

EVIDENCE NCUBE

Versus

ROSEMARY MANGANI

And

EDWIN MANGANI

And

ADJAR DAVID MVERA

And

REGISTRAR OF DEEDS N.O.

And

DEPUTY SHERIFF N.O.

IN THE HIGH COURT OF ZIMBABWE

TAKUVA J

BULAWAYO 27 & 28 OCTOBER 2015; 21-22 MARCH 2016;

16 FEBRUARY & 4 MAY 2017

Civil Trial

J. Mugova for the plaintiff

Adv. T. Zhuwarara for the 3rd defendant

No appearance for the 1st, 2nd, 4th and 5th defendants

TAKUVA J: The dispute here is over immovable property that was sold to two people by the 1st and 2nd defendants who are husband and wife. The matter convened by way of an urgent chamber application which was subsequently converted to action proceedings. A joint pre-trial conference minute shows the following as the issues referred to trial:

“1.1 Whether or not third defendant was an innocent purchaser?”

- 1.2 Whether or not the agreement of sale between second and third defendants was valid?
- 1.3 Whether or not the transfer and sale of the house by first, second, third and fourth defendants was lawful?
- 1.4 Whether or not the Title Deed registered in third defendant's name for stand number 12847 Bulawayo Township also known as house number 10 Shaw Close, Sunnyside, Bulawayo should be cancelled."

The 1st and 2nd defendants did not respond to the pleadings. Both failed to attend the trial. The plaintiff's claim is for:

1. Cancellation of the title deed registered in 3rd defendant's name in respect of stand number 12847 Bulawayo Township
2. Transfer of the said property into plaintiff's name.
3. The Sheriff be authorized to sign all necessary papers to effect transfer into plaintiff's name.
4. The 1st and 2nd defendants to pay costs of suit at a higher scale.

Plaintiff's evidence is to the effect that in 2006 she met 1st defendant through a friend. On 6 January 2006, plaintiff and 1st defendant entered into a written agreement of sale in terms of which plaintiff purchased stand number 10 Shaw Close, Sunnyside Bulawayo from the 1st and 2nd defendants. She said she had spoken to 1st and 2nd defendants while they were in Botswana. After the agreement she paid a deposit of Z\$750 million and the balance was to be paid in instalments over 28 months. The agreement was witnessed by 1st and 2nd defendants' son and one Mavis Ngwenya who is the sellers' cousin. Although the agreement of sale was signed by the 1st defendant, the witness said she bought the house from both of them since she used to communicate with both of them, but it appeared the 1st defendant was "running the show". As regards 2nd defendant's knowledge and approval of the sale, she said he was fully aware because he used to communicate with the plaintiff instructing her as to how and where to make payments for their children's school fees in South Africa. The instructions were that the money be deposited into the children's bank account in South Africa. Plaintiff complied and deposited

various amounts into Sharon and Decent Mangani's bank accounts in South Africa. She said the "husband" i.e. the 2nd defendant was particularly keen to have part of the purchase price channeled towards the children's school fees.

Plaintiff personally knew these children as their mother, the 1st defendant used to bring them to the house and as indicated above, one of them actually witnessed the agreement of sale between plaintiff and 1st defendant. She sent approximately 40% - 50% of the purchase price towards the children's school fees, the bulk of it being deposited into Sharon's account. According to plaintiff the 1st defendant is a Zambian national while the 2nd defendant is a Zimbabwean living and working in Botswana. She said she was made to believe that the house belonged to 1st and 2nd defendants. When it was put to her that at the time of the agreement she was not allowed to transact in foreign currency without Reserve Bank of Zimbabwe authorization, she said most of the money came from her father who was working in South Africa. Also when quizzed why she did not pay off the balance of the purchase price she said the 2nd defendant wanted her to pay the balance into his account. She refused arguing that since this was the last installment, both 1st and 2nd defendants should come and effect transfer. Both disappeared into thin air around 2008.

Meanwhile plaintiff who had been given vacant possession had tenants renting the whole house paying rentals to her. After the 1st and 2nd defendants stopped communicating with plaintiff one of her tenants Ike Chinyoka while reading the Chronicle of the 17th May 2007, discovered in the classified Ads section that there was a house for sale by private treaty in Sunnyside. The advert was produced as exhibit B and describes the house, its location and a phone number. Plaintiff was then advised by Mr Chinyoka and she phoned the number posing as a potential buyer and the address was given as that of her "house". She also discovered that the house was being sold through an estate agent called Net 7 Real Estate. However, the name of this estate agent was not revealed on the advert.

Alarmed by this development, plaintiff approached her lawyers who obtained a provisional order from this court per NDOU J in the following terms:

“Pending the return day, the following interim relief is granted:

1. The 1st respondent be and is hereby ordered not to sell, cede, assign, transfer or deal with stand number 10 Shaw Close, Sunnyside, Bulawayo in any way which may be prejudicial to the applicant’s interests therein.
2. The 2nd respondent be and is hereby ordered not to effect any session or transfer of stand number 10 Shaw Close, Sunnyside, Bulawayo to any third party without the authority of this honourable court.”

Plaintiff advised her tenants to inform prospective buyers who came to view the property that there was a dispute of ownership and that the house was not for sale. She further left a copy of the provisional order with Ike Chinyoka with specific instructions to exhibit the same to prospective buyers as proof of the existence of the dispute. The provisional order was served on Messrs Majoko and Majoko the erstwhile legal practitioners for 1st defendant and on the Registrar of Deeds. Indeed the provisional order was stamped by the former and the latter recipients on the 22nd May 2007.

