VINCENT MATONGO
versus
WELLINGTON MURAMBA
and
CBZ BANK LIMITED
and
V. NYEMBA & ASSOCIATES
and
REGISTRAR OF DEEDS N.O

HIG COURT OF ZIMBABWE
FOROMA J
HARARE, 2, 3, 4, 5, 23, and 24 November 2015, 1 December 2015 & 18 May 2016

Trial

T Bhatasara, for the plaintiff
Defendant in person

FOROMA J: The plaintiff in this matter sued the defendant and 3 others for the following relief:

(a) payment of the sum of $98 000-00 by the first, second and third defendants jointly and severally the one paying the others to be absolved
(b) payment of $24 450-00 by the first defendant
(c) interest on both the sum of $98 000-00 and $24 450-00 at the legally prescribed rate from the date of service of summons to date of payment in full
(d) costs of suit at attorney and client scale.

The plaintiff eventually withdrew his claims against the second defendant (CBZ Bank Limited) and the third defendant V. Nyemba and Associates (3rd defendant) at the pre-trial conference stage and before trial respectively.

Although the Registrar of Deeds was joined as a party in the plaintiff's action no relief was sought against it nor was any factual averment pleaded to justify its being joined. It is noted that the Registrar of Deeds advisedly did not seek to participate in the matter.

Trial thus proceeded in ernest against the first defendant only. The plaintiff's claim arises from a cancelation of an agreement of sale which agreement had been concluded by and between the plaintiff and the first defendant. The plaintiff's claim is for:

(1) refund of the sum of $98 000-00 being part of the purchase price paid to the defendant and refund of the cost of improvements effected on the defendant's property with the consent of the defendant before the cancellation of the agreement of sale.

The defendant defended the plaintiff's claims and filed a claim in reconvention claiming the sum of $156 859-00 representing damages on account of unauthorised alterations to the defendant's property as detailed in the claim in reconvention filed. As the plaintiff has withdrawn its case against the second and third defendants it will not be necessary to deal with their defences as pleaded.

It is common cause that the plaintiff breached the agreement of sale with the first defendant resulting in the first defendant cancelling the agreement of sale in or about January 2013. It is also common cause that at the time of cancellation of the agreement of sale the plaintiff had paid the defendants the sum of $92 000-00 towards the purchase price of the house purchased from the first defendant leaving a balance of $63 000-00. It is also common cause that the plaintiff and the first defendant agreed that the plaintiff could effect certain improvements to the property purchased namely construction of a perimeter wall around the boundary of the property purchased and sinking a borehole on the property. The plaintiff also claimed the cost of these improvements in the sum of US$24 450-00 from the defendant on cancellation of the agreement of sale. The plaintiff further claimed the $1 000-00 being a rental paid to the defendant but which the plaintiff did not utilise. The plaintiff further claimed costs of suit on a legal practitioner and client scale. The defendant defended the claims contending that the $92 000-00 that the plaintiff paid him towards the purchase price should be forfeited on account of both breach and the fact that the plaintiff had authorised the disbursement of the instalments paid at the time such instalments were paid. Whilst accepting that the cost of improvements were refundable, the first defendant claimed that he was entitled to set off the same against damages

claims that the first defendant had against the plaintiff as will be detailed herein below. The joint pre-trial conference minute agreed by the parties at the pre-trial conference required to be amended once the plaintiff withdrew its claims against the second and third defendants but the parties did not do so.

