MIKE MAKOPE
versus
GEOFFREY DZUMBUNU
and
THE REGISTRAR OF DEEDS N.O.
and
THE MINISTER OF LOCAL GOVERNMENT

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE 1,2,3,8, 9 April 11 May 2009 and 27 October 2010

R.T. Hove, for the plaintiff
N. Mashayamombe, for the first defendant
No appearance for the second and third defendants

Civil Trial

MAVANGIRA J: The plaintiff issued summons in which he claims for an order setting aside the cancellation of an agreement of sale between him and the first defendant and an order for specific performance for the delivery of the property, being a flat called Block 12, Room 93, Mufakose Flats. He later, by consent, amended his claim by adding an alternative claim for damages if the relief of specific performance cannot be granted to him. During the trial and as the plaintiff gave his evidence he indicated that he was abandoning the claim for specific performance. As a result the outstanding issue for the determination of this court is the claim for damages. The quantum of damages claimed in terms of the amendment is the amount of ZW$40 000 000 000 or the value of the property at the time of judgment whichever is greater. However, during the trial the parties advised the court that they had agreed on the quantum of damages in the event that the court found the first defendant liable to pay damages to the plaintiff. They advised the court that they had agreed that the quantum of damages be the amount of USD22 000.

The following issues were referred for determination at trial:

"1. Whether Denrose Agent was an agent for plaintiff and or defendant.

2. Whether or not the oral agreement was entered into by the first defendant and plaintiff prior to 6th September 2006.

3. Whether or not the oral agreement of sale entered into between first defendant and plaintiff is valid.

4. Whether or not the plaintiff entered into a written agreement of sale with first defendant. If so what were the terms of the agreement?

5. Whether or not the plaintiff honoured all his contractual obligations.

6. Whether or not the cancellation of the agreement is valid.

7. Whether or not the cancellation of the agreement of sale complies with the Contractual Penalties Act, [*Cap 8:04*].

8. Whether or not the plaintiff is entitled to have the property ceded to him.

9. What order should be made as to costs?"

The pertinence of the above issues will emerge from the evidence that was adduced before the court as detailed below.

One Memory Chatambudza Makope was the first witness to give evidence on behalf of the plaintiff. His evidence was to the following effect. He was involved in all transactions involving this matter and was always acting on behalf of his brother, the plaintiff. He produced a special power of attorney executed in his favour by the plaintiff. The plaintiff, whilst in the United Kingdom, saw an advertisement in a newspaper to the effect that the immovable property in issue, being a flat in Mufakose known as Block 12 Room 93 was on sale in Zimbabwe. The advert was allegedly placed in the said newspaper by estate agents known as Denrose Real Estate (Denrose). The plaintiff asked the witness who was in Zimbabwe to go to the offices of Denrose and see one Patrick Disban (Disban) in connection with the advertisement. The witness went to the offices of Denrose together with his parents. Disban indicated that he was already waiting for the witness' arrival. Disban then gave the witness an agreement of sale (exhibit 2) in respect of the said property and the witness signed on behalf of the purchaser. The first defendant was reflected on the agreement as the seller of the property.

The purchase price for the property was $6 500 000 (Zimbabwe currency). The plaintiff made payments from the United Kingdom directly to Denrose and Disban would advise the witness and family accordingly whenever such payments were received. The witness did not receive any receipts in respect of any such payments from Denrose. He produced a print-out (exh 3) purportedly made by Denrose and handed to him which reflects that the plaintiff had made a payment of $6 500 000; that interest accumulated after investment was $698 082,19; that the purchase price after interest was added on was $7 198 082,19; that to make the purchase price of $10 000 000, the balance to be paid was $2 801 917,81. Towards

the liquidation of the balance of $10 000 000 the plaintiff made two payments directly to Denrose in the respective amounts of $1 196 000 and $800 000 as reflected in exhibit 4 being copies of the relevant receipts.

