IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 01/2016**
HOLDEN AT NDOLA
(Civil Jurisdiction)

BETWEEN:

SYLVESTER MUSONDA SHIPOLO **APPELLANT**

AND

SHADRECK MAIPAMBE **RESPONDENT**

Coram: Mambilima, CJ, Malila and Musonda, JJS
on 4th and 7th September, 2018

For the Appellant: Filed a Notice of non-appearance

For the Respondent: In Person

JUDGMENT

MUSONDA, JS, delivered the Judgment of the Court.

A. <u>Cases referred to:</u>

1. **NFC Africa Mining PLC v. Lofoyi Enterprises Limited: Appeal No. 27 of 2006**
2. **Polliet Kabanda Chikole v. Bank of Zambia: Appeal No. 136 of 2004**
3. **The Attorney-General v. Agness Ngoma and Charles Kajimanga (as Liquidators of Zambia Co-operative Federation Finance Services Limited (In Liquidation): SCZ Appeal No. 181 of 2000**
4. **Nkhata and Others v. The Attorney-General (1966) Z.R. 124**
5. **Zulu v. Avondale Housing Project: (1982) Z.R. 172 and Others**

B. **Legislation referred to:**

1. **Rule 58 (2) of the Rules of the Supreme Court**
2. **Rule 69 (1) of the Rules of this Court**

C. **Other Works referred to:**

1. ***Treitel's Law of Contract, (1975)* at page 530**

1.0 INTRODUCTION

1.1 The appellant has approached us by way of this appeal for the purpose of contesting a judgment of the court below by which that court not only ordered a rescission of a written contract which he, the appellant, and the respondent had entered into in respect of the sale and purchase of house number 247/600, Chawama Compound, Lusaka ("the property") but also pronounced a liquidated sum of money in damages against him (the appellant).

2.0 HISTORY AND BACKGROUND FACTS/CIRCUMSTANCES OF APPEAL

2.1 The undisputed background facts to this matter as they were laid before the trial court were that, sometime in the year 2008, the respondent was desirous of selling the property. His

wish was to secure a buyer who would pay K110,000,000.00 for the same.

2.2 The appellant responded to the respondent's advertisement by making contact with him before subsequently meeting and engaging him over his intended sale.

2.3 According to the record, a side arrangement which emerged in the course of the appellant's interaction with the respondent over the property involved having the latter permit the former to use the documents of title relating to the property by way of collateral to secure the appellant's borrowing from the Public Pensions Board. The respondent was to be paid a sum of K10,000,000.00 by the appellant on account of this arrangement which was intended to facilitate the printing of a book which the appellant had authored.

2.4 According to the record, the dispute with which we are presently concerned turned on the sale and purchase agreement which was evidenced by an agreement which was executed between the appellant and the respondent in about March, 2010 and was expressed in the following terms:

"(SALE AGREEMENT OF A HOUSE NO: 600/247 CHAWAMA)

Date: 03/10

I SHADRICK MAIPAMBE NRC NO: 775380/11/1 HAS SOLD A HOUSE NO: 600/247 CHAWAMA TO MR. SHIPOLO SYLVESTER HOLDER OF NRC NO: 210010/43/1 OF SIKANZI CAMP, LUSAKA AT AN AMOUNT OF K70,000,000.00 (SEVENTY MILLION KWACHA ONLY).

AMOUNT PAID IS K30,000,000.00 (THIRTY MILLION KWACHA ONLY).
BALANCE TO BE PAID IS K40,000,000.00 (FOURTY MILLION KWACHA).

