ZIMBABWE HOUSING COMPANY (PVT) LTD
versus
GABRIEL MANDOMBO
and
SHYLET JANYURE
and
TAKWANISA NHETE
and
EMMANUEL MARONGEDZA
and
FAITH TACHIONA
and
LACKSON CHISHAVA
and
YULITA EDNA MABVANURE
and
STEPHEN ZAMBA

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 13 & 24 September 2018; 30 October 2018; 7, 8, 9, 10 ,11, 23 January 2019; 2, 8, 25 February 2019 & 11 June 2020.

Civil Trial

L T Mudziwepasi, for the plaintiff
T Nyamucherera, for the 1st & 2nd defendants
T Chihuta, for the 4th defendant
V Masaiti, for the 7th defendant
3rd, 5th, 6th & 8th defendants in default

KWENDA J: **Plaintiff's claim in brief:** The plaintiff is company duly registered in terms of the laws of Zimbabwe formed by one Collins Chinzou and his now deceased wife, Mrs Chinzou, as a trading vehicle for a family property business. The couple were the founding shareholders and directors of the plaintiff. Pursuant to the business the couple

acquired a certain piece of land known as Lot 1 of Cranbrook of Galway Estate measuring 22,8254 hectares which they registered as the property of the applicant under Deed of Transfer no 2938/97 dated 5 May 1997. Thereafter, plaintiff subdivided 17,4169 hectares of the land into 180 stands for resale under permit no 26/96 dated 2 June 1997. Mrs Chinzou assumed the position of administrator with full control of virtually all plaintiff's commercial activities which included servicing, sales, preparation of agreements of sale, reconciliation, approving cessions and management of staff. She controlled the business up to the time of her death in 2009. Mrs Chinzou would on occasions invite the first defendant to assist her due to her failing health. In or around 2004 plaintiff offered the first defendant on a full time basis to assist Mrs Chinzou which he accepted.

Mrs Chinzou later passed away whereupon first defendant took over as the administrator thereby inheriting the wide discretionary powers previously exercised by Mrs Chinzou. For some reason Collins Chinzou reposed in the first defendant the same trust he had reposed in his wife and did not introduce any checks and balances except that agreements of sales would be placed before him to sign on behalf of the plaintiff.

In or around 2017 or before plaintiff's business was no longer viable. One Broadwell Chinzou, the couple's son decided and did return from Botswana to help resuscitate the business. Plaintiff appointed him as its administrator. Meanwhile the plaintiff was placed under judicial management to save it from collapse. Broadwell Chinzou immediately commenced an extensive audit to verify the status of all stands, sales and payments. The audit unearthed some irregularities. [This trial was concerned with what plaintiff said were fraudulent disposals of stand nos 20755, 20462, 20563 and 20797]. Four suspicious agreements of sale purporting that second defendant had bought stand nos 20755, 20642 and 20797 and fifth defendant had bought stand 20563. The impugned agreements of sale and the receipts were subjected to forensic examination by a renowned Questioned Document Examiner and Forensic Scientist, LT Nhari, who concluded that they were fraudulent and that the first defendant had his footprints in the transactions.

At the same time Broadwell Chinzou also uncovered that the first defendant had approved the substitution of third parties as purchasers. First defendant had processed the agreements of substitution on counterfeit letterheads which resembled the plaintiff's template. [On the counterfeit agreements of substitution first defendant replaced plaintiff's

phone numbers with his and/or inserted plaintiff's landline numbers which were no longer in use and inserted email addresses foreign to the plaintiff]. The cedents had taken occupation of the stands on the strength of letters authored by first defendant, ostensibly, on behalf of the plaintiff, giving the third parties rights of occupation and falsely confirming to the responsible local authority that plaintiff had received the full purchase price.

The plaintiff now seeks confirmation by this court of the invalidity of the agreements of sale as well as the subsequent substitution of third parties as purchasers plus costs of suit. (hence case Numbers HC 1611/17 (stand 20755), HC 3122/17 (Stand 20742), HC 3123/17 (Stand 20563) & HC 3124/17 (Stand 20797). It will be noted that throughout the pleadings the plaintiff erroneously referred to the transactions concluded by second and fifth defendants and the third parties as cessions when they were in fact combined cession and delegation in terms of which the third parties substituted the alleged original purchasers in the impugned agreements of sale. A cession is an act of transfer by which personal rights(claims) are transferred from one estate to another. It can even be done without the corporation or knowledge of the debtor. See *The Law of Cession,* 2nd Ed by Susan Scott at page 7. See also *The Law of Contract in South Africa,* 3rd Edition by RH Christie at page 515

> "Cession may be regarded as the opposite of delegation, as it involves the substitution of a new creditor (the cessionary) for the original creditor'
> See *R H Christie* at page 523
> "there is no single term of art to describe the process by which a third party, by agreement of all concerned, steps into the shoes of the one of the parties to a contract and replaces him entirely both as creditor and debtor……For lack of a single word our courts have variously described the process…"

RH Christie has among the various terms used by the Courts suggested preference of the terms 'substitution of one party by another' or 'combined cession and delegation'. In this case the third parties did not only purport to take over personal rights but signed what were named acknowledgements in terms of which they accepted responsibility for future obligations arising from the agreements of sale. In some jurisdictions the combined process is called assignment.

First and second defendants' defence in brief: First and second defendants are husband and wife who married in 2001. They filed joint pleas with respect to stand numbers 20755, 20642 and 20797. The pleas raised two preliminary issues which are, that the various plaintiff's summons are fatally defective for failure to disclose a cause of action, alternatively

the plaintiff's claims had prescribed. On the merits they pleaded that the three agreements in which second defendant appears as purchaser were genuine and the second defendant had the right to assign the agreements of sale to third parties in the manner she did. They prayed for the dismissal of the claims, in some cases, with costs on the higher scale.

Third defendant: Third defendant who appears in plaintiff's records as the cedent of stand number 20755 did not defend despite being served with plaintiff's summons. Plaintiff moved for default judgment against him/her. I decided to delay judgment pending my resolution of the dispute between plaintiff and second defendant over the stand.

Fourth defendant's defence in brief: The fourth defendant appears in plaintiff's records as the cedent of stand no 20642. He defended the matter. He pleaded that since he acquired rights from second defendant, the fate thereof was dependant on how the court resolves the dispute between plaintiff and second defendant over the stand in question. He filed a counterclaim in which he said in the event that the court resolved the dispute against second defendant he would pray for reimbursement. The fourth defendant's counter-claim, as initially drafted presented, was vague in terms of who was supposed to reimburse him. The counterclaim was amended at the pre-trial conference and after the amendments approved and signed for by the presiding judge it was clear that the trimmed counterclaim was now targeting the plaintiff presumably as a claim based on unjust enrichment arising from the improvements which fourth defendant had made at the stand. Fourth defendant changed the whole import of the counterclaim when he amended the counterclaim on the 28th February 2018 to read as follows: -

> "Should this honourable court find in favour of the plaintiff, the 1st and 2nd defendants be ordered to reimburse the 3rd defendant the amount paid for the stand and developments thereon to the tune of $40 000.00."

However, the fourth defendant abandoned the counterclaim at the commencement of the trial after conceding that the High Court Rules 1971 as amended did not provide for a counterclaim against (a) co-defendants. During the trial, the fourth defendant somehow sought to introduce a new defence of estoppel which he had not pleaded at all. The thrust of the cross-examination on behalf of the fourth defendant was that the fourth defendant was an innocent purchaser and the operation of estoppel prevented the plaintiff from disputing the assignment of the agreement of sale by second to fourth defendant. His counsel put it to

plaintiff's witnesses that plaintiff was barred from vindicating the property because it had approved the cession of rights to him and had gone as far as writing a letter to the Ruwa Local Board confirming fourth defendant's rights over the stand. Plaintiff had therefore created the impression that all was in order and fourth had acted upon the representation to his prejudice. Fourth defendant persisted with the argument in closing submissions made on his behalf at the end of the trial. The procedural correctness of that approach and availability to him of the defence of estoppel are issues discussed later in this judgment. Fourth defendant also prayed for the dismissal of plaintiff's claim.

Eighth defendant: The eighth defendant who appears in plaintiff's records as the cedent of stand no 20797, was also served with plaintiff's summons but failed to defend. Plaintiff prayed for judgment against him but the court deferred its ruling to the end of the trial because the second defendant that she had properly acquired and validly ceded rights in the stand to eighth defendant.

Fifth and sixth defendants: Fifth and sixth defendants appear in plaintiff's records as purchaser and first cedent of stand no 20563. The impugned records reveal that sixth defendant in turn ceded the stand to seventh defendant. Fifth and sixth defendants were served with summons but did not defend this case. Plaintiff prayed for judgment against them but, once again, I withheld judgment pending the court's determination on the defence of estoppel raised by seventh defendant.

Seventh defendant's defence in brief: The seventh defendant filed her plea as a self-actor. Her thrust was that the plaintiff was barred from contesting her right to the stand because it had presided over the assignment of the agreement of sale to her by the sixth defendant. She too claimed that although the default of the fifth and sixth defendants had left a gap/ no obvious link between the plaintiff and her, plaintiff was barred from vindicating stand no 20563 because it had approved cession of rights to her by sixth defendant and had written a letter to the Ruwa Local Board confirming her rights over the property. She, too, prayed for the dismissal of plaintiff's claim against her. Mr *Masaiti* assumed agency and represented seventh defendant at the trial.

The parties agreed to consolidate the four cases for the purposes of trial whereupon I issued an order to that effect by consent and numbered the defendants (one) to (eight).

PLEADINGS IN DETAIL

The above introduction is an overview of the cases. What follows is a detailed exposition of the pleadings for a keen reader.