When the witness inquired why the purchase price had changed to $10 000 000 from $6 500 000 Disban advised him that as he could not release the money paid as purchase price by the plaintiff to the first defendant before cession was effected, the seller had indicated that because payment of the purchase price was taking long, he had increased the purchase price to $10 000 000. Disban also advised him that the plaintiff had agreed to pay the revised amount. The witness said that he saw the cession form, exh 5, sometime in December 2006 or January 2007. Section 1 of the cession form headed "**To be completed by Cedant**" was filled in, in the name of the first defendant but was not signed by the first defendant in the space provided for his signature. There is what purports to be a witness' signature and which appears to be the same signature as appears on the agreement of sale as that of the witness to the seller's signature thereon. The cession form purports to have been signed by the said witness on 25 September 2006, the same date on which the agreement of sale was signed by the seller and his witness. The other sections of the cession form meant for completion by the cessionary, the local authority and the Ministry of Local Government, Public Works and Urban Development were not completed.

It was also the witness' evidence that sometime in December 2006 or January 2007 Disban gave his father the keys to the flat and since then his father has been in control of the flat to this day. The witness never had any dealings with the first defendant. One Mr. Zimbudzana (Zimbudzana) also of Denrose then took over from Disban. He appeared to occupy a more senior position to Disban. When the witness inquired with him why cession was never completed, Zimbudzana said it was because the first defendant had an outstanding debt that he had to pay to the Ministry of Local Government first before cession could be effected. Thereafter the witness and his father would regularly go to the offices of Denrose and they would be told that the first defendant was in Bulawayo and would be given another date when he would allegedly be in Harare for purposes of effecting the cession. This happened on a number of occasions but cession was never effected.

The witness disputed that Denrose was the plaintiff's agent and said that the plaintiff never got his money back from Denrose. The witness produced as exhibit 6, a letter dated 7 February 2007 from the first defendant's legal practitioners to the plaintiff's legal

practitioners. The letter states *inter alia* that the agreement that the plaintiff was seeking to enforce was formally terminated and cancelled by the first defendant and that this was communicated to the plaintiff **"through the agents Messrs Renson Real Estate."** the letter further states that the termination was occasioned by the plaintiff's failure to meet the pertinent terms of the agreement and that the first defendant had instructed them to demand that the plaintiff vacates and hands over the keys to the premises failing which legal proceedings would be instituted for the said relief. The plaintiff then communicated with legal practitioners and since then the witness was not aware of any further attempts thereafter to evict the plaintiff.

When the keys to the flat were handed to his father by Denrose the indication made was that they could have the keys as they had paid in full for the flat and the only outstanding issue was the cession. He disputed the suggestion made that the keys had been given to them only for purposes of viewing the property. He said that they had viewed the property in September 2006 and were not given the keys then. He was not at any time given any written notice that there was a breach on the plaintiff's part which was to be remedied. With regards to the contents of exh 3 the witness said that neither the plaintiff nor he instructed Denrose to invest the money and that Denrose was supposed to pay the money to the first defendant.

The witness produced as exh 7 a letter dated 9 November 2007 from the Ministry of Local Government, Public Works and Urban Development stating that the Ministry would not consent to the cession of the first defendant's rights and interests in the property to the plaintiff. The witness said that it was because of that letter that the plaintiff is now only pursuing the claim for damages only. It was at this stage that both legal practitioners advised the court that they had agreed that if the alternative order for damages is granted the award should be in an amount of USD22 000.

The witness said that he does not know the date when the amount of $6 500 000 was paid by the plaintiff into Denrose's account. **(NB)** They only received the information from Denrose that that amount had been paid and when they asked for cession to be effected after payment was made the agent told them that they were waiting for the person who was going to come from Bulawayo (presumably Felix Dzumbunu) to sign the cession forms.

The second and last witness to testify for the plaintiff was Tawona Mike Munetsiwa Makope. He is the father of the last witness and the plaintiff. He said that after the plaintiff had seen an advertisement in the newspaper while he was in the United Kingdom, he telephoned

him and asked him to go and see one Patrick Disban at Denrose. Patrick took them to view a residential flat. After that and on 4 September 2006, Memory, the last witness, signed an agreement of sale, exh 2, in his presence. They were told to go back home and return the following day in order for cession to be effected. When they went back to Denrose the following day they were told that Mr. Dzumbunu from Bulawayo had not arrived to attend to the cession. They were told to come back the following day. They did and were again told that Mr. Dzumbunu had not yet come from Bulawayo but had made arrangements with his brother, one Geofrey Dzumbunu who was said to stay in Sunningdale. The witness and members of his family went back to Denrose the following day and again there was no attendance by the seller. To date cession has not been done.