The plaintiff opened its case by taking the witness stand. He testified that in May 2012 he entered into an agreement of sale for the purchase of the first defendant's residential property at No. 1 Hamble Close Glen Lorne for the sum of US$155 000-00 payable by instalments. In total he paid the first defendant US$92 000-00 and failed to raise money to pay the balance of the purchase price resulting in the first defendant cancelling the agreement of sale. The plaintiff also testified that he sank a borehole on the premises and installed an electric pump and built a perimeter wall made of brick and motor at a total cost of $22 200-00. The plaintiff further testified that he paid the first defendant the sum of $1 000-00 as rental on or before August 2012 in terms of the agreement of sale as he anticipated taking vacant possession then. As the first defendant did not permit the plaintiff to move into the house the plaintiff did not benefit from the rental paid. The plaintiff thus claimed this amount as refundable. The first defendant cross-examined the plaintiff in detail and the thrust of his cross-examination was that the plaintiff was responsible for the breach of the agreement of sale and that he should forfeit the amount paid towards the purchase price. The first defendant disputed the plaintiff's claim for any refund for the cost of improvements i.e. installation of a borehole and construction of a perimeter wall on the basis that not only was the cost of sinking the borehole excessive but the plaintiff had vandalized the borehole after the agreement of sale had been cancelled. The first defendant also claimed that the perimeter wall was not completed and that the first defendant incurred some costs to complete the incomplete portions of the perimeter wall. The first defendant also counter claimed some damages arising from unlawful cutting down of certain indigenous and exotic trees and fruit trees which the first defednant claimed the plaintiff cut from the yard of the premises and stumped out without the first defendant's authority. The first defendant also claimed the plaintiff had damaged some structures at the premises namely an L-shape glitter stone floor (braai area) and a 50 metre retaining wall and cut and uprooted 47various fruit trees leaving 17 stumps. The defendant also claimed damages from the plaintiff for digging up the driveway into the premises through Hamble Close which the plaintiff relocated to a different road. The plaintiff

disputed causing damages claimed by the first defendant and admitted having cut only those trees as would have interfered with the construction of the perimeter wall.

The plaintiff called his wife Mrs Matongo as a witness. Her evidence largely corroborated the plaintiff's testimony. She also disputed the damages claimed by the first defendant. Mrs Matongo also disputed most emphatically that there were any oral terms of their agreement which the first defendant was claiming had been omitted in the written agreement. She testified that the perimeter wall was completed at the time the agreement of sale was cancelled. She also disputed first defendant's claim that the plaintiff should forfeit the amounts paid towards purchase price as it was never agreed that forfeiture would be visited on the plaintiff in the event of a breach of the agreement of sale. She also disputed that the first defendant could lawfully be compensated for any interest he was required to pay to CBZ. Although she denied that the plaintiff had not vandalised the borehole she admitted that an electric switch had been removed so that the defendant could not enjoy or profit from sale of borehole water. She also denied that the plaintiff and herself had destroyed the glitter stone floor area and the 50 metre retaining wall at the property. She confirmed her husband's evidence that the plaintiff had altered the entrance to the property from Hamble Close to Glen Lorne Road. She also confirmed her husband (plaintiff)'s testimony that exh 1B (photographs) were not evidence that the perimeter wall had not been completed as it represented photographs taken during construction period.

Mrs Matongo also disputed the defendant's claim that the plaintiff destroyed a substantial number of indigenous Msasa trees and exotic trees and explained that the only trees cut and stumped were those that interfered with the construction of the perimeter wall. She, like her husband (the plaintiff) was subjected to a lengthy and repetitive cross-examination but was not shaken either. The plaintiff closed his case at the end of the testimony of Mrs Matongo.

The defendant opened his case by taking the witness stand. He like the plaintiff and his wife testified under oath.

His evidence in summary was that he stood guarantee for a loan advanced to his family company Home Sweet Home (Pvt) Ltd by CBZ Bank Ltd and on account of a default the Bank called up on his surety and his house which was the family's residence was exposed to a sale in execution. He managed to persuade the Bank through its legal practitioners V. Nyemba and Associates to allow him to dispose of his house by private treaty in the hope that he could realise

a price that could be sufficient to clear the debt owed to the bank and leave some extra amount with which he could purchase some other property to accommodate his family. The house that he wanted to save from a forced sale in execution is No. 1 Hamble Close which he eventually managed to sell to the plaintiff in terms of a written agreement of sale by private treaty. The agreement of sale was produced as an exhibit.

The defendant appears to have sold his house under pressure to ensure that the Bank did not force the house sale by public auction as that had had the potential of causing him a loss.

So financially pressurised was the defendant that he could not enforce his rights to insist on the plaintiff complying with the terms of the agreement when the plaintiff defaulted in the payment of the deposit and first installment.

