LLOYD SESA

Versus

HAWKFLIGHT ENTERPRISES (PVT) LTD
T/A HAWKFLIGHT CONSTRUCTION

HIGH COURT OF ZIMBABWE
MUTEVEDZI AND CHIVAYO JJ
BULAWAYO, 23 October 2024 and 27 March 2025

Civil Appeal

S. Mlambo for appellant

T. Dube for respondent

MUTEVEDZI J: In Chinua Achebe's fabled novel *Things Fall Apart*, the character called *Unoka* was said to be a lazy and improvident man, with no capacity to think about tomorrow. He was saddled with huge debts but for some strange reason, he kept borrowing more. His weakness typifies the reality that paying debts has been a disease afflicting Africans for centuries now. The tragedy of it is that those who so borrow and fail to pay back do not even realise the consequences which their actions may have on their off spring! MATHONSI J (now JA), spoke about it in 2013 in the case of *African Banking Corporation of Zimbabwe Limited T/A BANCABC v PWC Motors (Pvt) Ltd & Ors* HH 123/13. He erroneously thought it was confined to business people because the cancer appears to have spread even to the common borrower. They simply do not want to pay back and will cling to all kinds of defences in a bid to avoid repayment. In that case, HIS LORDSHIP had no kind words for the deadbeats and the mooches when he said:

> "This summary judgment application graphically illustrates that a trend is fast developing among business people in this country to borrow huge sums of money from financial institutions and when the time to pay comes, to pay as little as possible or better still, not to pay at all. A pattern is manifesting itself where business people will stop at nothing in avoiding to pay legitimate claims and in the process play havoc to investor confidence."

[1] In this case, the appellant, acquired an immovable property from the respondent on ridiculously favourable terms if what others go through is anything to compare with. True to the Zimbabwean DNA described above, he soon defaulted on his monthly

instalments. The arrears accumulated to over USD $14 000. The respondent beseeched him to remedy the breach. But its pleas fell on deaf ears. It was left with no choice but to approach the courts seeking cancellation of the agreement of sale and repossession of its property. It obtained judgment. On 16 January 2024, the Magistrate Court, sitting at Bulawayo cancelled the agreement of sale between the appellant and the respondent. It further ordered that the deposit and instalments paid by the appellant were to be retained by the respondent as rentals for the property under disputation. The court *a quo* also ordered that the appellant and all those claiming occupation through him at Stand number 77 Emthunzini Township, Bulawayo must vacate the property within (14) days of service of the court order. Unrelenting, the appellant was not amused by the decision and blaming the respondent for anything imaginable, he filed an appeal against it to this Court. We heard argument and reserved judgment. We hand it down now.

Factual Background

[2] In May 2011, the respondent, which is a duly incorporated company in terms of the laws of Zimbabwe and is into the business of constructing houses for sale and the appellant, a male adult who desired to purchase a home to live in, concluded an agreement of sale through which the appellant purchased an immovable property known as Stand number 77 Emthunzini Township. The purchase price was USD$ 41 040. The appellant deposited the sum of USD$ 1 075 towards the purchase price. It was a term of the agreement that the balance of the purchase price would be liquidated through monthly instalments of USD$285 over a period of two years. Unfortunately, the appellant breached the agreement when he fell into arrears amounting to USD$14 464.53. To remedy the breach, the respondent who was the plaintiff in the court *a quo*, sued out summons on 20 May 2019. Its claim was for the cancellation of the agreement of sale, the eviction of the appellant and all those who claimed occupation of the property through him and that the instalments which he had paid be forfeited to the respondent. The parties exchanged pleadings until pretrial conference stage at which they authored a joint pretrial conference minute which enumerated their issues for trial as follows: -

"1. Issues
1.1. Whether or not Plaintiff is entitled to cancel the contract and evict the Defendant.
1.2. Whether at the time Plaintiff issued summons the Defendant was in arrears with instalments on the purchase price of Stand No. 77 Emthunzini Township, Bulawayo, and if so, in what amount.