The witness said that when they asked Mr. Zimbudzana of Denrose why cession was taking so long, he said that they had discovered that Mr. Dzumbunu of Bulawayo the Ministry of Local Government some money in respect of the flat. Thereafter he was advised that Mr. Dzumbunu had settled what he owed the Ministry and that cession was imminent but cession did not take place. In November the witness was given the keys by Patrick Disban who told him that the flat was now theirs and that cession would be done later. At the end of November the witness went to the flat and found papers from the Municipality for payment of rates, water, electricity and rentals. He took the papers to Mr. Zimbudzana who told him to pay the bills as Mr. Dzumbunu was not going to do anything about them. All in all the witness paid Z$100 000. He did not move into the flat at that stage as he was waiting for cession to be done. He later took occupation of the flat through his nephew who moved in at the beginning of January 2007.

When the witness went back to Denrose to find out when cession would be done Mr. Zimbudzana showed him exhibit 3 reflecting that the plaintiff had paid an amount of Z$6 500 000. He said that he paid the monies reflected in the two receipts on exhibit 4 and that the money was not returned to him at any stage. Even though the agreement provided that occupation of the flat would only be after cession, he took occupation because the agent from Denrose told him to do so as there was nothing to wait for, the delay in having the cession done having been caused by the other party. Mr. Zimbudzana told him that if there was any money owing by the plaintiff to the first seller he would have advised the witness. The plaintiff's case was closed after this witness' testimony.

The first defendant then gave evidence to the following effect. He is the present leaseholder (of rights and title) in respect of the property in issue. He acquired the property after making application to the City of Harare after which he was called to an interview by the Ministry of Local Government. Thereafter the flat was allocated to him. Although he is not privy to everything that transpired concerning the agreement of sale, he agreed to the property being sold. He stayed in the flat for one and half years but it became too small for his family. He acquired another property and built a house big enough to accommodate his family. He then decided to give the flat to his brother, Felix, who is based in Bulawayo as he used to have accommodation problems when he came to Harare. After some time had elapsed Felix said that he wanted to sell the flat and he gave Felix the go-ahead to sell the flat and deal with the flat as he saw fit.

Under cross examination the witness was unable to say off-hand the terms of his lease with the City of Harare. He said that there was no paperwork to show that he had ceded his fights to Felix Dzumbunu. He said that exh 7, the letter from the Ministry of Local Government was incorrect in stating that the Ministry entered into an agreement of sale with him on 23 September 2006. Initially the witness said that he did not sign any cession forms. When he was shown exhibit 5 he said that he did not remember signing it. When he was then asked to compare the signature thereon with that on the agreement of sale, he then said that the signature was his. He also said that when he signed the agreement of sale he did not read it. He received no money from Felix for the property. Felix told him that the people were crooks and that no money had been paid. He also said that the address given in the agreement of sale as his address is in fact Felix' address. The address is in Harare and not in Marondera as it states. The two mobile phone numbers recorded thereon are for his brother and him respectively. He does not know and did not have any dealings with the people from Denrose and that the agreement was brought to him for his signature by his brother. He said that from the time that he gave the property to Felix he has no knowledge about the movement of the flat keys to Denrose and has no knowledge of any other events that transpired. He also said that he started living at his new home in 2004 or 2005 and by then he had already signed the agreement of sale. When he signed the agreement of sale the flat was still registered in his name at the Ministry of Local Government.

Felix Dzumbunu was the next witness for the first defendant. He is based in Bulawayo. His evidence was to the effect that he is familiar with this matter. The first defendant is his

brother. About ten years ago the first defendant who was renting the flat in question from the Ministry of Local Government offered the flat to him as it was no longer suitable for his needs due to the size of his family. He accepted the offer which included the responsibility to choose who occupies the flat, to pay rentals and any dues relating to the flat to the relevant authorities and assume all risk in relation thereto. The first defendant however remained and still remains the leaseholder of this immovable property.