The first defendant testified that he agreed to the plaintiff erecting a perimeter wall around the property sold and to drill a borehole without having to await the payment of the full purchase price. He also testified that the plaintiff only completed the drilling of the borehole but did not complete the construction of the perimeter wall. He produced photographs as exhibits to show that some sections of the perimeter wall were not completed. He further testified that he completed the unfinished sections of the perimeter wall after cancelling the agreement of sale. He further testified that the plaintiff caused him substantial damages in that he destroyed a retaining wall and glitter stone floor area and dug up his vegetable garden and destroyed some avocado trees indigenous Msasa trees and 45 - 48 exotic trees. He claimed that a total of 80 trees were cut and of the 80 trees claimed to have been cut some were stumped out. As a result of the destruction of the vegetation (trees on the property) the aesthetic value of the property was diminished and he claimed that he considered that the value of the property was reduced significantly as a result. He however was not able to indicate the extent of such devaluation of the property. The defendant sought to claim that 7.5 % of the value of the property was attributable to the aesthetic value lost on account of the destroyed vegetation. He was unable to adduce the evidence of an expert to determine the percentage contribution of vegetation to the value of a residential property and how that is determined.

The defendant also claimed that the plaintiff was not entitled to any refund of the portion of the purchase price paid which he argued should be forfeited because the plaintiff had deliberately breached the agreement of sale by not utilizing the purchase price of his Greendale property towards settling the purchase price of his (plaintiff's) house yet the plaintiff had

represented that he had the capacity to pay the balance of purchase price from the proceeds of the sale of his Greendale house aforesaid. In his counterclaim the defendnat sought to set off the damages he claimed he suffered as a result of the destruction of the retaining wall, the glitter stone floor and damaged yard against the plaintiff's damages claim.

The defendant also claimed that the agreement he entered into with the plaintiff was both written and oral and that the oral aspect was negotiated and agreed upon between the plaintiff and himself even though they both omitted to instruct V. Nyemba and Associates with those aspects when they gave V. Nyemba the details of their agreement for her to draft a written agreement. The claim by the defendant that part of the agreement of sale was verbal or oral was strongly disputed by the plaintiff and his witness. The defendant called his wife who also gave evidence under oath and generally corroborated the defendant's evidence. She confirmed that the plaintiff destroyed the retaining wall and the glitter stone floor destroyed the vegetable garden by uprooting vegetables which he transplanted in flowerpots. She further testified that the plaintiff destroyed trees at the property and that the plaintiff had not completed the construction of the perimeter wall which the defendant completed after the cancellation of the agreement.

The defendant's wife confirmed that the plaintiff had vandalised the borehole as claimed by the defendant. After Mrs. Muramba's testimony the defendant called 2 more witnesses namely one Wisdom Kachasu whom the defendant claimed was engaged by the plaintiff to do some land scaping. The witness Charles Makombe was an assistant to one Ngwerume who was contracted to complete the construction of the perimeter wall and Tawanda Boroma an ex-employee of the plaintiff who was brought to Hamble Close by Mr Matongo from Greendale when Mr Matongo sold his Greendale house. Wisdom Kachasu's testimony briefly was that he was engaged by the plaintiff and his wife to clear the land and plant kikuyu grass as a loan. He destroyed a wall made of stone and cement but did not know its length and was of varying heights at different points. He also dug up the old driveway on Hamble Close which had two strips of tar. He dug up the tar. He also testified that while he was attending to his task other people were on the premises constructing a perimeter wall and others cutting trees. His evidence was that the trees he saw being cut were about 20 metres from the perimeter wall. He said plaintiff did not pay him part of the agreed charge for the wok he was hired to do at the premises in question by the plaintiff. Asked whether he still needed the balance of the agreed charge from Mrs Matongo, Kachasu replied that because of the time lapse he had written the claim off and

decided to move on. By first week of September 2012 he had completed the task he had been hired to perform at the premises. He witnessed 2 tree stumps dugout and 5-7 tree stumps not yet stumped out.

Tawanda Boroma testified that he was working at plaintiff's Alfred Road Greendale house and he moved over to No. 1 Hamble Close Glen Lorne at the plaintiff's instance where he occupied the cottage and there were about 5 builders using a one room wooden cabin. He testified that building material was stored in the cottage verandah. He was employed as a guard. Whilst at 1 Hamble Close he saw land scaping people who dug up the yard and destroyed a wall from the kitchen going round the main house. He further testified that the plaintiff destroyed some glitter stone floor area outside the kitchen of the main house and also witnessed the plaintiff remove the pressure tank and DB. He testified that the perimeter wall was not complete when he left the defendant's residence in March 2014. He confirmed that the driveway consisting of 2 tarred strips was dug out. He confessed to not having seen any garden. When the plaintiff vandalised the borehole he started getting water from a stream 150-200 metres away from the main house.

