

NASHCRYSTAL MOTORS (PRIVATE) LIMITED
versus
TOTAL ZIMBABWE (PRIVATE) LIMITED
and
B.H. DRURY
and
DRAW CARD ENTERPRISES (PRIVATE) LIMITED
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 24 May 2021 and 12 August 2021

Civil Trial

**Advocate *L. Uriri* with *Mr P Makombe*, for the Plaintiff
S. Sadomba, for the First Defendant
No appearance for Second Defendant.
B. Chipupure, for Third Defendant
No appearance for the Fourth Defendant.**

MUZENDA J: Nashcrystal Motors (Private) Limited, (plaintiff) claims the following from first to third defendants:

1. (a) **For an Order cancelling the agreement of sale between second (B.H. Drury) and third (Draw Card Enterprises (Private) Limited) defendants pertaining to stand 2427A Umtali Township, Mutare, measuring 1364 square metres.**
- (b) **For an order cancelling Deed of Transfer Number 4777/2017 issued in favour of third defendant.**
- (c) **For an Order that first to third defendants take all necessary steps to pass transfer of stand 2447A Umtali Township, Mutare measuring 1364 square metres to plaintiff.**
- (d) **For an order that if first to third defendants fail within 14 days of the court's order to take the necessary steps, the Deputy Sheriff be authorised to take such steps on defendant's behalf.**

- (e) For an order that fourth defendant shall comply with the provisions of this order.**
- (f) As against first to third defendants, the one paying the other to be absolved, costs of suit.**
- 2. In the alternative and or in any event, as against first and third defendants jointly and severally, one paying the other to be absolved.**
- a. \$80 000 being reimbursement of the paid purchase price.**
 - b. \$100 000 being additional amount of money needed to purchase other premises of same value of extent.**
 - c. \$43 667 being costs of improvements done on the property in question.**
 - d. Interest on (a) and (c) from date of issue of summons to date of final payment**
 - e. As against first to third defendants, the one paying the other to be absolved, costs of suit.**

The first and third defendants entered appearance to defend the plaintiff's action. There is no appearance for second and fourth defendants.

Background

Second defendant (BH Drury) is a title holder of stand 2427A Umtali Township, also known as No. 17 Aerodrome Road, Mutare, the property measures 1364 square metres.

In 2009 first defendant acting on behalf of second defendant sold the property to the plaintiff and entered into an agreement of sale. The purchase price was US\$80 000 and the plaintiff contends that it paid in full in 2009. Plaintiff has been a tenant at the property in question from 1999 and upon payment of the purchase price in 2009 it ceased to pay rentals to first defendants.

After payment of the purchase price plaintiff demanded transfer of ownership from second defendant through first defendant but the two told plaintiff that plaintiff had delayed payment and had breached the agreement. Second defendant had consequently cancelled the agreement of sale and resold it to the third defendant. First defendant tendered refund of the purchase price. On these facts plaintiff prays for specific performance that is an order that the property in question be transferred to the plaintiff.

The plaintiff prays in the alternative that the first and second defendant acted wrongly by refusing to pass ownership to it after it had paid the full purchase price. In that event plaintiff states that it has a right to cancel the agreement of sale and claims refund of US\$80

000 and plaintiff would require US\$100 000 in order to purchase a premise of the same value and extent. Plaintiff also claims improvement damages for the additional it effected at the property worthy US\$43 667. The total of US\$223 667 is equally and alternatively claimed on plaintiff's claim under misrepresentation to the plaintiff that it was selling the property on behalf of the second defendant and held a right to sell the immovable property. The plaintiff claims that since the agreement of sale was cancelled first defendant is liable to reimburse the amount paid as well as damages suffered by the plaintiff arising out of the misrepresentation.

The third alternative claim is against the third defendant for the sum of US\$43 667 being the value of improvements added to the immovable property by the plaintiff now that third defendant is the registered owner of the property.

First Defendant Special Plea.

On 17 August 2018 first defendant filed a special plea of prescription. To the first defendant the facts established by the plaintiff show that plaintiff claim is based on an agreement entered into in early 2009. To first defendant plaintiff was made aware of the termination of the agreement of sale on 29 September 2010 and a refund was tendered to it but plaintiff refused to accept the refund. On 13 October 2010 plaintiff was informed of the sale of the immovable property to a third party and that transfer was no longer feasible and by 22 March 2011 when plaintiff's Legal Practitioners wrote to first defendant about the transfer, plaintiff effectively placed first defendant in *mora*. She ought to have acted from that date.

In response to the special plea the plaintiff stated that from 2009 to the date of summons first defendant has been admitting owing plaintiff. In any case first defendant through its legal practitioners acknowledged on 5 April 2018 through an email that it was holding funds payable to the plaintiff. An identical acknowledgment was repeated on 3 May 2018 when first defendant indicated that it was ready to disburse the purchase price. Plaintiff further added that prescription does not apply to the alternative claims of damages. It prayed for the dismissal of the special plea.

First defendant's Plea on Merits:

The essence of the first defendant's plea is to the following effect: at no point did it hold itself out as or act as an agent for the second defendant in respect of the immovable property in dispute. Second defendant offered the property for sale to first defendant and first

defendant was not interested so first defendant entered into a business arrangement which resulted in plaintiff purchasing the property from second defendant. The arrangement was that plaintiff would pay the full purchase price to the second defendant where after an agreement of sale would be finalised. However plaintiff breached the terms and conditions of the business arrangement and failed to pay the purchase on time resulting in the penultimate cancellation of the arrangement. Plaintiff refused to accept the cancellation of the arrangement. First defendant stated that it had no knowledge of the allegations made by the plaintiff in its papers in respect of the dealing between the second and third defendants.

First defendant added in its plea on merits that it is holding the refund of the purchase price in trust awaiting plaintiff's instructions. On the claim for damages in the sum of \$100 000 first defendant averred that those damages had not been proved, nor particularised and are too remote to be recoverable. The same challenge relates to the \$43 667 and plaintiff failed to mitigate its damages. Plaintiff was put to the proof.

Third Defendant's Plea

The third defendant principally distanced itself from the prior arrangements of the sale of the immovable property between plaintiff and first defendant. Third defendant bought the property from second defendant who had the right to title and interests in the subject property and concluded an agreement of sale leading to third defendant getting title. Third defendant added in its plea that it cannot effect transfer to plaintiff where plaintiff has no rights to the property. Third defendant states further that it is but a *bona fide* purchaser of the property and perceives no reason why it should be stripped off its real rights in the property. Third defendant added further that it bought the property *voestoots* from the second defendant and denies plaintiff's claim for enrichment. It prays for the dismissal of plaintiff's claim as well as alternative claims with costs.

Third defendant's Claim in Reconvention

After third defendant acquired title it engaged the occupant of the property, the plaintiff in good faith as to the evacuation of the property by the plaintiff. According to the third defendant it agreed with plaintiff that the latter would occupy the property for three (3) months and that during that period plaintiff would not be paying rentals.

Plaintiff latter demanded \$43 667 from third defendant for unjustified enrichment. Third defendant spurns the claim and claims that it has no obligation towards the plaintiff.

Third defendant bought the property and now holds title to it. On the basis of being the owner of the property the third defendant claims \$1000 per month rentals from plaintiff and the rentals are being claimed from October 2009 to June 2019, the total due to the plaintiff as at the date of claim in reconvention totalled US\$104 000.