Sometime in July or August 2006 the witness decided to dispose of the flat. The first defendant was agreeable to the idea. The rest of his siblings were also involved in discussions concerning the witness' decision. It then happened that one distant cousin of the witness whilst having drinks somewhere in Mufakose where he lives, mentioned this to Patrick Disban of Denrose. The witness was eventually talked to Disban and expressed his reservations about the possible complications that were likely to arise as the property was leased to the first defendant. Disban assured him that he was conversant with all the necessary procedures that had to be undertaken in such circumstances. The witness, having been assured that Disban knew all the procedures then gave him the responsibility of ensuring that all the necessary procedures and requirements regarding the transaction were properly attended to. He also gave him the authority to sell the flat. This was about the first week of September 2006. The witness was and remains unfamiliar with the procedures that needed to be done for cession to be effected. They discussed and agreed that the selling price would be between Z$5 million and Z$5,5 million. The discussion took place sometime in early September 2006.

A day after their discussion Disban phoned the witness and indicated that he had a prospective buyer for the property. Disban did not name or identify the prospective buyer. They agreed that Disban should prepare a preliminary agreement. Sometime during the first week of September Disban faxed the agreement to him in Bulawayo. The seller was stated to be F. Dzumbunu (the witness) and he asked Disban to correct it. Before faxing the corrected agreement, Disban advised the witness that the buyer had sent money for the purchase price from the United Kingdom. The witness asked Bisban to quickly attend to the amendment of the agreement so that he could come to Harare to sign it but Disban took his time and in the process, spanning a period of about one and half to two weeks, he was saying that the money which was destined for the account of Denrose was lost as the buyer had quoted the wrong name or account number and that the money had to be "resent".

The witness said that according to their agreement the money was supposed to be passed on to him upon the signing of the agreement. When Disban said that the money had been lost the agreement had not yet been signed and the witness had had no direct communication with the buyer. After the lapse of the one and half to two weeks period referred to above Disban said the money had been found. The witness was suspicious. Because of the hyper inflationary environment they were forced to re-look at the purchase price which they then agreed to place at Z$6,5 million. He told Disban to prepare the agreement of sale. He told Disban that he was going to come to Harare to sign as a witness as the first defendant was not prepared to sign as seller before the witness had signed the agreement as a witness. The witness eventually signed that agreement on 20 September 2006. The first defendant also signed the agreement on the same date. He said that his understanding of the agreement as well as that of Disban was that he was to get the purchase price upon or soon after signing the agreement and that he greatly emphasised the need for him to receive the money expeditiously. His understanding was also that cession would be effected after payment and only after cession would the purchaser take occupation.

The witness did not receive any payment after the signing of the agreement. When he contacted Disban the day after the signing of the agreement to inquire whether transfer of the money had been made into his account he was surprised to hear that cession had to be done first before payment could be made into his account. Before then the understanding had always been that payment was going to be made first. The witness became suspicious again and thought that Denrose possibly did not have the money which had been claimed to have been received from the purchaser for onward transmission to him and on the basis of which information the seller had proceeded with the signing of the agreement. He had been advised that the Z$6,5 million was already available before the signing of the agreement. Thereafter Disban sent the witness a text message or “sms” asking him to inform the first defendant to go and sign the cession forms in order to speed up transfer of the purchase price into the witness’ account before 11.30am on 22 September 2006. He said that he reluctantly asked the first defendant to go to the relevant local authority offices with the agent for the said purpose. At the local council offices the first defendant was told that an amount of about Z$300 000 had to be paid. The witness said that he declined the purchaser’s offer to pay the said amount and that he paid the money himself. When the witness asked if he could get payment of the purchase price first to enable him to pay the required amount, the response he received was that the

cession had to be done first. A legal practitioner, one Mr. Mukusha, (omit name?) who had come onto the scene purporting to be a representative of the purchaser suggested that they pay some Government officials Z$80 000 in order to secure the processing of the documents. He did not agree with the suggestion.