Having done that and believing that her interests had been secured, plaintiff communicated with 2nd defendant who agreed to come and collect the balance of the purchase price and simultaneously effect transfer into plaintiff’s name. He never came. Instead, plaintiff was given a deed of transfer of the property into the 3rd defendant’s name on 19 December 2007. She enquired from the Conveyancers Messrs Coghlan and Welsh who showed her an agreement of sale entered into on the 23rd May 2007 between 2nd defendant and 3rd defendant. When asked whether 3rd defendant knew that she had purchased the house at the time he entered into an agreement with 2nd defendant her response was “I am not sure but the tenants must have told him.” When the same question was repeated under cross-examination again her reply was; “I am not sure the Estate Agent should have told him.”

Plaintiff gave her evidence well. Her version is simple to follow. In fact most of her evidence is common cause. She has no direct knowledge of whether or not 3rd defendant

(through his agent) was indeed notified by her tenants at the property of plaintiff's or anyone else's interest in the property. This is the crux of the matter. Plaintiff honestly in my view simply gave her opinion that she believed 3rd defendant was informed before signing the agreement of sale. Further, her evidence is supported by the numerous documentary exhibits produced by consent during the trial. Plaintiff admitted that at the time 1st and 2nd defendants disappeared, she had not paid the outstanding R13 000,00 to the seller. In view of these reasons, I find her to be a credible witness.

Plaintiff's second witness was Mavis Ngwenya who is 1st defendant's cousin. She used to work at Barclays Bank Bulawayo together with plaintiff. This witness knows 1st and 2nd defendants as husband and wife although she had last met them in 2008 and is unaware of their whereabouts. At one time she was approached by 1st defendant who was selling her house and wanted the witness to assist in finding a suitable buyer. She later told plaintiff who showed interest and the witness introduced her to 1st respondent. The two later entered into an agreement of sale wherein she and Decent Mangani i.e. the 1st and 2nd defendant's son signed as witnesses. According to her 1st defendant would say "we" are selling our house and she understood this to mean 1st defendant and her husband the 2nd defendant were the joint sellers. Also, she indicated that 1st defendant would bring the children saying she had "problems paying university fees". There were occasions when she witnessed the 1st defendant collecting money from the plaintiff at Barclays Bank. She has no idea of how the second sale was conducted because 1st defendant kept her in the dark.

However she was categorical about the presence of plaintiff's tenants at the house. She said after receiving the deposit, 1st defendant said to the plaintiff, "the house is yours, you can put tenants if you like". Under cross-examination, the following exchange occurred;

"Q Who sold the house to plaintiff?

A Rosemary is the one who was coming saying we.

Q Did 2nd defendant come to Zimbabwe to discuss with Evidence?

A I do not think he did but he demanded payment for school fees.

Q Did plaintiff pay?

A I believe there were monies paid outside the country. ...

Q Do you know the ownership details of the house?

A I did not see these documents. She said we have relocated to Botswana and we are selling our house.”

Finally she said she witnessed the agreement of sale between plaintiff and 1st defendant in 2006. She said there were two agreements, one in Zimbabwe dollars and the other in South African Rands. This witness’ testimony simply confirms what transpired between plaintiff and 1st defendant. The 3rd defendant has no way of challenging this version as he was not yet in the picture. Only 1st and 2nd defendants could have competently challenged this testimony if they had appeared at the trial which they did not.

Plaintiff then called her tenant Mr Ike Chinyoka whose testimony was that although he secured accommodation at this house in December 2006 from plaintiff he only started staying there in January 2007 with his wife. Two months later 1st defendant came to the house and told him to vacate her house. He phoned plaintiff who came to the house and there was an altercation between plaintiff and 1st defendant over the non-payment of the balance of the purchase price which he understood to have been R13 000,00. Plaintiff admitted she owed 1st defendant R13 000,00 but denied being in arrears. He was assured by plaintiff to remain in occupation and inform her whenever problems arose.

After sometime, he saw an advertisement in the Chronicle newspaper showing the description of a house, its location i.e. Sunnyside and a telephone number. It also stated that it was a “private sale”. He became suspicious and he alerted the plaintiff who subsequently obtained a provisional order from this court. Plaintiff gave the witness a copy of the provisional order exhibit C in May 2007 with specific instructions to show it to prospective buyers or any other people interested in the house. Prior to his receipt of the provisional order some people in the company of Net 7 agents came to view the house but he refused them access into the house as per plaintiff’s instructions.

The third defendant came to the property after the witness had been given the provisional order. He told the witness that he had bought the house and would like the witness to vacate the same. After being shown the provisional order, he retorted “I am not interested in High Court orders, those who want to fight can fight this is my property. My daughter at NUST is coming to stay in it. The witness advised plaintiff who repeated her instruction that all prospective buyers should be shown the papers from the High Court.

Two months later 3rd defendant returned with “proof” that the property was now his. He brandished title deeds and left only to return on the 3rd occasion with his wife. Upon arrival, he told the witness that he had come to show his wife her property but the witness refused them entry until they spoke to plaintiff first. The witness again notified the plaintiff who advised him that her lawyers were handling the matter. On 15 January 2008 the 3rd defendant directed a notice to vacate number 10 Shaw Close on or before the 31st January 2008.

When it was put to him under cross-examination that the 1st meeting with 3rd defendant was an after-thought, the witness denied that, insisting that he actually met 3rd defendant whom he showed the provisional order but the latter was totally disinterested. According to the witness he showed the provisional order to everyone who came to view the house resulting in some of them thanking him for disclosing the ownership dispute. Mr Chinyoka said he pays US300,00 rentals to plaintiff through Eco-cash facility to her sister. He denied being 1st or 2nd defendants tenant pointing out that paragraph 3 of his supporting affidavit on page 32 of the record contains a mistake in referring to 1st respondent instead of “plaintiff” as he never rented the property from the 1st defendant. The criticism of Mr Chinyoka’s evidence is based solely on this seemingly contradiction. It appears that paragraph 3 of his affidavit is totally out of sync with the rest of the evidence some of which is common cause. For example, it is common cause that plaintiff bought the house in January 2006. Mr Chinyoka secured the premises for rental through plaintiff’s father in December 2006 and commenced living at the house in January 2007 long after 1st defendant fell out of the picture. Also according to Mavis Ngwenya, 1st defendant granted plaintiff permission to rent the house out if she so wished immediately after signing the

agreement of sale. Quite clearly in my view the reference in paragraph 3 to “1st respondent” is an error by Mr Chinyoka. At the heart of this matter is whether Mr Chinyoka showed the 3rd defendant the provisional order when he visited the property before transfer was effected. In order to answer this question, it is necessary to examine the evidence of these two closely.

