away with the provisions of s 40 of the Interpretation Act. He submitted that this was so because s 8 (3) states clearly that it is "without derogation from s 40..." and specifically provides as follows:

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"Without derogation from s 40 of the Interpretation Act [*Chapter 1:1*], 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."

25. Mr *Siziba* submitted that the *Washaya* case (*supra*) cited by the appellant was distinguishable because in that case service was by registered mail and such service is provided for in s 8; there was thus no need to consider s 40 of the Interpretation Act. He also submitted that it was incorrect to say, as submitted for the appellant, that s 8 should be read alone to the exclusion of s 40. It was counsel's contention that in *casu* there was effective service and that s 8 was complied with.

26. With regard to the alleged dispute of fact, counsel argued that the appellant's argument would only carry the day where, as in *Leathought Investments (Pvt) Ltd v Chirangano and Others* SC 60/21, such dispute of fact appears on the face of the statement of agreed facts itself and in the pleadings. He submitted that in *casu*, the parties decided to forgo preliminary issues and that the real issue that they placed before the court was the question – “who is entitled to take transfer of the property?” Furthermore, the appellant should have followed the proper channels to resile from the statement of agreed facts. Without having done so, the appellant must be held to the facts as reflected in the statement of agreed facts. The issue of the stand number is thus overridden by the statement of agreed facts which the parties signed. Further to that, after so signing, the appellant had, as agreed, filed a plea in which the issue of the stand number did not arise. The issue only arose during the hearing. He argued that the parties were bound to the facts in the statement of agreed facts and that the court only assists the parties by determining issues of law that arise therefrom. The appellant cannot therefore start alleging disputes of fact at the stage where the parties are addressing the court on issues of law.

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### **Second Respondent's Submissions:**

27. Miss *Nyaningwe*, for the second respondent, contended that the question for determination is whether or not the service of the notice of termination on the appellant's employee was proper service in terms of the law. She referred to *Nenyasha Housing Co-op v Violine Sibanda* 2019 (3) ZLR 9 (H) at 12H – 13A where the court stated as follows, *inter alia*:

“The notice (to) (sic) must be in writing as stipulated in s 8 (2) (a) of the Act. The procedure to be followed by the seller entails him giving notice to rectify, discontinue or remedy the breach, followed by the institution of proceedings.

The mischief behind this provision is to offer protection to purchasers in instalment sales.”

28. Counsel highlighted that the appellant conceded that he saw the notice of termination. Counsel also observed that the appellant was subsequently served with summons for cancellation but did not do anything about it.
29. Miss *Nyaningwe* argued that s 8 does not require personal service on the purchaser. She contended that s 8 (3) gives the seller the option to either deliver personally or on a nominated agent of the purchaser or to post by registered post. She contended that in *casu* the appellant was served effectively in that the notice was served on a responsible person at his usual address in accordance with the terms of s 40 (2) (c) of the Interpretation Act.
30. On the alleged dispute of fact, counsel submitted that there was no merit in the allegation as the parties are all in agreement that the stand in issue is Stand No. 6505. She further highlighted that the court *a quo* held that the validity of the agreement of sale between the first respondent and the second respondent is not an issue that the appellant should concern himself about; his matter does not turn on whether the second agreement was valid or not.
31. Counsel contended that the appellant was not genuine in pursuing the appeal but was merely frustrating the other parties and causing unnecessary delay in the finalisation of the matter. She further highlighted that the appellant had reoccupied the property and was benefitting from it and urged the court to dismiss the appeal with costs.

**ISSUES FOR DETERMINATION BY THIS COURT.**

32. Considering the grounds of appeal as well as the submissions made before this Court, the following issues emerge for determination:

1. **Whether or not service on the appellant’s gardener, of the notice to remedy the breach, was proper service.**
2. **Whether or not the appellant was entitled to specific performance.**