The witness raised with Zimbudzana his concerns over what had happened. He also raised the issue of payment of the purchase price again. Several excuses were raised and sometimes Zimbudzana would avoid talking to the witness when he called from Bulawayo. About the first or second week of October 2006 after several phone calls from both sides, Zimbudzana suggested that they hold a meeting primarily to look at another agreement as the witness was complaining about the delay in payment. Zimbudzana advised him over the phone whilst he was still in Bulawayo that there had been unforeseen delays in paying the money to the witness. He met with Zimbudzana and Disban in Harare at the Jameson Hotel. They asked him what he thought would be a fair price as at that date. He assumed that they were mandated by the purchaser when they indicated a revised offer of Z$9 million. The witness suggested Z$12 million. They eventually agreed at Z$10 million which was to be paid immediately after the signing of the agreement (NB No second agreement was ever signed).

It was agreed at the said meeting that Denrose would prepare a new agreement by the Monday following the day of the meeting and that it would be faxed to the witness for verification and signing. They also agreed on certain variations to the previous agreement, exhibit 2. They agreed that because of the history of unfulfilled promises, if Z$9 million was not paid within a week or five working days the witness would “automatically” cancel the agreement. He then sought to qualify this by stating that the Z$10 million was split into two amounts. Z$9 million was to be paid immediately upon signing the agreement and the remaining Z$1 million was to be paid at the end of December 2006. The agents said that they had Z$6,5 million in the bank and were expecting the plaintiff to send through telegraphic transfer the balance to make up the Z$9 million. Payment to the witness would thus be done within a few days. He then also stated that they agreed that the Z$6,5 million was to be paid immediately by way of bank transfer as it was alleged to be available and that as he used the same bankers with Denrose it was going to be an internal transfer which would have immediate effect. Neither the Z$6,5 million nor the Z$9 million was paid or transferred into the witness’ account as agreed. The witness said that he never saw any proof that the plaintiff had paid the monies he was alleged to have paid to Denrose.

It was also the witness' evidence that at the time that the agreement placing the purchase price was reached the flat was vacant but he had since given the keys to the estate agents before then so that they would be able to show the flat to prospective purchasers. He was not however sure as to the plaintiff managed to obtain possession and control of the flat but only assumed that the plaintiff was given the keys by the estate agents. He did not authorise the estate agents to give the keys to the plaintiff as he had not received the purchase price in terms of the agreement and in terms of the agreement occupation was supposed to be after payment and cession. He only became aware that the plaintiff had taken control of the flat at the end of November 2006 when he sent one of his employees on a routine check of the property. The witness' employee found a man who claimed to be the plaintiff's nephew. Thereafter the witness advised the nephew to let the plaintiff know that there were outstanding issues relating to the sale of the flat.

When the witness checked on his bank account during the first week of December 2006 in the normal course of business he found that an amount of Z$6 650 000 had been transferred into his account. The bank confirmed that the money had come from Denrose. The said amount was credited into his account on 24 November 2006. noone from Denrose had communicated to him about the transfer. The witness said that he immediately called the estate agents and advised them that he was canceling the agreement due to their non payment in violation of their agreement and that he made this communication during the third week of November 2006. (note discrepancy in dates here) He wrote cheques payable to Denrose in the full amount and hand deposited the envelope to Denrose offices during the period around 13 and 15 December 2006. He was told that the purchaser would be advised of this development. As his account was later debited he took it that Denrose deposited the cheques into its account. There was no further communication between the witness and the estate agents representatives concerning the agreement of the sale of the flat.

With regard to cession the witness said that after signing the cession form the parties proceeded to the City Council offices and to the offices of the Ministry of Local Government where relevant payments were made. The witness said that after he signed the cession form he handed it back to the estate agents who were familiar wit the necessary procedures and who were supposed to finalise the matter with the first defendant. As he never saw any document confirming that the cession was finally approved, his assumption was that cession was not finalised or effected. When asked to comment on exh 7, the letter from the Ministry of Local

Government, the witness said that he was led by the estate agents to believe that it was possible to sell the property legally. Furthermore, in terms of their agreement (which one, if the written one is he therefore saying it was not cancelled) the purchaser ought to have acquainted himself with all the encumbrances that might apply to the property. He said that the date of September 2006 which is stated in the letter is wrong and that to his knowledge the lease agreement between the first defendant and the Ministry of Local Government was entered into in 1994.