Case HC 1611/17 [Stand 20755 Cranbrook Park Ruwa

Plaintiff alleged the following:

It is the registered owner of stand No. 20755 Cranbrook Park, Ruwa held by it as a portion of Lot 1 of Cranbrook of Galway Estate as aforementioned. The defendants are Gabrial Mandombo, Shylet Janyure and Takwanisa Nhete (first, second and third defendants respectively). An audit carried out by plaintiff in 2017 led to the discovery of a forged agreement creating the false impression that plaintiff had sold stand 20755 Cranbrook Park, Ruwa to second defendant (his wife) on 9 October 2002 at a price of ZWL$800 000. There was also, on file, a cessionary agreement in terms of which second defendant purported to cede the stand to third defendant on 4 March 2012. The plaintiff averred that first defendant had participated in the creation of the false sale and cessionary agreements. The exact dates on which the allegedly sham sale agreements were not known to the plaintiff because there was evidence that the sale agreement had been backdated by altering the year 2005 to read 2002. The plaintiff pointed out certain questionable features of the sale and cessionary agreements which it said are evidence of the fraud. These will be discussed in detail under evidence. The plaintiff prayed for an order confirming that both the purported sale of stand No. 20755 Cranbrook, Ruwa to second defendant and the subsequent cession to third defendant were null and void. It prayed for costs of suit against the defendants jointly and severally, one paying, the others to be absolved.

First and second defendants who were both represented by Mr T *Nyamucherera*. pleaded as follows: -

They filed a joint plea wherein they raised, as a preliminary issue, that plaintiff's summons is defective in that it does 'not contain a true and concise statement of the nature, extent and grounds of the cause of action'. They also pleaded prescription as a point *in limine.* They averred that the plaintiff's claim based on the agreement of sale dated 9 October 2002 had become prescribed on the 9 October 2005 and a claim based on cessionary agreement dated 14 March 2012 had prescribed on 14 March 2015. Ordinarily prescription is

put forward as a special plea. First and second defendants failed to do so leaving the court to deal with it as an issue at the trial. On the merits first and second defendants pleaded that second defendant's agreement of sale is valid and such first defendant had validly acquired rights and interest in the stand no 20755. They put the plaintiff to the proof of its allegations. According to them, the agreement was genuine and had been properly executed with the knowledge of late Mrs Chinzou who was one of plaintiff's directors in the year 2002. The defendants asserted that the agreement in terms of which third defendant as the purchaser of stand 20755 is valid and competent since it was based on an earlier valid agreement of sale. The defendants prayed for the dismissal of plaintiff's claim with costs.

The plaintiff replicated that it had only become aware of the fraud after an audit. It maintained that the summons discloses a cause of action as amplified by the declaration.

Third defendant was duly served with summons on the 3rd May 2017 but failed to defend.

Case HC 3122/17 [Stand 20642 Cranbrook Park Ruwa]

Plaintiff claimed as follows: -

It is the registered owner of No. 20642 Cranbrook Park, Ruwa held by it as a portion of Lot 1 of Cranbrook of Galway Estate. The defendants are Gabrial Mandombo, Shylet Janyure and Emmanuel Marongedza (first, second and fourth defendants respectively). During the audit carried out in the year 2017 the plaintiff discovered a forged agreement of sale purporting that the plaintiff had sold Stand No. 20642 to second defendant on 5 September 2005 for ZWL$17 000 000.00 There was also, on file, an agreement dated 10th September 2012 in terms of which fourth defendant appeared to have substituted second defendant as the purchaser of the stand with the knowledge and approval of the plaintiff. The first defendant had masterminded the creation of the false documents. Plaintiff pointed out certain features which proved that both the agreement of sale and the subsequent agreement in terms of which fourth defendant became the new purchaser were counterfeit. These will be discussed under evidence. Later, first defendant had also misrepresented to the Ruwa Local Board that the fourth defendant had paid the purchase price to the plaintiff. The plaintiff prayed for an order declaring an order confirming that both the agreement purporting to be a sale of stand No. 20642 Cranbrook, Ruwa to second defendant and the subsequent agreement

substituting fourth defendant were null and void plus costs of suit against the defendants one paying, the others to be absolved.

First and second defendants filed a joint plea raising, once again, the preliminary issue, that plaintiff's summons does not disclose a cause of action and should be dismissed for failure to comply with the rules. They did not except to the summons. On the merits they stated that second defendant properly acquired the stand from the plaintiff and disputed plaintiff's allegation that first defendant generated a fake agreement. They averred that, in any event, in 2005 first defendant was not working for the plaintiff and accordingly he had no access to plaintiff's records. They asserted that the agreement of substitution in terms of which fourth defendant substituted the second as the new purchaser was valid because second defendant had properly acquired the stand from the plaintiff in terms of a valid agreement of sale.

In his plea, fourth defendant did not raise issues with plaintiff's allegation that stand no 20642 had been ceded to him by second defendant and it was "... clear that the fate of his rights (was) dependent on the outcome of the action' The action referred to was the court matter between plaintiff and second defendant over the validity of the disputed agreement of sale. He said he "…would …. (be) guided by the order of the court." In the event that the Court found that second defendant's impugned agreement of sale was invalid he would claim compensation for the improvements he had made at the stand. He filed a counter claim to that effect. He prayed for the dismissal of plaintiff's claim and counter claimed a sum of $24 000.00. Fourth defendant later abandoned the counterclaim before evidence was led after notifying the court that in the event found against first and second defendants he would make a delictual claim against them.

Case HC 3123/17[Stand 20563 Cranbrook Park Ruwa]

Plaintiff's claimed as follows:

It is the owner of stand No. 20563 Cranbrook Park, Ruwa. The 2017 audit uncovered other fraudulent transactions involving Gabriel Mandombo, Faith Tachiona, Lackson Chishava and Yulita Mabvanure (first, fifth, sixth and seventh defendants respectively). It found a forged agreement of sale purporting that on or about the 5th September 2005 plaintiff had sold Stand No. 20563 Cranbrook Park, Ruwa to fifth defendant for ZWL$17 000 000.00. A document dated 9th October 2007 purported to be an assignment agreement passing rights

and obligations in the property from fifth to sixth defendant. Another assignment agreement dated 8 June 2010 purported to represent the passing of rights and obligations from sixth to seventh defendant. On the 25th January 2013 first defendant misrepresented to the Ruwa Local Board that seventh defendant had received the full purchase price for the stand whereupon the Local Board placed her on record as the owner. Plaintiff averred that the agreement of sale, the subsequent cessions and the letter by first defendant to the Ruwa Local Board were fraudulent. None of the defendants had paid the purchase price to plaintiff. The plaintiff prayed for an order confirming all transactions null and void together with costs of suit against the defendants jointly and severally, one paying, the others to be absolved.

In his plea, first defendant stated that the summons does not disclose a cause of action and should be dismissed with costs. He said he was not the administrator of the plaintiff in 2005 which is the year appearing on the agreement of sale and in 2010 being the year appearing on the cessionary agreements. He asserted that the cessionary agreements between fifth and sixth defendants and later between sixth and seventh defendants were valid. As proof of the validity of the cessionary agreements he pointed out that plaintiff had accepted and receipted cession fees. First defendant prayed for the dismissal of plaintiff's case with costs on the higher scale.

Fifth defendant could not be located to be served with summons. Sixth defendant was duly served with the summons and declaration on the 9th August 2017 but did not enter appearance to defend.

In her plea, seventh defendant asserted that the she acquired rights in stand no 20563 in terms of a tripartite agreement involving sixth defendant, plaintiff and her. She substituted sixth defendant as the purchaser of the stand with the knowledge and approval of the plaintiff. She said, on that basis, she had validly acquired rights in the stand. She put the plaintiff to the proof thereof of its averments disputing the cession of rights to her. She said she paid the purchase price at the plaintiff's offices. She said 1st defendant wrote a letter dated 28th January 2013 to the Ruwa Local Board confirming that she had paid the purchase price. She said she had paid 'top up' for the stand which plaintiff receipted. She kept the receipt. She averred, further, that whatever happened (went wrong) within plaintiff's business is none of her business. She prayed for the dismissal of plaintiff's claim with costs.

HC 3124/17[Stand No. 20797 Cranbrook Park, Ruwa]

Plaintiff averred that the audit uncovered other fraudulent sale and cessionary agreements involving its stand No. 20797 Cranbrook Park, Ruwa involving Gabriel Mandombo, Shylet Janyure and Stephen Zambu (first, second, and eighth defendants respectively). Plaintiff found a forged agreement of sale purporting that on or about the 3rd March 2004 the plaintiff sold Stand No. 20797 Cranbrook Park, Ruwa to second defenadant for $300 000.00. Plaintiff averred that there was evidence that the agreement of sale was comprised of documents sourced from other files and put together. Plaintiff pointed out certain features which proved that the agreement was false. These will be discussed in evidence. Also on file was another document dated 8th September 2011 purporting to be an agreement in terms of which eighth defendant substituted the second as the purchaser of stand no 20797. That too, according to the plaintiff was invalid. The invalidity and falsity will be discussed under evidence. Eighth defendant entered into another agreement with one Arizhibowa Douglas who substituted him as the purchaser and is currently in occupation. Arizhibowa Douglas did not participate in the trial because he reached settlement with the plaintiff. The plaintiff averred that it never sold the stand to second defendant and she never paid for it. Accordingly, no rights passed from it to second defendant.

In a joint plea, first and second defendants stated that the plaintiff's summons should be dismissed for failure to disclose a course of action. As at the date appearing on the agreement i.e in 2004 first defendant had no access to plaintiff's records since he was not yet employed by it. They averred that second defendant was the 'owner' of the stand prior to cession to eighth defendant. They averred that the agreement in terms of which eighth defendant succeeded the second as the purchaser of the stand was handled by its administrator and therefore valid and that is why plaintiff accepted cession fees. They prayed for the dismissal of plaintiff's claim with costs on the legal practitioner client scale.

Eighth defendant was duly served with the summons and declaration on the 26th April 2017 but did not defend.