Third defendant counter-claims against plaintiff the following:

- (a) An order of ejectment of plaintiff from No. 17 Aerodrome Road, Mutare.**
- (b) An order for rentals from October 2009, to June 2018 in the sum of US\$104 000.**
- (c) Costs of suit.**

Plaintiff's Plea to Third Defendant's Claim in Reconvention.

In response to third defendant's claim in reconvention plaintiff contended that third defendant purchased the premises and improvement well after the additional improvements had already been done. Plaintiff also told third defendant's representatives that the property was sold to plaintiff. Plaintiff though admitting meeting third defendant at a round table conference contends that such a meeting was held on a without prejudice basis and third defendant never demanded rentals from plaintiff. The plaintiff insisted in its plea to the third defendant's claim in reconvention that if the third defendant is adjudged by this court that it is the new owner of the property then third defendant must pay for the improvements of \$43 667 in form of unjustified enrichment. Otherwise plaintiff stated that it cannot vacate the premises because it has a right of *lien*.

Plaintiff goes on to add that it was not leasing the property from the third defendant so as to justify demand for payment of rentals by the third defendant in any case, plaintiff goes on its plea, \$1 000 rentals are unjustified. Plaintiff occupied the property as owner from 2009 and to it there is no issue of rentals arising from the occupation. Plaintiff prayed that the claim in reconvention be dismissed with costs.

Issues Referred to trial

On 5 March 2020 the parties agreed that the following were issues for trial

1. The issue against first defendant
Whether or not matter has prescribed?
2. Issue against first and third defendant
Was there a double sale? If so was it fraudulent?
3. Issue against first defendant

Was there a valid cancellation of the agreement of sale?

4. Issue against third defendant.

Whether or not plaintiff has a right to an improvement lien? If so what is the quantum thereof?

5. Issue against first defendant.

Whether there was a misrepresentation by the first defendant to the plaintiff? If so is plaintiff entitled to

(i) *US\$80 000 refund.*

(ii) *US\$43 667 for improvements made.*

(iii) *Replacement value and if so the quantum thereof.*

6. The issue against plaintiff in reconvention.

(i) *Whether or not third defendant is entitled to evict the plaintiff and all those claiming occupation through it.*

(ii) *Whether third defendant is entitled to rentals? If so what is the quantum thereof.*

When special plea of prescription is to be raised by a party.

On the date of hearing of the matter, Mr *Sadomba* for first defendant applied that the special plea of prescription be dealt with first before delving into the main issues before the court. Mr *Uriri* opposed that proposition and submitted that a special plea of prescription needs full enquiry which requires evidence from the parties. After hearing counsel I ordered that the plaintiff proceed to lead its evidence and deal with prescription *in tandem* with the main issues for trial. I indicated that I would avail my reasons in my main judgment and the following are the reasons for the *ex-tempo order*. In the matters of (1) *Brooker v Madhanda and Another* (2) *Pearce v Mashanda and Another*¹ it was held that

“in a plea of prescription the onus is on the defendant to show that the claim is prescribed but if in reply alleges that the prescription has been interrupted or waived, the onus would be on the plaintiff to show that it was so interrupted”

It was further held that

“the court a quo erred by making a decision on the special plea on the absence of evidence. It was crucial for the court to understand the nature of the defence of prescription.”

The learned judge of Appeal went further to hold that

¹ 2018 (1) ZLR 33(s) per GOWERA JA (as she then was)

“it is accepted as settled that evidence is necessary when disposing of a matter in which a special plea is raised. When a party raises a special plea as a defence, new facts arise and because of the introduction of fresh facts which did not appear in the declaration, there is need for a court to hear the evidence of the parties where facts are disputed before making a ruling on the special plea. It was referred to as special plea mainly due to its ability to destroy the action or postpone the proceedings. It was just that the court *a quo* should have adopted the said procedure in order for the special pleas to be properly dealt with and an order for the remittal of the court *a quo* would best achieve this”

The conclusion made by the Court of Appeal in the aforesaid matter equally applies to the matter before me. The facts are precisely identical to the case cited and first defendant raised a special plea of prescription. Plaintiff in convention replicated raising interruption of prescription. The first defendant did not raise the special plea as a point in *limine*. In any case even if it had, once the plaintiff replicated, there is a change of onus and there would be need for oral evidence to be led by both parties. The special plea could not have been dealt with in the absence of evidence. It is on this basis that I ordered that the parties lead evidence both on the special plea and on the merits.

Plaintiff's Case

Mr *Thomas Sarimana* testified as the first witness for the plaintiff. He is the Director. His evidence was to the following effect. Plaintiff is in the business of repairing of and selling accessories for motor vehicles. Currently plaintiff operates at premises which are the subject of this matter. Sometime in August 1999, beginning of, the plaintiff entered into a lease agreement of the subject property and first defendant acted as an agent of second defendant. The lease lasted for a period of almost 10 years, up to February 2009. When first defendant sold the same property to the plaintiff. The witness signed the agreement of sale representing plaintiff. The purchase price was US\$ 80 000. The plaintiff experienced financial challenges and renegotiated new terms more specifically relating to the period of payment, however the full purchase price was paid in 2009 and after full payment plaintiff ceased to be a tenant of the property that year.

The witness testified that from the onset second defendant was aware of the agreement of sale. He pointed out that second defendant gave a power of attorney to Mr *Mark Richard David Stonier* empowering him to act on her behalf in transferring the property to the purchaser, the Power of attorney is dated first October 2002. The witness also referred the court to the water and services statements for the period 01 April 2021 to 21 April 2021 in the name of second defendant. Contrary to the letter dated 30 March 2011 from Messrs' Mark

Stonier Legal Practitioners addressed to plaintiff's legal practitioners of record, the witness reiterated that second defendant was fully aware of the agreement of sale. The agreement of sale reflected on p 33 of plaintiff's bundles was prepared by first defendant's legal practitioners and employees of first defendant. Moses Mudiima represented first defendant. Communication between the witness and first defendant was through Mr Moses Mudiima and Wycliffe Chirinda. The latter two were dealing directly with second defendant's legal practitioners and periodically informed the witness about first defendant waiting for second defendant to give first defendant green light as to the variation, signing and payment of the balance as well as the subsequent refund of the purchase price to the plaintiff.

The witness produced emails, letters and other forms of correspondence to show that though first defendant dealt with plaintiff, second defendant was fully aware of every development pertaining to the agreement of sale. At every crucial stage *Mark Stonier* had a final say. Second defendant agreed to extend the deadline for payment. Second defendant's legal practitioners provided a foreign account Trust Account Number based in Switzerland and directed plaintiff to deposit the purchase price in that account and on 17 march 2009 Mr Mudiima confirmed the method of payment to the witness and Messrs' Gill, Godlonton and Gerrans indicated to the witness that they were getting instructions from Mr Mark Stonier. However all the deposit were paid into Gill Godlonton and Gerrans Overseas Trust Account in Switzerland. The follow ups for balances outstanding were done by first defendant's employees, particularly Mr Mudiima and second defendant was frequently mentioned as the proprietor of the property being sold. The witness was also made to understand by first defendant that if plaintiff fails to meet the deadline of payment second defendant was going to resell the property to a third party.