The witness said that he did not receive the purchase price of Z$6,5 million in terms of the written agreement of sale, exhibit 2 neither did he receive the purchase price of Z$10 million in terms of the subsequent agreement. He did not authorise the plaintiff to take occupation of the flat.

Under cross examination the witness said that whilst in terms of the agreement of sale, exhibit 2, the payment of the agent's commission by the seller meant that Denrose was the seller's agent, it was not conclusive proof that Denrose was not also acting as the purchaser's agent as well. Although Denrose was supposed to be the seller's agent the actions of Messrs Disban and Zimbudzana and the authority that they exercised during negotiations made it clear to him that they were also acting as the purchaser's agent. As to why he, as witness would, before the first defendant, as seller, sign the agreement of sale he said that that was because he had effective control of the flat as the first defendant had given it to him. He said that although the agreement of sale did not specifically make time of payment of the essence of the agreement it was at all relevant times the clear understanding that payment was going to be made immediately after signing or within a reasonable time "for as long as it took to effect transfer". It was highlighted to him that whilst he signed the agreement as a witness on 20 September 2006 the first defendant only signed as the seller on 25 September 2006. He answered that after signing the agreement he left it with another of his brothers who was to take it to the first defendant for his signature and he was not sure what transpired thereafter. He was then asked why he would expect payment soon after he had signed yet he was only signing as a witness. His response was that they had always agreed that because of the inflationary environment, payment had to be prompt.

The witness' attention was drawn to the first defendant's synopsis of evidence which states that the parties entered into an agreement on or about 6 September 2006. He commented that this was not correct and said that there was no written agreement on 6 September 2006.

He was also referred to paragraph 1 of the first defendant's plea which states that the (first) (check plea) defendant entered into a written agreement of sale on 4 September 2006 and he said that he had no comment to make about that. He said that the only discussions that he ever had concerning the agreement of sale were with the two named gentlemen from Denrose. He only had a brief casual discussion with Mr. Makope (senior) but it was not about the contents or details of the agreement of sale. He was asked why it had taken him until the third week of November 2006 to cancel the agreement of sale yet their agreement at the Jameson Hotel meeting was that if payment of Z$9 million was not made within a week thereof, translating to about the third week of October 2006, cancellation would be immediate. His response was that communication was always being made to establish the reasons for the non payment. Sometimes the agent would not take his calls whilst at other times he would be told that payment would be made the following day but he eventually decided to cancel as the payment was not made.

It was put to the witness that the plaintiff's stance was that he only paid the additional amount because he wanted the flat and not because of any new agreement. He said that there was a new agreement which he negotiated with Denrose as the plaintiff's agent. He said that Denrose represented both the plaintiff and the first defendant. He also said the figure of Z$11 million in paras 5 and 6 of the first defendant's synopsis of evidence looked like an error to him and he denied the suggestion put to him that kept increasing the purchase price for the flat. The witness was referred to clause 6 of the agreement of sale, exh 2, which requires the giving of 14 days' notice to remedy a breach and was asked if he had given such notice in relation to the written agreement. He said that he did not need to give notice as the action that cancelled the agreement came from the plaintiff who made new proposals. It was put to him that as no notice had ever been given the agreement of sale, exhibit 2 had therefore never been cancelled and was still a valid agreement of sale. He denied this and said that they had entered into a new agreement of sale which naturally superseded exh 2. Although the new document that the parties were supposed to have signed was never produced, the parties' actions, particularly the payment of Z$6,6 million into his account by the purchaser and subsequent payments of Z$800 000 and Z$1,1 million were all meant to fulfill the new purchase price.

The witness said that he asked for, but Denrose never produced proof of any payment that they allegedly received from the plaintiff. Neither did the plaintiff furnish him with any proof of payment to Denrose except for the manually produced exhibit 3 which does not give

the dates or methods of payment. He insisted that the plaintiff took occupation in November 2006 and not end of December 2006 or beginning of January 2007 as claimed by the plaintiff. His attention was drawn to paragraph 3,5 of the first defendant's plea which states that the first defendant allowed the plaintiff to occupy the flat in September 2006. It was put to him that he allowed the plaintiff to take occupation because he had paid Z$6,5 million in terms of the written agreement. He denied this. He was asked to produce but could not, documentary proof that the Z$6,6 million was returned to Denrose. He was however surprised by the suggestion that the plaintiff had never received that money as the agents in their correspondence never disputed that they had received the money. The said correspondence was not however produced before the court.