1. ***ON ONE CONDITION THAT HE WILL USE THREE SHOPS BEFORE PAYING THE BALANCE.***
2. ***HE WILL NOT USE ANY OF THE OTHER PART OF THE PROPERTY TILL HE PAYS THE BALANCE OF K40,000,000.00 (FOURTY MILLION KWACHA) WHICH HE PROMISED TO PAY IN SIX MONTHS TIME FROM MARCH 2010.***

OWNER	:	.....***Shadreck Maipambe***.....
SIGN	:	.....*(Signed)*.....
BUYER	:	.....***Sylvester Shipolo***.....
SIGN	:	.....*(Signed)*.....
WITNESS	:	.....
SIGN	:	.....***"***

2.5 It is self-evident from the agreement which has been reproduced in the preceding paragraph that:

2.5.1 The agreed purchase price for the property was K70,000,000.00.

2.5.2 Out of the said K70,000,000.00, a sum of K30,000,000.00 was acknowledged to have been paid.

2.5.3 The balance, being K40,000,000.00, was to be paid by not later than September, 2010.

2.5.4 It was a condition precedent to the payment of the balance referred to in 2.5.3 that the appellant was, in the meantime, going to enjoy the use of the three shops which formed part of the property.

2.6 The record revealed that by the beginning of March, 2011 neither the condition in 2.5.4 had been fulfilled nor had the payment in 2.5.3 been made.

2.7 By a letter dated 19th March, 2011, the respondent demanded payment of the K40,000,000.00 balance from the appellant failing which the respondent was to institute recovery proceedings in court.

2.8 On or about 30th November, 2011 the respondent instituted an action in the High Court of Zambia against the appellant seeking the recovery of a sum of K110,000,000.00 which sum was pleaded in the statement of claim as having been made up of the agreed purchase price for the property (K100,000,000.00) and K10,000,000.00 on account of the appellant's failure to settle the same within the agreed timeframe. The respondent also sought, in the alternative, a rescission of the sale and purchase agreement as well as damages for breach of the same.

2.9 In his defence and counter-claim, the appellant averred that the K10,000,000.00 which the respondent had pleaded in his statement of claim as the payment on account of the appellant's failure to settle the purchase price in a timely manner was, in fact, the commission which the appellant had separately paid on account of his use of the respondent's documents of ownership of the property as collateral to secure the borrowing earlier referred to. The appellant also denied having agreed to the K100,000,000.00 purchase price which the respondent had asserted in his statement of claim and averred that, in fact, the agreed purchase price had been K70,000,000.00 and that a sum of K30,000,000.00 was actually paid by the appellant towards the said purchase price.

2.10 In his counter-claim, the appellant sought a total sum of K144,000,000.00 representing what he deemed to have been unrecovered rental income for the property less the K40,000,000.00 which the appellant was still owing on account of the balance of the purchase price.

3.0 TRIAL OF THE ACTION - EVIDENCE BEFORE LOWER COURT

3.1 Although the record does not disclose due adherence to the usual pre-trial procedure relating to civil actions, the matter was tried in the usual manner.

3.2 In addition to what has been disclosed in the background facts, the gist of the plaintiff (now respondent)'s evidence as laid before the court below and so far as is relevant to this appeal, was that in March, 2010, he accepted the appellant (then defendant)'s offer to purchase the property at K70 million Kwacha. The appellant even demonstrated his seriousness by making a partial payment of K30 million towards the agreed purchase price thereby leaving an outstanding balance of K40 million.

3.3 The respondent further testified that the appellant defaulted with respect to settling the outstanding balance and that he told the respondent *"... to move out of the house"* failing which he was not going to pay the balance.

3.4 Under cross-examination, the respondent told the trial court that he was still living in the property with his mother. He also reiterated that he was paid K30 million by the appellant

as earlier stated. He also admitted receiving K1 million from the appellant on account of council rates for the property.

3.5 For his part, the appellant told the trial judge in his evidence-in-chief that, initially, he did not intend to buy the property but merely wanted to use his title deed as collateral for some borrowing as we disclosed early on in this judgment.