The witness denied that the agreement of sale was cancelled. The witness told the court that plaintiff was never appraised of the cancellation. All the alleged emails or letters talking of the cancellation were not sent to plaintiff. What the witness acknowledged receiving were correspondences about rectifying breach for late payment. However the plaintiff sought extension of time and first and second defendants agreed to the extensions which facilitated plaintiff to pay the outstanding balances and demanded transfer of ownership. Contrary to the requirement of either party giving the one at least fourteen days notice to rectify the breach as stipulated in the agreement of sale, plaintiff never received that notice. The witness also remarked that no notice of 30 days for the cancellation of the agreement was posted to him before the purported cancellation. No one placed plaintiff on

terms that the contract has been terminated or was about to be terminated. He was not informed that the property had been resold as alleged by first defendant.

The witness went on to state that the first and second defendants never informed plaintiff that the property had been sold to a third party. The witness got to know about third defendant on 30 September 2015 through one Mr Farai Chitsinde. The witness told Mr Chitsinde that plaintiff had purchased the property and also informed Mr Chitsinde about the caveat at the fourth defendant's offices over the title deeds. The witness was not aware that third defendant took transfer of the property on 6 December 2017.

It is also the witness' evidence that plaintiff paid the full purchase price of US\$80 000. The witness referred the court to correspondences confirming payments of US\$20 045, US\$3 500, US\$1 100 and 6000 pounds. The witness also produced letters confirming that Coghlan Welsh and Guest was holding a total of US\$80 000 in trust ready for release to the plaintiff. It is important to observe that the same amount ready for refund to the plaintiff is the same amount paid through an offshore Trust Account for Gill, Godlonton and Gerrans.

It was the witness' evidence that after taking occupation of 17 Aerodrome Road soon after payment of the purchase price it made additions or improvement on the property. Plaintiff produced details of the improvements which totalled US\$43 667-52. Plaintiff is the one paying municipal rates.

In respondent to the third defendant's claim in reconvention ejection and arrear rentals the witness told the court that plaintiff ceased to be a tenant in 2009. Third defendant never demanded rentals from the plaintiff. Plaintiff only became aware of third defendant on 30 September 2015. The title was registered on 6 December 2017 when the witness had told Mr Farai Chitsinde about the existence of an agreement of sale. The witness added that there was no contractual relationship between plaintiff and third defendant. He told the court further that plaintiff cannot pay rentals to a property it had bought. However if the third defendant is declared the owner of the property in dispute then it must pay US\$43 667-52 for unjustified enrichment. Otherwise the third defendant must transfer title to plaintiff.

Plaintiff's witness went on to tell the court that first and second defendants did not provide the witness with a copy of the contract or agreement of sale. Even though the witness had requested for a copy. To the witness the date of transfer of ownership of the property was 6 December 2017 and the date of issue of summons is 1 June 2018. The witness reiterated to court that he got bank details from first defendant and deposited the funds in that Trust

account. He was never instructed nor directed by first or second defendant to stop any further payments to show or confirm that the contract had been cancelled.

Under cross-examination by first defendant's legal practitioner, the witness reconfirmed that at all material times first defendant was second defendant's agent and first defendant would only cause transfer of ownership with the full cooperation of second defendant who was registered owner of the property. The witness was aware of the crucial role of Mr Mark Stonier who was representing the second defendant. Mr *Stonier* made several sanctions and approvals on the requests for extension of time to allow plaintiff to effect payments. The witness denied receipt of an email terminating the contract. The witness was referred to an unsigned agreement of sale by counsel for first defendant and commented there was one which all parties appended their signatures but that copy was not subsequently forwarded to the plaintiff by first defendant up to this date. He acknowledged that there is an email addressed to plaintiff's lawyers dated 27 November 2019 but the witness responded by stating that by that date plaintiff had paid the purchase price in full. He also admitted that summons commencing action reflect the date of 1 June 2018, 9 years after November 2009 and 7 year from 2011 when first defendant threatened to issue summons. The witness also indicated under cross-examination that the last instalment towards the purchase price was made in October 2009 and by that date the witness confirmed that first defendant had informed plaintiff that they no longer had the mandate to act on behalf of second defendant. However first defendant could not provide alternative contract to deal with the matter. The witness told the court that first and second defendant acknowledged liability to plaintiff and he admitted that the refund was tendered to plaintiff but the latter demanded specific performance having met its obligation in the agreement of sale. He explained the basis of plaintiff's claim for US\$100 000 for compensation and further added that first defendant dealt with plaintiff throughout as if first defendant owned the property.

Plaintiff's witness' was also cross-examined by third defendant's counsel. The witness told the court the improvements were effected at the premises in 2016 and plaintiff did not require third defendant's consent to make the improvements since it perceived that it had bought the property. Plaintiff would claim value for improvements if the third defendant is declared the owner of the property in dispute. Plaintiff applied for a caveat on the title deeds and insisted it is registered.

It was plaintiff's witness' evidence that second defendant fraudulently sold the property to the third defendant who had knowledge of the agreement of sale between plaintiff

and first defendant. It was also Mr *Thomas Sarimana's* testimony that he warned third defendant through Mr F. M. Chitsinde on 30 September 2015 that the property had been purchase by the plaintiff and paid in full. However second defendant regardless of this knowledge fraudulently effected transfer of rights from herself to the third defendant in 2017. Plaintiff prays that first and second defendants be found liable to transfer property into plaintiff's name or alternatively pay plaintiff the refund, the compensation, the value for improvements and costs. Plaintiff then closed its case.

First Defendant's Case

First defendant led evidence from Ms Esther Vherenga, current Total Zimbabwe Training Manager. She gave the following evidence. She was not initially involved in the matter between her company and plaintiff. However after reading the filed papers she understood what the matter is all about. She understood that plaintiff and first defendant had a commercial relationship where plaintiff was a tenant at the disputed property owned by Mrs B Drury, (second defendant). She acknowledged that an agreement of sale was negotiated between first defendant and plaintiff but she does not know whether a signed copy exists. She added that from her reading of the file as well as various correspondences between plaintiff and first defendant the agreement of sale would be signed after plaintiff had paid the purchase price of US\$80 000 in full. According to her, plaintiff slackened in its payments and failed to meet the deadline. Two more extensions were granted to plaintiff after first defendant formally consulted second defendant's agent and legal practitioner Mr Mark Stonier. She alluded to various emails and correspondences captured in exh B (first defendant's bundles) relating to reminders extensions of time and cancellation of the agreement of sale. She acknowledged also that from 2011 no summons were served on first defendant despite a letter of demand from plaintiff's legal practitioners threatening court action. To first defendant the agreement of sale was cancelled and plaintiff was offered the refund and plaintiff rejected the money and demanded specific performance claiming that it had fully met its contractual obligations. To first defendant it advised the plaintiff that the property had been resold to an unnamed third party. Sometimes on 13 October 2010 the witness told the court that there is no basis for first defendant to pay damages to the plaintiff because plaintiff was well aware that the commercial arrangement was cancelled.

