

INNOCENT NYAMASOKA

Versus

DANIEL ZIVANAYI MUGUMBATE

And

MUNICIPALITY OF KARIBA

HIGH COURT OF ZIMBABWE  
BACHI-MZAWAZI J  
CHINHOYI, 28 September 2023 to 16 October, 2023.

**Civil Trial**

*J. Zuze*, for the plaintiff  
1<sup>st</sup> defendant in person  
No appearance, for the 2<sup>nd</sup> defendant

**BACHI-MZAWAZI J:** What confronts this court in this civil trial is a box ring match. There is no witness testimony, nor is there any other real, direct and independent evidence to support either side's averments. It is the plaintiff's word against that of his opponent. The mammoth task is the need to place before the court enough circumstantial evidence upon which the court can plough through to arrive at a reasonable inference exclusively pointing one direction as opposed to the other, intriguingly bearing in mind the parameters of the burden of proof in Civil matters.

In his summons commencing action, the plaintiff prays for a two- fold relief against the 1<sup>st</sup> defendant, an order declaring him the lawful owner of certain rights and interests in Stand number, 3258 Nyamhunga, Township and a compelling order for the 1<sup>st</sup> defendant to facilitate the cession of the said immovable property with the 2<sup>nd</sup> defendant, from his names into the plaintiff's. In the event that, he succeeds in his first claim and the 1<sup>st</sup> defendant's is not willing to act as so requested, then plaintiff seeks an order instructing the Sheriff of the High Court to stand in his stead and have cession effected.

The factual history behind the lawsuit and a common cause fact is that, sometime on the 15<sup>th</sup> of August 2014, plaintiff and the 1<sup>st</sup> defendant entered into an instalment agreement

of sale over property stand number 3258, Nyamhunga, Township, Kariba. The agreed purchase price was US\$5500.00, to be paid in three instalments of, US\$2000,00 at the conclusion and signing of the agreement of sale on the 14<sup>th</sup> of August 2014. The second amount of US\$2000,00 was supposed to be paid on or before the 5<sup>th</sup> of September, 2014 and the last of US\$1,500.00 on the 28<sup>th</sup> of September, 2014.

It is a known fact that on the first transaction, the parties cautionary approached a duly registered legal practitioner to prepare and witness the signing of the agreement of sale but who did not partake in the exchange of the initial cash. Undisputed evidence was also led to the effect that the plaintiff in trust or naivety parted with the documentation of the property in question and gave them to the plaintiff.

Another agreed fact that the plaintiff failed to pay the amounts at the stipulated dates and amounts but proceeded to erect structures on the stand in dispute. In addition, it is not in question that, the 1<sup>st</sup> defendant has refused to facilitate change of name and cede his rights to the plaintiff since 2014. Interestingly, the plaintiff claims to have paid all that was due to the 1<sup>st</sup> defendant but alleges that the 1<sup>st</sup> defendant has refused to meet his side of the bargain, on one hand.

On the other, the 1<sup>st</sup> defendant, in his plea denies that he received any other cash apart from the initial US\$2000,00 which was signed for. The 1<sup>st</sup> defendant's defence for the non-compliance with the cession of rights aspect is that he deliberately stopped pursuing his payments after several failed attempts by withholding the cessation of his rights and interests in the property until the balance due was paid. In turn, he filed a counter claim, claiming the payment of the purchase price balance of USD3 500.00 with interest pre-dated to the 5<sup>th</sup> of September 2014 and Cost of suit on a higher scale.

Notably, the defendant had been previously dragged before a Magistrates court in Kariba on the same cause of action albeit in a court application form. The case was struck off on the basis that it had triable issues and fodder for action proceedings.

On the trial date before this court, both the plaintiff and 1<sup>st</sup> defendant did not call any witnesses but gave sole testimonies. In his evidence the plaintiff without the production of any proof asserted that he paid, all the purchase price in the following manner, the sum of US\$2000,00 at the signing of the agreement of sale the 14<sup>th</sup> of August 2014, US\$2000, on the 15<sup>th</sup> of September, 2014. An amount to the tune of US\$1000.00, is said to have been paid on the 5<sup>th</sup> of October, 2014 and US\$350, on the 25<sup>th</sup> of October, 2014. The last payment of

US\$150, 00 is the only amount with reference to an incident of the 1<sup>st</sup> defendant's relative's funeral.

The plaintiff failed to explain why he did not reduce the payments to writing or involve witnesses on all the disbursements he claim to have made. He also admitted to breaching the clear provisions of the lease agreement on the amounts and dates to pay the remaining purchase price. He could not even attest to any outstanding events on the rest of the days payments were made. Nor, could he tell the court as to the place where those payments had been made, times of the day or anything peculiar surrounding those singular payments. One would wonder, if he was so meticulous as to keep records of actual payments as detailed in his written and oral submissions why then did he not reduce the same to writing at the time of payments and sign for them or seek the 1<sup>st</sup> defendant's corresponding signature let alone produce those records before this court. It remained his word against that of the 1st defendant.