THE TRIAL

Issues

I am being called upon, after hearing evidence to determine the following: -

(i) whether or not the various plaintiff's summons disclose causes of action

(ii) If so, whether or not all or some of plaintiff's claims have prescribed as alleged by the first and second defendants

(iii) If not whether or not plaintiff sold stand nos 20755, 20642, 20563 and 20797 to the defendants whose names appear on the impugned respective agreements of sale.

(iv) If not, whether the defences of estoppel are available to the fourth and seventh defendants

Counsel opted to make opening statements at the commencement of the trial.

Mr *Mudziwepasi* said in all four cases, the plaintiffs will seek to prove that the initial sale agreements were fake and consequently the subsequent agreements of substitution were null void. He unpacked the reliefs sought by the plaintiff.

Mr *Nyamucherera*, representing first and second defendants, said that his clients would refute plaintiff's allegations. His clients' joint position was that all the agreements were genuine and second defendant had lawfully acquired stand nos 20755, 20642 and 20797 from the plaintiff which she validly resold to third parties. He submitted that first and second defendants would seek to prove that the plaintiff's claims had prescribed. The period of prescription commenced to run from the dates on either the agreements of sale or substitution. Mr *Nyamucherera* said, in any event, the plaintiff was estopped from denying the validity of the agreements The estoppel arose from the fact that the agreements of substitution were executed at plaintiff's offices. The plaintiff was estopped from disowning its own processes. The court asked Mr *Nyamucherera* whether he would not encounter difficulties in representing both first defendant and second defendant because first defendant is a former employee of the plaintiff who should have acted in the interests of his principal. In the event that it became clear that first defendant committed fraud it was not going to be possible for second defendant to cross-examine him to dissociate herself from the fraud. That was not achievable with the same lawyer representing both. Mr *Nyamucherera* replied that he was not compromised. Accordingly, the trial proceeded with Mr *Nyamucherera* representing first and second defendants. Counsel did not persist with the 'preliminary objection' to the effect that the various plaintiff's summonses do not disclose causes of action. Clearly the plea lacked merit. In any event a litigant may not allege that a summons does not disclose a cause of action and plead on the merits without excepting to it. The fact that the first and second

defendants pleaded on the merits is evidence that they had full appreciation of the case against them. See *Civil Practice of the High Courts of South Africa,* 5 ed Juta,By Herbstein & van Winsen at p 630:

> "An exception is a pleading in which a party states his objection to the contents of a pleading of the opposite party on the grounds that the contents are vague and embarrassing or lack averments which are necessary to sustain the specific cause of action or specific defence relied upon.
> Taking an exception is a procedure which is interposed before the delivery of a plea on the merits by a defendant or before the delivery of a replication or rejoinder of issue a plaintiff. It is designed to dispose of the pleadings which are so vague and embarrassing that an intelligible cause of action or defence cannot be ascertained or to determine such issues between the parties as can be adjudicated upon without the leading of evidence.
> The aim of the exception procedure is thus to avoid the leading of unnecessary evidence and to dispose of a case in whole and in part in an expeditious and cost effective manner."

It follows that an exception should not be pleaded as a preliminary issue. It is not an issue which should await trial. Order 21 of the Zimbabwe High Court Rules, 1971 sets out the procedure after filing an exception. Ideally, the excipient must set the exception down by agreement with the other party within ten days (r 138 (a)), failure of which either party may unilaterally do so within a further period of four days. (r 138 (b)).

Mr *Chihuta* who represented the fourth defendant stated that his client had been caught up in a fight between plaintiff and second defendant. In the event that the dispute over the disputed sale of stand 20642 was resolved in favour of second defendant his client would naturally benefit and would pray for costs against the plaintiff. In the event that the court found against second defendant his client had counter claimed against them for reimbursement of the purchase price and compensation for the value of the developments. Mr Chihuta abandoned the counterclaim before the leading of evidence.

Mr *Masaiti* who represented the seventh defendant adopted the fourth defendant's submissions. He said seventh defendant is in possession of stand No. 20563 which was sold to the fifth defendant. He submitted that fifth defendant duly acquired rights in the stand from the plaintiff before ceding her rights to the sixth defendant, who in turn ceded same to seventh defendant.

PLAINTIFF'S CASE

Plaintiff's first witness

What follows is an account of **Collins Chinzou** who was sworn in to testify as plaintiff's first witness. He is plaintiff's managing director. The plaintiff's co-business is buying land, servicing it and selling stands. He holds a degree in Town and Country Planning and a postgraduate diploma in Development Planning and City Planning. He is a member of the Royal Planning Institute.

Plaintiff discovered that first defendant prepared agreements of sale purporting to have sold plaintiff's stands located in Granbrooke Park Ruwa to his wife, second defendant. He said plaintiff never entered into an agreement of sale with first defendant's wife for the sale of the stands and had not received any payment from her for the stands. He identified and produced as plaintiff's exh 1 a bundle of documents being Deed of transfer NO. 2398/96 with attachments namely: -

- a schedule of property transferred
- a subdivision permit dated 27/11/2002
- a list of 181 stands created in terms of the permit.

The witness said the plaintiff never sold *stand no 20755* to the second defendant. He produced a bundle of documents as plaintiff's exh 2 consisting of: -

- an agreement of sale with second defendant as the purchaser
- an addendum in terms of which the third defendant was substituted for second defendant as the new purchaser
- a receipt No. 024 for the sum of $850 000 purportedly issued by plaintiff to second defendant after she paid for the stand.

  The witness said plaintiff was disputing all the documents in exhibit 2. To demonstrate

that the sale agreement dated 9 October 2005 was false he said the purchase price of $800 000.00 was inconsistent with the correct values for the year. According to his recollection stands were selling at $2 500 per square metre and the correct value was $300 000. The year '2005' on the signature page of the agreement had been altered to read 2002 by the cancellation of "5" and substitution therewith "2". He believed that the signature page had been obtained from the plaintiff's other files since the plaintiff kept duplicate originals of all agreements signed. He identified the handwriting on the agreement as that of the first

defendant. He said the anomalies were discovered after an audit carried out to check whether all agreements of sale were more and whether the stands sold had been fully paid for.

The witness said that first defendant had also created another agreement of sale purporting that plaintiff had sold *stand 20642* to the second defendant. According to him no such sale had taken place. He produced plaintiff's exh 3 the agreement being a bundle consisting of

- The deed of transfer 2938/97 and subdivision permit
- The disputed agreement of sale for stand no 20642 dated 5 September 2005
- Addendum dated 10 September 2012 in terms of which fourth defendant substituted second defendant as the purchaser for the stand. (In this respect the court noted that the acknowledgement signed by fourth defendant was back dated 10 Feb 2012)
- Plaintiff's letter dated 18 May 2016 asking for proof of purchase
- Extract from receipt book showing a forged receipt in the name of second defendant.

According to the witness all the documents, except plaintiff's title deed, were not genuine. He pointed out that the year, 2005, on the agreement was an alteration of the year 2002 by the deletion of the typed "5" and substitution there with a handwritten "2" thereby backdating it. He identified first defendant's handwriting on the forged agreement of sale purporting that the stand plaintiff had sold the stand to his wife, second defendant for $17 000 000.

The witness testified that first defendant had forged another transaction with respect to *Stand No. 20563.*He produced plaintiffs exhibit 4 consisting of the following: -

- The disputed agreement of sale dated 5 September 2005 with fifth defendant as the purchaser
- an addendum dated 9 October 2007 in terms of which sixth defendant was substituted as the new purchaser.
- another acknowledgment dated 8 June 2010 (the court noted the year had been changed from 2011 to 2010) in terms of which seven defendant substituted sixth defendant as yet another new purchaser.
- another addendum dated 8 June 2011(altered from 2010) being the disputed cessionary agreement between sixth and seventh defendants. The acknowledgment

signed by the seventh defendant as part of the agreement of substitution was backdated 8 June 2010)

He said in his opinion, a copy of the signature page of an agreement containing his signature had been shopped elsewhere and attached to the fake agreement and in any event all the documents were invalid. He said plaintiff never dealt with all the defendants.

The witness testified as follows with respect to *stand No. 20797*. He produced the plaintiff's bundle as Exhibit 5 containing the following: -

- The disputed agreement of sale with second defendant as the purchaser.
- An Addendum dated 8 September 2011 in terms of which eighth defendant was substituted as the purchaser.
- A receipt Number 1424 for $300 000 dated 3 August 2004 purporting to be the receipt issued by plaintiff to second defendant
- the report by L T Nhari, a Questioned Document Examiner and
- Confirmation by Econet that cell No. 0772 599 757 belonged to first defendant and was first used/registered on 21 April 2010.

He testified that the forged agreement was on plaintiff's typed template but had been completed by the first defendant and in all probability the signature page (page 8 thereof) had been shopped from elsewhere and affixed to a forged agreement.

Under cross examination by Mr *Nyamuchera* representing first and second defendants the witness maintained that the agreement for stand No. 20775 was forged. He was unable to explain how a signature which he admitted to be his was appearing on the agreement he claimed to be forged. He was however steadfast that he never signed an agreement of sale with second defendant as the purchaser. He said before first defendant started working for the plaintiff Mrs Chinzou (the witness' wife) used to hire him as a casual worker to assist in preparing agreements. He conceded that the plaintiff was placed under judicial management in 2017. A list of beneficiaries presented to the judicial manager contained second defendant's name against stands Nos. 20797 and 20625 and there was no name against stand 20755.

He was questioned how the substitution agreement for stand no 20755 could have been processed on the strength of a photocopy of an agreement of sale and why plaintiff accepted cession fee and why the fee was receipted by plaintiff's employee and explained

that first defendant was in control and Nicola, who wrote the receipt worked under the instruction of first defendant.

Still under cross-examination by Mr *Nyamucherera* he maintained that first defendant filled in the details on the disputed agreement of sale for stand No. 20642. He maintained his stance that Nicola Jack has issued a receipt for the cession at the behest of the first defendant. Asked why innocent parties who were misled by plaintiff's employee, first defendant, should be prejudiced, he replied that the third parties were not innocent.