Under cross examination by plaintiff's counsel, the witness conceded that at all material times, stretching from the lease period, first defendant acted as second defendant's

agent. She also admitted that rates and utility bills have been in second defendant's name. At the time plaintiff entered into agreement of sale, it knew that second defendant was the registered title holder and first defendant was the agent. She also agreed and admitted that from the correspondences between plaintiff and first defendant's agents the agreement was reduced to writing. First defendant registered the terms and Messrs Gill, Godlonton and Gerrans, (first defendant's legal practitioners) prepared a written agreement. The witness made a further concession to the effect that the transaction pertaining to the negotiation and subsequent written agreement of sale was approved by Total's head office in Paris, France. She further conceded that she was not the custodian of the file holding documents relating to the transaction. File was with a legal officer of first defendant. She did not take over duties of Mr Mudiima and Chirinda who were at the helm of the negotiations. She did not see a letter from first defendant's legal practitioners addressed to plaintiff or its legal practitioners giving plaintiff fourteen or 30 days notices about rectifying the breach or termination of the agreement of sale. She could not dispute the plaintiff's suggestion that plaintiff became aware of third defendant as the purchaser on 30 September 2015 when Mr Chitsinde visited plaintiff at the subject property in dispute. Third defendant did not have questions to the witness. First defendant then closed its case.

Third Defendant's Case

Third defendant opened its case by calling its Managing Director Mr Edmore Samson. His evidence was to the following effect. On 3 July 2009 third defendant purchased the disputed immovable property and paid US\$60 000 to second defendant and obtained title in December 2017. He explained the delay for obtaining title stating that there were both financial challenges, on third defendant's part and administrative drag on the part of the Zimbabwe Revenue Authority but at the Deeds Registry there were no challenges.

The witness added that third defendant was claiming US\$1 000 per month rentals from plaintiff calculated from December 2017 to date on 30 September 2015 he admitted sending his personnel to the property, according to the witness, Mr Chitsinde passed through the place. There was no basis for third defendant to pass transfer to the plaintiff. The witness became aware of plaintiff's presence at the property in 2017 after third defendant got title and agreed with plaintiff that the latter will be given three months notice to vacate the premises and pay rentals to third defendant. Later third defendant got a letter from plaintiff's lawyers

demanding US\$43 667 for the value of the improvements. According to the witness plaintiff did not claim ownership over the disputed property.

Under cross examination by first defendant the witness reiterated that third defendant purchased the property in 2009 and went on to re-explain why transfer took nine years to process.

During cross-examination by plaintiff's counsel the witness admitted that before payment of the purchase price, third defendant had not inspected the property and made its interest known to the plaintiff. He told the court that all that he was interested in was title regardless of what he was buying. In 2009 he never told plaintiff about the purchase of the property.

The witness could not dispute plaintiff's evidence that Farai Chitsinde his Human Resources and Administration Manager visited plaintiff on 30 September 2015 and left his business card with Mr Sarimana, plaintiff's Managing Director. He equally could not dispute the fact that Mr Sarimana advised Mr Chitsinde about plaintiff's purchase of the same property. The witness later conceded that third defendant knew at the time it signed the agreement of sale that someone else was in occupation of the property. He told the court that the US\$1 000 rentals was pegged by third defendant and agreed to by the plaintiff. He stated and denied that plaintiff was the first purchaser of the disputed immovable property. He admitted that from his evidence in chief his claim for rentals is not from 2009 to 2018 but from 2017 to date. The third defendant then closed its case.

On 12 February 2021 all the parties synchronised issues for trial as follows:

- 1. Whether or not matter has prescribed?**
- 2. Was there a double sale? If so was it fraudulent?**
- 3. Was there a valid cancellation of the agreement of sale?**
- 4. Whether or not plaintiff has a right to an improvement lien? If so what is the quantum thereof?**
- 5. Whether or not there was a misrepresentation by the first defendant to the plaintiff? If so, is plaintiff entitled to**
 - (i) US\$ \$80 000**
 - (ii) US \$43 667 for improvement made**
 - (iii) Replacement value and if so the quantum thereof.**
- 6. (i) Whether or not third defendant is entitled to evict the plaintiff and all those claiming occupation through it.**

(ii) Whether third defendant is entitled to rentals? If so the quantum thereof.

Issues 1-3 relate to the issue of the agreement of sale and prescription defence raised by the second defendant. Issues 4-6 centres on the alternative claims of the plaintiff as well as counter claim by third defendant. It is important to mention at this stage that if the plaintiff's main claim succeeds issues 4-6 will not be dealt with for they largely depend on the resolution of the enforceability of the agreement of sale and specific performance in favour of the plaintiff. The court will thus address the issue of prescription first.

Whether or not matter is prescribed?

The special plea of prescription is only raised by first defendant. First defendant contend that plaintiff's claim is based on an agreement of sale entered with between the parties about early 2009. On 29 September 2010 plaintiff after being made aware of the termination of the agreement of Sale refused to accept and returned funds paid towards the purchase price and demanded specific performance of transfer of the property. On 13 October 2010 plaintiff was informed of the sale of the property to a thirty party and that it would not be possible to effect transfer into its name. On 22 March 2011 plaintiff's lawyers demanded transfer of the property within fourteen days alternatively payment of damages sustained arising from the terminated agreement of sale. Hence at the latest by 22 March 2011 the plaintiff was aware of the facts on which to make his claim and had placed first defendant in *mora*

In response to the special plea, plaintiff avers that from 2009 to date, that is up to 2018, first defendant has been admitting owing plaintiff. On 14 March 2018 plaintiff wrote a letter of demand to first defendant and on 5 April 2018 first defendant through its legal practitioners acknowledged owing plaintiff money. A further acknowledgment by email was made on 3 May 2018. Plaintiff added that its alternative claim for money held by first defendant's legal practitioners together with claim for damages is not affected by the special plea of prescription.

In replication to plaintiff's response, first defendant reiterated that prescription has not been interrupted. It denies acknowledging liability in respect of plaintiff's claim. It added that first defendant had always denied liability since it has terminated the agreement of sale and tendered disbursements of the funds to the plaintiff.

In support of its special plea first defendant submitted that section 15 of the Prescription Act² provides that a debt arising out of a contract of sale prescribes after a period of 3 years and in terms of section 16(i) of the same Act prescription starts to run as soon as the debt becomes due. First defendant further submitted that section 2 of the Act defines a *debt* as including anything which may be sued for or claimed by reasons of an obligation arising from statute, contract, delict or otherwise and referred the court to the matter of *Chandavengerwa and Another v Mutyada and Another*³.

First defendant went on to add that whether a debtor expressly or tacitly acknowledges a debt resulting in the running of prescription being interrupted a court applies on objective assessment of what the debtor's conduct conveyed in respect of whether or not it was subjectively intended to acknowledge liability⁴. First defendant has always disputed any liability or wrong doing and also denied acknowledging indebtedness to the plaintiff. First defendant urged the court not to place any probative value on the funds held in trust by its legal practitioners.

Plaintiff submits to the *contra*. It cites s 18(i) of the Act which deals with the interruption of Prescription by an acknowledgement of liability by a debtor. It qualifies its claim principally as hybrid comprising specific performance alternatively damages for breach and improvements done on the property. First defendant did not deny holding US\$80 000 in trust. Plaintiff further submitted that first defendant's legal practitioners on 3 May 2018 clearly confirmed that US\$80 000 was held in trust ready for release and that from April and May 2018 prescription started to run afresh. Plaintiff referred the court to the matter of *Donald Vundhla v William Thabani Dube and Anor*⁵. Further it was argued on behalf of the plaintiff that first defendant's legal practitioners acted as its agents in acknowledging liability and cited the matter of *Musemwa & Others v Gwinyai Family Trust & Ors*⁶. It was added that the onus to show that the claim had prescribed lay on the first defendant. It was further submitted that the date on which a debt arises is not necessarily the date on which the debt becomes due. A debt becomes due when the plaintiff becomes aware or ought reasonably to be aware of the facts from which the debt arose, it was added. A debt is due when the creditor has a complete cause of action that is when all the facts necessary to sustain the cause of

² Chapter 8:11

³ HH 54/10. Ad also Catherine Chiwawa v Apostolos Mutzuri + 4 Others HH7/2009.

