

ANGELBOSS CONNECTIONS (PVT) LTD

versus

MARTIN MANYASHA

[In his capacity as the executor of the Estate Late Maxwell Mubako]

And

PAMELA MANYASHA

And

THE REGISTRAR OF DEEDS

And

THE SHERIFF FOR ZIMBABWE

And

MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE

ZISENGWE J

MASVINGO, 2 & 12 November 2023 & 12 February 2024

Judgement delivered on 27 June 2024

### **Civil trial**

*T. Tandi*, for the plaintiff

*T. Goro*, for the second defendant

*No appearance*, for the first, third and fourth & fifth respondent

ZISENGWE J: This is a claim for an order of specific performance. The plaintiff, a registered company, seeks to have the first and second defendants compelled to take all necessary steps to effect transfer to it certain immovable property it purchased from them. In the event of the latter's failure or refusal to co-operate in this regard, the plaintiff seeks an order authorizing the sheriff (i.e., the fourth defendant) to do so in their stead. The claim comes in wake of an agreement of sale in respect of the said property entered into between the second defendant and her late "husband", Maxwell Mubako (hereinafter referred to simply as "Mubako") as sellers on the one

hand and the plaintiff as purchaser on the other. The property in question is Stand No. 9343, Lundi Star Drive, Rhodene, Masvingo (“the property”). The plaintiff avers that it has since met its side of the bargain by paying the full purchase price but that the defendants in breach of the express terms of that agreement of sale have refused to effect sign all relevant documents to effect transfer.

The agreement of sale in question was entered into on 13 March 2012. The purchase price was US \$75 000 payable as follows; US \$57 000 upon signature, US \$15 000 on or before 23 March 2012 and the balance of US \$3 000 on or before 13 April 2012. In these proceedings the plaintiff is represented by one Julius Marimbire.

It is common cause that the property was encumbered by a mortgage bond in favour of the now defunct Interfin Bank, which encumbrance was addressed in a special clause captured in clause 7 the agreement of sale which reads:

**“7. Special clause**

1. The sellers undertake to ensure that the bank (Interfin) which is holding the Title Deeds of the property hands over the Title Deeds of the property to the purchaser on or before 16 March 2012. The bond must be cancelled when the Title Deeds are handed over.”

Further, although the following conditions also do not feature *ex-facie* the agreement of sale, the plaintiff avers in his declaration that the parties also agreed as follows:

- (a) That the transfer of the property would be effected after payment of the purchase price and release of the deed of transfer.
- (b) That transfer of the property would be effected after payment of the full purchase price and release of Deed of transfer.

Most importantly, the plaintiff avers that he has since honoured his side of the bargain by not only paying the amount of US \$57 000 upon signature but also a further ZAR 4 000 (which according to him translated to US \$3 000 at the time) on 19 April 2012 and the balance in several instalments. He claims that he made several other payments which included the balance on the Mortgage Bond and that such payments were accepted by the second defendant’s late husband with the acquiescence of the second defendant.

He accordingly avers that in breach of the agreement the first and second defendants failed to cause the handover of the deed of transfer and have refused to given him vacant possession of

the property. He claims he only managed to obtain possession of the property pursuant to an order of the Magistrates Court.

In their joint plea, the first and second defendants professed ignorance of the payment of the ZAR 4 000 and that in any event the express agreement was that payment was to be in United States dollars. They further averred that if payment was done to the second respondent's late husband, same was never brought to the attention of the second defendant. They also stated that the Late Mubako had no authority to receive the money in second defendant's behalf.

They further professed ignorance on the circumstances of the granting of the order in the magistrates court which according to them was granted in default of the second respondent.

Of importance it was averred by the defendants that the second defendant's husband did not act as agent for the second defendant and that whatever payments plaintiff may have made to late Mr Mubako, had nothing to do with agreement of sale. Additionally, it was asserted that the second defendant was never involved in the release of the title deeds (by Interfin) nor did she associate herself with the dealings between Mubako and plaintiff. It was further stated that the second defendant's consent (which according to them was vital) was neither sought nor granted.

In summation it was contended by the defendants that the claim was without merit and that the plaintiff should only go after Mubako's estate to recover 50% of the value of the property.

In its replication the plaintiff stuck to its guns and maintained not only that it paid the purchase price in full but also that the second defendant had admitted that fact in correspondences previously exchanged between the parties it also retorted that should the defendant persist with her position that Mubako had no authority to receive payments then it was up to her to claim her share from his estate.

He also fired a broadside at the first respondent for failing to formally accept the claim as it related to 50% of the property (i.e., the share in the property owned by the late Mubako).