### **APPLICATION OF THE LAW TO THE FACTS.**

**Whether or not service on the appellant’s gardener, of notice to remedy the breach, was proper service.**

33. What emerges from the appellant’s first ground of appeal is that he holds the view that the court *a quo* erred in law in finding that the instalment sale agreement of the property, between him and the first respondent was lawfully terminated. What is also clear from a perusal of its judgment is that the court *a quo* came to the now impugned conclusion on the basis that the appellant was served with the notice to remedy the breach through his gardener at his given address of service. The court *a quo* relied on s 8 of the Contractual Penalties Act as read with s 40 (2) (c) of the Interpretation Act. It stated in para 26 as follows:

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“26. The written notice, drawing the attention of the first defendant as the purchaser to breach of the agreement and calling upon him to rectify the breach within thirty days of service of the notice on him failing which the cancellation of the agreement would follow, was served on him in terms of section 8 of the Contractual Penalties Act as read with section 40(2)(c) of the Interpretation Act, in that it was served by leaving it with his worker at his usual or last-known place of abode which he provided in the agreement.”

34. Section 8 of the 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 subs (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 subs (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 being 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.”

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35. Section 40 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.”

36. On this issue, the court *a quo* noted the following at para 6 of its judgment:

“... Counsel submitted that 1st defendant does not dispute that the notice of cancellation of the agreement was served on his gardener on the 12 August

2015. What was disputed was that the return of service did not relate to the service of the notice of cancellation.”

37. The court *a quo* pertinently repeated this observation in para 11 where it stated as follows:

“first defendant agreed that the notice of termination of the initial agreement of sale was served upon the first defendant at No. 43Aberdeen Road, Fortunes Gate, Bulawayo on the 12<sup>th</sup> August 2015, on the first defendant’s worker. First defendant is bound by the statement of facts. In his submissions Mr *Ndubiwa* contended that the first defendant does not dispute that the notice of cancellation of the agreement was served on his gardener on the 12 August 2015. What was disputed was that the return of service did not relate to the service of the notice of cancellation.”

38. In its analysis and in disposing of the issue, the court further stated at paras 25, 26 and 27 of its judgment:

“25. In determining whether service of the notice was valid service, the court is required to tease out the intention, purpose or context of s 8(3)(b) of the Contractual Penalties Act. Its purpose is to make provision for effective service of a written notice of breach of the agreement of sale. In the agreement of sale first defendant provided his address as number 43 Aberdeen Road, Fortunes Gate, Bulawayo. That is the address where the notice of termination of the agreement was served. The agreement does not specify the manner of service of a written notice in the case of breach. The first defendant accepts that the notice was indeed delivered, but contends that it was not delivered in terms of the provisions of the law. **The position taken by the first defendant is tantamount to saying “yes” the notice was delivered and I saw it, but it did not come to me via the correct route.** Such a position is unattainable (sic) (untenable?). What the law requires is the effective service of the notice, and leaving it with his worker amounts to effective service. (the emphasis is added)

26. The written notice, drawing the attention of the first defendant as the purchaser to breach of the agreement and calling upon him to rectify the breach within thirty days of service of the notice on him failing which cancellation of the agreement would follow, was served on him in terms of s 8 of the Contractual Penalties Act as read with s 40(2)(c) of the Interpretation Act, in that it was served by leaving it with his worker at his usual or last-known place of abode which he provided in the agreement.

27. The notice of cancellation clearly specified that first defendant had breached the agreement of sale by failing to pay the instalments. He was given thirty days’ notice calculated from the 1<sup>st</sup> August 2015 to remedy the breach by settling the amount due. The notice specified that failure to settle

the amount within thirty days shall lead to an automatic cancellation of the agreement of sale. First defendant did not comply with the notice of cancellation, and he unilaterally deposits to the plaintiff's legal practitioners trust account the balance of the purchase price almost three years after the deadline of the 1<sup>st</sup> September 2015. On 19 May 2017, this Court confirmed the cancellation of the agreement of sale between plaintiff and first defendant, and while the order was extant, the property was sold to the second defendant. That on the 22<sup>nd</sup> November 2018 the order confirming cancellation of the agreement was rescinded is of no moment. Therefore the issue whether the agreement between the plaintiff and first defendant was lawfully terminated is answered in favour of the plaintiff and second defendant."

39. The court *a quo*'s summation, analysis and conclusion cannot, in my view, be said to be devoid of soundness. They exude a clear and lucid examination of the evidence that was placed before it in the form of the statement of agreed facts as well as an application of the law to those facts that accords with sense and logic.