⁴ First defendant referred the court to the matter of Jovena Energy services (Pvt) Ltd v Pickglo Trading (Pvt) Ltd HH544/15

⁵ HC 1663/05

⁶ HH 136/16

action come into existence, plaintiff contended and referred the court to case law⁷. When plaintiff becomes aware of all facts which he or she must prove to obtain a judgment in his or her favour, it was further contended. *In casu*, the plaintiff submitted that it never got to know the identity of third defendant as a third party purchaser. Plaintiff requested a copy of the agreement of sale between second defendant and third defendant from first defendant and could not get one. Third defendant's true identity was only unearthed on 30 September 2015 and immediately thereafter plaintiff sprang to action. Third defendant admitted to this fact, it was submitted. The third purchaser is a critical party to the litigation. It was added. It is the third defendant's contract which plaintiff seeks to be set aside as well as the title deed passed in third defendant's favour which is to be reversed in order for plaintiff's claim for specific performance to become possible. As such according to plaintiff prescription alternatively ought to have started running on 1 October 2015. Summons were issued on 1 June 2018 and served on first defendant on 8 June 2018 and as such the plaintiff's claim against first defendant had not prescribed. It was further submitted on behalf of plaintiff.

Plaintiff's counsel went on to submit that the principal relief in the main claim is against second and third defendant, in which the setting aside of title is sought against second and third defendants, yet the two did not plead prescription. Plaintiff added that once title is reversed by the court it revives second defendant's rights which rights are then passed onto plaintiff and this is common cause pertaining to plaintiff's main claim in convention. Second defendant cannot raise prescription on behalf of the second and third defendant, nor can this court *mero motu* raise such a special plea on behalf of a litigant⁸. Plaintiff prayed for the dismissal of the special plea.

Application of the law to the facts on prescription

In order to determine the question of prescription the court had to make a finding on the cause of action upon which the plaintiff's action was premised and when specifically the cause of action arose. What constitutes a cause of action was crisply described in *Abrahams & Sons v SA Railways and Harbours*⁹ as follows:

“The proper meaning of the expression “cause of action” is the entire set of facts which gives rise to an enforceable claim and includes every act which is natural to be proved to entitle

⁷ *Syfan Holdings Ltd v Pickering* 1998 (1) ZLR 10 (S) at 19-20,
Dube v Banana 1998 (2) ZLR (HC) at 95-96,
Pables v Dairy Board Zimbabwe (Pvt) Ltd 1999 41 at 45-46

⁸ Section 20 of the Prescriptio Act, Chapter 8:11

⁹ 1933 CPD 626 at 637 per WATERMEYER J

plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action.”

Section B of plaintiff’s declaration titled: “Claim based on specific performance is crafted as follows:

- “9. Sometime in early 2009, the first defendant sold to plaintiff the said certain piece of immovable property being Stand 2427A Umtali Township measuring 1364 metres commonly known as 17 Aerodrome Road Mutare. First defendant acted as agent of the second defendant.
12. In pursuance of the said agreement of sale, plaintiff paid the whole purchase price in 2009 and stopped paying rentals to first defendant.
13. Plaintiff demanded transfer of the property in question into its name but both first and second defendant have neglected or refused to do so.
14. In breach of the said agreement of sale entered between the parties second defendant fraudulently sold the property in question to the third defendant who had knowledge of the agreement of sale between plaintiff and first defendant.
15. Second defendant fraudulently effected transfer of ownership rights from herself to the third defendant in 2017, under deed of transfer No 4777/17 on 6 December 2017.
17. First and second defendants are still holding on to the purchase price and therefore liable to transfer into plaintiff’s name title of the property in question.”

It is apparent that the cause of action of the plaintiff is the right to transfer the property in terms of the alleged agreement of sale. The clause relating to transfer in the alleged agreement of sale reads:

“TRANSFER AND COSTS

(a) transfer shall, be registered by Messrs Gill, Godlonton and Gerrans Conveyancers of Harare subject to due compliance by both parties with their obligations hereunder.”

Prescription begins to run when the debt is due, and the creditor becomes or ought to have become aware of the identity of the debtor and of the facts from which the debt arose.¹⁰

The learned author adds:

“Unless the debtor wilfully conceals the existence of the debt in which case S 16(2) (of the Prescription Act) provides that it shall not begin to run until the creditor becomes aware of the existence of the debt. To ascertain when a contractual debt first becomes due regard must be had to the terms of the contract.”¹¹

It is now trite that the period of prescription of a debt in terms of s 15(d) of the Act is 3 years. The interpretation section of the same Act defines “debt” to include anything which

¹⁰ Professor RH Christe. Business law in Zimbabwe, Juta & Co Lts 1998 ed at p 114.

¹¹ Ibid, at p 114

may be saved for nor claimed by reason of an arising from statute, contract, delict or otherwise. Going by the definition of “debt” as contained in the Prescription Act the right of the purchaser to place a seller in *mora* is itself a debt in favour of the purchaser which debt would constitute the right to have transfer into the plaintiff’s name. In the case before me the plaintiff enquired from first defendant for the identity of third defendant and first defendant deliberately concealed that information. Plaintiff fortuitously discovered third defendant’s details on 30 September 2015 when an employee of third defendant left a business card to Mr Sarimana and incidentally learning that third defendant was the second purchaser of the property in dispute. Plaintiff immediately took action by writing to defendants about its intended legal action as per the current claim before the court. I am persuaded by plaintiff’s counsel’s submission that given the nature of plaintiff’s claim which heavily hangs on the cancellation of the agreement of sale between second defendant and third defendant, prescription began to run from 1 October 2015, a day after plaintiff knew about the identity and particulars of third defendant.

In the matter of *Makgatho v Old Mutual Life Assurance Co. Zimbabwe Ltd*¹² it was held:

“There may be need for the other party to explain the reasons for the delay and prove when the debt as defined, became due. Prescription may be interrupted by an acknowledgement of liability, which on the facts of this case occurred on 12 December 2000 when the principal debtor sent an e-mail to the respondent.”

Plaintiff’s summons clearly shows that plaintiff’s principal claim is for the cancellation of an agreement of sale entered between second and third defendants and that title be transferred to it. Plaintiff could not have proceeded to claim against third defendant in 2009 for cancellation of the subject agreement of sale without knowing the third defendant in my view. Even if plaintiff threatened civil action from 2009 against first defendant its relief based on the current form could not have been feasible since it was not aware of third defendant. As already concluded hereinabove that information only availed to plaintiff from 30 September 2015. I therefore come to a conclusion that prescription commenced to run from 1 October 2015.

