GRACIOUS DUBE
versus
TENDAI MBONA
and
REGISTRAR OF DEEDS
And
HOPEWELL CHARENZWA

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 3 November 2010, 4 November 2010, 25 November 2010
14 January 2011, 25 January 2011, 26 January 2011, 23 March 2011,
4 April 2011 & 12 October 2011

E. Hamunakwadi, for the plaintiff
Advocate *T. Mpofu,* for the defendants

MTSHIYA J: The delay in the preparation of this judgment is sincerely regretted. As can be seen from the dates of hearings the trial took long to complete. This was largely because as from 26 January 2011 the court had to adjourn on the promise that the plaintiff's wife, one Anna Dube (Mrs Dube) would arrive from the United Kingdom to testify. After a long wait, she never came and the trial had to proceed without her.

The background to this case is as follows:-

On 2 February 2009 the plaintiff issued summons out of this court seeking the following relief:-

"1. An order compelling reversal of transfer of stand 5447 Tynwald Township of Lot 1 of Lot 15 Tynwald measuring 397 square metres from third defendant to plaintiff.

2. Third defendant to sign all the necessary papers to pass transfer within 7 days of judgment, failure of which the second defendant signs all the necessary papers to reverse transfer within 7 days of judgment, failure of which the second defendant signs all the necessary papers to reverse transfer in the plaintiff's favour.

3. First defendant pays costs of suit"

Initially the summons did not cite the third defendant. The position was, however, changed through a notice of amendment filed on 23 September 2009.

It is the plaintiff's case that prior to 25 February 2009 he was the owner of Stand No. 5447 Tynwald Township of Lot 1 of Lot 15 Tynwald Township measuring 397 square metres (the property). He had title deeds to the property until it was transferred to the first defendant on 8 July 2008. The first defendant later sold and transferred the property to the third defendant on 25 February 2009.

The plaintiff alleged that in May 2008, his wife, Mrs Dube, who is based in the United Kingdom, (UK) advised him that the first defendant was selling a property in Mabelreign for £80 000. The plaintiff alleged that it was then verbally agreed that as part payment the plaintiff would offer his Tynwald property, the property under dispute, to the first defendant. The Tynwald property was valued at £6 000 and the plaintiff's wife had already paid £3000 towards the £80 000 for the purchase of the first defendant's Mabelreign Property (translating to a total down payment of £9000). The transfers of property would be effected simultaneously. The transactions were being handled by Messrs Mushonga Mutsvairo and Associates (Legal Practitioners). They had reduced the verbal agreement into a written agreement.

Although having signed the written agreement on 20 May 2008, the plaintiff disputes that the agreement represented the actual verbal agreement. He says it turned out that the signed agreement was for the sale of his Tynwald property and, contrary to the verbal agreement, had nothing to do with his purchase of the first defendant's Mabelreign property.

The defendant's position, however, was that the written agreement of sale prepared by his legal practitioners represented the true agreement between the parties. That was why he was able to take transfer and later sold and transferred the property to the third defendant.

Two witnesses were called for the plaintiff's case. The plaintiff Mr Gracious Dube (Mr Dube) was the first witness.

The plaintiff, as already indicated in the brief background to the case, told the court that the written agreement of sale that he was made to sign at the offices of Messers Mushonga Mutsvairo and Associates did not capture the verbal agreement whereby his Tynwald property was only going to be used as part payment for the first defendant's Mabelreign property. He, however, agreed that he had never seen or viewed the Mabelreign property.

The 76 year old plaintiff told the court that although the property had been transferred to the third defendant it remained his because he had been 'robbed'. He had, as a result of what happened, reported the matter to the Law Society of Zimbabwe, the Police and the Anti-

Corruption Commission. That, however, had not resulted in the return of his property. The plaintiff was convinced that his wife, Mrs Dube, had paid a sum of £3000 to the first defendant. He said he had been advised that the first defendant, who is also based in the United Kingdom, would be coming to Harare at the end of May 2008 where upon he would be shown the Mabelreign property.

Mr Dube testified that he was later "summoned" by one Blessing Mbona, (Mr B. Mbona), a brother of the first defendant, to meet at Messrs Mushonga Mutsvairo and Associates' offices. He, in the company of one Rashid Saibu, attended at Messrs Mushonga Mutsvairo & Associates' offices where he was given a bunch of documents to sign. The agreement of sale, prepared by Mr Shepherd Mushonga (Mr Mushonga) of Mushonga Mutsvairo & Associates, was part of the bunch of papers he signed. He said he did not read the terms of the agreement at the time of signing because he sincerely believed that it captured the verbal agreement. He also said he had, during his visit, handed over the title deeds of the property to Mr Mushonga. He said after signing the agreement, Mr Mushonga had given him some papers to submit to the Zimbabwe Revenue Authority (ZIMRA). He had gone to ZIMRA in the company of between 4 to 5 people.