With regards to stand No. 20563 (HC 3123/17) he conceded that the agreement was typed. He however maintained that first defendant had prepared it since he was plaintiff's administrator on the time the fraud was discovered.

With regards to stand 20797 the witness conceded that the plaintiff had withdrawn its claim against Arizhibowa Douglas. He did not know why the decision had been made. (It turned out later in evidence that the decision had been made by Broadwell Chinzou).

Under cross-examination by Mr *Chihuta,* for the fourth defendant with regards to stand No. 20642 witness conceded that the signature on the agreement of sale was his and that the agreement of substitution was on the official letterhead. He also confirmed that fourth defendant paid cession fee and that in the circumstances a 3rd party would have no reason to doubt that the substitution was proper. He also confirmed that fourth defendant had built a house at the strand. He confirmed that he has no evidence of connivance between first, second and fourth defendants.

Cross examined by Mr *Masaiti* for the seventh defendant the witness confirmed that he had seen seventh defendant at the plaintiff's offices accompanying a relative who had bought a stand. Mr *Masaiti* put to the witness certain remarks contained in a judgment of a magistrate who tried a related criminal matter that plaintiff was unjustifiably backtracking on the agreement of sale. He conceded that the magistrate had made the observations. He conceded that an innocent purchaser could not have known that there was anything amiss. He also conceded that what resembled the plaintiff's letterhead was used in plaintiff's office by first defendant, to process seventh defendant's substitution agreement at the time that first defendant was an employee of the plaintiff. The witness also conceded that seventh defendant paid a cession fee which was receipted by the plaintiff. The witness also conceded that three persons were involved in the cession i.e. one employee showed seventh defendant the stand,

another drafted the cession agreement and yet another wrote the receipt. He conceded that the signature on the original agreement was his but he could not say how it got there. He conceded that the signature page bore a signature attributed to fifth defendant but failed to explain how the signature was on the same page with his if he did not sign the agreement. He conceded that seventh defendant paid a 'top up' in response to a general letter addressed to all purchasers of stands.

The witness conceded that first defendant prepared and signed all agreements of substitution and was virtually in control of all activities of the plaintiff.

Brief comment

It was clear from Collins Chinzou's evidence that he entrusted the plaintiff's property business in the administrator. His faith in the administrator reached the level of naivety. It is not surprising that at some stage the plaintiff had to be placed under judicial management after suffering losses. While giving evidence Collins Chinzou appeared largely disorientated and of doubtful fitness health wise.

Plaintiff's second witness

The plaintiff called **Broadwell Chinzou** as its second witness.

He said his qualifications are a degree in Accounting Science and membership of the Institute of Chartered Accountants and Botswana Institute of Chartered Accountants.

He worked for the plaintiff as its administrator. His duties as administrator are to do customer reconciliations, drafting agreements of sale, liaising with external auditors, attending to customer queries and any other duties as may be assigned. He turned out to be plaintiff's key witness because he was personally involved in the audit of all stands that had been sold to determine validity of all the various documents pertaining to the sales. Wherever he was not satisfied he wrote letters inviting the persons in occupation to bring proof of purchase and payment of the purchase price. The audit unearthed the transactions which the plaintiff now wants confirmed as invalid by this court.

His evidence with regards to stand 20755 was as follows: -

First defendant started working for the plaintiff as administrator on 1 April 2006. He went through the plaintiff's bunch of documents which were produced together as exh 2. He

identified the agreement of sale dated 9 October 2002 as the one which he found on file with respect to the sale of stand No. 20755. On the face of it, it was an agreement between the plaintiff and second defendant. He however said it was a counterfeit and to demonstrate that he made the following observations.

- The agreement of sale bore first defendant's handwriting and yet it was dated in the year 2002. The presence of the first defendant's handwriting was strange because he (first defendant) had not started working for the complainant in the year 2002.
- The signature at p 7 of the agreement ought to have the signature of Mrs Chinzou who was the then director, shareholder and signatory responsible for preparing all agreements. In all probabilities the agreement dated was drawn well after 2002 and backdated. The date had been changed from 2005 (typed) to 2002 (in pen).
- . There was no receipt on file. All receipts are written in triplicate i.e. customer copy, file copy and a fast copy which remained in the receipt book He found a fast copy No. 024 dated 9 October 2002 for $800 000.00. A handwriting expert examined the fast copy and concluded that the first defendant had superimposed his wife's (second defendant's) name and stand No. 20755 on old cancelled receipt. The expert identified the handwriting as that of the first defendant. First defendant was not yet working for this plaintiff in 2002 and his handwriting was not expected to be on the receipt dated 9 October 2002.
- The stand is occupied by third defendant who upon being interviewed claimed to have bought the stand from the second defendant. Third defendant produced an agreement of substitution on what appeared to be plaintiff's letterhead. The letterhead was forged. It bore cell No 0772 599 757 which belonged to first defendant and not that of the plaintiff. The landlines on the agreement belonged to the plaintiff but plaintiff had long stopped using them.
- The standard procedure for cessions required the original agreement of sale, a separate agreement of the parties to the resale, verification by the plaintiff whether the cessionary was indeed the holder of rights and interest in the stand and verified proof of the purchase price. In the case of stand 20755 the cession was done without the original agreement of sale to back it.

- The payment by third defendant of cession fees to the plaintiff was a design by first defendant to launder a fraudulent transaction. First defendant had approved the cession in his capacity as administrator. The receipt for the cession fees was issued by the receptionist on the instruction of first defendant in his capacity as administrator.

His evidence with regards to stand 20642 was as follows: -

The agreement of sale dated 5 September 2005 produced as part of exh 3 was ostensibly between second defendant and the plaintiff but it was fake.

- He said the agreement was backdated and a counterfeit. The cell No. 0734 359 263 appearing on the agreement had only been acquired by Mr Chinzou (1st witness) in the year 2014. During the years 2005 and 2006 Telecel numbers were prefixed by the code 023 and not 073. In 2005 Mr Chinzou was using a Net one line. He pointed out certain cancellations on page 2 of the agreement signed for by Mrs Chinzou. The purchase price was changed by the cancellation of $15 000 000 and substitution therewith $17 000 000 in paras 3 and 3.1. The words 'N/A' were inscribed in ink in paras 3.2, 3.3 and 3.4. It was too much of a coincidence that page 2 of the agreement for stand No. 20563 purportedly sold to fifth defendant had identical alterations in the same handwriting. The agreements found in the respective files for stand No. 20642 and 20503 were photocopies. He arrived at the conclusion that those pages had been photocopied from the same source document. Another striking similarity between the agreements for stand No. 20642 and that for stand 20503 was that both agreements do not have typed clauses 15, 16 and 17 which are part of the plaintiff's template. Actually under clause 15 there is just the sub-heading 'WAIVER' and nothing follows. The signature page is not numbered, again contrary to the template. The font on the first page is different from the rest of the agreement which means the front page was prepared separately and copies from other sources affixed to it. He said the agreement did not exist in the plaintiff's records. He pointed out the agreement which plaintiff found on file was different from the one which first and second defendants tendered with their bundle of documents. [The court recalled that first and second defendants had, in their joint plea asserted that the disputed agreement found on file was genuine. At pre-trial conference stage they came up with a wholly new typed agreement structured differently. Actually they formally admitted that the new

agreement had not been pleaded] The witness said the agreement which was now being produced by first and second defendant was an afterthought.

- He said that he, on behalf of plaintiff, during the audit, asked second defendant to produce the original agreement of sale and a receipt for the purchase price. She brought receipt No. 2101 dated 8 July 2004 for $17 000 000 which appeared to have been prepared and signed by Henry, plaintiff's employee. The receipt was submitted to forensic examination and some anomalies were uncovered. The receipt was dated in 2004 yet the agreement was dated a year later in 2005. The receipt No. 2101 had been used several times fraudulently. The *bona fide* receipt No. was issued to Mary Mupinda who bought stand No. 20704. The receipt had also been fraudulently used in another transaction involving Rickwood Investments. [Rickwood settled the matter after Rickwood agreed to pay the purchase price]. The receipt No. had therefore been used for 3 different people for 3 different values. In the case of second defendant, the receipt was dated 8 July 2004 for 17 million. With respect to Rickwood it was dated 21 April 2005 and the figure is $2 million. The genuine receipt was dated 26 April 2005 issued to Mary Mupinda for 4 million. [Figures changing due to the hyperinflation and slashing of zeros by the reserve bank.]
- Second defendant had entered in an agreement with fourth defendant in terms of which the latter substituted her as the purchaser. The witness said the agreement had been executed in order to launder the stand. When first defendant prepared the agreement of substitution he knew that second defendant did not have rights to cede to fourth defendant. The phone number on the substitution agreement is 0773 597 757 which belongs to first defendant as confirmed by Econet in an affidavit. The email address palchinassociates2@gmail.com does not belong to the plaintiff and plaintiff has no access to it.

His evidence with regards to stand 20563 was as follows: -

The agreement of sale found on file was a counterfeit. He gave the reasons stated below for the assertion.

The agreement was inconsistent with plaintiff's standard template.

The mobile telephone no. 073435263 was acquired by Mr Chinzou in 2014 and there was no way it could have been used in 2005. The prefix for Telecel numbers in 2005 was 023

and not 073. The agreement was therefore not created in 2002 or 2005. It would only have been created after Mr Chinzou's cell number was known i.e. after 2014. Page 2 is a replica of page 2 of the agreement for 20642 with the cancellations and corrections identical signed for by Mrs Chinzou. Clauses 15, 16 and 17 are also missing. The last page had a different font from the other pages of the agreement. The page was pulled out of an agreement prepared by an Estate Agent known as Metro Properties (which was doing business with the plaintiff) and affixed to a forged agreement. He found out that the page was pulled from an agreement by an estate agent, the two properties with respect to an agreement with Cornelius Moyo who bought stand 20629 through the estate agent. There was no record of any payment by fifth respondent. There were agreements in terms of which sixth defendant substituted fifth defendant and subsequently sixth defendant had been substituted by the seventh defendant. The agreement of substitution between fifth defendant to sixth defendant is dated October 2007 and was recorded on an imitation of plaintiff's letterhead bearing cell no number 0772 599 757 which belonged to first defendant. He first used the cell number as new on 21 April 2010. In 2007 Mrs Chinzou was alive and she was the administrator. There was no reason the cessionary agreement would bear first defendant's cell number which was not existing anyway in 2007. He said in all probabilities the agreement was prepared later than 2007 and backdated. He said the sixth defendant never paid cession fees.