On this crucial issue, the witness mentioned 3 visits to the property by the 3rd defendant. He was very clear on what transpired on each visit. The common thread running through his evidence is that he denied the 3rd respondent permission to view the house. Also he was in no doubt that he showed 3rd defendant the High Court order. This witness’s evidence that 3rd defendant mentioned his daughter at NUST during his conversation with him is telling. This evidence was not challenged at all. Also while 3rd defendant and his agents give varying reasons for not entering the house to inspect they all agree, except in the case of the alleged 1st visit by Muchineuta and Ndlovu, that they never entered the house again. In my view, this corroborates this witness’ testimony that he never allowed them access into the house.

Petronella Madhuku was the plaintiff’s third and final witness. She is the previous witness’ wife and was living at the house in dispute i.e. number 10 Shaw Close Sunnyside Bulawayo. Her evidence was that some people came to view the property wanting to purchase it. She would phone her husband who informed these people that the house was not for sale. She did not grant them access into the house but would walk outside the house. Later she was given the provisional order to show it to prospective buyers. The 3rd defendant’s agent Mr Mawere Muchineuta came to view the house but she denied him access because the house was not for sale. She said she actually told him so. He returned in the company of the 3rd defendant who said he had already purchased the house. She showed them the provisional order after barring them from entering the house. The two read the provisional order and left only to return on a later date in the company of 3rd defendant’s wife but again they never viewed the inside of the property as she did not allow them into the house.

Under cross-examination, this witness was quizzed on the contents of her supporting affidavit that appears on pages 30 – 31 of the record. It was contented that paragraphs 3, 4 and 5 of her affidavit were inconsistent with her evidence in chief in that in the affidavit she said she was staying at the house well before plaintiff purchased it while in her evidence in chief she said they only started staying there after plaintiff had purchased the house.

In her explanation, the witness said she did not know why paragraph 3 states what it states but the truth of the matter according to her is that they started staying there in 2007 after plaintiff had bought the house from the 1st defendant. In my view, whether or not these tenants were living at the house prior to the sale of the house to plaintiff is neither here nor there. The crux of the matter is whether or not they told 3rd defendant and his agents that the house had been previously sold to someone and whether or not they showed the 3rd defendant and his team the provisional order. In this regard, they did not waver at all. There was no equivocation or contradiction on this point.

The precise dates when 3rd defendant visited the property are critical in so far as they indicate that on the 1st occasion he said he had already purchased the house but transfer had not gone through. The evidence of Petronella Madhuku is to the effect that she does not remember the exact dates or month she showed the 3rd defendant the provisional order what is critical is 3rd defendant did not have the title deed at that time otherwise he would have brandished it.

This witness gave her evidence convincingly. If she had wanted to exaggerate, she could have said she showed the 3rd defendant the provisional order on his 1st visit. She did not say so. I find this witness to be a credible witness whose testimony is corroborated by the 3rd defendant and his witnesses who confirm the numerous visits to the house. Further probabilities favour the conclusion that the witness informed them of the existing dispute over ownership of the house. Why would she fail to mention this fact in view of her being in possession of a document from the High Court? She was aware that the house had already been sold to plaintiff who had taken the dispute to the High Court for resolution. She had been given the provisional order by her

husband who instructed her not to allow any prospective buyers into the house. She told other potential buyers that the property was not for sale. Why would she fail to tell third defendant and/or his agents the same story?

Third defendant opened his case by taking the witness stand. His evidence is as follows:

While working in Kenya as a Consultant, he saved some money and wanted to invest in property. Since he could not afford a house in the low density suburbs in Harare, he set his eyes on Bulawayo where he requested his long time colleague one Mawere Muchineuta Mawere to look for a suitable property. This was around the 17th May 2007. After sometime, Mawere informed him that he had seen an advert in the Chronicle for a house in Sunnyside he told him to “go for it”. He was told that Mawere had contacted Net 7 Estate Agent in order to view the property. He subsequently received emails confirming the visit to the house and its description including the fact that there was a servant’s quarter. After that, he became convinced that he should negotiate the purchase price with the Seller who he believed was a Mr Mangani. A price in Zimbabwe dollars equivalent to US\$36 000,00 was agreed upon and he instructed Mawere to enter into an agreement with the seller. It was a term of the agreement that he would pay US\$12 000,00 as deposit and the balance would be paid over the next two months. He then paid through a bank account in Botswana belonging to a company called Broadhurst Township Pvt Ltd. The final installment was paid in July 2007 and he then came to Zimbabwe in August 2007. During that visit, he came to Bulawayo where he “saw the house from outside” as he did not have the “time and energy to look inside”. Subsequently, he returned in November to show his wife the “surprise”. Again he did not enter the house because the “owners were away”.

Mr Mvere said he was not aware until the 19th December 2007 that someone had purchased the property before he did. According to him this information came from Mr Chinyoka during his visit to the property in December to give Chinyoka a notice to vacate. He was in the company of his agent (Mawere). He was surprised because the property had been “transferred”. He also said prior to that date, he had not “met anyone at the premises” and that

he engaged Coghlan and Welsh to do the conveyancing. No problems were encountered during this exercise as there were no caveats on the title deed in the Deeds Registry.