Mr Dube went further to explain that it was only upon consulting his legal practitioner, that he realised the written agreement did not reflect what had been verbally agreed. He said the written agreement stated that he had been paid a trillion dollars (Zimbabwe dollars) yet he had not received any money from Mr *Mushonga*. He had also observed that the power of attorney that Mr Mushonga relied on had a forged signature. This was on the basis that the signatures on the powers of Attorney given to Mr B. Mbona and Mr *Mushonga* were different. He had, as a result of what happened reported the matter to the Law Society of Zimbabwe, the Police and Anti-Corruption Commission. He had also, through his legal practitioner, caused a caveat to be placed on the property.

Mr Dube said his wife had told him that the first and third defendants were related. That being the case, he believed the third defendant was part of the plan to rob him of his property.

Under cross examination, Mr Dube, who was hesitant to answer questions at times, maintained his story about the verbal agreement. He said he had never authorised the lifting of the caveat he had caused to be placed on the property. He also said, although he was not a handwriting expert, he could easily tell that the signatures on the powers of attorney given to

Mr *Mushonga* and Mr B. Mbona were different. He insisted that the third defendant was aware of the dispute over the property.

The second and last witness for the plaintiff's case was Rashid Shaibu (Mr Saibu). Mr Shaibu told the court that he was the plaintiff's son-in-law and would drive him around as he did when he drove him twice to Mr *Mushonga*'s offices. He said during the first visit the plaintiff had handed in title deeds for the Tynwald property. He went on to testify that during the second visit the plaintiff had signed the papers given to him by Mr *Mushonga*. He had then driven the plaintiff and other two people to ZIMRA. He had not witnessed any exchange of money at Mushonga's offices.

Under cross examination Mr Shaibu said he was not aware of the details of the transaction between the parties.

The first defendant, Mr Justin Tendai Mbona, (Mr T. Mbona) was the first to testify in defence.

Mr T. Mbona said he knew the plaintiff through his wife, Mrs Dube. He said he and the plaintiff's wife lived together in the UK. He said had had conducted business dealings with Mrs Dube and in the course of those business dealings Mrs Dube had informed him of the plaintiff's intended sale of the property under dispute. He had indicated an interest to buy the property. To that end he said he had instructed his young brother, Mr B. Mbona, who had a power of attorney from him, to view the property. Mrs Dube had told him that the title deeds to the property were in the name of the plaintiff. He said after a report from his brother, Mr B. Mbona, he had agreed with Mrs Dube to buy the property at a price of 1 trillion dollars (Zimbabwe Dollars). He would pay that amount in British pounds (sterling) on the understanding that Mrs Dube would transfer same to her husband (the plaintiff) in Zimbabwe. He said on the basis of an agreed exchange rate, their calculations had resulted in him paying Mrs Dube £3000 as an equivalent of one trillion Zimbabwe dollars as the agreed purchase price of the property. He said there was no discussion of his Mabelreign property.

Mr T. Mbona had then instructed Mr *Mushonga*, who handled all his legal matters, to proceed with the transaction leading to the registration of the property in his name. He said Mrs Dube had, in his presence, telephonically instructed her husband (the plaintiff) to take all the necessary documents to Mr *Mushonga*. He said Mrs Dube had also confirmed to her husband that the purchase price had been paid in full and so transfer could be effected.

Mr T. Mbona denied that there was a "larger agreement" which involved the sale of his Mabelreign property, namely No. 10, 25th Avenue, Mabelreign, Harare. He said he had

never intended to sell his Mabelreign property. He stressed that he never had any verbal agreement (i.e. 'larger agreement') with the plaintiff. He had instead a verbal agreement with Mrs Dube who acted as an agent of her husband, the plaintiff. Mr *Mushonga* had later reduced the verbal agreement into a written agreement of sale. He said the written agreement of sale signed by the plaintiff was the only agreement between the parties.

Mr T. Mbona, said that there being no lawful impediment, he had sold the property to the third defendant who is not related to him. He had first met the third defendant at court. He had, however, been advised by both his brother, Mr B. Mbona and Mr *Mushonga* that summons had been issued in respect of the property.