He said seventh defendant had claimed in earlier proceedings at the magistrate court that she had bought the stand from the plaintiff in the year 2011 yet the cession to her is dated 8 June 2010. The transcript of the proceedings in the Magistrates Court was produced by consent and the date 8 June 2010 appears at pa 4. The witness testified that seventh defendant had conceded the discrepancy under cross-examination during the criminal trial and that appears at page 17 of the Criminal trial record.

He said during a cession the parties were required to bring proof of their own agreement for the resale, the original agreement of sale and proof of payment of the purchase price for verification. First defendant had prepared and signed the agreement of substitution without all that in order to launder the stand. He said there was proof that seventh defendant had never met sixth defendant to conclude any agreement of substitution and that appears at p 17 of the Criminal record of proceedings. No one, including seventh defendant, had seen the had signed the sixth defendant signing the agreement of substitution. He said the plaintiff

does not handle resales of stands. He testified that stand 20563 had been sold to one Pascal Bambe who defaulted payment leading to its repossession in 2014. There is no way the same stand could have been sold and ceded to seventh defendant in 2010 or 2011.

His evidence with regards to stand 20797 was as follows: -

The witness said all the transactions found on file were invalid. He took the court through the various documents in the bunch produced as plaintiff's exh 7.

- The agreement of sale had the following anomalies. First defendant's cell number 0912 599 757 was inserted as the purchaser's contact number. Clauses (a) to (e) on p 1 were repeated on p 2. The agreement was not on the plaintiff's standard template. Clauses 16 and 17 were repeated. The agreement had p 7 repeated. The last page had the date changed from 2005 to 2004. What it means is that the page was pulled from a 2005 agreement and backdated. If the agreement was prepared in 2004 it could not possibly bear a future date. The handwriting on the agreement is that of the first defendant. This was confirmed by the questioned document examiner. In 2004 Mrs Chinzou was still alive and an administrator. She therefore should have signed the agreement of sale but her signature is missing. While the agreement had the year changed from 2005 to 2004, the last sentence on p 2 says that payments were supposed to commence in 2003, which is a year earlier before the agreement was dated. In any event the agreement purported to be a cash sale and there would have been no need for instalments. Page 2 had reference to instalments. It means the page was shopped from an instalment sale agreement and affixed. The witness opined that in all probabilities somebody put documents together from various sources but faked to synchronize the dates.
- There was a receipt for the stand in the name of the second defendant dated 3 March 2004 in the sum of $300 000 purportedly receipted by Sarah. The questioned document examiner identified first defendant as the person who wrote second defendant's name, the stand no. 20797 and the amount.
- There is an agreement of substitution in favour of eight defendant dated 8 September 2011. He said that agreement too is a counterfeit. The letter head on which the agreement of substitution is recorded bears first defendant's cell number 0772 599 757 which had also appeared as second defendant's number on the agreements of sale.

- The witness had been hoodwinked to approve the substitution of Arishbhowa Douglas as the purchaser of the stand in question before discovering the fraud. The plaintiff and Arishbhowa have resolved the matter between them.

The witness concluded his evidence in chief by stating that first defendant had worked for the plaintiff in different capacities from 2004 to February 2016. During his employment he became administrator after the death of Mrs Chinzou.

Cross-examination of second witness

The witness was cross-examined by Mr *Nyamucherera* for first and second defendants at length over a period of 3 days. He remained unshaken. The substance of his testimony remained intact. The anomalies that he had pointed became even more glaring.

The witness was also cross examination by Mr *Chihuta,* for the fourth defendant. It will be recalled the fourth defendant's position was that he acquired stand 20642 from second defendant. The witness conceded that first defendant wrote a letter to the Ruwa Local Board purporting to act for the plaintiff confirming that fourth defendant had paid the full purchase price. He conceded that fourth defendant could have equally fallen victim as the plaintiff. The witness conceded that during his tenure, first defendant had assumed the *de facto* powers of a director of the plaintiff since he was administering all business of the plaintiff from drafting agreements, handling clients, handling clients' queries, selling stands, reconciling customer records and permit and authenticating resales, preparing cessions agreements with respect to resale. He also conceded fourth defendant paid cession and top up fees for the stand. He conceded that, on the face of it, the counterfeit purchase agreement in second defendant's name looked genuine and bore the signature of plaintiff's director even if shopped elsewhere. He also conceded that anyone in the position of the fourth defendant could have been misled by first defendant's conduct. He conceded that there was nothing to alert an innocent purchaser to the anomalies he had pointed out. He also conceded that plaintiff had failed to place sufficient safeguards to work as checks and balances on the way first defendant was carrying out his duties. He conceded that the plaintiff left itself wide open to abuse coz it entrusted too much to first defendant. The witness conceded that "plaintiff was exposed to high level of risk." The witness said that the fraudulent scheme was conceived by first defendant who had manipulated the lack of checks and balances.

Under cross examination by *Mr Masaiti* who represented seventh defendant the witness conceded that first defendant had so much power that he was the heartbeat of the plaintiff. He conceded that seventh defendant paid cessions fee whereupon the stand is registered under her name at the Ruwa Local Board. The first defendant had written a letter to the Ruwa Local Board falsely confirming that seventh defendant had paid the purchase price. He however maintained that seventh defendant had not paid the purchase price for the stand. She did not have a receipt.

Plaintiff's third witness

The third and last witness to testify for the plaintiff was **Leonard Tendai Nhari**, a Forensic expert. He said he is a holder of degrees of BSc in Physiology and Msc in Bio Chemistry with special emphasis on forensic analysis. He is a former Government Chief Forensic Scientist. He started practicing in 1980. He is a former Forensic Consultant for the Commonwealth. Technical Operations in Namibia from 1990 to 1993. He was a member of the Forensic Science Society of the UK and he has practiced as consultant since 1999. He outlined his expertise as Forensic Science investigation including examination of questioned documents, handwriting and signature comparisons, verification and analysis of print script and investigation of fraud cases.

He identified the report he prepared with respect to the questioned documents. He demonstrated why in his opinion receipt No. 024 in the sum of $800 000 for stand 20755 was fake. He said it was a carbon copy which had physical evidence of cancellation marks and the handwriting on it was consistent with the handwriting on the agreement for stand 20755. He identified first defendant as the author of both documents. He confirmed the receipt for stand No. 20797 as counterfeit as well. The witness was subjected to cross examination but has profession findings could not be discredited.

Application for absolution from the instance

First, second, fourth and seventh defendants applied for absolution from the instance. Mr *Nyamucherera* who represented first and second defendants had clear difficulties in motivating the application on behalf of his clients in the face of the evidence of Broadwell Chinzou and the Questioned Document Examiner. He was clearly compromised. The weight of the evidence adduced on behalf of the plaintiff pointed to first defendant as the main architect of the fraudulent transactions. His foot prints had been traced in most of the

agreements of sale, cessionary agreements, receipts and interaction with the various cedents. At the same time, first defendant had not disclosed to his principal (the plaintiff) that second defendant was his wife. First defendant had thus failed to disclose his interest in second defendant's dealings with the plaintiff. For all intends at all times when he put his wife's name on sale agreements and agreements of substitution he was essentially transacting with himself. He was representing both the seller and the purchaser at the same time, his wife and he having come from the same house and bed to transact in plaintiff's office. In any event there is no way he would have validly created a binding agreement. A valid contract comes into existence when the minds of two or more persons meet with a view of creating binding obligations. See The law of contract in Sought Africa 3rd ed by RH Christe at p 7 the heading 'Proof of agreement'

> "In order to decide whether a contract exists, one looks first for the agreement by consent of two or more parties. A person cannot contract by himself alone…."

Although there are suggestions that can happen it would have to be an exceptional cases where a person acts in different capacities with the necessary authority. For the purposes of this judgment it will not be necessary to explore that complex area of contract law. This was a contract of sale. See p 60 of Business Law in Zimbabwe by RH Christie. At page 142. The author explains the formation of a contract of sale is very simple terms

> "The general requirements for the formation of a contract of sale are no different from those applicable to any other contract, but for any contract to be identifiable as a sale there must, as noted above, be an agreement to exchange property for a price …"

At p 141 a sale is defined as:

> "a contract in which one promises to deliver a thing to another, who on his part promises to pay a certain price."

A person may therefore not exchange with self or pay a price to self. Put differently a person may not validly enter into a contract which entails exchange of values with oneself.

The first defendant also had an obligation in a normal transaction to disclose his personal interest. Our common law makes it an offence when an agent unlawfully conceals from a principal his interest in a transaction see s 173 of the Criminal Law Codification and Reform Act [*Chapter 9:23*] or fails to disclose the full nature of a transaction to his principal (see s 172 of the Criminal Law Codification and Reform Act. It is inconceivable that one

would expect an unlawful act committed against another to create obligations between the offender and the victim.

A contract induced through misrepresentation cannot be treated as binding. One can misrepresent through non-disclosure and the innocent party can refuse to be bound by that agreement. A sale should be *bona fide*. See *The Law of Contract in South Africa* 3 ed RH Christe at p 7. In this case first and second defendants held themselves out to the plaintiff and its workers as strangers in order to conceal first defendant's personal interest in the transactions he was handling. There is no way the plaintiff would have let first defendant handle transactions on its behalf in which he had a personal interest.

I concluded that the evidence presented by the plaintiff was such that if not challenged could lead me to find for the plaintiff. See *Gascoyne* v *Pant & Hunter* 1917 TPD 170 *Tekere* v *Sibanda & Anor* HB 90/18.