I am further fortified on this conclusion by the bonus fact that has not been strongly denied by the first defendant that on 3 May 2018 first defendant acknowledged holding plaintiff’s US\$80 000-00 in its lawyers trust account.¹³

¹² 2015 (2) ZLR 5 (S) per GARNE JA (as he then was) at p 12B

¹³ See the matter of *Barrel Engineering & Founders (Pvt) Ltd v Bitumen Construction Services (Pvt) Ltd* 2016 (2) ZLR 582 (H) at 582 F-G

The tacit acknowledgement of liability interpreted the period of prescription. In a plea of prescription the onus is on the defendant to show that the claim is prescribed.¹⁴ A special plea of prescription is often referred to as a peremptory exception in the sense that if it is established it renders claim permanently unenforceable and can be raised by special plea at any stage of the proceedings but a party raising it ought to lead evidence either through an affidavit or orally during trial. In this case the defendant failed to prove that plaintiff's claim has prescribed. Plaintiff managed to pass the hurdle as to why it waited from 2009 to 2018 to issue summons against defendant more particularly that the identity of third defendant had been concealed by first defendant regardless of request made about that information.

Further plaintiff's claim is for cancellation of an agreement of sale between second defendant and third defendant and transfer of the title to plaintiff from second defendant. In practical and procedural norms involving transfer of ownership of title from second defendant to plaintiff, first defendant has absolutely no role. Its second and third defendant who are directly affected, yet the two did not raise the special plea of prescription. The special plea raised by the first defendant cannot be raised by first defendant for the benefit of second and third defendant and given the nature of plaintiff's claim first defendant is not in a position to raise such a plea, which benefits second and third defendants. I come to a conclusion that the special plea of prescription is misplaced and was not proved by the first defendant, and it is accordingly dismissed.

Was there an Agreement of Sale between first defendant and plaintiff? Was there a double sale and was the second agreement of sale tainted with fraud?

The plaintiff's pleadings on this aspect of the agreement of sale are very clear and after looking at the totality of all the parties' evidence it is abundantly clear that there was an agreement of sale entered between plaintiff and second defendant's agent first defendant in 2009. In first defendant's special plea of prescription it equally alludes to this contract which the court should accept as being uncontroverted. What is in dispute however is that first defendant in its plea on the merits¹⁵ denied ever acting as second defendant's agent? What came out of the agreement between first defendant and plaintiff was a "business arrangement" where plaintiff was going to pay second defendant's property. A comparison of first defendant's plea on merits and oral evidence adduced in court reflects a glaring total

¹⁴ Brooker v Mudhanda & Anor (supra), per GOWORA JA (as she then was) at 133 G

¹⁵ P 90-94 of the record.

transformation of first defendant's trajectory in the whole matter, oral evidence led on its behalf fits chameleonic changing of colour where the first defendant makes a total detour of testimony parallel and totally divorced from the pleadings. First defendant made a u-turn and then admitted that all that its agents did in the negotiations of the agreement of sale, receipt of payment of the purchase price and drafting of all letters, mails and copies of the written agreement of sale, first defendant did so in its capacity as second defendant's agent. The ultimate conclusion by the second defendant to its role as an agent buttressed and solidified plaintiff's declaration and cause in the sense that the following crystallised as common cause:-

- a) Messrs Gill Godlonton and Gerrans Legal Practitioners representing first defendant prepared an agreement of sale between first defendant and plaintiff.
- b) The agreement of sale relates to a definite immovable property being stand 2427A Umtali Township measuring 1364m² and of a specific purchase price expressed in money being US\$80 000 payable within a specified period of time.
- c) In *lieu* of the agreement of sale, plaintiff made payments through the seller's lawyers albeit in staggering instalments.
- d) During the tenancy of payment plaintiff experienced some financial challenges and engaged first and second defendants for extension of time for payment and was granted till plaintiff fully paid the purchase price in 2009 and immediately stopped paying rentals.

The evidence and facts on record show that the agreement of sale was prepared by first defendant and based on it payments were made and first defendant regularly alluded to the "agreed terms for payment in its evidence which agreed terms dates were spelt out in the written agreement of sale. This is the same agreement of sale which first defendant repeatedly refers to as cancelled." A party cannot allude to cancellation of an agreement of sale which never existed. The written agreement of sale provided and captured the clear description of the property and its location, the agreement identified the parties, the purchase price and methods of payment and place of payment. The same agreement provided the issues of notices, passing of risk, date of occupation, transfer and costs as well as breach and rights of the parties in the event of such breach. Correspondences between first defendant and plaintiff patently alluded to the agreement of sale and terms specified therein. In carrying out its obligations plaintiff requested for extensions of deadline dates provided from the terms of

the agreement of sale. The allegations of breach by the first defendant are based on dates deadline agreed upon by the parties and recorded in that agreement. The extensions were laid on the foundations of dates agreed upon by the parties privy to the agreement of sale. For first defendant to submit that there was never an agreement of sale is but to say the least absurd given the facts of this matter. I come to a conclusion that given the sudden changes of the course of first defendant's defence in its evidence in chief where it unreservedly conceded and presented in its oral evidence that it was second defendant's agent, a valid agreement of sale was concluded where second defendant represented by first defendant sold stand 2427A Umtali Township Mutare to the plaintiff for US\$80 000. Later the agreement was varied from a cash sale agreement to become an instalment sale. In pursuance of the varied agreement of sale plaintiff paid the whole purchase price in 2009 and stopped paying rentals. After payment of the full purchase price, plaintiff demanded transfer. Hence from the foregoing I have come to a conclusion that there was a valid agreement of sale.

The next question is whether the agreement of sale between second defendant and third defendant was tainted with fraud?

On 3 July 2009 Mrs Beryl Howie Drury (second defendant) represented by Mr *R. D Stonier* entered an agreement of sale with third defendant represented by Mr Edmore Samson, which agreement relates to the property in dispute (pp 8-11 of third defendant's bundles) exh C. the first agreement of sale was between first defendant and plaintiff. It is common cause that neither second defendant nor Mr *R D Stonier* was part of the original agreement. Second defendant besides being first defendant's principal *vis-à-vis* the first agreement of sale, did not personally make any representations which culminated in the formation of the contract between first defendant and plaintiff. The second agreement was made after first defendant had advised second defendant's legal practitioners that plaintiff had breached terms of the first agreement and that that agreement of sale had been terminated. That representation by the first defendant cannot be visited upon the second defendant nor her legal practitioner. I do not see any elements of misrepresentation made by the seller to the third defendant and am unable to even find the second agreement of sale between second and third defendant fraudulent. The best that can be said about that agreement is that it was a second sale. As a result I have come to a conclusion that the court is dealing with a typical case of a double sale.

Was there a valid cancelation of the first agreement of sale?