In his testimony the 1<sup>st</sup> defendant asserted that, it was his idea to reduce the sale into writing and to sign in the presence of a lawyer in the first place. He stated that the signatures acknowledging payment and receipt of the initial deposit were done before the same legal practitioner at his instance. The 1<sup>st</sup> defendant told the court that after the first payment no other payment was done. When each subsequent payment was due in accordance to the dates in the agreement of sale he would visit the said legal practitioner's offices hoping to meet the plaintiff there, receive payment and sign acknowledgment of receipt.

His uncontroverted testimony is that on each of those occasions the plaintiff will be called by the legal secretary of the law firm, would promise to come but will not show up. Ist defendant, said that he eventually gave up pursuing for his outstanding balance with the lawyers but was called by plaintiff a long time after the deadlines to collect not the whole balance but a pittance which he considered as a mockery especially after the plaintiff had constructed some buildings on his stand before paying the balance. The plaintiff stated that he was further, infuriated by the fact that the plaintiff was callous enough to then want to pay him in small amounts from proceeds which will be realised from the business premises he had set up on his unpaid for stand.

On being cross examined as to why he didn't exercise his rights in terms of clause 10 of the agreement of sale, he replied that if had wanted to rescind or have the sale cancelled then he would have religiously stuck to the breach clause in the lease agreement. He testified that he never wanted to retain the property but to have his balance paid and his remedy was

that he vowed and resolved not to fight the plaintiff and wait for the day of reckoning, when he will need him to cede his rights and interests with the 2<sup>nd</sup> defendant. It is the 1<sup>st</sup> defendant's further averment that he has not waived and is resolute in his assertion that there is still an outstanding purchase price of USD3500,00 as evidenced by another similar but failed lawsuit by the plaintiff in the Kadoma Magistrates court, a fact which is not in dispute.

It is the 1<sup>st</sup> defendant's summarised evidence that in his lack of sophistication, he was not concerned with the legal technicalities of breach, or the pursuance of the breach provisions in the agreement, as he is not cancelling the sale but just wants his balance. He also stated that he has no problem with ceding his rights and interests for as long as he gets paid his dues. He quizzed the applicant on why as a businessman did not reduce all the transactions he claim to have taken place in writing and attach the attendant signatures from both sides.

In light of the above both sides of arguments from both parties, the agreed issues on the signed joint pre-trial minute are;

- a. Whether or not the plaintiff paid the full purchase price?
- b. Whether or not the 1<sup>st</sup> defendant enforced clause 10 of the agreement of sale between himself and the plaintiff?
- c. Whether or not it was a material term of the agreement of sale that the 1<sup>st</sup> defendant would acknowledge in writing with every payment made or received?
- d. Whether or not the plaintiff is entitled to the order as prayed for in his summons?

It is my considered view that the last issue on whether or not the plaintiff is entitled to the order as prayed for in his summons is all embracing and will encompass the rest. From this perspective, it is established law that the plaintiff in a civil suit generally bears the onus to prove his assertions or claim. It also settled law that he avers must prove. Though the standard of proof in Civil matters is not as onerous as that in Criminal suits, the person with the burden of proof in the former should do so on a preponderance of probabilities. See *Curem Overseas (Private) Limited Zimbabwe Platinum Mine (Private) Limited and CCZ 6/2019 Constitutional Court application CC254/18 and Liberal Democrat & Ors-v-President of the Republic of Zimbabwe E. D. Mnangagwa N. O & OR CC 27/18*.

As can be envisioned from the arguments above both parties did not adduce any supporting evidence to buttress their standpoints. The court, as noted in the introductory note is left with a task to sieve through the circumstantial evidence if any so as to reach a reasonable inference.

In the case of *Ebrahim v Pitman NO, 1995 (1)ZLR 176 ( H)*, cited with approval by the Supreme Court in the case of *British American Tobacco Zimbabwe v Chibaya SC30/19*, postulated that,

“In a civil case where the court seeks to draw inferences from the fact, it may, by balancing probabilities, select a conclusion which seems to be more natural or plausible (in the sense of credible) conclusion from among several conceivable ones even though that conclusion is not the only reasonable one.”

In *Miller v Minister of Pension [1947] 2 All ER 372, 374*, the balancing of probabilities was explained as follows,

“It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not’ the burden is discharged but if the probabilities are equal then it is not”

In *casu*, the court has to take into account the conduct of the parties holistically from the onset of their source of dispute as part of the circumstantial evidence to be assessed as a starting point. In other words the demeanour of the parties during the whole ordeal actually depicts the degree of honesty of either one of them. These will be taken into account and weighed alongside the parties testimony in court.