Under cross-examination it emerged that Boroma noticed builders using firewood to cook and used electricity for lighting and charging cell-phones. He witnessed 2 sets of builders who came to do work. He testified that Mrs Muramba kept chickens at the premises and she had a gardener called Johannes who looked after the chickens.

Contrary to what Kachasu testified Boroma did not see a flourishing garden at the premises. After the agreement had been cancelled Boroma remained with the defendant as he claimed he had nowhere to go. He denied having witnessed the cutting of trees contrary to the summary of his evidence. He did not see any vegetables garden in the yard neither did Mrs Matongo instruct him to pull out the flowers and vegetables. He claimed he stumped out 15-20 trees. He arrived at the premises before Kachasu who came about 2 weeks later. He and the plaintiff did not part on a friendly note. They failed to agree on the issue of his remuneration.

Charles Makombe testified that he was an assistant to one Ngwerume who was engaged by the defendant to complete the construction of the perimeter wall which it took them 3-4 weeks to complete. He did not know how much the defendant was charged or agreed with Ngwerme for completing construction of the perimeter wall.

Assessment of Evidence.

As the claims against the second, third and fourth defendants were withdrawn before trial the first defendant will interchangeably be referred to herein as the defendant. It is safe to conclude that the following facts were common cause as between the plaintiff and the defendant.

a). The parties agreed with each other that:

(i) The plaintiff paid the sum of US$92 000-00 towards the purchase price of the defendants' house

(ii) The plaintiff erected a perimeter wall.

(iii) That the plaintiff vandalized the borehole on cancellation of the agreement of sale even though the extent of such vandalising was disputed.

(iv) That the plaintiff breached the agreement of sale.

(v) That the plaintiff removed the boundary fence and hedge in order to erect the perimeter wall.

(vi) That the plaintiff changed the driveway from 1 Hamble close and relocated it to Glen Lorne Road.

(vii) Some trees were cut at the premises but the quantity was disputed with the plaintiff claiming that it cut only those trees which interfered with the construction of the perimeter wall and the defendant claiming that the plaintiff stubbornly destroyed the trees at the property as he was in a hurry to improve the property to their taste and did so pre-maturely to the defendant's prejudice as they eventually were not able to compete the acquisition of the defendants property so as to benefit from such improvements.

Assessment of plaintiff's claim

As indicated above the plaintiff's claim was not seriously disputed from the evidential point of view. The defendant sought to make an issue of the quantum of the plaintiff's claim for the cost of improvements i.e. borehole and perimeter wall. The defendant argued that the cost of sinking the borehole was excessive and suggested that the average cost of sinking a borehole from information available from the print media was far less than that claimed by the plaintiff. Besides the defendant argued that the plaintiff vandalized the borehole by removing the pressure

tank and the switch which the plaintiff strongly disputed. Although the plaintiff denied having vandalized the borehole as claimed by the defendant I find that the defendant's testimony has a ring of truth. Besides it is partly admitted by the plaintiff's wife who sought to justify the vindalising by saying they did not want the defendant to benefit from sale of the water from the borehole. In all probability if the plaintiff's intention was to disable the borehole from providing water he would not have merely unplugged the switch as by reason of its cost the defendant would have easily replaced the switch and continue operating the borehole. I am satisfied that the plaintiff disabled the borehole by removing the pressure tank as claimed by the defendant and his witnesses. The court cannot take judicial notice of the cost of sinking and installing boreholes but will deduct the cost of replacing the borehole pressure tank in order to restore it to a working condition after its vandalizing by the plaintiff.

While the defendant claimed that the perimeter wall was not completed and sought to set off the cost of competing the wall after the cancellation of the agreement the defendant did not call the builder Mr Ngwerume whom he allegedly contracted to complete the construction of the perimeter wall. Instead he called one Charles Makombe who could not justify the claim of $5 000-00 for the completion of the perimeter wall as he did not know the cost of the work agreed between the defendant and Mr Ngwerume. The defendant could have called the builder to support his claim for the cost of completing the perimeter wall but he did not do so. The court is unable to assess the state of incompleteness contented for by the defendant and the cost of completing the wall without reference to the builder's evidence in this regard.