As to why the witness did not claim rentals from the plaintiff after he took occupation of the flat the witness said that they instead wanted to take action to evict the plaintiff from the premises. He had however not filed any papers for the eviction of the plaintiff. It was then put to him that that was because the plaintiff was in lawful occupation. He also believed that any such dues or any monies that would have accrued to him through the occupation of the premises by the plaintiff would be taken into account when this court makes its judgment. The witness also said that he had not called Denrose to testify because "to a certain extent the agent was surprisingly hostile" to him and he felt that they were conniving with the plaintiff. The first defendant's case was then closed.

The first issue referred for determination is whether Denrose was agent for the plaintiff or for the defendant. In *Frazer NO v Ruwisi* 1990 (2) ZLR 99 (SC) at 103D to 104G KORSAH JA said:

> "In *Balzun v O'Hara & Ors* 1964 (3) SA 1 (T) at p4, Colman J quoted with approval, the following words from the judgment of Lord Greene MR in *Wragg v Lovett* [1948] 2 All ER 968 (CA) at p969G:
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> > '…we must not be understood as suggesting that when a vendor merely authorises a house agent to 'sell' at a stated price he must be taken to be authorising the agent to do more than agree with an intending purchaser the essential (and, generally, the most essential) term, ie the price. The making of a contract is no part of an estate agent's business, and although, on the facts of an individual case, the person who employs him may authorise him to make a contract, such an authorization is not lightly to be inferred from vague or ambiguous language."
>
> Relying on the above quoted words of Lord Greene MR, QUENET JP held in *Guest and Tanner (Pvt) Ltd v Lynch* 1964 RLR 252 (A) at 256G – 257A, that:

> "…the words 'go ahead and prepare the agreements to clinch the sale' are susceptible of the meaning, 'prepare the agreement so that a sale can be concluded', and do not necessarily, mean 'prepare the agreements and you conclude the sale'."

And *Christie*, in his book *Business Law in Zimbabwe* at p336, observes that:

> "…the presumption that the ordinary relationship (between an estate agent and his principal) is intended is so strong that instructions to 'sell' or to 'go ahead and prepare the agreements to clinch the sale' will not be interpreted as authorizing an estate agent to conclude the sale."

It seems to me that the mere acceptance of a deposit by an estate agent, without more is not unequivocal evidence of a mandate to conclude a contract on behalf of his principal. It is susceptible to the inference that if the deposit and the proposed terms of the payment of the balance of the purchase price meet with the approval of his principal, then the seller and purchaser may conclude an agreement of sale. The doctrine of consideration has no place in the law of Zimbabwe, and **I do not see that the only inference to be drawn from the acceptance of a deposit by an estate agent, without more, is that he has a mandate to conclude an agreement on behalf of his principal.** (Emphasis added)

I think this issue of a receipt of a deposit from a buyer was succinctly dealt with by WATERMEYER J in *Earlie Homes Estates v Miller* 1977 (4) SA 288 (C) at 290C-E, where the learned judge said:

> "In my view the estate agent, **unless he is the agent of the seller to receive the purchase price which, in the absence of express or implied authority, he is not** (see *Tank v Jacobs* 1 SC 289; *Wessels v De Villiers*, 1 G 141 (1885 OFS 141) *Field & Co v Marks & Co Ltd*, 12 EDC 13; *Roberts v Bryer Bros* 1931 OPD 197; *Burt v Claude Cousins & Co Ltd [*1971] 2 All ER 611 at pp615-618; and *Sorrel v Finch* [1976] 2 All ER 371) must hold the deposit for the would-be purchaser. Until such time as the contract of sale is completed the would-be purchaser can call upon the estate agent to return the money, but if the contract of sale is completed then the estate agent is bound to deal with the deposit in terms of the contract of sale".