First defendant in its pleadings contend and submit that after plaintiff tottered in its payments of the purchase price, first defendant allegedly in consultation with second defendant notified plaintiff about the cancellation of the agreement of sale. First defendant alluded to e-mails written to Mr Samson about the cancelation. On the other hand plaintiff to the contrary contended that no notice for cancelation was brought to its attention. It was never informed to stop making payments in fulfilment of the purchase price. It is trite that cancelation is governed by the written agreement between first defendant and plaintiff. First defendant's witness conceded during cross-examination by plaintiff's counsel that the agreement of sale binds the parties and clause 10 of that agreement of sale reads as follows:

"10. DEFAULT OF PARTIES

In the event of either party failing to sign any document or fulfil any other of its obligations under this agreement within 14 (fourteen) days of being required so to do by the said conveyancers then such party shall automatically and without receipt of any other notice become liable to pay the other party *mora* interest at the rate of 5 per cent per annum on the United States Dollar equivalent of the purchase price from the expiry of the said period of 14 (fourteen) days until the rectification of such default and, in addition such other party shall, during such period have the right exercisable by giving 7(seven) days notice of the intention so to do unless such default shall be rectified during the said period of 7days, summarily to terminate this agreement and claim for *mora* interest, already accrued up to date of such termination. (my emphasis)

First defendant's witness admitted during cross-examination by plaintiff's counsel that she did not have any document either from first defendant or its legal practitioners showing a seven (7) days notice was given to the plaintiff expressing first defendant's or second defendant's intention to terminate the agreement of sale. As already ruled above herein once first defendant granted plaintiff extension to offset the purchase price in staggered instalments the agreement transformed into an instalment sale as defined in s 2 of the Contractual Penalties Act.¹⁶ If the buyer is in breach the seller cannot proceed against it or him without first giving 30 days notice of its intention to cancel¹⁷ and thereafter proceed to cancel. Neither first defendant nor second defendant showed on their papers that either gave plaintiff such a notice of 30 days. As clear from clause 10 of the agreement of sale cited *in extensor* above, the remedy open to first or second defendant in the event of a breach is to

¹⁶ Chapter 8:04

¹⁷ Section 8 of the Act

“claim damages without prejudice to any claim for *mora* interest already accrued up to the date of such termination.” The breach clause does not talk of the seller terminating the sale and resell the property in my view. I am satisfied from the foregoing that the termination of the agreement was neither in terms of the agreement of sale nor in terms of the Contractual Penalties Act. The agreement of sale between plaintiff and second defendant represented by first defendant was extant as at July 2009 when second defendant entered into an agreement with the third defendant.

The next sequential question is did third defendant know about the sale between plaintiff and second defendant?

Mr Edson Samson who testified on behalf of third defendant told the court that he did not know until transfer was done, that is sometime after 6 December 2017. He admitted that he did not inspect the property nor did third defendant inform plaintiff about third defendants’ interest in the property. Further under cross-examination Mr Samson admitted that third defendant knew that plaintiff was in occupation. However Mr Samson told the court that all what he was interested in was the title of the property regardless of what he was buying. He would think of ejecting an occupant upon transfer.

The stance given by Mr Samson exudes an evasive attitude and as correctly observed and submitted by plaintiff’s counsel, the body conduct of the third defendant’s main witness did not augur well with seriousness and audacity. Mr Samson indeed avoided eye conduct with any of the court officials, he gave his testimony fidgeting with papers and looking down, he lacked confidence in what he was saying. He was not sure whether Mr Chitsinde inspected the property or simply passed by. However as apparent from the facts established in court, third defendant from 3 July 2009 the date the agreement of sale, knew about plaintiff occupying the property. In its counterclaim against plaintiff third defendant computed its rentals from July 2009 up to 2018 although Mr Samson later altered the claim to be determined from 2018 to the date of judgment. In any case further the third defendant was aware of plaintiff from 30 September 2015 when Mr Farai Chitsinde paid a visit to the property and left his business card with Mr Samson. Transfer took effect on 6 December 2017, roughly 2 years 3 months after the third defendant’s employee met Mr Sarimana. Transfer of the property from second defendant to third defendant was done when third defendant was well aware of plaintiff’s interest in the property and third defendant did not take any remedial action to settle the matter with second defendant nor with plaintiff until it

was served with summons in 2018. Mr Drury nor Mr R. D Stonier were called by third defendant to refute that third defendant knew about the first sale between first defendant and plaintiff. The court's view is that Mr Samson was generally not credible and sometimes lied and contradicted himself moreso when it came to inspection of the property and knowledge of the plaintiff's occupation.

“It is trite that if a litigant gives false evidence, his story will be discredited, and the same adverse inferences may be drawn as if he had not given evidence at all. If a litigant lies about a particular incident, the court may infer that there is something about it which he wishes to hide.”¹⁸

The third defendant was investing US\$60 000 into the property which was being sold as it was, it will be totally absurd for Mr Samson to forgo inspection of the building and proceed to ignore it totally from July 2009 till December 2017 when he got title. I am convinced that third defendant is not an innocent purchaser as it was aware of the dispute between plaintiff and first and second defendants and presumably played a wait and see attitude so that if the dust settles third defendant would take steps. Third defendant was also fully aware that the first agreement of sale between plaintiff and second defendant was extant before it took transfer, this it did in 2009 and further reconfirmed on 30 September 2015.

Whether plaintiff is entitled to an order of specific performance?

Looking at the totality and plausibility of the evidence adduced before the court one inescapable conclusion is that there existed an agreement of sale between plaintiff, first and second defendant that caused plaintiff to send payments to first and second defendant's legal practitioners in lieu of payment for the property. Whether the agreement was written or oral, it is binding all the three parties, plaintiff, first and second defendants. First defendant submitted that there is no signed written agreement but the court did not hear first defendant utterly denying an agreement between the parties. As clearly stated in the matter of *Guoxing Gong v Mayer Logistics (Pvt) Ltd Anor* ¹⁹.

“It is plain that the verbal agreement was lawful and binding. This intended reduction of the verbal agreement to writing was a mere formality not forming part of the contractual agreement. It is rite that in the circumstances of any prohibition or agreement to the contrary, a verbal agreement is lawful and binding. This explains why by far the majority of contractual agreements are verbal. There is no legal requirement in our jurisdiction that every contractual agreement be reduced to writing.”

¹⁸ Leader Tread Zimbabwe (Private) Limited v Smith HH 131/03

¹⁹ SC 2/17 at p 3 of the cyclostyled judgment

The circumstances of this matter given the oral evidence as well as the unsigned document alluded to and admitted by first defendant as binding on them, shows that plaintiff had proved the existence of a valid agreement of sale.

“In a civil case, where the court seeks to draw inferences from the facts, it may by balancing probability, select a conclusion which seems to the more natural or plausible (in the sense of credible) conclusion from among several conceivable ones, though that conclusion is not the only reasonable one.”²⁰

As already alluded to herein the first defendant in his evidence in chief unequivocally admitted that at all relevant times it was acting as an agent of second defendant. In the case of *Mining Industry Pension Fund v DAB Marketing (Pvt) Ltd*²¹ it was stated:

“The importance of the admission is that it is thus seen as limiting or curtailing the procedures before the court in that where it is not withdrawn, it is binding on the court and in its face the court cannot allow any party to lead or call for evidence to prove the facts that have been admitted.”

Hence in my view first defendant agrees and acknowledges the facts that it entered into an agreement of sale representing second defendant and that agreement binds both plaintiff and second defendant. The only caveat posed by first defendant relating to that agreement is that plaintiff breached it. This argument by first defendant has already been dispensed with above and serve to add that first defendant agreed to extend the period for payment. The agreement of sale binds second defendant. “The vast majority of contracts are terminated by the performance for reciprocal obligations of the parties. In the case of sale, e.g. the contract is terminated once the seller had performed by making delivery and the buyer by paying the purchase price.”²² This is precisely the scenario of this matter.