I failed to appreciate the argument that there was no cause of action for a declarator or that there was no relief sought against first defendant. First defendant's actions were being impugned and the order sought was to confirm the invalidity of his actions when he purported to conclude agreements on behalf of the plaintiff.

First and second defendants put forward the defence of prescription as points *in limine* in their joint plea. Prescription is a special plea and it was up to the defendant who raised it to establish same even in circumstances where it was not properly pleaded. On the merits, the second defendant had the burden to prove that she had paid the purchase price. See RH Christie at p 481

> "when it is disputed whether payment has been made or not, the onus is on the debtor to prove that he has paid the debt in question. If he fails to satisfy the court that there is a sufficiently strong balance of probabilities in his favour, judgment must be given against him. There can be no question of absolution from the instance."

Further down on the same page

> "A forged receipt naturally has no probative value."

For the reasons stated above I dismissed the application by first and second defendants.

Mr *Chihuta* also applied for absolution from the instance on behalf of fourth defendant. He submitted that fourth defendant was an innocent purchaser. At the close of the plaintiff's case he had not presented evidence of his *bona fides*. There was no evidence that

he had paid any price for the stand. There was no evidence of any agreement between him and second defendant. The questions put on behalf of the fourth defendant in cross-examination raised issues of estoppel. Estoppel is in substance a defence by way of confession and avoidance. The fourth defendant did not plead estoppel. He also did not incorporate its essentials in his plea filed of record. Even if he had done so, the *onus* or burden of proof would still be on him and he could only discharge such burden in the defence case. Burden of proof is defined as the duty which a party has of satisfying the court that he is entitled to succeed in his claim or defence whatever the case may be. The incidence of that burden decides which party will fail on a given issue if after hearing the evidence the court is left in doubt. It is also called the risk of non-persuasion. The burden or onus in civil cases is determined by the pleadings. See *The South African Law of Evidence*, LH Hoffman and DT Zeffert at pp 497 & 498. There is no way fourth defendant would discharge such a burden without giving evidence. Accordingly, I also dismissed fourth defendant's application.

Mr *Masaiti* made a similar application for seventh defendant submitting that she was an innocent purchaser who had acquired rights by way of cession from sixth defendant. It was however common cause that she never met sixth defendant. She never had an agreement with him. She never paid money any money to him. Seventh defendant pleaded the essentials of estoppel albeit inelegantly because she did so as a self-actor. She also could not discharge the burden on her without giving evidence.

THE DEFENDANTS' CASES

Gabriel Mandombo said he was plaintiff's administrator from 2009 to 2016.

His testimony with regards stand 20755 was that he helped his wife, second defendant by filling in her personal details and price, size and number of the stand in the blank spaces of the template prepared by Mr Chinzou. he was helping his wife (second defendant). He said he purchased more than 30 stands from the plaintiff and this was one of them which he bought for his wife. He said there was nothing amiss about his handwriting on the agreement of sale since agreement of sale templates were completed by purchasers. He produced his own agreement of sale to demonstrate that. He said the price of $800 000 was within the range of the prices of the stands and cited examples. He said nothing turned on the cancellations on the agreement. He said all the four impugned agreements of sale were dated prior to his recruitment by plaintiff and at that time he had no access to plaintiff's files. However, all

records of payments for the stands were in the company records and computer system. He accepted that he wrote receipt No. 024 dated 9 October 2002. He said the receipt had originally been written in 2002 but he did the overwriting in the year 2010. Like all other receipts he wrote which were identified by the Forensic Scientist he extracted the information from the printout/reconciliation in the computer. He said when he joined plaintiff all the stands had been sold. What was left was stand audit and matching with the owners. He accepted that he processed and approved the agreement substituting his wife with third defendant as the new purchaser of stand 20755. Nicola Jack receipted the cession fee.

With regards to stand Nos. 20642 and 20563 first defendant said he does not know why he is being accused of preparing the agreements of sale. He had no comments to make on the anomalies. He admitted processing and approving the agreement in terms of which fourth defendant substituted his wife as the purchaser cession of Stand No. 20642. He produced exhibit 13 being a typed agreement of sale in fifth defendant's name, an agreement of substitution between fifth and sixth defendants and another agreement in terms of which seventh defendant substituted the sixth. The court noted that the agreement of sale was different from the one found on file in that its page 2 was typed and had no corrections. First defendant conceded that his copy of the agreement of sale for stand no 20642 was typed throughout was not similar to the one found on plaintiff's file. He was unable to explain satisfactorily why copies of the same agreement would differ. He was unable to explain why he failed to dispute the agreement submitted with plaintiff's summons which was dissimilar to the one he produced at pre-trial conference stage. His agreement also bore a different phone number. He said his copy of the agreement of sale had to be changed when his personal details changed. The court finds the witness' explanation preposterous. An agreement is not rewritten simply because a cell number has changed. The changes are effected in the file and not on the agreement itself. It did not contain the date on which fifth defendant signed. He said payments for the stands were appearing in the plaintiff's system. He also conceded that the agreements for stand 20642 and 20563 had striking but unusual similarities like the same cancellations and corrections on p 2 purchase price and same missing clauses. He was unable to explain the coincidence. He was unable to explain why he did not disclose to plaintiff his personal interest in the purported purchases of stand by his wife or the cessions.

He said he had not prepared the substitution agreement dated 2007 for stand no 20563 wherein sixth defendant substituted fifth defendant. He processed the cession from sixth to seventh defendant. The court noted that the agreement of substitution between fifth and sixth defendants had not signed by sixth defendant. First defendant said he had sold and received the purchase price on behalf of sixth defendant.

With regards to Stand No. 20797 first defendant's testimony was as follows:

He said his wife validly ceded her rights to eight defendants on 8 September 2011. He said the agreement of substitution which he approved was above board and another employee was involved by writing the receipt. He accepted that the cell number on the agreement of substitution is his. He started working for the plaintiff in 2009. He said all cession done before he joined the plaintiff as an employee had his number. He said he inherited the number 091 2 599 757 from Mr Chinzou who had been using it before 2009. He however did not controvert the evidence from Econet that the line was first used as new on 21 April 2010 and that was the first registered user of that line He confirmed that he had written receipt No. 1424 for the purchase price of $300 000. He said he wrote the receipt after getting information from the computer. He said his wife's receipt was genuine notwithstanding the receipt for Mary Mupinda which he was seeing for the first time.

Brief comment

Second defendant testified. *With regards stand no. 20755* her evidence was that she bought stand from the plaintiff on the 9th October 2002. She said she paid cash whereupon plaintiff issued receipt No 024 to her. She said she later sold her rights to third defendant but she and third defendant did not attend at plaintiff offices together. They signed on different dates. She confirmed that her husband prepared the agreement of substitution. Under cross examination she said the agreement for stand no 20755 was brought for her by her husband already completed thereby contradicting her husband. She said she did not have the agreement of sale and receipt for stand no 20755 because she sold the stands [implying that she gave the documents to the substituted purchaser.] She claimed that she and her husband acquired numerous stands which they sold.

With regards Stand 20797 she said she bought the stand from plaintiff and later sold it to eighth defendant

With regards Stand No. 20642 her evidence was that she bought the stand from plaintiff. She explained that she paid for this stand in 2004 but she was only invited to sign the agreement a year later and that explained why the receipt predated the agreement of sale. She said she signed two different agreements for this stand. She said they were similar. Her attention was however drawn to clause 3.4 which had a different meaning, she could not explain why she failed to dispute the impugned copy found on file. [If anything in her joint plea with her husband she had asserted that the plaintiff's copy which she now disputed was genuine]. She was clearly shaken under cross examination and she could not explain any of the unsatisfactorily features. She could not explain how Mrs Chinzou's cell number had been inserted as purchasers (her number) on the agreement of sale for stand 20642. It was understandable because first defendant had brought the agreements to her already completed. Cross-examined by Mr *Chihuta* for fourth defendant she confirmed that she never showed fourth defendant the typed a copy of agreement which she had claimed was given to her. She did not dispute that first defendant introduced her to fourth defendant not as his wife but as a teacher from Kwekwe. She said she ceded her rights to fourth defendant at plaintiff's premises.

In re-examination the witness said she had not seen the original of certain of the agreements. She said she was not present when the agreements were prepared.

First and second defendants then closed their case.

Fourth defendant testified. He said he is a builder. He said he met first defendant in Ruwa servicing some stands. He asked first defendant whether he or his company still had stands for sale. First defendant said all stands had been sold but there were people who had lost employment who were selling stands. They agreed that first defendant advise should a stand become available. Later, first defendant told the witness a teacher from Kwekwe was selling a stand for $4000. The witness went to the plaintiff's offices where he requested to be directed to first defendant's office. In the office he met second defendant who was introduced as the teacher from Kwekwe. He was shown an agreement of sale similar to the forged agreement and dissimilar to the typed one produced jointly in court by first and second defendants. He paid cession fee and top up. First defendant gave him a letter to enable him to pay endowment fee at the Ruwa Local Board. He paid endowment fee whereupon he built a house valued at USD40 000. He said he never suspected that there was anything wrong

because first defendant created the impression that second defendant was a stranger to him. He handed over a sum of $4000 to first defendant which he in turn gave to second defendant.

Fourth defendant then closed his case.

Seventh defendant testified as follows: - She went to plaintiff's offices in search of a stand to buy. She was taken to Collins Chinzou's office. Coliins Chinzou invited first defendant to his offices and asked him whether there were any stands available. First defendant said there was one. Mr Chinzou left and first defendant remained to help her. He pulled out a file. She had told first defendant how much she had. First defendant said he had identified a stand which was commensurate with her money. He offered her stand no 20563 measuring 200m2. She paid $3500 for the stand. She negotiated a reduction of cession fee from 600 or 650 to $350. She was then taken to the site by Victor Chinzou.