Under cross examination Mr T. Mbona said although the agreement of sale was between him and the plaintiff, he had never spoken to the plaintiff. He was in direct communication with Mrs Dube. His brother Mr B. Mbona and his lawyer (Mr *Mushonga*) dealt directly with Mr Dube, who he knew was the owner of the property. He maintained that he had paid £3000 for the property on 18 May 2009 and Mrs Dube had proof of payment. He did not need a receipt since he trusted Mrs Dube. He said he did not know if the money he paid was transferred to the plaintiff. That, in any case, he stated, was not his concern.

Mr T Mbona said that the signatures on the powers of attorney, although different, were his. He told the court: "yes, all of them are mine depending on what business I am in … being in business I have to protect my finances".

Mr T. Mbona said, notwithstanding knowledge of the summons issued on 6 February 2009, he had gone ahead to effect transfer to the third defendant because the property belonged to him. He said he had never discussed the issue with the third defendant and was shocked that the Dubes had issued summons against him yet everything had been properly processed by his legal practitioner.

Mr *Mushonga* was the second to lead evidence after the first defendant.

Mr *Mushonga* a practising lawyer, said he has been in practice for the past 23 years – with 22 years of practice on his own account. He had known the first defendant for 4 years and the first defendant had called him from the UK to confirm that he had acquired property and wanted him to attend to the transfer. To that end he had been visited by the plaintiff and Mr B Mbona, the first defendant's young brother, who had a power of attorney from the first defendant. Mr *Mushonga* said he also had a power of attorney from the first defendant. He said during their (ie the plaintiff and Mr B. Mbona) visit to his offices the two had given him

all their particulars and the description of the property. He said Mr Dube had also confirmed the price of one trillion Zimbabwe dollars for the property.

Mr *Mushonga* said:

> "After getting the details, I called my secretary to do the agreement. It was done. I gave it to the two, Blessing Mbona and Gracious Dube. They went through it clause by clause. Thereafter we had a final draft. I then asked for the Title Deeds for Transfer. He had not brought the Title Deeds. He brought same next day in the company of someone he called his son ….. I Perused the Title Deeds – there were no caveats. I made copies and attached a copy to the signed agreement of sale. I then instructed the parties to proceed to ZIMRA for an exemption certificate".

Mr *Mushonga* said he had explained to Mr Dube that since he was above the age of sixty five years, he might be exempted from paying Capital Gains Tax. He said he had not assigned anyone to accompany the parties to ZIMRA and the parties had come back happy with the exemption certificate. He had personally attended to the transfer of the property.

Mr *Mushonga* testified that on the instructions of the first dependant his law firm advertised and later sold and transferred the property to the third defendant.

He confirmed that whilst in the process of selling the property to the third defendant, in February 2009, they received summons from the plaintiff. He believed that this was prompted by the viewing of the property by prospective purchasers. He went on:-

> "We got a buyer through an estate agent and entered into an agreement with H. Charenzwa. He came with the agent. I explained the position. After agreement we received an attempted interdict – we opposed it …… interdict was withdrawn. We then proceeded to do the transfer … was told that there was a routine caveat …. Did not personally investigate the caveat issue but was briefed by Mhlolo .. was told that no interim order was granted".

Mr *Mushanga* said other than the written agreement of sale there was no other agreement between the parties that he had been made aware of. He said there was no other property linked to the agreement. He said he was shocked to read same in the summons and could not believe the price of £80 000 for a Mabelreign property.

Mr *Mushonga* described the plaintiff as a sharp old man who looked like a professional. He went on:

> "I had no reason to cheat him. I had no interest beyond my instructions. We went through the agreement, correcting it until we signed. To me he looked like he was just an agent for his wife. We were all following what London was doing. He was being phoned by his wife before we signed".

With respect to the caveat, Mr *Mushonga* again had this to say:

> "I did not transact when it came to the transfer. I allocated transfer to Mhlolo. I did not uplift the caveat".

Under cross examination Mr *Mushonga* maintained that all he had done was to reduce to writing what the parties had agreed on. On the issue of the caveat, he said his understanding was that the caveat had fallen away when the application for an interdict was withdrawn. He said the plaintiff knew that payment of the purchase price was being effected in London. He said he had only read about the verbal agreement in the summons. He had gone through the agreement of sale with the plaintiff and believed the plaintiff had no problem with the agreement. Mr *Mushonga* said the sale to the third defendant had been advertised and as such he did not see the basis of any dispute. He believed the third defendant was an innocent purchaser.