1.3. Whether after February 2019 the Plaintiff refused to accept instalments in any other currency other United States dollars.
1.4. Assuming that the Defendant was in arrears in instalments, whether the provisions of the Contractual Penalties Act regarding notice to be given to a defaulting purchaser are applicable and also whether they were complied with by the Plaintiff.
1.5. Whether assuming the Plaintiff was entitled to cancel the agreement of sale, the penalty of forfeiture of the deposit paid and all instalments paid was a fair penalty"

Proceedings in the court *a quo*

Plaintiff's case (Respondent)

[3] The plaintiff's case was built on the evidence of one Martin Moyo (Martin). He said he was employed by the respondent as its operations manager. His authority to represent the respondent was as set in its board of directors' resolution which was produced in court. Martin's evidence was that the respondent is in the business of constructing and selling houses. He detailed that when the appellant approached the respondent desirous of purchasing a house, the two parties had found each other and signed a written agreement to that effect on 27 June 2011. The purchase price of the property was pegged at US$ 41 040.00. A deposit of USD $1 750 was required and that thereafter, the appellant would pay monthly instalments of USD$285 plus USD$17 insurance. It was a material term of the treaty that in the event of the appellant defaulting on his obligations, the respondent would cancel the agreement of sale and repossess the house. He added that both parties were aware, at the time they concluded the agreement of sale, that the respondent was not the owner of the property. Instead, the rightful owner of the house was another entity called Glastonnbury Dairy Products. Martin's further testimony was that the appellant defaulted his monthly instalments from 2012 to 1 October 2019, at which stage he had accumulated arrears of USD$14 784.53. The respondent gave the appellant a seven days' notice to remedy the breach. The appellant did not do anything. He remained in breach.

[4] Under cross examination, Martin admitted that at the time that the respondent sold the property, it did not have title to the land on which the house was built. He said the agreement between the parties reflected that aspect. He denied that the respondent had refused to accept local currency from the appellant as payment of instalments.

Defendant's case (Appellant)

[5]The Defendant's case was anchored on the evidence of Archgirl Sesa who is a spouse to the appellant. She said she derived authority to represent the appellant from a power of attorney which was authored by the appellant. Her evidence, which it must be noted, was essentially hearsay, the appellant had entered into an agreement of sale with the respondent. She confirmed the payment terms as per the agreement of sale. She admitted that the appellant had been given seven days' notice to remedy his breach of the contract after he fell into arrears with his monthly instalments. Regarding that, she said the respondent had treated the appelant unfairly because other purchasers who were in breach had been given thirty days' notices.

[6] The witness said when she approached the respondent intending to clear the US$14 000 arrears, the respondent had refused to accept the equivalent of that amount in local currency. Thereafter, she said she had made payments amounting to $ZW28 890 through Mangwana and Partners Legal Practitioners who operated a trust account for Emthunzini residents through which they would pay the respondent. She concluded her evidence by stating that at the time of the signing of the agreement of sale, the respondent had no permit to develop the land as all relevant documents were obtained later.

[7] Under cross examination, she agreed that the appellant had arrears at the time of issuance of summons and had failed to remedy the breach after being given seven days' of notice in terms of the agreement of sale.

Findings by the court *a quo*

[8] The court *a quo* found it common cause that the appellant was in arrears and that the agreement of sale entitled the respondent to cancel the agreement after giving the defaulting party seven days' notice. It concluded that the notice had in this case, been accordingly given and lapsed before the appellant rectified his breach. The court *a quo* found as untruthful, the appellant's averments that he had been denied to offset his arrears in local currency. In the end, it ordered that the agreement of sale between the appellant and the respondent be cancelled, the deposit and the instalments

paid by the appellant up to the time of default be forfeited to the respondent as rentals and that the appellant and all people claiming occupation of Stand number 77 Emthunzini Township, Bulawayo vacate and give vacant possession of the property to the respondent within fourteen days of service of the court order on the appellant.