### **The evidence**

Julius Masimba Marimbire, the director of the plaintiff company on the one hand and the second defendant on the other were the sole witnesses for their respective cases. The remaining defendants understandably did not lead any evidence. Before summarising the evidence of Marimbire and the second defendant, it is necessary to identify the uncontested facts.

It is common cause that at the material time the second defendant was married to the late Mubako in terms of an unregistered customary law union. It is also common cause that they each held 50% undivided shares in the property.

Two key developments, however, seemed to conspire to mire what would otherwise have a straight forward claim been for breach of contract. These were the death of Mubako and the liquidation of Interfin Bank. Be that as it may, it would appear from the pleadings filed by the main protagonist in this dispute (i.e., the plaintiff and the second defendant) that the deed of transfer to the property was, upon the instructions of Mubako and the second defendant to be released by Interfin Bank to the plaintiff's on or before 16 March 2012 and after payment of the first instalment. Secondly that the transfer of the property would be effected after full payment of the purchase price and release of the deed of transfer.

The sole issue referred to trial at the PTC was - "whether the plaintiff discharged its obligation in respect of both the first and second defendants in relation to the property in issue."

### **The evidence of Julius Masimba Marimire**

This witness as stated earlier is the director of the plaintiff. He insisted in his evidence that he not only paid the purchase price in full but also that as a matter of fact he paid in excess of the agreed purchase price. According to him Mubako had assured him in the discussions leading to the agreement of sale that if he paid US \$50 000 then Interfin would release the title deeds. He testified that in the wake of the signing of the agreement he paid US \$50 000 directly into an account identified to him for that purpose by the bank manager, and a further US \$7 500 in cash a part of which was in the form of ZAR 4 000 bringing the total to US \$57 500. Most pertinently, he insisted that the second defendant was well aware of these payments.

After those initial payments the Marimbire indicated that the plaintiff unsuccessfully requested the release of the title deeds. His engagements with both Mubako and the second defendant on the release of the title deeds did not bear fruit prompting him to approach the Magistrates court to compel that release thereof.

The result of those proceedings, according to Marimbire, was that it was agreed that the plaintiff would pay the balance (which according to him stood at US \$17 000) which amount had to be paid directly into the bank for the deeds to released. Pertinently, the witness testified that

both Mubako and the second defendant were present and participated in those proceedings as evidenced by the record of proceedings, a copy of which was attached to his bundle of documents.

On account of the relative importance of those proceedings to the present dispute it is necessary to reproduce here both the record of proceedings and the order granted in their wake. Those proceedings were apparently presided over by Magistrate L. Manyika on the 7 August 2012. The applicant was represented by Makausi and both respondents are reflected as having been present in person. I use the word “apparently” given that the second defendant initially disputed the authenticity of those proceedings labelling them a fraud. However, the plaintiff (then as applicant) is recorded as having submitted via counsel as follows:

**“Applicant:**

We have reached an agreement as follows:

- a) 1<sup>st</sup> and 2<sup>nd</sup> respondents be and are hereby ordered to provide applicant with title deeds by 15 August 2012.
- b) 1<sup>st</sup> and 2<sup>nd</sup> respondents will provide applicant with the figure of amount owing to the 3<sup>rd</sup> respondent on or before 13/08/12 and such amount will be paid to the 3<sup>rd</sup> respondent by applicant and it will be deducted from the balance of US \$17 500 outstanding for the property.
- c) 1<sup>st</sup> and 2<sup>nd</sup> second respondents will get the balance if there is any amount due after payment to the third respondent when they provide the title deeds to the property.
- d) Each party pays its costs”

Thereafter the following is recorded:

**“1<sup>st</sup> respondent:** I confirm the terms

**2<sup>nd</sup> respondent:** I confirm

**Ruling**

Order granted by consent the agreed terms.”

Attached to those proceedings is an order which mirrors the terms agreed upon but more importantly it captures all parties to those proceedings. The second defendant is captured as the second respondent.

Marimbire testified that when the second defendant and the late Mubako failed to honour the terms of the order by consent, the plaintiff followed this up by filing another court application, this time for the former two be held in contempt of court, (copies of which application were produced as exhibits). In this regard the plaintiff sought *inter alia* to have Mubako and the second

defendant committed to prison defying the earlier court order. The record of those proceedings shows that whereas Mubako was in attendance the second defendant was in default. Ultimately however, the court was satisfied that they were properly served with the application and both elected not to file any opposing papers hence it granted the application as prayed for.

The witness testified that he ended up paying further US \$131 000 for the property. He testified that he did so to save the property from foreclosure.