Later the witness changed his evidence and admitted that during his August visit he saw “the wife who was heavily pregnant”. He then took a decision to delay the eviction to a later date. At the time he visited the property for the 1st time, he had already paid the final purchase price. When asked if he would have purchased the house had he known of the ownership dispute, his response was that he would certainly not have done so. After purchasing the house, he noticed that it was in need of repairs. According to him there was nothing amiss in buying a house without seeing it. Under cross examination, he said he could not remember whether Petronella said something after he told her he had purchased the house. When asked why he had said in paragraph 3.8 of his opposing affidavit he had seen the property for the 1st time in December 2007 when in his evidence in chief he said the 1st time he saw the property was in August of the same year, the witness said he meant the 1st time he “entered the house”.

As regards due diligence search, he said that was done by the Estate Agent and Mawere. On the location of the house he said he did not know Bulawayo that much and it was his 1st time to hear about Sunnyside.

What I find peculiar is the 3rd defendant’s attitude towards this property. He flew from Kenya, came to Bulawayo, drove to Sunnyside but suddenly had no time or energy to view the interior of the house. He stood outside and returned to Kenya. What is more baffling is that he bought property without seeing it. He did not even see its pictures. This is not all, he went to the property for the second time in November 2007 and this time he said he could not view the property because “owners” were absent. This explanation is unsatisfactory for a number of reasons. Firstly, who was he referring to as “owners” in view of the fact that he already knew having been told by Mawere that they were tenants. Secondly, there is no explanation as to why he did not make an appointment with these tenants through the Estate Agent, Mawere or 1st and 2nd defendants before embarking on these trips whose frequency was once every four months.

Thirdly, it is highly improbable that 3rd defendant would simply walk away after having come all the way to view the house. A reasonable person in 3rd defendant's circumstances would have at least contacted the Agents to ascertain the whereabouts of the tenants instead of simply returning to Kenya without viewing a house he had paid US\$36 000,00.

For these reasons, I find the 3rd defendant's explanation to be totally incredible and false. The reason why he did not view the interior of the house is because Petronella and her husband barred him from doing so. I find also that 3rd defendant was shown the provisional order by the tenants and he ignored it. The 3rd defendant's prevarication on this crucial issue further buttresses this conclusion. While 3rd defendant denied that it was not necessary to view the house before buying it, he conceded that when he eventually entered the house he "noticed that the inside was dilapidated" with broken window panes and unsafe cables. The interior paint work was in a terrible state that he immediately placed an order for some paint from Botswana.

Third defendant then called Mawere Muchineuta as his witness. His evidence was that after being advised by 3rd defendant to look for a property to purchase, he saw an advertisement in the Chronicle newspaper. He then visited the estate agent and together with an agent from Net 7 went to view the property. Upon arrival they introduced themselves as people who had come to view the property on sale. At the premises was a woman who introduced herself as the tenant's wife. After asking to view the inside, the woman granted them access and they viewed "all bedrooms except the main bedroom". They noted some defects including cracks etc.

When they returned to the office he contacted 3rd defendant and informed him that the property was reasonably priced. Later the Net 7 representative, a Mrs Rosemary Mangani (1st defendant) came and confirmed that the property had not been previously sold to any other person. This meeting took place around 18 May 2007 and the agreement of sale was signed on the 23rd May 2007. He signed as the purchaser and Rosemary Mangani signed as the seller. Although there was no power of attorney, he found this arrangement to be in order.

Having signed the agreement the witness next visited the property in August 2007 in the company of 3rd defendant who was visiting the property for the 1st time. However, they could not enter the house since there was no one at the premises. Again he returned to the house in November 2007 in the company of 3rd defendant and his wife but they could not enter the house because there was no one at the house. The last time he visited the house was in December 2007, again in the company of the 3rd defendant who had title deeds for the property. This time they found Mr Chinyoka at the house and he was shown the title deed by 3rd defendant. According to the witness Mr Chinyoka then remarked that “there is something not right with the house. Someone has bought it”. He said this was the first time he heard about a previous sale.

Under cross-examination, he was asked why he was unable to say what the interior colour of the house was and whether or not there were any fittings and fixtures in the bedrooms, he gave three different reasons. Firstly he said “I did not bother myself all I wanted was the state of the house”. Secondly, he said, “I did not have the time to check for wardrobes etc.” Thirdly he said, “It did not come into my mind.” When the witness was asked to explain what happened when he visited the property in the company of the third defendant, he made a u-turn and conceded that they found the tenant’s wife outside and she refused them entry. When asked the reason why they were not allowed to enter the house he could not supply any. Asked to explain the variance in his evidence, he could only say “it was a slip of the tongue.” Also the witness could not reconcile the evidence of 3rd defendant with his on the crucial aspect of the visits, who they found there and what was said. In particular, 3rd defendant did not say that on the 1st visit, he was in the witness company. As regards the second visit, 3rd defendant specifically mentions his wife and not the witness. On the other hand and quite curiously the witness said he accompanied the 3rd defendant on the 1st two trips.

There are glaring contradictions in the evidence of the 3rd defendant and this witness. For starters, 3rd defendant said on the 1st visit he was too tired to view the house, yet this witness said there was non-one at the house. On the 2nd visit 3rd defendant said there was no-one at the house or later that there was a heavily pregnant woman but does not say why they could not enter the

house yet this witness said belatedly that she barred them from entering the house. The question that lingers is why is there such confusion, prevarication and contradiction on this aspect? When this mumbo-jumbo is juxtaposed with the clear evidence of Chinyoka and his wife it becomes crystal clear that neither 3rd defendant nor Mawere entered this property for purposes of “viewing” it on all the occasions they visited the house. The reason is plain simple, they were prevented from entering because the house was not for sale. From the evidence, it is apparent that Mawere and the Net 7 agent became aware of the previous sale before signing the agreement of sale. That they were informed of this development by the tenants is pretty obvious. As for 3rd defendant, it is clear that he became aware of the prior sale after the agreement of sale but before the transfer.