3.6 The appellant further testified that when he eventually agreed to buy the property he did so on the understanding that the price was to stand at K70 million and that:

> *"...the plaintiff (now respondent) was going to let free for my use the 4 front shops upon paying him part of the K70 million with a view that he moved out of [the property]".*

3.7 According to the appellant,

> *"... the [respondent] accepted this condition and [proceeded] to draft the [sale and purchase] agreement."*

3.8 The appellant further testified that he –

> *"... advanced the (respondent) K30 million in the presence of his elder brother [and that] K40 million [remained] outstanding."*

3.9 He also told the court below that:

"We agreed that I would have the 4 front shops while there was a balance outstanding. Unfortunately, when I went to assess the shops, I found [that the respondent] had collected rentals from tenants 3 or 4 months in advance. He [also] refused to ...[have] me discuss with the tenants. I wanted to [turn] the shops into 1 and realise money out of it...

He never gave me an indication of when he would move out...

He told me he was waiting for the balance before he could move out...

I was waiting for [him] to move out so I could pay the balance."

3.10 Under cross-examination, the appellant told the trial court:

"...I refused to accept the [rentals] from the shops... The condition was for me to use the shops [and] not to get rentals. I did not get the rentals. I was reluctant to pay because the [respondent] was in the house."

4.0 TRIAL COURT'S CONSIDERATION OF MATTER AND DECISION

4.1 In its judgment, the court below reviewed the evidence which the respondent and the appellant had deployed before that court and made a number of findings of fact from which the court's crucial conclusions were drawn.

4.2 A prominent finding which the trial court made was that the parties had entered into a written contract of sale for the sale of the property to the appellant at the price of K70,000,000.00.

4.3 A further finding which the court below made related to what we earlier referred to as a 'side arrangement' between the two parties in terms of which the respondent had allowed the appellant to use his documents of title to the property to secure a borrowing from the Pensions Board.

4.4 According to the trial court's further finding, the arrangement to have the appellant use the respondent's certificate of title to the property as collateral was to subsist for only a period of three months. As things turned out, the appellant could not return the certificate of title within the said period; indeed, not even after the expiration of a period of five months.

4.5 According to the trial judge, the appellant had no intention of purchasing the property in question and only agreed to do so following the Pensions Board's refusal to surrender back the title deeds to the appellant on account of the fact that he was still owing the institution.

4.6 The trial judge further found that the appellant had breached the sale and purchase agreement in question in several respects including:

(a) *Failure to pay the K40,000,000.00 balance of the purchase price within the agreed time-frame;*

(b) *Refusal to receive rentals in preference to taking possession of the property.*

4.7 Having made his findings, as highlighted above, the trial judge then proceeded to conclude his judgment in the following terms:

4.7.1 That the appellant acted in bad faith in that he had no genuine desire to purchase the property but merely wanted to secure a means of financing the publication of his book and, consequently, had willfully breached the contract in question;

4.7.2 That the respondent had proved his case on a balance of probabilities and entitled to the remedy of rescission of the contract of sale in addition to a sum of K30 million in damages;

4.7.3 With regard to the appellant's counter-claim, the learned judge dismissed the same and criticized the

appellant for having refused to accept the rentals for the 4 shops and insisting on taking possession of the same. The judge also ordered the appellant to return the title deeds relating to the property to the respondent.

5.0 THE APPEAL AND GROUNDS THEREOF

5.1 The appellant was not happy with the judgment of the lower court and has now appealed to this court on the basis of the six (06) grounds which are contained in the memorandum of appeal and which have been expressed in the following terms:

"1. That the learned trial Judge erred in law and fact when he found and concluded that the action was instituted as a result of negotiations to the initial sale of the property at the sum of K110,000.

2. That the learned trial Judge erred in law and fact when he found and concluded that the Appellant breached the first condition to the sale agreement by refusing to accept rentals.

3. That the learned trial Judge erred in law and fact when he found and concluded that the motive of the Appellant in the second contract was to buy time and not buy the house.