Proceedings before this court

[9] Irked by the decision of the court *a quo*, the appellant approached this court with an appeal against the decision. His grounds of appeal were couched in the following manner: -

"**GROUNDS OF APPEAL**

1. The court a quo erred and misdirected itself in failing to address in its judgment matters raised by the appellant in her evidence and in submissions which matters were dispositive of the matter.
2. The court a quo erred in failing to appreciate that as the parties contract was one of sale of land to which the Contractual Penalties Act applied regarding the notice period required to be given to the appellant in the event of a breach of the agreement of sale. The court a quo erred in holding that 7 days' notice was adequate notice to the appellant.
3. The court a quo erred and misdirected itself in failing to appreciate that when the agreement of sale was entered into there was no permit of subdivision by which Stand 77 Emthunzini was created and that, in consequence, the respondent had no lawful cause of action against the appellant.
4. The court a quo erred and misdirected itself in failing to appreciate that when the agreement of sale was entered into the respondent had no title to the land and consequently could not lawfully sell the land.
   Alternatively,
5. The court a quo erred and misdirected itself in failing to consider whether the penalty imposed by the respondent was fair and reasonable regard being had to the Contractual Penalties Act.

RELIEF SOUGHT

WHEREFORE, the Appellant prays for the following relief:

a) The appeal succeeds with costs.
b) The judgment of the court a quo be and is hereby set aside and substituted with the following order, 'The plaintiff's claim against defendant is dismissed with costs."
c) Respondent pay costs of suit."

Issues for determination

[10] In other words, Ground 1 complains that the court *a quo* did not consider all evidence to make a finding that the respondent had proved its case on a balance of probabilities. Ground 2 alleges that the seven days' notice contravened the Contractual Parties Act. In grounds 3, 4 and 5 the appellant alleged that the agreement of sale was illegal. In summary therefore, the issues for determination are whether or not:

a. The court *a quo* failed to consider all issues which had been placed before it for determination
b. the agreement of sale was illegal
c. the seven days' notice contravened the law

d. the respondent proved its case against the appellant on a balance of probabilities.

Whether or not the court *a quo* failed to address the issues which had been placed before it.

[11] In the case of *Jayesh Shah v Kingdom Merchant Bank Limited* SC-4-17 at p. 9 of the cyclostyled judgment, the GWAUNZA DCJ, relating to the purpose of a pretrial conference minute remarked that: -

> "Agreements reached and recorded in a pre-trial conference minute are **primarily concerned with what issues the parties have agreed the trial judge should consider and determine at the trial. Thus, a PTC minute's value lies in streamlining the issues relevant for a proper determination of the dispute between the parties.** While the agreed issues should and must, arise from the facts alleged and/or disputed in the pleadings, the written evidence tendered, and the law that is said to be applicable, I find that implicit in the contents of the PTC minute *in casu*, was the suggestion that the parties were *ad idem* as to the seemingly expanded nature of the real dispute between them. This is because on the basis of that minute, which they have not abandoned, the parties expected the court *a quo* to consider and determine aspects of the dispute that had not been properly articulated in the respondent's declaration." (Bolding is my emphasis).

[12] This Court, in *Clive Robert Field v Bridget Anne field (nee Parham)* HH-68-21 dealt with a party in the proceedings who intended to sneak in issues that had not formed part of the joint pretrial conference minute. It held that:

> "This approach will defeat the whole purpose of the pre-trial procedure. Not only will it create confusion as to what issues the court is to determine but is unprocedural in itself.
>
> If defendant has issues with the pre-trial conference proceedings such should have been resolved before the matter came for trial. **The matter was set down for trial based on the issues as per joint PTC minute.** The fact that the defendant did not sign it is neither here nor there… This court, as a trial court, cannot start acting as if it were dealing with a pre-trial conference. **That stage is past and the joint pre-trial conference minute is there to guide the trial court."** (Bolding is my emphasis).