40. In *Nenyasha Housing Co-operative v Violine Sibanda* HH 456/19 at p 3 of the judgment, the court stated the following in respect of s 8 of the Act:

"An instalment sale is defined as a sale agreement which requires that payment of the purchase price be made in three or more instalments by way of deposit and two or more instalments with transfer of the property which is subject of the sale being transferred after full payment of the purchase price ...

It further stated at pp 4-5:

The procedure to be followed by the seller entails him giving notice to rectify, discontinue or remedy the breach, followed by the institution of proceedings. The mischief behind this provision is to offer protection to purchasers in instalment sales. Where a purchaser in an instalment sale is in breach of the terms of the agreement, he is afforded an opportunity to rectify, discontinue or remedy the breach before proceedings for cancellation of the instalment sale are commenced. Where he is in breach and is able to remedy the breach within the time specified in the notice, the need to cancel the sale falls away. Failure to give a purchaser notice to rectify, discontinue or remedy the breach renders the proceedings for cancellation of the contract a nullity....." (the underlining is added)

41. In *casu*, the appellant provided his address of service as number 43 Aberdeen Road, Fortunes Gate, Bulawayo. It was noted that the initial agreement did not stipulate the manner in which service of a written notice was to be effected. However, the court found, as supported by the Sheriff's return of service, that service of the notice of breach and of termination was made at the appellant's given address. In doing so it relied on the cited provisions of the Act and the Interpretation Act. The court *a quo*'s finding that service of the notice on the gardener was proper service on the appellant, is in accord with the appellant's own admission that he saw the notice. This goes to show the effectiveness of the service. The purpose of the pertinent legislation was therefore served. The appellant's attempt three years later to purport to rectify the breach also confirms the same considering that no other or second notice was served on him and he did not at any stage complain that the notice had come to his attention belatedly. His expectation for the first respondent to accept his attempted or purported rectification of the breach three years later amounts to an exhibition of lack of seriousness; the same lack of seriousness that is also exhibited by the concession that when he was served with summons he did not take the appropriate action. The claim that the service of the summons is what led him to make the payment that he did three years later does not accord with common sense or with the recorded sequence of events. He made the alleged attempt to supposedly rectify his breach way after the deadline stipulated in the notice and also after the confirmation of the cancellation of the sale. That was a vain transaction on his part and could not salvage the self-inflicted consequence of the cancellation that was now a reality.

42. I opine that where, as happened in this case, a party to a contract has chosen an address as his or her or its *domicilium citandi* where service of documents or correspondence on

matters relating to the contract should be effected, compliance by the other party with the procedure prescribed for service of notices under law would constitute effective service of such document regardless of who receives the notice. The contention by the appellant in this matter that the service on his gardener who resides at his chosen *domicilium citandi* did not constitute proper service, cannot, on the particular facts of this matter, succeed. This is particularly so considering the very important fact that the appellant accepted that he saw the notice. Apparently, he took no action merely because the notice had not been handed to him personally, even though he saw the notice. It is my considered opinion that to allow the appellant to successfully hide behind strict compliance with the Contractual Penalties Act would, on the particular facts of this matter, make a mockery of the purpose of the provision in issue, as captured in para 40 above. It would create a situation where a party who has had the requisite notice brought to his attention, can opt to hide behind a finger and not take the necessary remedial action, to the detriment of the giver of the notice. It is quite conspicuous that in *casu*, the appellant purported to remedy his breach three years after the notice to remedy admittedly came to his attention. This was in circumstances where no subsequent notice was served on him and the agreed time frame for the payment of the purchase price had long expired. The protection that the Act gives to purchasers does not afford the appellant the liberty to ignore a notice that has come to his attention and only act on it when it suits him, in this case three years later.

43. The court *a quo* did not misdirect itself in the approach that it took and in arriving at the finding that the appellant was properly served with the notice that was served on his gardener at his chosen *domicilium*. A contrary finding would have resulted in an untenable situation where the appellant, having admittedly seen the notice, would evade the consequences of his failure to heed such notice and comply or rectify the defect by

hiding behind a finger. The court *a quo* did not avail him such relief. This Court sees no justification for interfering with the court *a quo*'s factual findings and resultant determination of the issue.