It was also his evidence that at that stage Interfin Bank had sued the second defendant together with Mubako for the recovery of the outstanding loan amount. He then stepped in and paid off all the sums of money that were required to stave off foreclosure which was imminent. As proof of the proceedings by Interfin against the second respondent and Mubako, Marimbire referred to correspondence dated 14 March 2014 authored by Govere Law Chambers at the former's behest seeking a pacific settlement of that dispute. He also referred to a letter authored by his then legal practitioner T. Tandjani dated 12 May 2014. In the latter letter, the said legal practitioners set the record straight on plaintiff's interest in that matter. The letter also set out the history of the sale of the property to it and the payment of US \$50 000 which had since been made pursuant thereto.

He also referred to a letter by Chirairo and Associates dated 21 April 2021 apparently authored on behalf of second defendant and Mubako for the payment of US \$15 520 being the unpaid balance for the purchase price of the property.

He indicated that despite him having paid the sums of money on question, Mubako and the second defendant for their part had neither paid anything towards rescuing the property from imminent foreclosure nor have they offered to reimburse him the sums of money he paid in this regard. He produced proof of payment on the form of a bank transfer in the sum \$131 920 Zimbabwe dollars. He explained that at that point in time, there was a monetary policy which decreed the Zimbabwe dollar to be equivalent (1:1) with the United States dollar.

According to him, over and above the ZWL \$131 920 he also made the following payments:

ZWL \$26 000 on 27 August 2020

ZWL \$20 000 on 21 September 2020

ZWL \$10 000 on 28 October 2020

ZWL \$12 000 on 24 November 2020

US \$1 300 plus \$35 000

US \$1 500 to Interfin's lawyers

Ultimately however the deeds were released. The next step was to have the property transferred to the plaintiff's name. According to the witness, whereas Maxwell Mubako was quite prepared to cooperate with the transfer, the second defendant remained intransigent and refused to co-operate. To compound matters Mubako passed away before transfer could be effected.

He categorically refuted both the suggestions that whatever payment he may have made were not in fulfilment of the terms of the agreement of sale and that second defendant was unaware of these payments. In the latter regard he insisted that as a matter of fact, the second defendant was at the "forefront". Further, he testified that at no point did the second defendant express any objections or reservations on payments being made to Mubako, nor did she evince any unease towards that.

He was quizzed during cross examination on why the initial US \$50 000 was paid into Mubako's personal account instead of that of Riaan Enterprise which owed the bank the sum of US \$57 000. In response he indicated that he was instructed by both Mubako and Interfin's bank manager to do so.

He would also deny suggestions put him to in cross examination that a meeting was held at one Tinomudaishe Chikwerere's residence where the issue of the payment of the \$50 000 into Mubako's account was discussed. Needless to say, he denied that the second defendant expressed discontent with him having paid that amount into Mubako's account.

The question of the apparent absence of power of attorney by second defendant authorizing Maxwell Mubako to receive payments on her behalf assumed prominence during cross-examination. It was suggested in this regard that in the absence of such a power of attorney, Mubako could not have acted as an agent for the second defendant. Marimbire insisted, however, that Mubako with whom he had dealt with from the onset had assured him that the second defendant had consented to the payments being made to his account. Further he indicated that in any event the second defendant did not specify how she wanted payments made.

He was also questioned on why he had taken it upon himself to pay off the mortgage bond when that was not part of the agreement of sale. His response was to the effect that he was

authorized to do so by the court order of the 7<sup>th</sup> of August 2012. He would also refute suggestions that the second defendant was not present. He would also explain that he “overpaid” in a bid to save the property from foreclosure. He also dismissed repeated suggestions that the payments he made to Mr Mubako’s account related to some other obligation than the one at hand. He insisted that he discharged all his obligation under the agreement of sale and that therefore that the plaintiff was entitled to the relief it sought.

### **The second defendant’s case: The evidence of Pamela Manyasha**

The evidence of the second defendant was a triple pronged attempt at the rebuttal of Marimbire’s evidence. In so doing Ms Manyasha sought to dispute each of the three pillars of Marimbire’s evidence. Firstly, she denied that the plaintiff paid the purchase price of the property at all or in full. Alternatively, she indicated that if it did, then her late husband had no authority to receive her (50%) share of that purchase price, let alone gave it to her. Thirdly, she denied that there were proceedings in the magistrates court which authorised the plaintiff to pay off the outstanding purchase price in exchange for the transfer of the property to him.

As far as the purchase price is concerned, the second defendant distanced herself from the US \$50 000 which the plaintiff paid into her late husband’s account suggesting that this payment had nothing to do with fulfil.