In *Zimbabwe Electricity Transmission and Distribution Company v Ignatius Ruvinga* SC-20-13, the Supreme Court equally pointed out the essence of a pretrial conference by holding that: -

> "It may be noted here that the purpose of the pre-trial conference is to attempt to reach settlement between the parties and, where this is not possible, **to identify issues for trial with a view to curtailing the proceedings**." (My emphasis)

[13] My view is therefore that the above authorities make it clear that at trial, a court is specifically guided by the pretrial conference minute(s) in regards to the issues which it must determine. If it were not the rule, and parties to a civil trial were allowed to raise

issues they wished to be determined at every turn, there is little doubt if any that such trials were likely to drag with no end in sight. But because of that rule, the parties are and must be confined to the issues stated in the pretrial conference minute(s). In this case counsel for the appellant argued that ordinarily, a court judgment ought to address issues raised by the parties. He contended that the court *a quo* had failed to address in its judgment that the respondent had refused to accept payment of the appellant's installments in local currency, that the respondent had waived its right to cancel the agreement when it accepted payments made through Messrs *Mangwana & Partners'* Trust Account; it did not determine whether or not the Contractual Penalties Act must have regulated the notice period given to the appellant by the respondent; he also said that the court *a quo* ought to have determined that the penalty clause in the agreement of sale was unenforceable; that the appellant had paid the purchase price in full. Counsel further argued the court *a quo* failed to appreciate that at the time the parties entered into their agreement of sale, there was no subdivision permit by which stand number 77 Emthunzini, Township was created. He said all the above issues were pertinent. He referred us to the judgment of the Supreme Court of *Gwaradzimba NO V CJ Petron & Co (Pty*) *Ltd* SC-12-16 whose ratio was that where there are disputes on questions of law and fact, there must be a judicial determination of such disputes and that failure to resolve such disputes or to give reasons for a determination thereon constitutes a misdirection warranting an appellate court to interfere with the decision of the trial court. He urged us to apply the above principles to set aside the decision of the court *a quo*.

[14] In response, counsel for the respondent was emphatic that in civil trials, it is trite that a court may only determine those matters that will have been placed before it by the parties through their pleadings. He said pleadings, serve the purpose, not only of informing the other party what case he/she/it has to meet to also warn the court as to which branch of the law the dispute before it falls. For that reason, the parties must remain confined to their pleadings. The respondent contended that in this appeal the appellant sought to rely on two issues, both of which he had unfortunately not pleaded in the court aquo either through his pleadings or an amendment thereof. Such issues could not have been the focal point of the court *a quo's* determination. It added that the appellant had averred and was therefore required to prove in the court aquo, that there

had been no subdivision permit in existence at the time of the signing of the agreement of sale because the rule is that a party who relies on the negative must prove that negative.

[15] In relation to the question of the permit for instance, the respondent argued that the issue was brought to its attention during trial from the bar by counsel for the appellant. As a result, the respondent who had the subdivision permit which had been issued as far back as 2010 was ill-equipped to produce it then. Such documents ought to have been discovered in terms of the rules.

[16] As such, the respondent's major contention was that the court *a quo* was right not to determine issues which had not been properly pleaded and placed before the court. We have above, already outlined the principles of the law which apply in instances as this. The issues which the parties streamlined and agreed would form the basis of the trial at PTC stage have equally been set out above. For purposes of completeness and contextualizing the arguments herein, we restate that they were whether or not plaintiff was entitled to cancel the contract and evict the defendant; whether at the time the plaintiff issued summons the defendant was in arrears with instalments on the purchase price of Stand No. 77 Emthunzini Township, Bulawayo, and if so, in what amount.