4. That the learned trial Judge erred in law and fact when he found and concluded that the Respondent was denied the opportunity to sell his property to someone else.

5. **That the learned trial Judge erred in law and fact when he concluded that the Appellant's refusal to accept part of the rentals to the shop advanced by the Respondent made the Appellant not to be entitled to any other rentals outside the agreed three months period tied to the contract.**

6. **That the learned trial Judge erred in law and fact when he concluded that the Respondent proved his case on a balance of probability."**

6.0 THE ARGUMENTS ON APPEAL

6.1 At the hearing of the appeal, the appellant, who continued to appear in person, did not appear as he had filed a Notice of non-appearance pursuant to Rule 69 (1) of the Rules of this Court in which he confirmed his absence and reliance upon his filed Heads of Argument. The respondent did, however, attend the hearing and confirmed his reliance upon his filed Heads of Argument.

6.2 Before we turn to highlight the arguments as canvassed by the parties to this appeal, we wish to make the general observation that, from what has been placed before us in the way of grounds 1, 3 and 4 above, it is scarcely clear as to what material bearing these three grounds can have upon the critical outcomes and conclusions which the trial court's judgment engendered as highlighted below:

6.2.1 *That the appellant had 'willfully breached' the sale and purchase agreement in question.*

6.2.2 *That the appellant's breach of the sale and purchase agreement in question warranted and entitled the court to rescind the same as the respondent had sought in its action.*

6.2.3 *That, in addition to the granting of the equitable relief of rescission, the respondent was entitled to K30,000,000.00 (now K30,000,00) in (presumably) general damages.*

6.3 In our considered view, none of the grounds numbered 1, 3 and 4 meets the requirement of Rule 58 (2) of the Rules of this court which, in effect, obliges an appellant to "specify", in his memorandum of appeal, *"... the points of law or fact which are alleged to have been wrongly decided by the trial judge."* Accordingly, we are inclined to exclude the three grounds from further consideration in this judgment.

6.4 Turning to the three grounds which have survived our preliminary scrutiny or what we might call the 'Rule 58 (2) test', it was contended by the appellant in respect of the second ground of appeal that the issue of collecting rentals by him was not a matter which the sale and purchase agreement

had captured. The appellant contended that the first condition of the sale agreement which, according to the appellant, the respondent himself had drafted after reaching a verbal understanding with him, was that the respondent was going to yield vacant possession of the 4 shops to him with a view to having the latter use the shops to sell his own merchandise.

6.5 The appellant further argued that, instead of surrendering the shops in question to him for his own use, the respondent collected rentals from the shops' tenants and even attempted to share the same with him, contrary to what was agreed in the sale and purchase agreement.

6.6 According to the appellant, it was as a result of the respondent's actions which have been alluded to in 6.5 that he decided not to perform his side of the bargain with the respondent by not paying him the balance of the purchase price. To support his action, the appellant cited the following passage from *Treitel's Law of Contract*:

> **"One party to a contract is entitled to refuse to perform his part if the other has failed to perform a condition precedent or a concurrent condition."**

6.7 The appellant concluded his arguments around the second ground of appeal by faulting the court below for having held and concluded that he had breached the sale and purchase agreement by refusing to accept rental payments on account of the shops in question. In the appellant's estimation, it was as a result of the respondent's breach of the condition precedent in question that it became impossible for him to perform his own side of the bargain under the sale and purchase agreement.

6.8 With respect to the 5th ground of appeal, the appellant faulted the trial judge for having reached the conclusion that his refusal to accept rentals relating to the shops in respect of the initial period of three months had properly served to preclude the appellant from recovering the rentals which arose after the initial period of 4 months.

6.9 Notwithstanding his contention in 6.8, the appellant reiterated his contention in respect of the second ground of appeal.

6.10 With regard to the 6th ground of appeal, the appellant argued that the trial court misdirected itself by upholding the

respondent's claim which could not find support in the pleadings which the respondent had settled in the court below.