In my view Mawere is an incredible witness who after realising that he had not done a good job on behalf of his friend, or had been duped by 1st and 2nd defendant, tried to fabricate his evidence in order to make it suit or support the 3rd defendant’s claim that he was an innocent purchaser of the property. I am convinced that the evidence of Mawere, wherever it conflicts with that of Chinyoka and his wife should be rejected *in toto*.

Libion Mpofu (Mpofu) was 3rd defendant’s last witness. During the period 2007 – 2008 he was employed at Net 7 Real Estate as a principal registered estate agent. He obtained a mandate from Mrs Mangani acting on behalf of her husband to market the property in issue. Mr Mangani was contacted and he confirmed that he was indeed selling his house. A deed search was conducted and the property was marketed through advertising it in the newspaper. Thereafter, he was approached by a prospective buyer whom he took to the property to view the house. When they arrived they found “tenant” at the house and they showed him a written mandate signed by Mrs Mangani. The tenant allowed them into the house but did not interact with the tenant as his role was simple to take the buyer to the property. He specifically remembers the date of this visit as the 16th day of May 2007.

After the visit, the buyer later came back with an offer which he communicated to Mrs Mangani. He then conducted a final deed search and when he was satisfied that there were no “restrictions” he drew up an agreement of sale that was eventually signed by the parties. Although 2nd defendant did not sign the agreement, he assured the witness on the phone that he would sign transfer papers. Subsequently, the agreement was referred to Coghlan and Welsh for conveyancing.

Under cross-examination, the witness conceded that he felt uncomfortable selling this property without a written mandate from the 2nd defendant who was the registered owner of the property. He only proceeded with the sale after he had been authorized by the managing director. As regards the viewing of the house, he insisted that he entered and saw the three bedrooms, a sunken lounge, kitchen, toilet and bathroom, although he could not state colour inside the house. The witness agreed that ordinarily a document like a provisional order would be kept in the file of the property it relates. He however said during the deed search, he did not look for documents inside the file but just looked at the cover of the title deed. Further, the witness agreed that by the time 3rd defendant’s title deed came out i.e. 27 November 2007, the provisional order (annexure C) was already in existence. He however denied having seen that provisional order until a day before he testified.

The witness said he never personally met the 2nd defendant but his managing director (the one who had earlier on authorized the sale) drove to Plumtree with the papers for 2nd defendant to sign on the other side of the border. He said this was normal as they wanted the 2nd defendant to pay their fees. Asked why 2nd defendant could not enter Zimbabwe the witness said he (2nd defendant) said he was busy. It was accepted that other Net 7 employees took some prospective buyers to view the property.

While this witness’ memory failed him on a number of aspects and attributed this to lapse of time (i.e. an 8 year period) he could clearly remember one date namely the 16th May 2007 when he visited the property in the company of Mawere. The question becomes what is so

magical about this date? Despite the fact that none of these witnesses specifically mentioned this date in their supporting affidavits of 3rd defendant, they were adamant in their *viva voce* evidence that it was definitely on the 16th of May 2007. Both said they were responding to an advertisement in the Chronicle which Mpofu falsely claimed to have flighted by Net 7. What makes this evidence incredible is that it is common cause that the advertisement was flighted on the 17th May 2007 without Net 7's letter heads. Therefore if Mawere and Mpofu claim to have viewed the house on the 16th of May 2007, they definitely were not responding to the advert. In my view, the reason why these witnesses stuck to the 16th of May is so that the evidence of Madhuku that she showed them the provisional order becomes incongenous in that the order was only issued 2 days later on the 18th of May 2007.

In my view, Mawere and Mpofu were not credible witnesses on this point. The reason for not telling the truth is to emasculate the evidence of the tenants that both barred them from viewing the property after the advert had been seen by Chinyoka. It should be noted that since the provisional order was granted on the 18th of May 2007 and the agreement of sale was signed on the 23rd May 2007, Mawere and Mpofu had 5 days to view the house after the provisional order had been given to the tenants. That being the case, I take the view that the probabilities favour Madhuku's version that she showed people who came "with estate agents" a copy of the provisional order. I find also that this witness' testimony that when he visited the house a tenant "allowed them in" is manifestly false.

Despite the fact that at pre-trial conference, the parties filed a joint pre-trial conference minute reflecting only four issues for trial, third defendant raised a litany of issues during the trial and in his closing submissions.

Firstly, it was contended that the 1st and 2nd defendants (who never bothered to defend themselves) were peregrine as they both do not keep residence in Zimbabwe. That being the case, so the argument went. The plaintiff was enjoined to satisfy the court before the issue of process that the peregrines 1st and 2nd defendants were present within Zimbabwe for arrest or

“had property within the country capable of attachment.” Further, it was argued that failure to seek confirmation of jurisdiction in regards to 1st and 2nd defendants renders the whole proceedings a nullity. Reliance was placed on *Monarch Steel (1991) (Pvt) Ltd v Fourway Haulage (Pty) Ltd* 1997 (2) ZLR 342 at 345C; *Chirongoma v T G Logistics* HB-11-06 and *Ngani v Mbanje & Anor* 1987 (2) ZLR 111 (S).

In my view, the case before me is distinguishable in that it was never conclusively established on evidence that the 1st and 2nd defendants are *in cola* or peregrine. This is largely because the 1st and 2nd defendants were not before me. The 3rd defendant then decided to raise a defence that should have been raised by these two. The only evidence on record is that the 1st defendant’s parents were Zambians while the 2nd defendant is a Zimbabwean who resides in Botswana with the 1st defendant. It is also common sense that the immovable property in dispute is in Zimbabwe and registered in the name of the 2nd defendant.