Regarding the cutting down of trees the defendant testimony was not convincing. He claimed he watched helplessly while the defendant was destroying the vegetation consisting of both indigenous and exotic trees at a time when the plaintiff was already in breach of the agreement of sale (instalment arrears) and to his knowledge. The protestations the defendant allegedly made sounded more of a recent fabrication. They appear to be an after thought in order to make up a case for a set off against the plaintiff's claim for refund of the amount paid towards the purchase price and the cost of improvements.

Even if my finding on this aspect were to be faulted the defendant would not have succeeded on this head of its claim in reconvention as the defendant did not adduce the correct evidence to prove the quantum of loss on account of the destruction of trees. One would have

expected the defendant to lead evidence of say the Forestry Commission on valuation of unlawfully cut trees or the evidence of commercial value of the timber cut.

The defendant also claimed that the plaintiff destroyed a retaining wall and glitter stone floor. In support of this head of damages the defendant relied on the testimony of his wife and one Kachasu and Boroma. The evidence of these three witnesses was contradictory in material respects. For instance Boroma who arrived before Kachasu did not see a flourishing garden and found the glitter stone floor partially dug out. The witness did not agree on the number of trees cut and stumped out. Boroma's testimony was tainted by the fact that he fell out with the plaintiff on the issue of his remuneration around the time the agreement of sale was cancelled. He may have been motivated to give false evidence against the plaintiff as a way of trying to get even with the plaintiff. Besides the testimony of the plaintiff and witnesses called did not tally on material respects.

In all probability it is unlikely that the plaintiff would have destroyed a retaining wall whose function was to strengthen the building structure of the property he had bought thus exposing the building to structural weakening and damage to his own detriment. The defendant's suggestion that the defendant perpetrated some damage to the property by seeking prematurely to make improvements to the property by cutting down trees digging up the garden and the glitter stone wall and the retaining walls is difficult to believe for the simple reason that the suggested improvements were an expense which the plaintiff could ill-afford to incur in the light of his precarious financial position. It should be remembered that the plaintiff had an obligation to pay the defendant the full purchase price within six months after depositing the sum of US$50 000-00 upon the signing of the agreement of sale. The instalments were in the sum of $17 500-00 per month and it is common cause that the plaintiff failed to pay the initial deposit on time as he only managed to pay the sum of $48 000-00 about a week after due date (signing the agreement of sale) and failed to pay the other instalments on time. Considering that the plaintiff was already in default it is highly unlikely that he would have incurred additional financial obligations towards improving the purchased property before he had fully paid for it. For these reasons among others alluded to above I do not accept the defendant's testimony on those aspects of the defendant's claim in reconvention suggesting premature improvement of the premises by the plaintiff.

The defendant also sought to claim interest that he paid to the CBZ Bank after cancellation of the agreement. He however conceded that the agreement of sale does not show that interest payable to CBZ Bank featured in their negotiations. The defendant never informed the plaintiff of its liability for the interest chargeable by CBZ. I do not find its legal basis as a damages claim on account of breach of agreement. In any event the defendant elected not to cancel the agreement of sale at the earliest opportunity (i.e. the initial breach by the plaintiff when the plaintiff failed to pay the $50 0000-00 deposit on time) without bringing the plaintiff's attention to the consequence of this breach (as regards interest) shows that it was never contemplated that such interest could be claimed by the defendant as damages.

The defendant's claim of $5 000-00 for completing the perimeter wall is totally not legally sustainable even assuming that the plaintiff did not complete its construction. The wall was constructed by agreement and on breach of the agreement of sale the defendant benefited from the perimeter wall in whatever state it was at cancellation of the agreement of sale. It is important to note that the defendant claims that the plaintiff left about 20 000 bricks on site which he allegedly used to complete the construction of the perimeter wall. Surely if the plaintiff had left such quantity of bricks at the site he could not have forgotten to claim them or their value at the time the agreement was cancelled. It should also be borne in mind that the perimeter wall was never considered as a contractual term or condition for the defendant's benefit.

The fact that he (plaintiff) did not claim the alleged bricks or their value tends to give credence to the plaintiff's contention that the photographs showing heaps of bricks on site were taken while the perimeter wall was in the process of construction. For this and other reasons herein above it cannot be considered that the defendant had adequately proved its claim for the cost of completing the construction of the perimeter wall.