On signatures appearing on the powers of attorney, Mr *Mushonga* said he had never bothered to look at them. Upon viewing the signatures he agreed that they 'varied' and he could not answer for the first defendant. He maintained that he had gone through the agreement clause by clause with the plaintiff and Mr B. Mbona.

Next to testify, after Mr *Mushonga,* was Mr Blessing Mbona, the first defendant's brother. He said the first defendant was his blood brother. He said he resides at the first defendant's Mabelreign property and had resided there for the past five years. He had known the plaintiff from the time the first defendant told him about his intention to purchase the Tynwald property. He confirmed the meetings at Mr *Mushonga*'s office, where he and the plaintiff had signed the agreement of sale. He also confirmed the visit to the ZIMRA offices where, he said, Mr Dube was interviewed.

He said on the basis of a power of attorney from his brother, he was able to transact business with Mr *Mushonga* and the plaintiff. He said he had never heard about his brother's intention to sell the Mabelreign property or the plan to swap it with the plaintiff's Tynwald property. He said he had always remained available for discussions with the plaintiff. He insisted that at ZIMRA Mr Dube had been interviewed. He also testified, under cross examination that his broker, the first defendant, had three signatures.

The final witness to give evidence was the third defendant, Mr Hopewell Charenzwa. (Mr Charenzwa). He confirmed that he now owns the property. He said he had come to know about the property through Floburg Real Estate who told him the property was being sold through Messrs Mushonga Mutsvairo and Associates. He had bought the property for US$8000 and the transfer was handled by Messrs Mushonga Mutsvairo and Associates. He

said he was happy the transaction was being handled by lawyers. He then entered into an agreement of sale, a copy of which was produced as exhibit No 2.

Mr Charenzwa said he had never spoken to the Mbonas and the Dubes. He said after two weeks following the agreement of sale, he had been called to the legal practitioners (Messrs Mushonga Mutsvairo and Associates) where he received his title deeds. A copy of the title deeds was produced as exhibit No. 3.

Mr Charenzwa confirmed receipt of summons and said he only received same after the property had already been transferred to him. He denied that he was related to the first defendant. He had retained Messrs Mushonga Mutsvairo and Associates as his legal practitioners because they had handled the earlier transfer and he had no funds to engage a new set of legal practitioners. He said, notwithstanding being the owner of the property, he had not yet taken vacant possession.

Under cross examination the witness said he was an innocent purchaser and believed that given the involvement of legal practitioners in the transaction, there would be no fraud. He said that, although he had become aware of the dispute relating to the property, he believed all his papers were in order. He also said that during the transaction, most of the talking had been done by a Mr Chazika, who represented the Estate Agent.

As already indicated, Mrs Dube did not come and so the need to re-open the plaintiff's case fell away.

On 3 November 2010 when the trial commenced Mr *Hamunakwadi* for the plaintiff started off by asking for leave to hand in the plaintiff's bundle of documents. Without objection from Advocate *Mpofu,* for the defendants, the bundle of documents was duly produced and admitted as exh 1.

Soon after the admission of exh 1, Mr *Hamunakwadi* applied for an hour's adjournment so that he could place before the court a consolidation order of cases HC 426/09 and HC 1364/09. I adjourned the matter as requested but when proceedings resumed there was nothing said about the consolidation order and so the court proceeded to hear evidence on case HC 426/09 (i.e evidence narrated above).

In terms of the Joint Pre-Trial Conference Minute filed on 22 June 2010 the agreed issues for trial are:

> "1.1 Whether or not the agreement entered into between the plaintiff and the first defendant is valid, if so whether there was payment by first defendant to plaintiff.

1.2 What were the terms of the alleged agreement?

1.3 Whether the alleged written agreement legally passed ownership to first defendant.

1.4 Whether or not third defendant is an innocent purchaser.

1.5 Whether or not the plaintiff was defrauded of Stand No. 5447, Tynwald Township, Harare".

A lot was said and written on this matter but I believe that at the end of the day the crucial finding is on whether or not there was a valid agreement of sale between Gracious Dube (the plaintiff) and Tendai Mbona (the first defendant) entitling the first defendant to obtain title deeds for Stand No 5447 Tynwald Township of Lot 1 of Lot 15 Tynwald (the property). If the finding is in the negative and subject to the principle of an innocent purchaser then in terms of law the first defendant would have had nothing to sell to the third defendant.