6.11 In his reaction to the appellant's arguments, the respondent contended, in respect of ground two, that the trial judge was on firm ground when he determined that the appellant had breached the first condition of the sale and purchase agreement by refusing to accept the part rentals which the respondent had availed to him.

6.12 With regard to the 5th ground, the respondent argued that the trial judge was on firm ground when he held that the appellant's refusal to accept part of the rentals in respect of the shops which was availed to him by the respondent precluded the appellant from recovering other rentals beyond the three months period which had been tied to the sale and purchase agreement.

6.13 With respect to the 6th ground, the respondent contended that he had established a breach on the part of the appellant and that that breach entitled him to the relief which he successfully sought in the court below.

7.0 CONSIDERATION OF THE APPEAL AND DECISION

7.1 We have carefully considered the arguments and submissions which the two parties canvassed before us in the context of the judgment of the court below, the evidence and arguments which had yielded that judgment and the grounds which had excited this appeal and are grateful to the two sides for their determined and spirited exertions before us.

7.2 Our consideration of the three surviving grounds of this appeal must, necessarily, begin with examining the second ground of appeal which, as structured, invites us to bring the sale and purchase agreement in question into sharp focus.

7.3 Early on in this judgment, we reproduced the sale and purchase agreement and went on to unpack its key features. Those key features included the following:

(a) The fact that the appellant, as the purchaser, owed a sum of K40 million balance on account of the transaction in question;

(b) The appellant's obligation to pay the K40 million balance by not, later than September, 2010; and

(c) A condition precedent to the effect that, prior to settling the said balance referred to above, the appellant was to enjoy the benefit of using the 4 shops which we repeatedly referred to in this judgment.

7.4 In his judgment, the trial judge made the following observations:

> **"I find that by refusing to accept the rentals of the four shops, the [appellant] breached the first condition of the March, 2010 Sale Agreement. Under the terms of the Sale Agreement he was obliged to accept the rentals as he was taking possession subject to termination of the tenancy agreement. Thereafter he had the option to terminate the tenancy agreement..."**

7.5 In his arguments under the 2nd ground of appeal, the appellant contended that, according to the sale and purchase agreement in question, his entitlement to the use of the 4 shops ahead of paying the balance of the purchase price constituted a condition precedent.

7.6 Having examined both the sale and purchase agreement and the evidence which was placed before the learned trial judge, we have been somewhat troubled as to what precisely had informed the judge's finding and conclusion as captured in 7.4 above. In our view, the so-called first condition of the sale

and purchase agreement was couched in very plain and clear language. It was clearly of the nature of a condition precedent which had entitled the appellant to *"...use three shops before paying the balance..."*. The appellant specifically spoke to this condition in his evidence. He confirmed having verbally agreed upon it with the respondent before it was reduced to writing by the respondent himself.

7.7 We have repeatedly said in countless decisions including **NFC Africa Mining PLC v. Lofoyi Enterprises Limited[1]; Polliet Kabanda Chikole v. Bank of Zambia[2]; The Attorney-General v. Agness Ngoma and Charles Kajimanga (as Liquidators of Zambia Co-operative Federation Finance Services Limited (In Liquidation)[3]** that a *"judgment must be anchored on (or supported by) evidence adduced before the court."*

7.8 Clearly, the learned trial judge appears not to have paid attention to the settled principle we have briefly highlighted above. This, in our view, was a misdirection not only on account of the principle we have highlighted above but on account of the additional principle that the judge's finding of

fact was perverse and, consequently, liable to be interfered with in accordance with what we have said in numerous cases such as **Nkhata and Others v. The Attorney-General[4], Zulu v. Avondale Housing Project[5]** and others.