Wille’s *Principles of South African Law* Sixth Edition by T. R. Gibson at pages 60-61 defines domicile as “a conception which is composed of two elements, the one physical and the other mental; the physical element is residence in a particular country and the mental element is the intention of remaining in that country permanently. The ordinary meaning of residence is the place where a man eats and drinks and sleeps”.

According to the same author a domicile of origin is acquired by every person at “his birth, and, in the case of a legitimate child, it is the domicile of its father.” On the other hand, a domicile of choice is “a domicile in a country, other than his domicile of origin by a person of full legal capacity; this he acquires by establishing his residence in the new country with the intention of continuing to reside there permanently”. He goes on to state that “A change of domicile is never, presumed and consequently the onus of proving a change of domicile is on the person who alleges it to have taken place; it follows that both the elements of domicile, namely the actual change of residence and the deliberate change of intention, must be clearly established.”

Herbstein & Van Winsen, *The Civil Practice of the High Courts of South Africa*, fifth Edition Vol I at page 69 define the terms in *cola* and *peregrines* thus:

- “(1) an *in cola* is a person who is either domicile (in the technical sense) or resident within the area of the jurisdiction of the court, provided that the residence is of some permanent or settled nature;
- (2) a *peregrines* is a person who is neither domiciled nor residence (in the sense indicated above) within the area of the jurisdiction of the court.”

In *casu*, while there is evidence that the 1st and 2nd defendants were resident in Botswana at the time of the sale, there is no evidence that they were not domiciled in Zimbabwe and that undefined status cannot vitiate the proceedings. These two defendants’ *animus manedi* is unknown. In any case, we are dealing here with immovable property situate within the territorial jurisdiction of this court. In other words this court is the *forum rei sitae*. Consequently, it is irrelevant whether the defendant is *in cola* or a *peregrines*, or that he is not physically present within the area over which the court exercises jurisdiction.

For these reason I find that the first point raised by the 3rd defendant has no merit and it is hereby dismissed.

Secondly, the 3rd defendant argued again belatedly that the plaintiff’s cause cannot be predicted on the law of double sale in that *in casu*, the plaintiff bought the property from the 1st defendant while the 3rd defendant bought the property from the 2nd defendant who was represented by 1st defendant. Coupled with this argument is the submission that the plaintiff’s relief is incompetent in that since she did not buy the property from 2nd defendant (the owner) she is not entitled to specific performance. It was contended that this was so because the 2nd defendant not being a party to the agreement between plaintiff and 1st defendant could never have been under any obligation to transfer the property into the plaintiff’s name. Reliance was placed on the case of *Guga & Anor v Zongwana & Ors* [2014] I ALL SA 203 (ECM) and Christie, *The Law of Contract in South Africa* 5th ed at p 260-261. Finally, it was also argued that the plaintiff’s relief is anomalous because she seeks to enforce a contract that is

unenforceable in that the defendant could not sell the property in her own right even on the basis of her marriage to the 2nd defendant.

The 3rd defendant's argument is summarised in the following paragraphs of his closing submissions;

- “17. In this present matter the evidence led clearly shows that the plaintiff did not enter into any agreement with the 2nd defendant who was the owner of the property at the time. There is nothing in the agreement the plaintiff now basis her claim that evidences the assertion that the 2nd defendant was ever involved, ratified or acceded to such an agreement.
18. ...
19. ...
20. ...
21. ...
22. Put succinctly, the plaintiff bought the property directly from the 1st defendant, who was not the owner and purported to sell in her own name, and because of that, the plaintiff only claim damages from the 1st defendant. The 1st defendant was not the owner of the property and cannot transfer ownership of the property to the plaintiff. Any attempt to do so would have entitled the 2nd defendant to an interdict.” (my emphasis)

Ratification

R. H. Christie, *Business Law in Zimbabwe* Second Edition at page 340 states;

“Ratification is the adoption by a principal of an act done professedly on his behalf, either by a person who was not his agent at the time or by a person who, although his agent did not at the time have authority to do the particular act. It can therefore be used either to create a contract of agency or to confer authority on an existing agent, and also to validate, both between the principal and the agent and between the principal and a third party, a transaction tainted by the agent's breach of trust to the principal; *Flood v Taylor* 1978 RLR 230 232-3”.

Ratification need not be express but may be implied, even from mere acquiescence - see *Ottawa Rhodesia (Pvt) Ltd v Burger* 1974 2 RLR 183, 189, 1975 (1) SA 462 466 where

ratification was implied from acceptance of the benefit of the transaction. See also *Barran v Thawe Mine Ltd* 1944 SR 68 and *Cripps v Collins* 1937 SR 161.

In my view, this is a misreading of the evidence placed before this court. While it is a fact that the house was registered in 2nd defendant's name, 1st defendant told the plaintiff that they are selling the house. Put differently she convinced the plaintiff that she had the consent of her husband (2nd defendant) to sell the house. Not only that the 2nd defendant ratified the agreement by not only receiving the purchase price, but also directed the plaintiff to use part of the purchase price to pay for his children's college fees at universities in South Africa. There is no doubt that the 1st and 2nd defendants were acting in concert when they sold their house to the plaintiff. It does not make sense to me to argue that the 2nd defendant was unaware and did not approve the sale when there is uncontroverted evidence that he had the proceeds channeled towards his children's welfare at a foreign university. He at one stage directed the plaintiff to deposit the balance of the purchase price into his account with a bank in Botswana. To hold that the 2nd defendant was not at all "involved, ratified or acceded to such an agreement" would be tantamount to condone fraudulent activities by spouses acting as accomplices in nefarious activities to dupe unsuspecting buyers.