In dealing with the above issue, I find Advocate *Mpofu*'s analysis in para 6.8 of his written closing submissions worth noting. He submits:

"6.8 It is clear that plaintiff told a tall story which could not bear scrutiny. It is simply an unbelievable story which mirrors the clear lack of courage in plaintiff's efforts. The story told by first defendant on the other hand is easy to believe. It is corroborated by the decision of the plaintiff's wife not to come and testify over matrimonial property. The probabilities are that the wife received the money. The explanation for her conduct is irrelevant. On the other hand it cannot be probable that the plaintiff goes into Mushonga's, (*sic*) carries with him title deeds, signs an agreement, is accosted to Zimra and gives away his property. He stays with an agreement of sale for 8 months without reading it. He is told of a Mabelregn property that he never gets to view although he transfers his property. It can only be that issues arose between the plaintiff and his wife over the repatriation of the money and the plaintiff now wants to take advantage of the situation. The only believable story under the circumstances is that of defendant".

Under the circumstances, the court has to establish which story is most probable.

Mr *Hamunakwdi*, for the plaintiff, correctly submitted that the true story to be accepted is the one that shows that there was a meeting of the minds (*consensus ad idem)*, the property *(Merx)* and the price *(pretium)* (ie a story establishing a valid agreement). He submitted that as far as the plaintiff's story goes these elements only existed in the verbal agreement (the 'larger agreement') that was not correctly reflected in the written agreement

that the first defendant is relying on. He said the written agreement did not show what the true price for the property was.

Mr *Hamunakwadi* further submitted that a caveat that had been placed on the property had not been uplifted in terms of the law. This, he said, had been confirmed by Mr *Mushonga* who could not supply details as to how his office had dealt with the issue of the caveat.

Added to the above, Mr *Hamunakwadi* submitted that the third defendant could not have been an innocent purchaser. He said given the fact that by 6 February 2009 the first defendant had already been served with the summons through his legal practitioners who were also the third defendant's legal practitioners, taking ownership on 25 February 2009 became questionable. He believed the transactions were fraudulent and therefore the call for reversal of the transfers was legitimate. He said the court should base its decision on a balance of probabilities. *In casu*, he said, the plaintiff had on a balance of probabilities, managed to prove his case.

In his detailed written submissions, Advocate *Mpofu*, for the defendants, came to the conclusion that the plaintiff's claim "is confused and lacks a valid legal basis". He submitted:-

> "1.4 It is not plaintiff's claim that he has cancelled the agreement between the parties, neither was his evidence to that effect. It is also not his claim that he has tendered the £71 000-00 which first defendant has refused to accept. Going by the plaintiff's own story, there is an agreement between the parties. If there is such an agreement then the court cannot incur the reproach of being a destroyer of bargains, by setting aside transfer and thus cancelling the agreement which the plaintiff has not cancelled.
>
> 1.5 It must also be noted that the plaintiff does not pray for an order cancelling nor confirming the cancellation of the agreement. Upon what possible basis therefore can the plaintiff pray for transfer of the property in view of this claim? In the absence of a proven and pleaded cancellation, his claim can only be for an order for counter prestation, naturally upon prestation. As pointed out in *Farmer's Corp Society (Reg) v Berry* 1912 AD 343 350.
>
> > '*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as is possible, a performance of his undertaking in terms of the contract' See also *Both v Que Que Municipality* 1973 (2) SA 754 (R)'.
>
> 1.6. The claim therefore, even if the plaintiff were to be believed is bad in law. It is so much confused and no relief could ensue therefrom".

On the basis of the above Advocate *Mpofu* urged the court to dismiss the claim. He

then went on to submit that the plaintiff's wife, despite being an intergral party to the action and despite being accorded the opportunity to come and give evidence, had refused to do so. He said, in the absence of a rebuttal of the role played by the plaintiff's wife in the transaction, it was impossible for the plaintiff to prove his case.

Advocate *Mpofu* went further to submit that it was inconceivable that a man of the plaintiff's standing could:-

(a) Sign a simple agreement without reading it

(b) Surrender his titled deeds without viewing the swap property.

(c) Transfer the property notwithstanding the caveat

(d) Claim, without evidence, that the first and third defendants were related; and

(e) Buy a Mabelreign property for £80 000.

On the issue of signatures, Advocate *Mpofu* submitted that the plaintiff was not a handwriting expert and the signatures were identified by the first defendant and confirmed by Mr B. Mbona.

In examining the two stories emanating from the evidence given by both sides and the submissions made by counsel for the parties, I shall proceed by stating that I find it extremely difficult to understand:

(a) Why the plaintiff could sign such an important agreement without carefully reading it.