[17] We pause here to state that much as the two issues above were stated as points of contestation but in reality, they were not. It is clear from both the appellant's and the respondent's testimonies in the court *a quo* that there was no dispute that the agreement of sale provided for the cancellation of the contract in case of breach and that the appellant had fallen into arrears in the sum of USD$14 784.53. The court *a quo* ruled so, in its judgment. The law is that a court is not required to determine common cause aspects in a trial. In the case of *Mining Industry Pension Fund v Dab Marketing (Private) Limited* SC-25-12 the Supreme court held that:

> "A formal admission made in pleadings cannot be ignored by the Court before whom it is made. Unless withdrawn, it prevents the leading of any further evidence to prove or disprove the admitted facts. It becomes conclusive of the issue or facts admitted."

[18] The next issues related to whether after February 2019 the plaintiff had refused to accept instalments in any other currency other than United States dollars; Once more

we note that the court made a specific determination of that issues. In its judgment it stated that: -

> "what defendant [appellant] is called to answer are the terms of his contract with the plaintiff. Clearly, she was in breach and didn't remedy the breach in seven days. **A bald averment that she was restricted to only make payment in USD or ZAR cannot offset the established evidence that payment was not effected**." (bolding is for emphasis)

[19] As such and in not so many words, the court *a quo* related to and determined the question of whether or not the appellant was denied the opportunity to liquidate his arrear instalments in local currency. Admittedly, on the issue of whether the provisions of the Contractual Penalties Act regarding notice to be given to a defaulting purchaser were applicable and whether they were complied with by the plaintiff, the court's determination was expressed rather inelegantly. But that it was stated inelegantly does not detract from the conclusion that the trial court dealt with the issue. It said that it found no basis for holding that simply because others in circumstances similar to his had been afforded longer notice, then the notice period given to the appellant was inadequate because the circumstances of such others had not been brought before it. It also indicated that because of the doctrine of sanctity of contracts the court could not create a new contract for the parties. With concern, we note again that the question of whether or not the appellant was in arrears at the time the summons was issued reared its head, yet it was common cause that he indeed was in arrears.

[20] Clearly, therefore the court *a quo*, in one way or another, dealt with all the issues that had been agreed by the parties to form the focal point of the court's determination in their dispute. Whether it got the law correctly on those issues is an argument for another day. The appellant's grievances were that the question of payment in foreign currency was not addressed but we shall demonstrate that it was. He then raised other issues that were outside the framework of the joint PTC minute and had not been pleaded such as that the appellant had paid the full purchase price or that the penalty clause in the agreement was unenforceable or that there was no permit for the subdivision of Emthunzini or that then payment that he made to Mangwana and Partners signified that the respondent had waived his right to cancel the agreement. The point was emphasized in *Malachi and Others v Evalengical Church of Zimbabwe* SC-14-22 where the Supreme Court held that:

> "In *Mashonaland Tobacco Company (Private) Ltd v Mahem Farms (Pvt) Ltd & Another* SC 152/20 at p.9, this Court summed up the general principle regarding the necessity of pleading a cause of action in these words: -
>
> > "As a general rule, judgment cannot be granted on a cause of action that is not pleaded. The pleadings must clearly set out the precise parameters of the issues contested between the parties. Thus, in the Namibian case of *Courtney Clarke v Bassingthwaighte* 1991 (1) SA 684 (Nm), at 698, it was explained that: -
> >
> > > "…there is no precedent for the principle allowing a court to give a judgment in favour of a party on a cause of action never pleaded, alternatively, there is no authority for ignoring the pleadings… and giving judgment in favour of a plaintiff on a cause of action never pleaded. In such a case the least a party can do if he requires a substitution or amendment of his cause of action, is to apply for amendment."