The Law

Enforceability of Penalty Clauses in a contract s 4 (1) of the Contractual Penalties Act [*Chapter 8:04*] provides that a penalty stipulation shall be enforceable in any competent court subject to the provisions of the Act.

Forfeiture of amounts paid by a party to a contract is a penalty stipulation and is enforceable only if (i) the parties stipulated it and (ii) it is not out of proportion to any prejudice suffered by the creditor as a result of the act omission or withdrawal giving rise to liability under

a penalty clause – see clause 4 (2) of Contractual Penalties Act. In the absence of forfeiture being agreed to as part of the terms and conditions of the agreement whether oral or written forfeiture cannot be implied for the reason that it has not been stipulated. In *casu* a reading of the parties' agreement/contract reveals that forfeiture as a penalty was not stipulated. Forfeiture cannot therefore be implied in the absence of its stipulation. The defendant's argument that any of the payments made by the plaintiff should be forfeited is clearly not legally sustainable especially since there is no penalty stipulation in the agreement of sale.

Proof of oral terms of an agreement of sale in an agreement for the sale of land where the purchase price is payable by instalments.

Section 7 of the Contractual Penalties Act provides that "every instalment sale of land shall be reduced to writing. This section contains a proviso couched as follows:

> "Provided that where any such contract or any term or condition thereof has not been reduced to writing the onus of proving the existence of that contract term or condition as the case may be shall rest on the person alleging its existence."

An instalment sale of land is defined in clear and unambiguous language in s 2 of the Act as follows "Instalment sale of land" means a contract for the sale of land whereby payment is required to be made – (a) in three or more instalments or (b) by way of deposit and two or more instalments and ownership of the land is not transferred until payment is completed. The parties in this matter are not agreed that the signed written agreement of sale between them is the exclusive memorandum of their agreement with the plaintiff contenting that it is and the defendant contenting that there are certain terms and conditions that were orally agreed but omitted from the written memorandum of agreement. On account of its contention the defendant filed an amendment to its claim in reconvention on 24 July 2015. In terms of the amendment the defendant averred that the agreement was partly oral and partly written. The defendant further pleaded its amendment as follows 3.1. The essential elements of the oral part of the agreement were that:

(a) The source of the buyers funds for the purchase of the property would be the proceeds from the sale of the Buyers own house in Greendale.

(b) Since the buyers house in Greendale was being purchased by instalments the buyer would in turn make instalment payments for the purchase of the seller's property and

(c) The buyer had tailor made the instalment payments for his purchase of the sellers property to match and suit the buyer's receipts from the instalments payments of his own Greendale house.

In para 8 of the amendment the defendant further avers as follows - Despite the buyer having sold and receiving full proceeds for the sale of his Greendale house as represented by him to the seller in terms of para 3.2. (a) to (c) hereof the buyer failed and or neglected to pay to the seller the proceeds of such a sale thereby rendering impossible the performance of his obligation to pay in terms of the agreement of sale and thereby being the author of his own breach. The plaintiff pleaded to the defendant's amended claim in reconvention essentially denying the existence of an oral part of the agreement contenting that the written agreement of sale was the sole and exclusive memorandum of the agreement between the parties.

The amendment of the defendant's claim in reconvention gives rise to an important legal issue namely whether a party to a written memorandum of agreement of sale is legally permitted to adduce evidence to prove that there are aspects of the parties oral agreement which were omitted in the written agreement of sale. This entails the interpretation to be given to s 7 of the Contractual Penalties Act aforesaid.

The plaintiff's contention is that the parole evidence rule also known as the integration rule prohibits a party from altering by production of extrinsic evidence the recorded terms of an integrated contract in order to rely upon the contract as altered – *Nhundu* v *Chiota and Anor* HH 97/06 *Johnston* v *Leal* 1980 (3) SA 927 at 943. The plaintiff quotes the following provision of the written agreement as excluding any suggestion that there was any oral part of the agreement. "The parties hereto acknowledge that this agreement constitutes the entire contract between them' – per clause 6 of the agreement exh 1. The Plaintiff also argued that the issue of an oral part of the agreement was an afterthought.