She identified her agreement of substitution with sixth defendant. She said she did not meet sixth defendant whom she believes had signed the agreement on a different day. In 2013 she paid a 'top up' amount of $250 whereupon first defendant gave her a letter which she took to the Ruwa Local Board. Utility bills from Ruwa board are now in her name. She said she was later summoned to plaintiff's offices where the fraud was revealed to her. She believes the misunderstanding between plaintiff and first defendant should not prejudice her. She had no reason to be suspicious since she was attended to at plaintiff's place of business and the director was present and attended to her. Under cross examination she said she had signed the agreement of substitution which bore sixth defendant's signature because she believed that, that is how a cession is done. She did not receive a receipt for the USD3500 she paid to first defendant. Only the top up which she paid later was receipted. She was also given a copy of an alleged first agreement of sale. She could not explain how the cessionary agreement had two dates- i.e. 8 June 2011 and 8 June 2010. She did not seem to appreciate that the differences in dates were of significance.

Seventh defendant then closed her case.

COURT'S FINDINGS AT THE END OF THE TRIAL

In summary

My findings at the end of plaintiff's case remain relevant. Plaintiff called three witnesses. Collins Chinzou was completely unaware of the existence of counterfeit agreements of sale. He presented as a naïve person who had a lot of faith in corporate

governance. The plaintiff was a vehicle through which Collins Chinzou and his late wife were running their family property business. Upon its incorporation, Mr Chinzou appointed his wife as the administrator with unfettered control of the plaintiff's affairs and business. She remained at the helm of the plaintiff's business during her life time. First defendant was a nephew of Collins Chinzou's late wife. During her lifetime, the late Mrs Chinzou had occasionally invited the first defendant to help out at the business. When Mrs Chinzou died first defendant succeeded her as the administrator whereupon he inherited unfettered control of the plaintiff's business and the vast discretionary powers formerly exercised by Mrs Chinzou. All employees worked under his supervision and instruction. Collins Chinzou did not limit his powers. First defendant was related to Mrs Chinzou and it was not contested that she also put a lot of faith in him. It was clear from Collins Chinzou's evidence that he was not likely to know of the counterfeit sales had it not been for the audit/reconciliation exercise undertaken by his son Broadwell Chinzou when he took over as administrator from first defendant. Collins Chinzou omitted to put in checks and balances. He reposed in the first defendant the same faith and trust that he had in his late wife. First defendant took advantage of the trust and conceived a plan to swindle the plaintiff. In his wife's own words, the first defendant brought to her completed agreements of sale for her signature. It is therefore not correct that he only assisted her to complete plaintiff's standard agreement of sale. In actual fact she was not present when the agreement templates were filled in. She never kept the originals of the agreements of sale. In her evidence second defendant never said she paid for the stands. Accordingly, there can be no sale to talk about with respect to stand numbers 20755, 20642 and 20797 Cranbrook Ruwa. The plaintiff established through irrefutable and cogent evidence that the agreements of sale were counterfeits since there are no evidence of valid agreements of sale between the plaintiff and second defendant with respect to those stands concerned. The only agreements that are available were proved to be counterfeits. The plaintiff also proved that the receipts which second defendant sought to rely on were forged. I have already discussed the legal position that where payment in the performance of a contract of sale is disputed, the onus is on the purchaser to prove payment.

As soon as plaintiff proved that the purported disposal of stand No. 20755 to second defendant was fraudulent it followed that third defendant could not validly substitute her as the purchaser. Second defendant had no valid agreement (rights, interests and obligation) to

assign to another party. The challenge to the agreement of substitution prepared by the first defendant whereby he substituted third defendant for second defendant as the purchaser of stand 20755 to dispose. The initial agreement of sale having been shown to be false and the alleged substituted purchaser (third defendant) having defaulted after being served with plaintiff's summons. It is not known whether third defendant exists or signed the purported cession agreement because none confirmed the signature or actions attributed to him/her. Either he exists only on the papers prepared by the first defendant or if he exists, he is in wilful default.

I therefore find that the purported sale of stand No. 20755 Cranbrook Park Ruwa by plaintiff to second defendant did not take place and the agreement of sale on plaintiff's records was forged. The subsequent agreement of substitution dated 4 February 2012 is therefore a nullity.

The plaintiff managed to prove that the agreement placed in its records purporting to be a sale to second defendant of Stand No. 20642 was also counterfeit. Details relating to clause 15 were missing. It had no clause 16 and 17. The last page was not numbered whereas all pages on the template were numbered. The second page was clearly plucked from somewhere and affixed to the agreement because it was identical to page 2 of the agreement for stand No. 20563 in every detail including cancellations and alterations. The last page had provision for an estate agent to sign which did not apply to direct sales conducted by plaintiff. Mobile number 0734 359 263 was not in existence in 2005 and yet the agreement was dated 2005. Receipt No. 210 had been fraudulently linked to the sale and purchase of stand 20642 yet it belonged to another purchaser known as Mary Mupinda. Second defendant did not have the original of the agreement of sale. She did not have proof that she paid the purchase, price. The purported cession was handled by Gabriel Mandombo who put his cell No. The agreement was back dated because the cell no. was used as new in 2014, 9 years later. I therefore had no difficulty in accepting that the agreement of sale for stand no 20642 was a fraud. It follows that forth defendant could not validly substitute the second defendant in as a purchaser of the stand because there was no valid agreement in the first place. Second defendant had no rights and interest to validly cede to fourth defendant. Fourth defendant however argued that that the plaintiff was estopped from denying the validity of the cession and that he (fourth defendant) acquired rights in terms of cession.

It was submitted on his behalf that plaintiff' business was conducted in such a way that fourth defendant as an innocent purchaser had reason to believe that the disposal was not above board. Counsel submitted that fourth defendant built a house worth USD40 000 at the stand because he believed all was above board. Counsel cited the case of *Chelly* v *Nandoo* 1974 (3) SA 13 as authority for the legal position that estoppel is a full defence to vindication. It is therefore a valid and recognized limitation to the owners right to vindicate. He submitted that the estoppel arose from the fact that first defendant had unfettered discretion. The absence of checks and balances was entirely plaintiff's fault. Plaintiff was therefore open to fraud. Fourth defendant had no reason to doubt the validity of the agreement of substitution in view of the letterhead, payment of cession fee, payment of top up and the letter to the Ruwa Local board. He submitted that fourth defendant was entitled to assume that internal processes had been validly undertaken citing section 12 of the Companies Act [Chapter 24:03] (now repealed and replaced).

> **"12 Presumption of regularity**
> Any person having dealings with a company or with someone deriving title from a company shall be entitled to make the following assumptions, and the company and anyone deriving title from it shall be estopped from denying their truth—
> (*a*) that the company's internal regulations have been duly complied with;
> (*b*) ……..;
> (*c*) that every person whom the company, acting through its members in general meeting or through its board of directors or its manager or secretary, represents to be an officer or agent of the company, has been duly appointed and has authority to exercise the functions customarily exercised by an officer or agent of the kind concerned;
> (*d*) that the secretary of the company, and every other officer or agent of the company having authority to issue documents or certified copies of documents on behalf of the company, has authority to warrant the genuineness of the documents or the accuracy of the copies so issued;
> (*e*) that a document has been sealed by the company if it bears what purports to be the seal of the company attested by what purports to be the signature of a person who, in accordance with paragraph (*b*), can be assumed to be a director of the company:
> Provided that—
> (i) a person shall not be entitled to make such assumptions if he has actual knowledge to the contrary or if he ought reasonably to know the contrary;
> (ii) a …"

Fourth defendant submitted that section 12 of the Companies Act quoted above applied because the second defendant's claim to rights and interest in the property was based on an agreement on plaintiff's files. There was therefore no lack of diligence that could be attributed to fourth defendant. Citing *MDC* v *President of Zimbabwe and Ors* HH 1291/05, fourth defendant resisted the declaratory order sought by plaintiff on the grounds that public

policy militated against its grant at the instance of the plaintiff which had failed to put enough safeguards to ensure that the public would not be deceived.

This legal stance adopted by fourth defendant was apparent during his cross-examination of plaintiff's witnesses, Collins Chinzou and Broadwell Chinzou. Fourth defendant's handicap is that he did not plead estoppel as a defence. If anything he conceded and promised in his plea that as soon as the sale/purchase agreement claimed by second defendant was shown to be a fraud, he would not resist the plaintiff's claim. He promised that he would instead seek compensation for the improvements he made at the stand from the first and second defendants. No changes had been made to the plea at the end of the trial. Fourth defendant is therefore bound by his plea.

Even if fourth defendant had raised the defence of estoppel on the grounds that he was an innocent purchaser who was also misled by plaintiffs' conduct, he should have an onus to discharge. It is trite that in litigation, he who avers must prove. I have already quoted from the *South African Law of Evidence* by LH Hoffman and DT Zeffert at p356

> "Estoppel is in substance a defence (or reply) by way of confession and avoidance, which must be specifically pleaded…."

See also Amler's Precedents of Pleadings 4 ed Butterworts at p 137.

> "The essence of the doctrine of estopped by representation is that a person is precluded or estopped from denying the truth of representation previously made by him to another person if the latter, believing in the truth of the misrepresentation acted thereon to his detriment. *Aris Enterprises Finances Pty Ltd* v *Protea Assurance Co. Ltd* 1981 3 SA 274 (A) 29
> …if a party wishes to rely on stopped then party must plead it and prove its essentials."

In this case defendant relies on estoppel by representation.

At p 354 of *South African Law of Evidence* 4 ed by LH Hoffman and DT Zeffert

> "Estoppel by representation (to attempt one of those potted definitions that tend to be dangerous because they must be, of necessity, too terse) may be set up when a party is prevented from denying a representation, that he has previously made to another party, if the latter, in the belief that it was true, acted on it to his prejudice. The representation must have been of such a nature to be reasonably expected to mislead or to induce belief in the existence of particular facts, and in the case of vindicatory action, there must have been *culpa* on his part."