The evidence of the second defendant consisted of a triple pronged rebuttal of each of the three pillars of Marimbire’s evidence. Firstly, she denied that the plaintiff paid the purchase price of the property at all or in full. Alternatively, it was her position that if it did, then her late husband, Mubako, had no authority to receive her part of the purchase price. Thirdly, she distanced herself from both proceedings of the magistrate’s court.

As far the origins of the agreement of sale are concerned, it was her evidence that there was a common understanding as amongst the parties thereto that an initial payment of US \$57 000 was to be paid to the bank (Interfin) to extinguish the seller’s indebtedness to the bank.

It was her evidence therefore that the US \$50 000 purportedly paid into Mubako’s account had nothing to do with the agreement of sale as it was outside the terms of the agreement. According to her this explains why the bank did not release the title deeds. While accepting that the agreement of sale did not spell out the modality of payment, she nonetheless expressed the

view that since the agreement was in the name Riaan Enterprise her expectation was that the instalments would be paid into that company's account.

Further, it was her evidence that, the balance was to be paid on instalments but she soon realised that the plaintiff had defaulted in paying the second instalments the first instalment being the US \$57 000. It was at that stage that she brought up the issue with Mubako. When she did not receive a satisfactory response from Mubako she then approached the plaintiff's legal practitioners.

She then confronted the plaintiff (she obviously meant Marimbire) to enquire about the default in the payment of the second instalment. The answer she received from him was that he was waiting for the release of the title deeds. Soon thereafter she learnt from the Assistant bank manager that the bank had been closed. She also learnt from that same individual that the deeds had not been released because the \$50 000 had been paid into Mubako's individual account (instead of that of Riaan Enterprise). She dismissed Marimbire's assertion that he had compiled with the bank manager's instruction to deposit the money into Mubako's account, stating as she did that the bank manager was not part of the agreement and therefore had not say thereto.

When she approached the plaintiff's legal practitioners she learnt that the plaintiff had instituted proceedings against her and Mubako for failing to release the title deeds.

According to her, the subsequent enquiries with the curators of Interfin bank at the bank's Headquarters in Harare confirmed that the \$50 000 had been paid into Mubako's personal account.

She further professed ignorance of the payment of US\$ 131 000 which one plaintiff purportedly made towards the purchase price.

She insisted that the money should have been paid into the "correct" account. She insisted that Mubako had no authority to receive payments on her behalf. She therefore maintained that whatever payments may have been paid by plaintiff was a private and separate matter between plaintiff and Mubako and had nothing with the agreement of sale.

She categorically denied that the plaintiff had discharged its obligations under the agreement and that as far as she was concerned the mortgage bond was never cancelled and the title deeds in respect of the property were not released.

She would however make an about turn during cross examination and accept that she had since learnt (after the institution of the present proceedings) that the title deeds had since been released.

As far as the court proceedings are concerned, it was the second defendant's evidence that she first learnt of the court proceedings against her and Mubako from the plaintiff's legal practitioners when she approached them to enquire why payments were not forthcoming. This was before she went to Interfin bank's headquarters to carry out her investigations.

According to her, when she went to court, (presumably on the day of the hearing of the matter) all parties concerned (who included herself, Marimbire, Makausi and Mubako) did not enter the court room. What transpired according to her was that the men conversed amongst themselves (Marimbire, Makausi and Mubako). She vehemently denied ever having lent her consent to the order that was ultimately given.

Similarly, she professed ignorance of legal proceedings instituted by Interfin against her and Mubako and Riaan Enterprises. Needless to say, she expressed ignorance of the fact that in those proceedings she (alongside Mubako and Riaan enterprises) were represented by Messrs Govere and Associates legal practitioners. She indicated that she only learnt of those proceedings after Mubako's death.

As for the contempt of court proceedings' (brought under case No. 1515/12), she testified that she deposed to a notice of opposition after receiving assistance from some lawyers who assist women, and filed the same sometime in November 2012. This was some two months after the contempt of court proceedings which were concluded on the 4<sup>th</sup> of September 2012 and the warrant of ejectment which was issued the next day. Her explanation, however, was that, she never received any court process as these were being directed to Mubako's office or they came late.

During cross examination, it was pointed out to the second defendant that the notice of opposition upon which she sought to rely had not been served on the plaintiff or his legal practitioners of record then (Saratoga Makausi Legal practitioners). In her response she indicated that she had no one to properly guide her at that stage.

She would also distance herself from the letters by Messrs Govere legal practitioners and Chirairo legal practitioners referred to earlier. She was quizzed on why she had not taken any action against the legal practitioners who had ostensibly masqueraded as her counsel if that was the case.