It seems clear from the authorities that, **where an estate agent, before any binding contract is made, asks for and receives a deposit, giving the receipt in his own name without more, he does not receive as an agent for the vendor;** for it that were so the estate agent would be under duty to pay the deposit to the vendor forthwith. Since, however, **he can only pay it to the vendor against transfer of the property or return it to the purchaser if the contract is not concluded, he holds the deposit in trust for both to await the event. He is nothing more than a 'stakeholder' and not a mandated agent of the vendor."** (Emphasis added)

The agreement of sale makes reference to the agent in two clauses only. Clause 1 (b) provides:

> "The purchaser shall pay the agent's commission on the sale being $487 500. 00 (four hundred and eighty seven thousand five hundred dollars) to be deducted from the purchase price.

Clause 1 under "GENERAL CONDITIONS" PROVIDES:

> "The agent's commission and survey fees, if any on this sale shall be paid by the seller. The cost of transfer of the property from the seller to the purchaser including conveyancing fees, transfer duty and stamp duty, shall be paid by the purchaser. The transfer shall be carried out by the conveyancer appointed by the seller."

On the basis of the above cited authorities and the evidence adduced before this court, Denrose or Messrs Disban and Zimbudzana cannot in this case be said to be agents of one party to the exclusion of the other. They received and held the deposit for the would-be purchaser whilst awaiting the completion of the contract. They did not pay the money to the vendor.

The only written agreement between the parties is exhibit 2 which has already been referred to above. It states in clause 1:

> "**1 <u>THE PURCHASE PRICE AND TERMS OF PAYMENT</u>**
>
> The property is sold by the Seller to the Purchaser for the sum of $6 500 000.00 (six million five hundred thousand dollars) to be paid as follows:
>
> (a) The purchaser pays cash in the sum of $6 500 000.00 (six million five hundred thousand dollars) after signing this agreement.
>
> (b) The purchase shall pay the agent's commission on the sale being $487 500 (four hundred and eighty seven thousand five hundred dollars) to be deducted from the purchase price.
>
> (c) The Cession of the property will be done by CITY OF HARARE."

As the agreement does not specify the date by which the purchase price was to have been paid, it can only be presumed that the payment was to be made immediately after the signing of the agreement or within a reasonable time thereafter. Whist the purchaser signed the agreement on 4 September 2006, the seller signed on 25 September 2006. However the plaintiff's brother and witness, Memory Chatambudza Makope said in his evidence that he did not know the date when the amount of $6 500 000 was paid by the plaintiff into Denrose's account. They only got confirmation of Denrose having received the said amount at the time when they were asking for cession to be effected. It is also the first defendant's uncontroverted testimony that he did not receive any payment from Denrose or from the plaintiff as purchase price for the property. Regarding the allegations made that the terms of the agreement were varied with the seller raising the purchase price to $10 million, note is made that Special Condition "A" in the agreement of sale provides:

> "**A <u>ENTIRE CONTRACT</u>**
> The parties acknowledge that this agreement constitutes the entire contract between them and there shall be no variation of it save in writing signed by both parties."

No proof of variation of the agreement in conformity with the requirements of Special Condition "A" was placed before the court. Yet by purporting to pay the increased purchase price the first defendant can only be taken to have thereby conceded that payment of the $6 500 000 was not made in terms of clause 1.

It appears to me that if I am correct in the above summation that the rest of the issues stated above as having been referred to trial or for determination at trial become irrelevant. The fact of the matter is that the seller, the first defendant, did not receive any payment for his property and that position prevailed even up to the time of trial. From the authorities discussed above Denrose was not the first defendant's agent and was nothing more than a stakeholder. There can thus be no justification for the granting of the relief sought by the plaintiff. Neither Denrose nor Disban nor Zimbudzana are parties to this action. There is no explanation by them as to the fate of the monies that they apparently received from the plaintiff and from members of the plaintiff's family. It can only be for the plaintiff to ascertain the true position with them. What is clear is that the plaintiff has not adduced any proof of payment of the purchase price to the first defendant. The plaintiff cannot succeed. Costs must follow the cause.

In the result it is ordered as follows:

The plaintiff's claim is dismissed with costs.

Hove & Associates, plaintiff's legal practitioners
Mashayamombe & Partners, first defendant's legal practitioners.