The evidence clearly shows that the 1st and 2nd defendants' *modus operandi* was to use 1st defendant to enter into agreement of sale involving this property, leaving 2nd defendant to rectify then either by conduct or expressly as he did in respect of the agreement between 1st defendant and 3rd defendant. He ratified this agreement by signing transfer documents at Plumtree border post. This enabled the 3rd defendant to transfer ownership of the property into his name. Surprisingly, while 3rd defendant's argument is that it is this act of ratification that gives his agreement validity at law, he does not want to extend this agreement between 1st defendant and the plaintiff in circumstances where 3rd defendant is incapacitated from denying that fact because he is not the 2nd defendant whatever e says on that issue is pure speculation devoid of any evidential value.

From the above, I make a finding that 1st and 2nd defendants sold the property to plaintiff. After being paid the bulk of the purchase price, they again sold the same property to the 3rd defendant who again paid the purchase price and had the property transferred into his name. Quite clearly, the law of double sale is applicable in this matter in that 1st and 2nd defendants sold the property to plaintiff and 3rd defendant. It is common cause that plaintiff purchased the property in dispute prior to the purchase by 3rd respondent.

The law in double sales

The maxim *qui prior est tempore potior est jure* meaning “he who is earlier in time is stronger in right.” In other words the possessor of the earlier right is entitled to specific performance. ROBINSON J in *Chimponda v Rodrigues & Ors* 1997 (2) ZLR 63 stated the principle thus:

“if in a double sale situation, the second buyer has knowledge of the first sale of the property, either at the time of the sale or at the time it took transfer of the property, then, unless there are special circumstances affecting the balance of equities, the first buyer can recover the property from the second buyer. In such an instance, the second buyer’s only remedy is an action for damages against the seller. In deciding whether there are special circumstances affecting the balance of equities, the court must bear in mind that the primary right of the wronged buyer is the remedy of specific performance which will be granted unless there is some equitable reason disqualifying him from obtaining such relief.” (my emphasis)

I must indicate that the facts in the *Chimponda* case are almost on all fours with the facts *in casu* in that in the former, the seller had fraudulently sold her immovable property to two different buyers. Both buyers had paid the full purchase price for the property. The second buyer had obtained transfer of the property to it. The 1st buyer sought an order that the second buyer transfer the property to him on the grounds that the second buyer had knowledge of the 1st sale before transfer of the property was registered in the second buyer’s name. The court held further that there were no special circumstance affecting the balance of equities disqualifying the 1st buyer from being granted his primary right of specific performance. After agreeing to

purchase the property but before the property was transferred to it, the second purchaser had notice or knowledge of the prior existing sale of the property to the first purchaser.”

Similarly in *Charuma Blasting & Earthmoving Services (Pvt) Ltd v Njainjai & Ors* 2000 (1) ZLR 85 (S) SANDURA JA held that;

“... when dealing with the sale of the same property to two buyers, a factor that the court takes into account when deciding upon the remedy is whether the second buyer was aware of the earlier sale of the same property. In the present case, although the second respondent was not aware of the prior sale at the time he entered into the sale contract, he was certainly aware of this at the time he took transfer.”

As regards the balance of equities McNALLY JA (as he then was) weighed these in *Guga v Moyo & Ors* 2000 (2) ZLR 458 (S) and came to a conclusion that:

“Where a seller fraudulently sells immovable property to two purchasers the court has to decide between two innocent buyers. Where transfer has not been passed to either party the basic rule in cases of double sales is that the first purchaser should succeed, in the absence of special circumstances. The first purchase is treated as having the strong claim and the second purchaser is left with a claim for damages against the seller.

In the present case, there were various circumstances which cumulatively amounted to special circumstances such as to justify ordering the transfer of the property to the second purchaser. The second purchaser had paid more money to the seller than the first purchaser. The second purchaser had taken possession of the property and had expended considerable sums on the house. The first purchaser had failed to take action to protect his interests by registering a caveat against the title deeds after he became aware that the seller was behaving dishonestly. Finally, a law firm was holding for the seller monies payable to the seller from the second purchaser upon transfer and the court could compensate the first purchaser by ordering that this money be paid to the first purchaser instead of the seller.”

See also *Muranda v Todzaniso & Ors* 1998 (2) ZLR 325 (H); *Brothers (Pvt) Ltd v Lazarus NO & Anor* 1991 (2) ZLR 125 (SC); *Muzvagwandoga & Anor v Mai-kai Real Estate Development Trust & Ors* HH-114-15 at p 11; *Mwayipaida Family Trust v Madoroba & Others* [2004] ZWSC 22.

As regards the equities, it is trite that the onus lies on the 3rd defendant to prove the existence of special circumstances necessitating the maintenance of the status quo – see *Fisc Guide Investments v Tazarurwa & Ors* HH-28-2005 at p 2. Third defendant argued that the equities conclusively favour him because of the following reasons;

- (a) He dealt with the true owner of the property, namely the 2nd defendant.
- (b) The plaintiff seeks to enforce an illegal contract in that she flouted exchange control regulations by paying for the house in foreign currency.
- (c) Plaintiff has been collecting rentals and has since profited from the said transaction. Therefore she suffers no ill showed she be denied the property.
- (d) The plaintiff has to date not paid the full purchase price while the 3rd defendant has paid full value for the house and received bona fide transfer.
- (e) Third defendant paid significantly more money than the plaintiff.
- (f) Third defendant would not be able to recover any damages from the 2nd defendant due to the fact that the 2nd defendant is resident outside of the jurisdiction and has no property in Zimbabwe.
- (g) The 1st defendant had communicated the cancellation of the earlier agreement with the plaintiff.

On the other hand Mrs *Mugova* for the plaintiff argued that 3rd defendant has neither alleged nor proved any special circumstances warranting the maintenance of the status quo. She argued relying on *Macape (Pvt) Ltd v Executrix Estates Forrester* 1991 (1) ZLR 315 (SC) that the agreement between plaintiff and 1st and 2nd defendants was lawful. The legality argument was brought by the 3rd defendant who argued that since the plaintiff paid part of the purchase price in foreign currency without Exchange Control authorization, that agreement was unlawful. On the evidence, both buyers used foreign currency without authorization. Both claimed to have used “free funds” to make payment. In what I find to be strange and illogical argument, 3rd defendant contended that; “It is no answer to toy and impugn the sale to the 3rd defendant as he is not the one who is trying to convince the court to enforce an illegal contract. It is the plaintiff

who concluded an illegal transaction and who now seeks to see its enforcement. The 3rd defendant need not prove the legality or otherwise of his agreement as he bears no burden of proof. In any case the 3rd defendant led evidence to the effect that he purchased the property for value and used free funds.”