44. Having found that the notice was properly served on the appellant, it therefore follows that the agreement between the appellant and the first respondent was properly terminated. The appellant was served with the notice which placed him in *mora*. The appellant however failed to remedy the breach within the timeframe stipulated by the notice. The agreement of sale having been properly terminated, the appellant's 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> grounds of appeal therefore lack merit.

**Whether or not the appellant was entitled to specific performance.**

45. In his sixth ground of appeal, the appellant contends that the court *a quo* erred in law in finding that he was not entitled to the relief of specific performance. The law on specific performance is settled. By claiming specific performance, the innocent party is asking the court to order the defaulting party to do exactly what he contracted to do or, put differently, to fulfil his contractual obligations. However, specific performance cannot be granted to a party who has not fulfilled or is unwilling and is not ready to fulfil his contractual obligations. This point was emphasised by this Court in the case of *Intercontinental Trading (Pvt) Ltd v Nestle Zimbabwe (Pvt) Ltd* 1993 (1) ZLR 21 (S) as follows:

“Before I deal with this matter, I think it prudent for the court to remind itself of the correct manner in which the remedy of specific performance should be approached.

Historically, it was KOTZE CJ in *Cohen v Shrines, McHattie & Kind* [1882] 1 SAR 41 at 45 who, after consulting authorities, held that Roman-Dutch law clearly recognised the right to a specific performance of a contract, and it is interesting to note that the classic exposition of the rule on specific performance was expressed in a case which arose in the High Court of this country and which

came before the South African Appellate Division, namely *Farmers' Co-operative Society (Reg) v Berry* 1912 AD 343. In that case INNES JA stated at 350;

‘*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by KOTZE CJ in *Thompson v Pullinger* ‘the right of a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt’.”

46. An order for specific performance lies in the discretion of the court. In *Benson v South Africa Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 783 C-D, it was held that the discretion of the court is:

“[not] ... completely unfettered. It remains, after all, a judicial discretion and from its very nature arises the requirement that it is not to be exercised capriciously, nor upon a wrong principle (*Ex parte Neethling* (supra at 335)). It is aimed at preventing an injustice – for cases do arise where justice demands that a plaintiff be denied his right to performance – and the basic principle thus is that the order which the court makes should not produce an unjust result which will be the case, e.g. if, in the particular circumstances, the order will operate unduly harshly on the defendant.”

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47. In exercising its discretion and in coming to the conclusion that it did, the court *a quo* stated that the general rule is that, *prima facie*, every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand the other party, so far as it is possible, to perform its undertaking in terms of the contract. It found that the second respondent was entitled to specific performance because in terms of the agreed facts, the second respondent agreed and undertook to pay the full prescribed purchase price in respect of the property and he met his side of the bargain. On the facts of this matter, as reflected in the statement of agreed facts, the court *a quo* correctly exercised its discretion in awarding the second respondent specific performance.

48. On the facts, to deny the second respondent specific performance would cause him undue hardship as he has already paid the full purchase price, and he did so in accordance with the agreed terms of the sale agreement. The court *a quo* correctly exercised its discretion in finding that the second respondent was entitled to specific performance. Such discretion cannot be lightly interfered with. In *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) the court held that:

“If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account relevant some consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always (it) has the materials for so doing. In short, this Court is not imbued with the same broad discretion as was enjoyed by the trial court.”

#### **DISPOSITION**

49. It follows from the above analysis that the court *a quo* having correctly exercised its discretion, the appellant’s sixth ground of appeal lacks merit and ought to be dismissed. <sup>24</sup><sub>22</sub>

50. In the final analysis, this appeal lacks merit.

51. It was for these reasons that the court, after hearing the parties, dismissed the appeal with costs.

**GUVAVA JA** : I agree

**CHITAKUNYE JA** : I agree

*Mashayamombe & Co Attorneys*, appellant`s legal practitioners

*Ndove & Associates*, 1<sup>st</sup> respondent`s legal practitioners

*Webb, Low & Barry*, 2<sup>nd</sup> respondents` legal practitioner

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