As a general legal proposition it is correct that the parole evidence rule is still in vogue. However the proviso to s 7 of the Contractual Penalties Act does infact provide an exception to the application of the parole evidence rule as it stipulates that while all instalment sale of land agreements must be reduced to writing it goes on to introduce a salutary proviso by placing the onus of proof on the party who claims that the instalment sale of land agreement was either oral or if written that an agreed oral term or condition was omitted in the written agreement to prove the existence of such oral contract or term or condition.

Having found that the proviso to s 7 of the Contractual Penalties Act creates an exception to the parole evidence rule the next enquiry is whether, the defendant has discharged the onus on him to prove that the agreement between the parties was partly oral. In his application to amend the defendant pleads the amendment as follows

3.1. The buyer made representations to the seller that:

a) the source of the Buyers funds for purchase of the property would be proceeds from the sale of the Buyer's own house in Greendale

(b)

(c)

For the sake of completeness para 3.1. should be read with para 8 of the notice of application to amend. Paragraph 3.1. as read with para 8.1. and 8.2, show that what the defendant is seeking to prove as an oral part of the agreement is a misrepresentation that the plaintiff was capable of financing the purchase of the defendant's house and that the funds would be sourced from the proceeds of the sale of the plaintiff's house. A misrepresentation such as this is not a term of the agreement. The plaintiff was simply reassuring the defendant that he had the capacity to purchase the property if infact the plaintiff made such representation. This is because the plaintiff had not yet identified a buyer of the plaintiff's house and the terms of agreement for the purchase of his house had not yet been agreed with the potential buyer of the plaintiff's house. There was no assurance that the price of the plaintiff's house would be adequate to pay for the purchase price of the defendant's house. Even if I had misconstrued the alleged misrepresentation the defendant would still be out of court because he signed an agreement exh 1 which contains the following exclusionary provision 6 which reads as follows:

> "6. The parties hereto acknowledge that this Agreement constitutes the entire contract between them and that no other terms conditions warranties or representations whatever have been made expressly or by implications by either party than those incorporated herein."

This clause in the written agreement of sale by operation of the *caveat subscripto* rule bars the defendant from relying on any representations as part of their agreement except those incorporated in the written agreement *Nyika* v *Moyo and Others* HB 145/10.

Additionally even if oral representations were to be found to have been made the breach of the agreement would not preclude the plaintiff from recovering the amounts claimed by the plaintiff on account of cancellation of the agreement of sale.

Section 9 (3) of the Contractual Penalties Act empowers the court to have regard to all the circumstances of the case in assessing the relief that may be given including those indicated hereunder. I propose to take into account the following relevant factors in assessing the relief to be granted bearing in mind the findings of fact made herein above.

(i) In assessing the amount refundable to the plaintiff I consider in favour of the plaintiff that the amount he paid the defendant enabled the defendant to save his house from a forced sale by CBZ.

(ii) The value of the defendant's property was enhanced by the construction of a more solid brick wall on its perimeter.

(iii) The value of the defendant's property was also enhanced by the sinking of a borehole.

(iv) The plaintiff did not enjoy the property from the date the agreement of sale was signed to the time it was cancelled.

(v) The defendant did not take remedial action or such action as would have mitigated his loss e.g. promptly cancelling the agreement of sale or renegotiating the agreement in the light of the plaintiff's breach.

(vi) That the defendant granted the plaintiff a considerable lee-way to rectify its breach and save itself the loss of the property.

The defendant did not obtain a valuation of the property in order to determine that the property had deteriorated in value as a consequence of the plaintiff's conduct that the defendant complained of. Had the defendant obtained a valuation of his property immediately after the cancellation of the agreement of sale such valuation would probably have highlighted some of the matters that the defendant claimed constituted or contributed to the devaluation of his property.

In the result the court finds that the defendant's claim in reconvention has not been proved on a balance of probability.

It is therefore ordered that the defendant pay the plaintiff,

(1) The sum of $92 000-00 being refund of the purchase price paid

(2) $20 800-00 being the cost of improvements less the cost of vandalising the borehole.

(3) $1 000-00 being refund of rent paid

(4) interest on the above amounts at the legally prescribed rate with effect from the date of service of summons

(5) Costs of suit.

(6) Defendant's claim in reconvention is dismissed with costs.

Mupanga Bhatasara Attorneys, *defendant's legal practitioners*