Ultimately, she indicated that she neither intended to refund the plaintiff the amounts it paid towards the purchase price of the property and to salvage it from the precipice of foreclosure nor is she prepared to sign the requisite papers for its transfer to plaintiff.

### **The issue**

The sole issue that was referred for trial was deceptively simple namely - ‘whether the plaintiff discharged its obligation in terms of the agreement of sale’. Camouflaged under this composite are three related questions viz:

- a) Whether the plaintiff paid the sums of money he claims to have paid
- b) Whether payments were towards the purchase price of the property
- c) Whether the payments through Mubako were without the second defendant’s involvement, consent or acquiescence and if so whether Mubako had authority to receive payment on behalf of the second defendant.

The first two questions and the first part of the third are purely matters of fact. The second part of the third question, (which only falls for determination if the first two questions are answered in the affirmative), is a question of law. In the latter instance, the question can aptly be put thus: “whether or not payment of the whole purchase price to one of two or more joint sellers absolves the purchaser in respect of his obligation to the other or others.”

### **Whether the plaintiff paid the sums of money he claims to have paid.**

This, as earlier stated, is a question of fact. The case of *Stellenbosch Farmers’ winery group Ltd & Anor v Martell et cie & Ors* 2003 (1) SA 11 SCA, provides as useful technique on how the resolution of factual disputes is done. The following was stated:

“On the central issue; as to what the parties decided, there were two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make a finding on (a) the credibility of the various factual witness; (b) their reliability and (c) the probabilities. As to (a) the courts findings will depend on its impression about the veracity of the witnesses. That in turn will depend on a variety of subsidiary factors not necessarily in order of importance, such as (i) the witness candour and demeanour in the witness box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded on his behalf or with established fact or with his own extra-curial statements or actions (v)

the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to other witnesses testifying on the about the same incident or event. As to (b) a witness's reliability will depend apart from the factors mentioned under (a) (ii) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed facts. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

Using the above general guideline, I find that the sum total of the evidence at my disposal demonstrates that the plaintiff did pay not only the US \$50 000 but also the \$131 920 (the latter *albeit* in Zimbabwe dollars). Marimbire's evidence on this regard is supported by the paper trail related to those payments.

Starting with the US \$50 000, by the second defendant's own admission, her investigations which *inter alia*, led her to Interfin's headquarters in Harare revealed that this amount had been paid. Equally confirmatory of this amount having been paid is the Interfin deposit slip bank dated 13 March 2012

The payment of the ZAR 4000 was proved by the acknowledgement of receipt, which forms part of the record, executed by Mubako in this regard. The plaintiff from as far back as 2012 has been remarkably consistent about having paid this amount. He did so during Mubako's lifetime to safely discount the apprehension of this being an afterthought or fictitious creation on the part of Marimbire. In the same vein, up until now there has never been a denial or doubt of the ZAR 4 000 having been paid. The letter of demand issued by MESSRS Chihambakwe Makonese & Ncube, the plaintiff's erstwhile legal practitioners dated 8 June 2012 and the subsequent court processes lend credence to these two amounts having been paid

The plaintiff's evidence of having paid the sum of ZWL \$131 920 is supported in part by the proof of electronic transfer produced by consent during the proceedings. Further, there is the email dated 21 May 2020 authored by MESSRS Kantor & Immerman at the plaintiff's behest, directed to Messrs Wintertons (Interfin's legal practitioners at the time). The email confirming and explaining as it does the payment of this amount by the plaintiff effectively smothers any suggestions that it was not paid.

Then there is the payment of US\$1300 made on 23 March 2020 which was acknowledged by Mubako on a document titled “receipt”. This amount as with the previous three payments can safely be accepted as having been paid.

I am equally convinced that the plaintiff did pay the other sums of money set out in the letter by MESSRS Kantor & Immerman dated 17 May 2021 directed to MESSRS Chirairo & Associates. After all that letter was in response to the demand by the latter for the payment of the sum of US\$ 15 520 on behalf of Mubako and the second defendant. Sight must not be lost of the fact that the standard of proof in civil matters is only on a balance of probabilities. I find it highly improbable that those amounts were and still are a figment of the plaintiff’s imagination. At the time the said letter was authored, Mubako as with the second defendant had ample opportunity to dispute the payment of the said amounts.

Ultimately, in answer to the first question I find, at the very least on a balance of probabilities that the plaintiff was able to show that he paid the amounts in question.

#### **Whether payments were towards the purchase price of the property**

Whereas the plaintiff insists that all these payments were meant partly to settle the purchase price, and partly to save the property from foreclosure, the second defendant argues contrariwise, and claims that these amounts were unrelated to the purchase price.