The fourth defendant not having specifically plead estoppel, the essentials of the estoppel he now relies on are not clear. Estoppel takes various forms. It is not clear whether

the representation he alleged is that his induced to pay for the property by representation made to him by the plaintiff, what is referred to as representation "… orally, in writing, words or conduct provided it is an unequivocal statement of an existing fact." see *South African Law of Evidence* ed by LH Hoffman and DT Zeffert at p 358 or representation through negligence in which case he would be saying he was a victim of second defendant's fraud facilitated by the careless breach of duty of the plaintiff towards him. If the fourth defendant relies on the former, then he can only properly raise that defence against vindicatory action by second defendant who represented to him that she had rights in stand no 20462 when she didn't. Plaintiff was equally a victim of a fraud committed by second defendant. Plaintiff did not receipt the purchase price. If the fourth defendant relies on representation through negligence, then he ought to have pleaded and demonstrated that plaintiff owed him a duty of care.

Fourth defendant consciously failed to raise and prove the defence of estopped preferring instead to recover from first and second defendant. Otherwise at law she was supposed to call upon the person from whom she acquired rights to her assistance in defending the title. As soon as second defendant's title proved to be defective it became clear that as successor the fourth defendant could not have better rights. He could only succeed on other grounds of which none appear in his plea.

Stand No. 20563 This stand purported to have been sold to fifth defendant. The plaintiff managed to prove that the purported agreement with fifth defendant was counterfeit. It proved the following anomalies. The last page was not numbered yet the rest of the agreement had page numbers. The last page was in all probabilities imported from somewhere and affixed to.

The agreement clause 2 was repeated. Page 2 of the agreement had striking. Similarities with the discredited agreement of sale for stand 20462 it contained the same cancellations and corrections. Like the fake agreement for stand 20462, details relating to clause 15 are missing clause 16 and 17 are missing. The provision for a registered agent is given to agreements drawn by plaintiff for direct sales. There was no proof of any payment by fifth defendant. Fifth defendant did not enter appearance to defend. Accordingly, plaintiff's assertion that the purported sale was fictitious remains undisputed. First defendant stated that he did not prepare the agreement. At the end of the day plaintiff's version of events was not controverted. The first defendant pleaded prescription as a preliminary issue. Prescription is a

special plea which must be pleaded as such. See *Jennifer Nan Booker* v *Richard Mudhamda & Ors* SC 5/18.

> "The defence of prescription should not be raised by way of exception but must be specially pleaded. The plea must set out sufficient facts to show on what the defence is based. ... such a plea is provided for in the High Court rules 1971 order 21 r 137."
>
> 'In a plea of prescription the onus is on the defendant to show that the claim is prescribed.'

The difficulty which confronted first defendant is that he raised the defence of prescription without doing so as a special plea. Order 2 sets out the procedure regarding the adjudication of a special plea within dealing with the merits. He did not adopt that procedure. I therefore dealt with prescription as one of the issues at the trial. However, that did not absolve the first defendant of the onus on him to prove the essentials of prescription pleaded by him. It is incomprehensible that that first defendant who claims to have no knowledge of when the disputed agreement was created can prove when the period of prescription commenced to run. Accordingly, first defendant contradicted himself. His situation is further complicated by the fact that on the agreement dated 5 September 2005 was a cell 073 4359263 which was not yet in use in 2005. What it means is that the agreement was prepared later than the year 2005 after Telecel had moved from the prefix 023 to 073. The forged agreement was therefore backdated. The papers reveal that there was a cession on plaintiff's purportedly by fifth defendant to sixth defendant dated 9 October 2007. The cession was disputed by the plaintiff. Fifth and sixth defendants did not appear to give evidence either as defendants or as seventh defendant's witnesses to disprove plaintiff's assertion/evidence disputing the cessions.

Indeed, seventh defendant claimed that she acquired rights and interest from sixth defendant. At law she was supposed to call upon the person from whom she acquired rights to her assistance in defending the title. See *Business Law in Zimbabwe* RH Christie at p 160-161:

> "The relationship between the buyer and seller … turns on what is usually described as the sellers guarantee or warranty against eviction
> …
> Eviction is interpreted in its broadest sense as meaning the total or partial loss of possession."

What it means a buyer threatened with eviction or a vindicatory action should seek protection from the person from he/she claims to have acquired rights.

Seventh defendant claims to have acquired rights from sixth defendant. However, in her own evidence she never met Sixth defendant. Cession involves the substitution of a new creditor (the cessionary) for the original creditor (the cedent) the debtor remaining the same. See *Law of Contract in South Africa* 3 ed at p 515. In this case there was no evidence from sixth defendant that he at any time plaintiff's creditor and that they approached plaintiff and asked to be substituted by seventh defendants. Additionally, when seventh defendant pleaded as a self-actor she raised the defence of estopped, *albeit* in elegantly, she implied that because the cession was executed at plaintiff's office, by an employee of the plaintiff and she relied on what was on the face of it a *bona fide* transaction the plaintiff was precluded from denying the truth of the representation. She therefore had the onus to prove the essentials of that defence. She therefore ought to have proved that she met sixth defendant who represented to her that he held rights and interest in the stand No. 20563 Cranbrook Ruwa and that the plaintiff owed her a duty of care in that regard. Either seventh defendant was grossly negligent in purporting to deal with an unknown quantity or she was complicity in the fraudulent scheme. Her evidence departed from her plea. She testified that she had bought stand No. 20563 from the plaintiff and paid $3500 to first defendant. If indeed she intended to deal with plaintiff she would have expected a receipt for the payment. It would have been a different ball game had she produced plaintiff's receipt for the purchase price. Any person who deals with a company and claims to have given hard currency to an employee of the company without receiving a receipt cannot possibly be genuine in his/her dealings.

In the result I find that plaintiff proved that plaintiff proved its case on a balance of probabilities and should succeed because seventh defendant has failed to discharge the onus upon her to prove the defence of estoppel.

Stand 20797

Evidence led by the plaintiff established the following the first page of the template was competed by first defendant. Clauses 1a to 1e were repeated on the 2nd page and that was inconsistent with the plaintiff's template. Page 7 was repeated and that is inconsistent with the plaintiffs' template clauses 16 & 17 were repeated. The anomalies led me to accept the submission that the agreement was hurriedly Gobbled up when the audit was announced. The file contained receipt No. 1424 which the plaintiff proved to be forgery through the evidence Forensic Scientist. The receipt had been overwritten by first defendant. It was not

first defendant's duty to write receipts. In any event he could not have validly receipted his own payment. I have already observed that first and second's proprietary rights were inseparable. In evidence, first defendant said he considered all properties acquired I his wife's name as jointly owned property. The question documents examine actually prove that the signature of Sarah on the receipt was forged.

I have no difficulty in accepting plaintiff's assertion that the purported agreement found on plaintiff's file was a counterfeit. The cedents did not defend.

As stated earlier first and second defendants' defence of prescription was dependent on them proving the date on which the agreements were prepared on a balance of probabilities. Plaintiff proved that the forged agreements were discovered in the year 2017 and there was evidence that they had been backdated.

DISPOSITION:

1. The first and second defendants' defence that plaintiff's various claims have prescribed be and is hereby dismissed.

2.1. It is confirmed that the agreement of sale between plaintiff and second Defendant dated 9 October 2002 for the sale of stand No. 20755 Cranbrook Ruwa a subdivision of Lot 1 of Cranbrook of Galway Estate held by the plaintiff under Deed of transfer 2938/1997 is a counterfeit and therefore null and void.

2.2. The subsequent substitution of the second defendant by the third defendant on the 4th February 2012 as the purchaser of stand no 20755 aforementioned be and is hereby confirmed a nullity.

2.3 1st, 2nd and 3rd defendants shall pay the costs of suit jointly & severally, one paying, the others to be absolved.

3.1 It is confirmed that the agreement of sale between plaintiff and second defendant dated 5 September 2005 for the sale of stand No. 20642 Cranbrook. Ruwa, a subdivision of Lot 1 of Cranbrook of Galway Estate held by the plaintiff under Deed of transfer 2938/1997 is a counterfeit and therefore null and void.

3.2 The subsequent substitution of the second defendant by the fourth defendant on as the purchaser of stand 20642 aforementioned 10th September 2012 be and hereby confirmed a nullity.

3.3 1st, 2nd and 4th defendants shall pay the costs of suit jointly & severally, one paying, the others to be absolved.

4.1 It is confirmed that the agreement of sale between plaintiff and fifth defendant dated 9 October 2002 for the sale of stand No. 20563 Cranbrook Ruwa a subdivision of Lot 1 of Cranbrook of Galway Estate held by the plaintiff under Deed of transfer 2938/1997 is a counterfeit and therefore null and void.

4.2 The subsequent substitution of the fifth defendant by the sixth defendant as the purchaser of stand no 20563 aforementioned on the 9th June 2007 be and hereby confirmed a nullity.

4.3 The substitution of the sixth defendant by the seventh defendant as the purchaser of the stand no 20563 on the 8th June 2010 be and hereby confirmed a nullity.

4.4 1st, 5th, 6th and 7th defendants shall pay the costs of suit jointly & severally, one paying, the others to be absolved.

5.1 It is confirmed that the agreement of sale between plaintiff and second defendant dated 3 March 2004 the sale of stand No. 20797 Cranbrook Ruwa a subdivision of Lot 1 of Cranbrook of Galway Estate held by the plaintiff under Deed of transfer 2938/1997 is a counterfeit and therefore null and void.

5.2 The subsequent substitution of the second defendant by the eighth defendant as the purchaser of stand 20797 on the 8 the September 2011 be and hereby confirmed a nullity.

5.3 1st, 2nd and 8th defendants shall pay the costs of suit jointly & severally, one paying, the others to be absolved.

Muvirimi Law Chambers, plaintiff's legal practitioners
Lawman Chimuriwo Attorneys at law, 1st & 2nd defendants' legal practitioners
Ziumbe and Partners, 4th defendant's legal practitioners
Musunga and Makaka Law Chambers, 7th defendant's legal practitioners