Starting with the plaintiff, he did not pay the amounts due on time and in three instalments. He was not even gentlemanly enough to explain his default. The plaintiff did not have the courtesy to pitch up at the original lawyers’ offices at the payments dates stipulated by the agreement of sale and never excused himself. If he could vividly remember those dates he claim to have unilaterally decided to pay and paid he failed to demonstrate to this court why then it was not imperative to seek a signed acknowledgment of receipt of payment let alone secure the presence of a witness.

It is also clear that, the plaintiff failed to convince the court that he is entitled to the relief sought for in the summons. If anything, the evidence evinces a man who took advantage of being in possession of both the immovable property and its papers. Who then rushed to satisfy the Local Council requirements of putting up a specified structure to the

satisfaction of the 2<sup>nd</sup> defendant so as to enable cession. He then hit a brick wall as the plaintiff failed to budge in on condition of the settlement of the balance purchase price.

Section 2 of the Contractual Penalties Act [Chapter 8:04] defines an installment sale of land as follows:

“An installment sale means a contract for the sale of land whereby payment is required to be made:- (a) In three or more installments or (b) by way of a deposit and two or more installments; and ownership of the land is not transferred until payment is completed.”

It follows that, since it is evident that this a an installment sale and falls within the purview of the above cited provisions of Chapter 8:04, then any cession of rights and interests can only be done where proof of the payment of all the outstanding balance has been made. From this perspective the plaintiff’s side of the story is improbable.

On the contrary, the portrait of the 1<sup>st</sup> defendant, is that of an unsophisticated elderly man who did not even conceal his anger and express his displeasure in court after discovering that the plaintiff chose to build on his stand before satisfying the balance purchase price. The 1<sup>st</sup> defendant did not shy away from expressing his sentiments that his ego was bruised when the plaintiff opted to pay him in bits and pieces from proceeds coming from his own stand. He readily surrendered the property documents on the first day of the transaction which ordinarily are released after the payment of the last instalment. It signals trust and takes a great man to assume that kind of risk if not naivety. All these cumulative factors point to an honest man.

In addition, incontrovertibly, he is the one who suggested the involvement of a lawyer and the subsequent precautionary measures taken thereat. It was not disproved that he frequented their last port of call, the lawyer’s office on the dates outlined in the agreement of sale, in order to receive his dues and sign for them to no avail. . From a composite evaluation of his actions and involvement the notion that the 1<sup>st</sup> defendant turned greedy and envious at a later stage and wanted more after having been paid is dispelled. No proof to that effect was adduced. As already observed, from the 1<sup>st</sup> defendant’s version of events his behaviour is consistent with that of an honest man thereby making his testimony more probable.

It is neither here nor there that he did not pursue the remedies provided for in clause 10 he already reasonably explained why he did not pursue that road. He knew where to catch

the plaintiff and he waited patiently to strike or the killer punch. Further even, if the agreement of sale is silent on the issue of signing in acknowledgment of payment, it does not take the plaintiff's case any further. He should have taken other steps to bail himself out or safeguard himself as is expected of any eminent and astute businessman as he was in this modern day and time. It has already been examined that it is absurd that a man who remembers actual dates of payments of events close to a decade ago from abstract, would fail to keep records nor produce them at least to authenticate his submissions.

In balancing the probabilities, the more natural or plausible and conceivable conclusion drawn from the most reasonable inference from all the facts in this case, at the exclusion of anything pointing to the contrary is that the plaintiff has failed to show that he paid the balance of the purchase price amounting to US\$3 500.00. The reasonable inference from the totality of circumstantial evidence placed on record points to the fact that the amount of US\$3 500.00 was not paid. No proof of payment or any thread evidence was adduced as to the payments. See, *Chitiki v Pan African Mining (Pvt)Ltd HC3057/2011* Therefore, the plaintiff's claim fails in its entirety. In turn there is sufficient circumstantial evidence that the 1<sup>st</sup> defendant's claim in reconvention succeeds.

Whilst courts do respect the contractual freedoms of parties, the agreement of sale in this case is straight forward. The amounts to be paid and the dates the amounts were to be paid as well as the last payment are crystal clear. The 1<sup>st</sup> respondent did not opt to sue on the agreement and cancel the sale all he is saying to the defendant in-convention is own up, pay up. He cannot be faulted in opting to use a primitive but effective out court of court mechanism to force compliance.

Nothing turns on the issue of prescription which though initially raised by plaintiff was abandoned by mutual consensus at the round table and is not part of the signed issues referred for trial.

In summing up, the court has taken cognisance of the timeframe the parties have wrestled in and out of courts to ascertain their respective rights. For that reason there is no reason for punitive costs.

Accordingly.

It is ordered that;

1. The plaintiff's claim fails with costs

2. The counter- claim succeeds with costs.
3. The defendant in re-convention *cum* plaintiff in the main claim is ordered to pay the 1<sup>st</sup> defendant in the main claim and plaintiff in the counter-claim the outstanding balance of the purchase price in the sum of US3 500.00 with interest at the prescribed from the date of this order.

*Mangwana and Partners , Plaintiff Legal Practitioners*  
*Daniel Z. Mugumbate in person.*