Regarding the initial payments of US \$50 000, the first defendant admitted during the PTC held before MAWADZE J that this amount was paid by plaintiff as part of the purchase price of the property. This lends invaluable support to the assertions by the plaintiff to that effect, the protestations by the second defendant notwithstanding.

Further, it is highly improbable that the said payment into Mubako’s account was unrelated to the purchase price if one has regard to the timing of that payment. The agreement of sale was signed on the 13<sup>th</sup> of March 2012, the same day that the payment of \$50 000 was made. Tellingly, in clause 3 of that agreement of sale headed ‘purchase price’, it was agreed that the sum of \$57 000 was to be signed on the signing of the agreement. It is therefore untenable, in the circumstances to suggest, as second defendant strives to do, that the payment of the \$50 000 was unrelated to the payment of the purchase price. The second defendant’s position in this regard can safely be disregarded as absurd and incongruous.

This brings me to the question of why the said amount was paid into Mukabo's account instead of Riaan Enterprises account. The modalities of the payment, or more specifically the account into which the account was to be paid is conspicuous by its absence on the agreement of sale. In any event the Mortgage bond which was sought to be discharged by that initial payment shows that Mubako and the second defendant were the mortgagors. Further, the agreement of sale shows that Mubako and second defendant were the sellers of the property. It is therefore incredulous for the second defendant to suggest that she expected the payment to be made into the account of Riaan Enterprises.

The evidence by Marimbire that he was instructed by the bank manager to pay that amount into Mubako's account rings true.

Equally lending credence to Marimbire's assertions that he paid (on behalf of the plaintiff) the US \$50 000 towards the purchase price of the property was his unwavering consistency over the lengthy period that followed. His version in this regard has been consistent throughout the history of confrontation and/or litigation spanning over a decade.

There is no need to belabour this point, I was thoroughly satisfied by Marimbire's credibility as a witness as supported by the various discreet pieces of evidence that the US\$50 000 was paid as part of the purchase price.

I am equally convinced from the evidence at my disposal that the plaintiff paid a further \$7 000 and an additional R4 000 to bring the total to \$57 500.

This is borne out partly from the court order of 7 August 2012. Given that the purchase price was US \$75 000 and the order by consent spelled out that the outstanding amount (to be paid by plaintiff) was US \$17 5000, it only stands to reason that the plaintiff had as of that stage paid a total of US \$57 500 I say this mindful of the fact that the plaintiff took a huge gamble by paying the \$7 000 in cash without receiving acknowledgement thereof. The fact however remains that no clause in the agreement of sale required plaintiff to pay into a specific account or in a specific manner.

It boggles the mind that the second defendant having specifically inserted a clause requiring plaintiff to pay the purchase price in a particular way would turn around and blame the plaintiff for having paid the same as instructed by Mubako and the bank manager.

Further support is provided by the court applications that followed. Although the second defendant strove to distance herself from the three court proceedings, the evidence suggests otherwise. In this regard the court proceedings of 7 August 2012 are critical. The record of proceedings shows that the second defendant was in attendance on that occasion. The second defendant for her part confirms that she attended court on that particular occasion. She also confirms the presence of Mr Makausi, the legal practitioner for the plaintiff, the same legal practitioner who is reflected on the record of proceedings. Yet she attempts to suggest that she did not enter the courtroom let alone participate on the proceedings. In my view that position is lame. It is highly improbable that the magistrate who presided over those proceedings would falsely endorse on the record that the second respondent was present and did participate in those proceedings. Having been sued by the plaintiff in that matter and having gone to the court specifically for that matter she would obviously have been keen to ascertain the outcome of that matter.

More importantly, however, the record speaks for itself. That record of proceedings having been discovered and an application for its production as an exhibit in the current proceedings having been made, there was nothing that precluded the second respondent, particularly represented by able counsel as she is, from verifying the authenticity of that record. She could not blow hot and cold, she could not in one breath consent to the production of the record of the court proceedings as an exhibit, yet in the next breath claim contest its authenticity. The second defendant cannot approbate and reprobate, she cannot acquiesce to a decision on the court and seek to distance herself from it. The plaintiff correctly referred to the doctrine of pre-emption in this regard which precludes such a party from opportunistically endorse two conflicting positions on the same decision of the court; *Dhliwayo v Warman Zimbabwe (Pvt) Ltd* HB12-22 & *Cohen v Cohen* 1980 ZLR 286 (S)

I am satisfied from the evidence as a whole only not that the second defendant participated in the proceedings of 7 August 2012, but also that she consented to the order sought by the plaintiff. Needless to say, I find the record of proceedings in question to be authentic.