Plaintiff led evidence to the effect that her father who was working in South Africa provided the forex in that country to pay for the property in South African Rands. Third defendant submitted that he used the money he earned in Kenya to pay for the property. The 3rd defendant who raised the issue did not lead any credible evidence to demonstrate how plaintiff violated the exchange control regulations in light of her claim to have used “free funds” provided by her father. To argue that the illegality should only affect the contract between plaintiff and 1st and 2nd defendants shows that 3rd defendant is approbating and reprobating at the same time. In my view, there is insufficient evidence on record to hold either contract illegal on the basis of the use of foreign currency in violation of the exchange control regulations.

As regards the occupancy and the collection of rentals, Mrs *Mugova* argued that from the evidence led, it is clear that plaintiff took control of the immovable property in January 2007. She exercised occupancy through her tenants and has derived benefit in terms of rentals, whilst 3rd defendant merely holds title to the property. As such so the argument went, it only follows that title be rightly given to plaintiff whilst 3rd defendant pursues damages against the 1st and 2nd defendants jointly and severally.

Furthermore, it was also contended for the plaintiff that despite the Registrar of Deeds having been served with the provisional order in plaintiff’s favour on 22nd May 2007, no caveat appears to have been registered on the title deed prior to 3rd defendant, hence the transfer of the immovable property into his name. The balance of equities is more inclined in the plaintiff’s favour as the 1st purchaser, and with 3rd defendant having been *mala fide* in obtaining transfer. Plaintiff is accordingly entitled to specific performance and obtaining transfer of the property.

Applying the law and principles on double sales to the facts of the case, I find that the 3rd defendant was not a *bona fide* transferee at the time he obtained transfer. This arises from the clear evidence led by plaintiff and her two witnesses Ike Chinyoka and his wife that all potential purchasers of the property in dispute were shown a copy of the provisional order which had been granted against 1st defendant in plaintiff's favour. In the result the agreement of sale between 2nd and 3rd defendants is invalid. Equally so, the transfer of the property to the 3rd defendant cannot be lawful.

As regards the equities I take the view that the 3rd defendant had failed to prove the existence of special circumstances necessitating the status quo to remain. I say so for the following reasons:

- (i) the plaintiff has been occupying the property since January 2007.
- (ii) plaintiff took reasonable steps to protect her interests when it became clear that the 1st defendant was behaving dishonestly. She obtained a provisional order from this court prohibiting transfer but the Registrar of Deeds despite being served with the order failed to effect a caveat on the title deeds. Plaintiff did all that one could do.
- (iii) plaintiff is not to blame for the non-payment of the balance of the purchase price in that 2nd defendant refused to return to Bulawayo to receive the balance upon transfer of ownership to plaintiff.
- (iv) third defendant claims to have paid more than the plaintiff but according to the agreement of sale between him and 2nd defendant, the purchase price was put at Z\$1 500 000 000 (1 billion five hundred million dollars). On the other hand according to the agreement of sale between plaintiff 1st defendant, the price is Z\$2 000 000 000,00 (2 billion dollars).

While giving evidence, 3rd defendant said the US dollar equivalent of the purchase price in May 2007 was US\$36 000,00. Plaintiff, also in her evidence paid the Rand equivalent of the purchase price was R13 333,00 in January 2006. No comparison was done to show how much in US terms the R13 333,00 was worth.

(v) the fact that 3rd defendant paid more money than the plaintiff should not be given too much weight because the transactions occurred during the era of hyper inflation in this country.

(vi) the tenants at the property regard themselves as the first purchaser and not of the second purchaser.

(vii) except in special circumstances, the policy of the law to uphold the sanctity of contracts would best be served in the ordinary run of cases by giving effect to the first contract and leaving the second purchaser to pursue his claim for damages for breach of contract.

(viii) the fact that the 3rd defendant might face challenges in recovering his money from the 2nd defendant cannot be used against the plaintiff in that 3rd defendant's chosen agents had papers signed at the Plumtree Border Post by the 2nd defendant. They obviously realised that they were dealing with a fugitive from justice. Third defendant is bound by the conduct of his agent. In any case he knew that 2nd defendant was working in Botswana before he paid the purchase price. He therefore took a conscious risk.

(ix) Again, on the evidence, it was accepted that the plaintiff is holding on to an amount of R13 333,00 which was to be paid to the 2nd defendant against transfer. In my view, it will be equitable to order that the amount be paid to the 3rd defendant but be deemed to have been paid to the 2nd defendant against transfer of the disputed property from 2nd defendant to the plaintiff.

Accordingly, it is ordered that:

1. The transfer of stand number 12847 Bulawayo Township under Deed of Transfer number 2928/2007 from 2nd defendant to 3rd defendant's name be and is hereby cancelled.
2. The said stand number 12847 Bulawayo Township be transferred to into the plaintiff's name forthwith.
3. In the event the 1st to 3rd defendants fail to comply with paragraph 2 above, the Deputy Sheriff is authorized to sign all the relevant transfer papers on 3rd defendant's behalf to effect the transfer.
4. The costs of the plaintiff and 3rd defendant are to be paid by the 1st and 2nd defendants on an attorney-client scale.

Messrs Lazarus & Sarif, plaintiff's legal practitioners
Gill, Godlonton & Gerrans c/o Coghlan & Welsh, 3rd defendant's legal practitioners