Having made a finding that the matter is typical of a double sale, the next question that ensues is whether plaintiff is entitled to specific performance. Specific performance is available only to a party that is liable to perform on its tendering performance of its obligations. As clearly emphasised in the case of *International Trading (Pvt) Ltd v Nestle Zimbabwe (Pvt) Ltd*²³.

“Prima facie every party to a binding agreement which is ready to carry out his own obligation under it has a right to demand from the other party so far as it is possible, a performance of his undertaking in terms of the contract, the right of a plaintiff to the specific performance of a contract where the defendant is in position to do so is beyond all doubt.”

All the three parties addressed the court on the law relating to double sales and the legal aspect on the subject seems to be common cause. In the matter of (1) *Betty Felicity*

²⁰ Samuel Mukozho v Standard Chartered Bank of Zimbabwe Ltd. SC 73/20 per MAKONI JA

²¹ SC 25/12 per MAKARAU JA (as she then was) at p 8 of the cyclostyles judgment

²² Johnson Ngorima & Simikwe Ngorima v Admire Chemhere HH 93/21 per MANGOTA J

²³ 1993 (1) ZLR 21 (H) at p 25

*Barros (2) Prompt Bulders Company (Pvt) Ltd v Gideon Justas Chimphonda*²⁴ the Supreme Court stated the approach in double sales as follows:

“Years ago courts’ approach to the question of a double sale of an immovable property was to hold that because the first nor second purchaser had a better right than the other, specific performance would not be granted to either, or would be granted only with an alternative of damages.

So it was appreciated that this solution was unsatisfactory because it left the choice to the seller who had caused the problem, more often than not by bad faith, and additionally it paid insufficient regard to the principle enshrined in the maximum qin prior est temporae potior est jure”

*Another principle apparently conflicting was applied in Hofguard v Registrar of Mining Rights*²⁵ *and Miller v Spaner*²⁶ *namely, that specific performance should be granted to the purchaser who can show a balance of equities in his favour. But in Le Roux v Odendaal & Ors*²⁷ *a compelling persuasive combination of these principles was another principle suggested by BRCOOME JP, it is the approach which has been applied by the courts of this country.”*

The learned Chief Justice went on to say²⁸

“ROBINSON J correctly applied the principle that the second appellant had knowledge at the time it took transfer of the prior sale the respondent had a right to specific performance (which was the remedy claimed) unless there were special circumstances affecting the balance of equities. The determination of the learned judge that there were no special circumstances for preferring the second purchaser above first one which clearly involved the exercise of a judicial discretion.”

*“In my view, the policy of the law will best be served in the ordinary run of the cases giving effect to the first and leaving the second purchaser to pursue his claim for damages for breach of contract. I do not suggest that this should be the invariable rule but I agree with the view expressed by Professor Mckerron that save in “special circumstances” the first purchaser is to be preferred, the broad principle, as set above was acknowledged in our law in Barros & Anor v Chimphonda*²⁹ *and similarly in Charima Blasting and Earthmoving Services (Pvt) Ltd v Nyanyai & Ors*³⁰.”

The onus is on the purchaser to prove the special circumstances tilting the balance of equities in his or its favour.³¹ However the balance of convenience always predominantly favours the first buyer in the absence of special circumstances. The first purchaser is treated

²⁴ SC 11/99 per GUBBAY CJ on p 5 of the cyclostyled judgment

²⁵ 1908 TTS 650 at 654

²⁶ 1948 (3) SA 772 (C) at 779

²⁷ 1954 (4) SA 432 (N) at 443 B-F

²⁸ Ibid on p 7 of the cyclostyled judgment

²⁹ 1999 (1) ZLR

³⁰ 2000 (1) ZLR 85 (5), See also Grandall Bros (Pvt) Ltd v Lazarus N. O & Anor 1991 (2) 125 (S)

³¹ Proline Nkomo (1) S Dzongera (2) Municipality of Bulawayo (3) E Mbudzi SC 51/2012 per MALABA DCJ (as he then was)

as having the stronger claim and the second purchaser is left with a claim for damages against the seller.

In casu third defendant submitted that it is a transfer or in good faith and did the transfer for value. It also added further that the balances of equity are in its favour in that second defendant told plaintiff that first defendant had no authority to sell the property; that second and third defendants did not collude in bad faith against the plaintiff. It was also argued on third defendant's behalf that the refund of the purchase price was tendered to plaintiff and the latter refused to accept it, and that the purchase price was held in a trust account of first defendant's coffers. Third defendant would be exposed to a double loss of both the property and the purchase price since second defendant had already left Zimbabwe.

It has already been ruled above that the first defendant acted improperly by cancelling the agreement of sale without due notice to plaintiff and that third defendant's conduct left a lot to be desired in the way it failed to warn plaintiff about its interest over the property from July 2009 to the date of transfer, and the court has already concluded that third defendant cannot be regarded as an innocent purchaser in the circumstances and facts presented herein. To the contrary plaintiff paid a comparatively larger sum of US\$80 000 to second defendant (the seller) through the latter's agent, and third defendant paid US\$60 000. From 2009 plaintiff ceased to pay rentals legitimately expecting subsequent transfer of ownership, it also paid rates to the local authority and effected improvements on the property. Plaintiff had been in occupation ever since 2001 to date and met its obligations in terms of the agreement of sale.

Third defendant did not take occupation from 3 July 2009 up to date. It did not take action to assert its rights but only reacted to plaintiff's action after the plaintiff issued summons. In my view the third defendant did not establish special reasons or circumstances to formulate the balance of equities in its favour. The balance of equities preponderantly weigh heavily on the part of plaintiff. In the result it is my finding that plaintiff had established all the requirements for specific performance and it ought to succeed on the main claim. Having said that there is no point to delve into the alternative claim for the reimbursement of \$80 000 damages for \$100 000 and value for improvements in the sum of \$43 667. There is equally no basis to deal with third defendant's claim for arrear rentals, serve to mention that in the light of plaintiff's success on specific performance third defendant's counterclaim has no legal basis and it is dismissed with costs.

Disposition

The following order is granted.

1. a) **The agreement of sale entered between second and third defendants on 3 July 2019 pertaining to Sand 2427 Umtali Township, Mutare measuring 1364 square metres be and is hereby cancelled.**
- b) **The Deed of Transfer Number 4777/2017 in favour of third defendant be and is hereby cancelled.**
- c) **Second and third defendants, or their lawful assignees, representatives or agents be and are hereby ordered to take all necessary steps to pass transfer of Stand 2427A Umtali Township, Mutare from third defendants name to that of the plaintiff.**
- d) **If second and third defendant, their agents, assignees or representative fail within fourteen (14) days from the date of issue of this court's order to take necessary steps, the Sheriff of the High Court of Zimbabwe or his lawful Deputy be and is hereby ordered to take such steps on the second and third defendants' behalf.**
- e) **The fourth defendant be and is hereby ordered to comply with this court's order and ensure that transfer of the property described herein is effected from third defendant's name to that of the plaintiff.**
- f) **First to third defendants to pay the costs, one paying to absolve the others.**
2. **Third defendant's counter-claim is dismissed with costs.**

Makombe and Associates, plaintiff's legal practitioners
Gill, Godlonton & Gerrans, 1st defendant's legal practitioners
Thompson Stevenson & Associates, 3rd defendant's legal practitioners