Then there are the proceedings of 4 September 2012. These proceedings were merely an attempt by the plaintiff to enforce the decision of the court of 7 August 2012. It did not confer any new rights or obligations as such. The record shows that the second defendant did not attend those

proceedings the record of proceedings also shows that there was a belated attempt by Mubako to hand over a notice of opposition from the bar. However, the court (per Mzinyathi Esquire) made short shift of that attempt and found that he (i.e., Mubako), as with the second defendant, was in contempt of court. The court proceeded to grant the application to have Mubako and second defendant found to be in contempt of court (for failing to by abide the decision of the court of 7 August 2012). Additionally, the court sentenced each of them to six months' imprisonment and finally an order of their eviction from the property was granted.

This court order was followed by a warrant of the ejectment dated 5 September 2012. The notice of opposition which the second defendant seeks to rely upon is of no moment. A court order is not undone by purporting to file a notice of opposition to the application long after the judgement has been granted. It is akin to slamming the stable doors shut long after the horses have bolted. Without an application for rescission duly granted, the notice of opposition has very little value in the context of the present proceedings. Almost 12 years have gone by now and the second defendant is yet to file an application the rescission of those judgments.

Finally, in this regard, there is evidence that Interfin Bank sued Mubako and second respondent over their failure to discharge their indebtedness. Although a copy of those proceedings was not attached, the correspondences relating thereto are self-explanatory.

Overall, the attempts by the second defendant to distance herself from all these proceedings seriously dented if in not completely ruined her credibility as a witness. She ought to have played open cards with the court by acknowledging those court cases instead of throwing in flimsy excuses in an attempt deflect the implications thereof.

I interpose here to address this issue of credibility. Throughout this matter, the second respondent patently appears to have conveniently adopted a denialist defence strategy. She chose to deny practically every facet of the plaintiff's evidence no matter how cogent or compelling. She denied that the plaintiff paid the amounts in question. She denied court proceedings and the orders accompanying them, she denied she and Mubako were at some point represented by Messrs Govere legal practitioners, (as evidenced by the latter's letter dated 17 July 2014). She also denied that at some point they were represented by Messrs Chirairo & Associates Legal practioners (as evidenced by the letter dated 21 April 2021). I could go on ad nauseum, but the fact remains that she irredeemably ruined her own credibility by adopting such an untenable denialist strategy.

Conversely, Marimbire impressed me as an honest and credible witness. His position that he made the payments in question consequent to the court orders, is supported by the record of the court proceedings and the related court orders.

**Whether the payments through Mubako were without the second defendant's involvement or acquiescence**

In this regard the plaintiff contended that the second defendant waived her right to be paid part of the purchase price directly. Whether or not a waiver has taken place is always a question of fact to be decided on a consideration of all the circumstances of the case, *Matimba v Salisbury Municipality* 1965 (3) SA 513 (SR). In *Harry v Director of customs & Excise* 1991 (2) ZLR 39 (HC) at 41 A-B, Blackie J summarised the requirements of waiver as follows:

“The onus is on the plaintiff to prove the waiver. To establish waiver, the plaintiff must show an express abandonment or surrender of rights (or at least conduct which is plainly inconsistent with their enforcement) with full knowledge and appreciation of those rights. *Laws v Rutherford* 1924 AD 261; *Minister van Justisie v Swanepoel* 1968 (1) SA 347 (SWA) at 354; *Patel v Controller of Customs*, supra at 88”

See also *Strachan v Lloyd Levy* 1923 AD 670.

Waiver of a right need only be proved on a preponderance of probabilities, see *Martin v De Kock* 1948 (2) 719 (A); *Alberts v Bryson* 1976 (2) RLR 193 (A)

The evidence as a whole undoubtedly points to the involvement of the second defendant in the payments in question. Had that not been the case, she would have asserted her rights right at the onset by either exercising her right to terminate the contract or instituting proceedings compelling the plaintiff to pay half the purchase price to her or something to the same or similar effect.

Even if one were to be generous to the second defendant and accept her position that she was not aware the plaintiff had paid the initial US\$ 57 500 towards the purchase price of the property, several opportunities presented themselves to her to assert her rights. Perhaps the clearest and earliest example are the contents of the plaintiff's affidavit in the proceedings of 7 august 2012. These should have alarmed her to say the least. One would have expected her to immediately spring into action to assert her rights at that stage, yet she did not. she should have alerted the plaintiff accordingly and all subsequent payment would have been made in accordance with her wishes. The record of proceedings shows that she accepted that the plaintiff had made a total

payment of US\$57 500 leaving a balance of only US\$17 500. These proceedings are evidently her Achilles heel.