(b) Why the plaintiff could surrender his title deeds before even viewing the swap property and indeed why the plaintiff could transfer the property not-withstanding the caveat.

(c) Why, out of all people, it is only the plaintiff who makes reference to a swap arrangement (ie the 'larger agreement').

(d) Why the plaintiff does not explain how he and his wife intended to clear the balance of £71000 on the Mabelreign property and why indeed he could accept a price of £80000 for the swap property which was later sold for a realistic price of only US$8000.

(e) Why the plaintiff withdrew the interdict application; and

(f) Why the plaintiff's wife could refuse to come and testify when a family property was at risk and indeed why the plaintiff who owned the property was being turned into a mere agent of his wife who did not own the property.

However, notwithstanding absence of clear answers to the above crucial questions, the parties agree that any agreement touching on the property must have been an agreement between the plaintiff as owner of the property and the first defendant. As indicated by Mr *Mushonga*, London was calling the shots but the property belonged to the plaintiff. The plaintiff played part in the conclusion of the agreement of sale. The first defendant's interests were well protected under a legal practitioner in Zimbabwe. At the end of day, this court must be satisfied, on a balance of probabilities, that there was indeed a valid contract between Gracious Dube (plaintiff) and Tendai Mbona (first defendant) - a contract clothed with all the elements already alluded to in Mr *Hamunakwadi*'s submissions.

We have *in casu* a litigant who has approached the court saying "Given the story I have given you (the court), can you really allow my property to go?" However, due to the absence of convincing answers to the questions I raised above, I think it would be difficult not to let the property remain where it is now. The evidence before the court makes it difficult to return the property to the plaintiff.

In the absence of convincing answers to the questions raised, what emerges is that on 28 May 2008 the plaintiff voluntarily signed an agreement of sale which had nothing to do with a swap arrangement. The description and the price of the property were clearly reflected on the first page of the agreement of sale. The plaintiff is not an ordinary villager. There is evidence that the caveat was withdrawn and that the interdict application was also withdrawn. The major player in all this was now the plaintiff, not his wife. There was therefore, in my view, no reason for the first defendant's lawyers to be apprehensive.

All in all, a thorough consideration of all the unanswered questions leads me to the conclusion that, on a balance of probabilities, the plaintiff's story ought to be rejected. If anything, the authenticity of the agreement signed on 20 May 2008 has not been shaken.

The different signatures attaching to the first defendant, cannot be rejected when the plaintiff does not even profess to know the actual signature of the first defendant. The plaintiff did not say he knew the actual signature of the first defendant. You cannot declare a bill to be counterfeit without knowing the genuine bill. It is indeed unusual that he used three signatures. However, that does not amount to forged signatures. No forgery of a signature was proved.

As I have already indicated above I am, on a balance of probabilities, convinced that the agreement of 20 May 2008, captured the import of the verbal agreement as explained by the first defendant. This finding means that as at 25 February 2009 the first defendant could

legally transfer the property to the third defendant. The courts are enjoined to uphold the sanctity of contracts (See *Intercontenental Trading (Pvt) Ltd* 1993(1) ZLR 21(H) and *Mwayipaida Family Trust v Michael Madoroba and Ors* SC 22/04).

Clause 8.3 of the Agreement of Sale provides as follows:

> "This agreement constitutes the entire contract between the parties and no other conditions or representations have been made by them or their agents other than those contained herein."

I find no compelling argument or evidence to persuade me to go beyond the meaning of Clause 8.3 of the agreement of sale.

Furthermore, my finding, on a balance of probabilities, is that the third defendant was an innocent purchaser. The property was not sold secretly. It was advertised. There was no iota of evidence of collusion between the first defendant and the third defendant. The transfer took place a time when the plaintiff was already legally represented.

Having accepted the first defendant's story it then follows that no larger agreement ever existed between the parties and it also follows that:

(a) The agreement of sale was valid.
(b) The terms thereof were accepted by the plaintiff through a signed agreement of sale.
(c) The first defendant obtained title to the property through a legal process
(d) The first defendant could legally pass title to the third defendant who was an innocent purchaser who had responded to the offer through an advertisement/estate agent; and
(e) The plaintiff was not defrauded of his property – he freely sold it to the first defendant.

In view of the foregoing, the plaintiff's claim cannot succeed.

The plaintiff's claim is dismissed with costs.

Maunga Maanda & Associates, plaintiff's legal practitioners
Mushonga Mutsvairo & Associates, 1st & 3rd defendant's legal practitioners