[21] In *Medlong Zimbabwe (Pvt) Ltd v Cost Benefit Holding (Pvt) Ltd* 2018 (1) ZLR 449 (S) at 455G, the Supreme Court also summarised the position as follows: -

> "In general, the purpose of pleadings is to clarify the issues between the parties that require determination by a court of law." And at page 456E-G that: -
>
> > "25.6 In *Jowell v Bramwell Jones & Ors* 1998 (1) SA 836 (W) at 898 the court cited with approval the following remarks by Jacob and Goldreign Pleadings: Principles and Practise at pp 8-9:
> >
> > > "As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings…For the sake of certainty and finality, <u>each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made.</u> Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as much bound by the pleadings of the parties as they are themselves. It is not part of the function of the court to enter upon any inquiry into the case before it other than adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, <u>the court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties.</u> To do would be to enter the realm of speculation… The court does not provide its own terms of reference or conduct its own inquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. In the adversarial system of litigation, therefore, <u>it is the parties themselves who set the agenda for trial by their pleadings and neither party can complain if the agenda is strictly adhered to.</u>" (underlining for emphasis)

[22] For the above reasons we find the appellant's first ground of appeal to be unmeritorious. We dismiss it.

Whether the agreement was a sale of land, was valid and whether the Contractual Penalties Act applied.

[23] The appellant argued that the respondent had no real rights over the land to sell the property to the appellant. He said only Gladstonbury Dairy Produce (Pvt) Ltd had. He said that any agreement of sale entered into without a permit of subdivision is null and void. We mention however once more, that as argued by the respondent, the issue was

not pleaded in the court *a quo*. It was not amongst the issues singled out for determination by the parties in their joint PTC minute. In his heads of argument, the appellant conceded that the issue was not pleaded and was not in the joint PTC minute. He argues however that the respondent's witness was cross examined on it. The respondent argued that that issue was raised for the first-time during trial and from the bar by counsel for the appellant. It left the respondent with little time and opportunity to properly respond to it. We have already said the court *a quo* was right to refuse to deal with the matter because it did not form part of the issues slated for determination. We appreciate that in an appeal a party can raise a point of law even for the first time. But that principle comes with conditions to it. In the case of *Zimasco Private Limited v Maynard Farai Marikano* SC-6-14, at p. 9 of the cyclostyled decision, the Supreme court stated that: -

> "It is settled law that a question of law can be raised at any time, even for the first time on appeal, as long as the point is covered in the pleadings and its consideration involves no unfairness to the party against whom it is directed."

[24] The condition, therefore, is that the party raising the point of law ought to have raised the issue either in its grounds of appeal on in its heads of argument and that the determination of the point of law must not occasion prejudice to the other party.

[25] We note in this instance that the question of the legality or illegality of a contract is a question of law. We equally observe that the appellant indeed raised the question of the illegality of the agreement of sale both in its grounds of appeal and it in its heads of argument. In addition, the respondent extensively responded to the issue in its own pleadings. Our view is therefore that, there is no prejudice that will be occasioned to the respondent if we determined the matter because the respondent has had adequate time to prepare for it. Below we deal with the issue.

[26] Elsewhere in this judgement, it was pointed out that the law is that he who alleges must prove and that a defendant who alleges a negative, bears the onus to prove that negative. See the authority of *Prinsloo Van der Linde & Anor* (CCT 4/96) ZACC5; 1997 for that proposition. In this case, the appellant bore the onus to prove that at the time that the agreement was signed, there was no subdivision permit which existed and which therefore made the agreement of sale illegal. The parties were both aware at the

material time, that the respondent was not the owner of the land in question. It followed therefore that the respondent could not pass title to the appellant in respect of that land. MALABA JA (now CJ) in *Khumalo v Mandeya & Anor* 2008 (2) ZLR 203 (S) articulated the position of the law in such circumstances to be the following:

> " At the time the parties entered into the agreement, the applicant was not the owner of the land and improvements thereon. He could not pass title to the land to the first respondent at the payment of the purchase price in terms of the agreement of sale. Mr *Zhou* argued that under our law a person can sell property which he does not own as long as the property exists and he realises that he may face an action for damages if he is unable to give good title to the purchaser when the time comes to hand over vacant possession and in the case of immovable of property give transfer: *Frye's (Pty) Ltd v Ries F* 1957 (3) SA 573 (A)at p 582A.
> It appears to me that the principle of law on which Mr Zhou relied to support the contention that what was sold by the applicant to the first respondent was "land" is not applicable to the facts of the case, the applicant held rights and interests in the land and improvements thereon under the lease-to-buy. It is also common cause that, with the written consent of the City Council, he ceded those rights and interests to the first respondent, who stepped into his shoes as the cessionary and acquired them under the lease-to-buy.
> A cession is an act of transfer of personal rights and interests from the cedent to the cessionary. It appears to me that the applicant ceded to the first respondent that he sold under the agreement of sale. In the circumstances, the argument by Miss *Maphosa* that, notwithstanding the language used by the parties in para 1 of the agreement of sale, what was in effect sold and purchased were rights and interests of the parties with the written consent of the City Council. To uphold the decision of the court a quo that the real rights in the land and improvements thereon in the sense of dominium was sold and purchased under the agreement of sale would accord no legal effect at all to the cession and the limited rights it transferred from the applicant to the first respondent." (own emphasis)

[27] In the instant case, that there was no sale of land. The respondent, despite the language used in the agreement of sale, only ceded its rights and interest in the land to the appellant. It is therefore not the respondent who was required to hold a subdivision permit of the land. Instead, the owner of the land Gladstonbury Dairy Produce was. Further, if the respondent did not sell land but rights and interests to the appellant, the application of the stringent requirements attendant upon a cancellation of an instalment sale of land and the notice requirements stated in s 8(1) (c) of the Contractual Penalties Act advocated for by the appellant in his heads of argument do not and cannot arise.

[28] On the question of the subdivision permit, the appellant sought to argue that it was absent on the basis of a prohibition notice which was issued by Umguza Rural District Council, the local authority under which the land in question fell. The respondent's contention in that regard was simple. It said that there had always been a subdivision permit issued to Gladstonbury as far back as 2010. A perusal of the parties' agreement of sale which appeared at p. 76 of the record showed that the introductory

paragraph referred to subdivision number BYO/METRO/04/10 and the corresponding diagram. As argued by the respondent, that detail spoke to a permit that had been issued in 2010. The respondent said it was correct that Umuguza RDC could have been in the dark about the permit because it was not the one that had issued it. The permit had been issued by the then Ministry of Local Government and Public Works which administered the land in question at the time. That argument was logical. Its logic was illustrated by documentary evidence inadvertently produced by the appellant himself. He wanted to buttress his argument that there had been no subdivision permit and first produced a prohibition notice referring to a portion of land called Lot 27A Lower Rangemore. On the other hand, the respondent argued that the land sold to the appellant is properly described as Lot 1 of Lot 27A of Lower Rangemore. It said as such, it was incumbent upon the appellant to have led evidence from the issuer of the notice to demonstrate that the prohibition related to the land under disputation. That was not done. Even if it were to be admitted (which it is not), that the notice related to the same land, the notice was stated in such vague terms that it was not possible to point out for what reason the prohibition notice had been issued. It stated three possibilities all of which were in the alternative. Those were that the prohibition notice had been issued because of:

a. Lack of subdivision permit or
b. Lack of approved layout plan or
c. Lack of approval by Umuguza Rural District Council as then planning authority.

For someone to then chose that it had been issued because there was no subdivision permit would simply amount to speculation. It could have been for any of the three reasons stated above.

[29] Second, the appellant argued that there was no permit previously, because a permit was only issued on 2 May 2023. But again, the argument seemed to us to be inaccurate. The irrefutable evidence is that on 26 April 2023, someone had written to the Ministry of Local Government inquiring about the subdivision permit to the land in Emthunzini. The Ministry responded to the inquiry on 2 May 2023, by a letter directed to various recipients which included Gladstonbury and Umuguza RDC among others. The letter stated inter alia that: -

"Reference is made to your minute AA/4N/dated 26 April 2023.