Similarly, the suit by Interfin against her and Mubako for the recovery of the outstanding balance and the Plaintiff applied to be joined to those proceedings citing as he did the fact that he had purchased the property and had duly paid the purchase price should have goaded her into prompt action to dispute payment of the sums listed by the plaintiff.

Several other opportunities strewn across the entire duration of the impasse availed themselves for the second defendant to so assert her rights in this regard. Her silence is telling. It can only say one thing and one thing only, namely that she accepted not only that the plaintiff had paid the purchase price (or part thereof at any given time) but also that she associated herself with that payment, in other words she waived her right to receive part of the purchase price in person.

The evidence therefore hardly admits of any doubt that the second defendant by her conduct induced a belief in the plaintiff that she was part and parcel of the entire arrangement wherein the purchase price was to be handed over to Mubako. She effectively waived her right to claim that half the purchase price was strictly speaking required to be paid to her (with the other half going to Mubako).

This should effectively be the end of the matter. Once it is found, as I have, that the plaintiff paid the purchase price of the property and that the second defendant acquiesced with the manner of payment then the debate on whether Mubako had authority (with the attendant legal question of ostensible authority so heavily relied upon by the second defendant), the to receive the payments falls away.

However, for the sake of completeness I shall address the question of whether the absence of a power of attorney executed by the second defendant in favour of Mubako meant that the latter could not legally receive her share of the purchase price on the former's behalf.

As stated earlier, the agreement of sale is silent on the modalities of payment. Considering that the Mubako and second defendant were at the material time in an unregistered customary law union and given that most of the dealings were between Mubako and Marimbire, I do not believe Marimbire can be faulted for having made payments through Mubako. The tenor of his evidence

was that he did so in good faith on the understanding that was Mubako's arrangement with the second defendant.

More importantly, however, Marimbire's evidence, which evidence I believed was that the second defendant was well aware that payments were being made to Mubako and that she (i.e., second defendant) was at the forefront in all dealings.

That there was no connivance between Marimbire and Mubako is borne out by the various court battles he waged against Mubako and second defendant. He served them both at all times. The proceedings of 7 August 2012 are particularly telling. The plaintiff averred in its founding affidavit that it had made certain payments to Mubako's account. If the second defendant's was averse to that arrangement

The second defendant cannot hide under the guise that Mubako was overbearing with her without her taking appropriate steps to protect her interests.

The meeting second defendant claims to have been convened to deliberate over the payments or failure to pay the plaintiff was completely denied by Marimbire. It was incumbent upon the second defendant to bring forth witnesses who attended that meeting. He who alleges must prove not he who denies.

Ultimately, I am convinced from the evidence as a whole not only that that the second defendant was fully aware of payments having been made either into Mubako's account or to him in person. The absence of a power of attorney, special or otherwise executed by the second respondent in favour of the

Ultimately, I am satisfied that the plaintiff has proved on a preponderance of probabilities that it discharged all its obligations in terms of the agreement of sale of 13 March 2012. It is therefore entitled to the relief it seeks.

### **Costs**

The general rule is that the substantially successful party is entitled to its costs. There is no justification for departing from that established position, neither is there any good cause for awarding costs on the punitive scale that the plaintiff seeks.

1. The claim succeeds.
2. The first and second defendants are hereby ordered to take all necessary steps and sign all documents as are necessary to pass transfer of the rights, title and interest in certain piece of land situate in the district of Fort Victoria, **being Stand Number 9343 Masvingo Township of Fort Victoria Township Lands, measuring 2000 square metres, held under Deed of Transfer 4644/2010, dated 12 October 2010,** into the Plaintiff's name within seven (7) days of service of this court order upon them.
3. In the event of the first and second defendants failing to abide strictly by the terms set out in paragraph (2) hereto, the fourth defendant or his lawful deputy be and is hereby authorised and ordered to take such steps and sign all such documents as are necessary to transfer from the first and second defendants to the plaintiff, rights title and interest in the property certain piece of land situate in the district of Fort Victoria, being Stand Number 9343 Masvingo Township of Fort Victoria Township Lands, measuring 2000 square metres, held under Deed of Transfer 4644/2010, dated 12 October 2010.
4. The fourth defendant be and is hereby ordered to approve and register the transfer as provided in the foregoing paragraphs.
5. The first and second defendants to pay the costs of this suit.

*Kantor & Immermani*, plaintiff's legal practitioners.

*Mbidzo Muchadehama & Makoni*, 1<sup>st</sup> and second defendants' legal practitioners