7.9 The learned authors of *Halsbury's Laws of England*, 4th edition, have stated at paragraph 962, under the sub-heading, *The Nature of Conditions Precedent*, the following:

> *"A contractual promise by one party (A) may be either unconditional or conditional. A conditional promise is one where the liability to perform depends upon something or event; that is to say, it is one of the terms of the contract that the liability of the party shall only arise, or shall cease, on the happening of some future event, which may or may not happen, or one of the parties doing or abstaining from doing some act... The major categories of conditional promises are: (1) Conditions precedent to the formation of the contract; and (2) Conditions suspensive of performance...*
>
> *A condition precedent to the formation of a contract... should be distinguished from a condition precedent to the performance of the contract. In the former case, no contract comes into existence until the contingency occurs; [while] in the latter case there is a contract but the obligations of one or both of the parties are suspended. Where the liability to perform only arises on the*

happening of the contingency or the performance of the condition, the condition is called a condition precedent..."

7.10 The same learned authors have stated that:

"More commonly, performance of a promise is subject to a condition precedent in which case neither party may waive the condition unless it is exclusively for his benefit. Such conditions precedent to performance may be subject to: (a) a purely contingent condition; or (b) a promissory condition. Where the performance of this promise is subject to a contingent condition precedent, it is not liable to perform his promise unless that condition occurs."

7.11 Turning to the matter at hand, it is amply clear that the learned trial judge did not pay careful attention to the clear and unambiguous terms of the sale and purchase agreement in question. In particular, the trial judge failed to pay attention to or to reveal his mind upon the meaning and effect of the condition precedent which was embedded in the clause of the agreement which was numbered '1'.

7.12 It can scarcely be doubted indeed that the said clause numbered 1 created what the learned authors of *Halsbury's Laws of England* described as a *'contingent condition precedent'* in terms of which the appellant was entitled to take

possession or occupation of the shops in issue for the purpose of undertaking his own business therein before his obligation to pay the balance referred to above could be triggered.

7.13 We must also stress, as the appellant correctly argued, that the clear terms of the sale and purchase agreement in question did not suggest recovery of rentals by the appellant on account of the shops in question.

7.14 In his judgment, the learned trial judge asserted that the appellant had:

> *"waived ... the first term of the [sale and purchase agreement] when he refused to take possession by receiving the rentals from the existing tenants..."*

The judge then went on to say:

> *"This [that is, the receiving of rent] was a condition of the sale which was not a condition precedent to the settlement of the outstanding sum of K40,000,000.00. By this conduct, the [appellant] waived the condition to take vacant possession of the four shops..."*

7.15 With the greatest respect to the learned trial judge, the preceding passages reveal, yet again, another troubling feature of the judgment now under attack.

The appellant told the judge below in his evidence that he did not want to be paid or to receive rentals on account of the shops in question but, in effect, wanted to have vacant possession of the shops yielded to him so that he could use them for his own business. The appellant's position was clearly consistent with what has been designated as the first condition of the sale and purchase agreement. Arising from the foregoing, the following questions beg answers: Where did the trial judge find the basis for treating the taking of possession as being synonymous with receipt of rentals? Are the two not mutually exclusive? Do the two necessarily go hand-in-glove?

Our answer to the above questions would be that taking possession of a property and receiving rentals on account of such a property are mutually exclusive acts which do not necessarily go hand-in-glove. Accordingly, we find the reasoning of the trial judge on this score seriously flawed.

7.16 With regard to the issue of the first condition earlier referred to being or not being a condition precedent, this issue was, in

the context of the sale and purchase agreement in question, as clear as night follows day.

7.17 Contrary to the reasoning of the trial judge, the parties to that agreement defined and agreed upon the condition precedent to the payment of the K40,000,000.00. That condition precedent was that the appellant was going to *"use three shops..."*. This, necessarily, entailed that the respondent was going to yield vacant possession of the shops in favour of the appellant. There was no question of the appellant having waived his right or entitlement as the trial judge erroneously misapprehended.