> Please find a copy of the Permit Number BYO/METRO/04/10 together with diagram number BF49 for your information."

[30] The above correspondence proved beyond doubt, the existence of a subdivision permit for the land in question prior to 2 May 2023 for two reasons. First, it showed that the permit dated 2 May 2023 was not a new permit. What the Ministry was issuing was simply a copy of the existing permit. Second, the references of the permit as in BYO/METRO/04/10 are the same references which appear in the parties' agreement of sale. That agreement predates the letter of 2 May 2023 by years. It is impossible that the parties would have inserted the details of a permit that would be issued years later. The argument about the absence of a subdivision permit must simply end there.

[31] Given the above, we conclude therefore that the contract between the parties was perfectly legal. We conclude that the agreement was not for the sale of land but rights and interests held by the respondent in land belonging to Gladstonbury. The sale of those rights was blessed by Gladstonbury itself. By parity of reasoning, we demonstrated that the Contractual Penalties Act could not apply. However, if any permit was required for that, Gladstonbury had procured the permit as way back as 2010. The agreement of sale itself referred to that permit in its preamble. We therefore find the grounds of appeal without merit and accordingly dismiss them.

Whether or not the penalty of forfeiture of deposit and instalments was fair

[32] The appellant's argument under this ground of appeal was once more premised on the provisions of the Contractual penalties Act. He conceded that even that Act allowed a seller to retain moneys paid by a buyer as damages but argued that the court is given discretion. We do not wish to reopen the argument of the Contractual Penalties Act which we closed earlier. The reality is that the penalty imposed by the respondent and which was made into an order of the court *a quo* was one which was provided for in the agreement between parties. At law, a party is bound by its bargain. The sanctity of contract is a revered principle of our law. The appellant bargained for that term of the contract. He must be hung by his own petard. In the case of *Firstel Cellular (Pvt) Ltd v NetOne Cellular* 2015 (1) ZLR 94 (S, the Supreme Court dealt with the question of a party being released from his/her/its obligations under a contract on the basis of supervening impossibility. It held that at page 10:

> "it is trite that the courts will be astute not to exonerate a party from performing its obligations under a contract that it has voluntarily entered into at arm's length. Thus, the suspension of a contractual obligation by dint of *vis major or casus fortuitus* can only be allowed in very compelling circumstances. The courts are enjoined to consider the nature of the contract, the relationship between the parties, the circumstances of the case and the nature of the alleged impossibility. (My emphasis)

[33] The circumstances of this case are that the appellant went into the agreement with his eyes wide open. He has been enjoying the benefits accruing from the property from the time the agreement was signed to date. He cannot take his deposit and instalments and walk away. That certainly would amount to unjust enrichment on his part. The respondent on the other hand would walk away with nothing yet it is the owner of the property in question. Such course would be highly prejudicial to the respondent. It is for that reason that the court *a quo,* although it failed to properly justify its course, was correct. Our view, once again is that the ground of appeal does not hold merit. Accordingly, it is dismissed.

Disposition

The law provides that an appellate court can only interfere with the decision of an inferior court in instances where the lower court committed a misdirection. As demonstrated in the discussion above we found none such misdirection inn the proceedings of the court aquo. We therefore are precluded from interfering with the decision appealed against. The appeal is devoid of merit and ought to be dismissed.

Costs

On the issue of costs, the general rule is that they follow the result. We have not been given any reason why we could depart from that position. Resultantly, we direct that:

The appeal be and is hereby dismissed with costs

MUTEVEDZI J……

CHIVAYO J agrees……

Messrs Majoko &Majoko, Appellant's legal practitioners

Messrs Maseko Law Chambers, Respondent's legal practitioners