7.18 It was, undoubtedly, a complete misdirection on the part of the court below to have concluded and held in its judgment that the appellant had waived his rights when he refused to accept rentals on account of the shops in question. Needless to say, the clear and unambiguous right which the sale and purchase agreement in question had created in the appellant's favour related to taking possession or occupation of the shops as opposed to recovering any rentals arising therefrom. Ground two succeeds.

7.19 With regard to the fifth ground, our reading of the judgment under attack did not suggest that the trial judge made a pronouncement which had the effect of disentitling the appellant from recovering rentals beyond the three-month period in respect of which the respondent had recovered advance rentals.

7.20 In any event, our understanding of the opinion which the judge below had expressed in relation to the issue of rentals was that the appellant had waived the right – without mentioning the period which that waiver covered. This ground must fail.

7.21 With respect to the sixth ground, it was not in dispute that the appellant had not paid the K40 million balance of the purchase price. On first impression, the appellant's failure to pay the K40 million balance on the purchase price constituted a breach of the sale and purchase agreement.

7.22 The appellant's reaction to the above allegation, however, was that it was the respondent's breach or failure to observe the condition precedent which we elaborately interrogated in the context of the second ground of appeal which, in effect,

relieved him of his obligation to perform his part of the bargain.

7.23 We entirely agree with the appellant's position as exposed above as it also finds support in the law as postulated in *Halsbury's Laws*. The question of the respondent yielding vacant possession of the shops to the appellant or, in any other way, facilitating his use of the shops constituted a *'contingent condition precedent'* which the respondent was obliged to fulfill ***before*** the appellant's obligation to settle the K40 million balance could be triggered.

7.24 To quote, once again, the learned authors of *Halsbury's Laws*, at paragraph 969:

"Where the performance of A's promise is subject to a contingent condition precedent, A is not liable to perform his promise unless that condition occurs... Where the performance of A's promise is subject to a promissory condition, B promises that the condition will occur, A is not liable to perform his promise unless B fulfills his promise, and non-fulfilment of the condition will also lead to B's liability in damages..."

7.25 The meaning which we have discerned from the latter part of the above passage from *Halsbury's Laws* is that, contrary to the conclusion which the learned trial judge reached in his

judgment, it was, in fact, the respondent who was in breach of a material or fundamental condition of the sale and purchase agreement. This breach, on the part of the respondent, served or operated not only to relieve the appellant of his obligation to settle the K40 million balance but rendered the respondent liable to him in damages. Accordingly, ground six succeeds.

8.0 CONCLUSION

8.1 Although the appellant founded this appeal upon a variety of grounds half of which we felt disinclined to consider on the basis that they were canvassing issues which were peripheral and had no material bearing upon the core findings and conclusions in the judgment which was under attack, we consider that the same has succeeded on the fundamental issue of breach of the sale and purchase agreement. Indeed, it was on account of the finding of breach that the lower court pronounced the material reliefs that it had pronounced. In the result, we set aside the judgment of the court below and, in its place, order as follows:

(a) That, given the peculiar circumstances of this matter, the sale and purchase agreement between the appellant

and the respondent in respect of house No. 247/600, Chawama shall stand rescinded;

(b) That the respondent shall refund to the appellant the sum of K30,000.00 which the latter had paid to the former by way of partial payment towards the purchase price of the property. The said sum of K30,000.00 shall attract interest at the average short-term deposit rate which was prevailing between 30th September, 2010 up to the date of this judgment and, thereafter, at the current bank lending rate as determined by the Bank of Zambia up to the date of payment;

(c) The appellant must, within 7 days from the date of this judgment, arrange to return the documents of title relating to the said house to the respondent; and

(d) Each party shall bear his own out of pocket expenses relating to this appeal.

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I. C. MAMBILIMA
CHIEF JUSTICE

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M. MALILA
SUPREME COURT JUDGE

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M. MUSONDA, SC
SUPREME COURT JUDGE