ZEVENROSE ENTERPRISES (PRIVATE) LIMITED
versus
HAMILTON PROPERTY HOLDINGS LIMITED
and
IREEN CHIWARA
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE 4, 10, 27 June 2013, 25 September 2013

Civil Trial

J.R.Tsivama, for the plaintiff
L. Zinyengere, for the 1st defendant
R. Harvey, for the second defendant
Non Appearance, for the 3rd defendant

CHIGUMBA J: Plaintiff issued summons against the defendants, on 24 March 2011, claiming:

1. An order declaring that Plaintiff is the lawful owner of stand 449 Borrowdale Brooke Township of stand 137 Borrowdale Brooke township (hereinafter referred to as the property in question).

2. An order setting aside the caveat placed on Deed of transfer number 4012/2010 at the instance of the second defendant.

3. An order compelling the first defendant to take all necessary steps required in order to effect transfer to the Plaintiff of the property situate in the district of Salisbury called stand 449 Borrowdale Brooke township of stand 137 Borrowdale Brooke Township,

measuring 1 438 square meters, held under Deed of Transfer 4012/2010, within seven (7) days of the date of this court order upon it.

4. In the event that first defendant fails to strictly abide by the terms stated above, the Deputy Sheriff, Harare, be and is hereby authorized to take such steps on behalf of the first defendant.

5. First and second defendants pay costs of suit jointly and severally, the one paying the other to be absolved.

At the pre-trial conference, on 15 November 2011, the plaintiff's application to amend its declaration was allowed, and the following claim added to it:

6. "Payment of an amount of six hundred United States Dollars US$600, 00 per month as holding over damages from the 1st of October 2010 to date of vacant possession.

7. "ALTERNATIVELY-A refund of the purchase price of ninety five thousand United States Dollars (US $95 000,00) from the 1st Defendant together with interest at the prescribed rate from the 9th of July 2010 to the date of payment in full with costs of suit on an attorney-client scale".

In its declaration, the plaintiff averred that, the third defendant, the Registrar of Deeds, was cited in its official capacity for purposes of compliance with the order sought. No explanation was proffered as to why the Deputy Sheriff was not cited as a party to the proceedings, for the same reason that the third defendant was cited. The plaintiff averred further, that, it entered into an agreement of sale with the first defendant on 8 July 2010, in terms of which the parties agreed that:

(a) First defendant was the owner of the property in question and the holder of title deeds thereto.

(b) A purchase price of US$95 000, 00 was payable upon signature of the agreement.

Plaintiff averred that it duly complied with its obligations in terms of the agreement, by paying US$95 000, 00 to first defendant's duly appointed agents, Property Plus, estate agents, on

13 July 2010. It was an implied term of the agreement that, after payment of the purchase price, the first defendant would take all steps necessary to effect transfer of the property to the plaintiff within a reasonable period or on demand. Despite demand, defendant has failed or neglected to do so, because second defendant has placed a caveat over the property when she has no legal basis on which to do so.

As a result of the plaintiff's amendment of its declaration at the pre-trial conference, the following averment was included in its declaration:

> "As a result of the second defendant's continued unlawful occupation of stand 449 Borrowdale Brooke Township of stand 137 Borrowdale Brooke the Plaintiff has suffered damages in the sum of US$600, 00 (six hundred united states dollars), per month being the rent it has been paying and continues to pay for rented property with effect from the 1st of October 2010 when it would have been entitled to vacant possession, to date".

In the alternative, plaintiff sought a refund of the purchase price from the first defendant.

The second defendant pleaded as follows to the plaintiff's claim:

The second defendant, in her plea, denied that the first defendant was the registered owner of the property in question, under Deed of Transfer 4012/2010. She denied that any purchase price was payable or paid, to first defendant or its agent. She stated that the first defendant had no authority, at law to purport to sell the property to the plaintiff. She averred that she had every right, at law, to place a caveat over the property. She averred that, no cause of action had been established against her, to warrant the claim for the upliftment of the caveat imposed by her. She averred that she is still the registered owner of the property, and denied entering into any agreement of sale with the first defendant wherein she sold the property to it, or passed transfer to it.

In response to the plaintiff's amended claim and declaration, the second defendant filed an amended plea in which she denied that the agreement of sale between the plaintiff and first defendant was genuine or valid. She reiterated that she is still the registered owner of the property, and averred that she never intended to sell her property to the first defendant; she merely borrowed money from it and surrendered her title deeds as security. In the alternative, the second defendant averred that the first defendant defrauded her by use of the loan agreement in the guise of a sale. She averred that the plaintiff has at all material times colluded with the first

defendant, and that it knew, or ought to have known that the first defendant had no right title or interest in the property, which it could pass onto the plaintiff.

On 2 November 2012, the matter was referred to trial on the basis of a joint pre-trial conference minute, which provided that the agreed issues for determination at trial were as follows:

1. Is the first defendant a locally registered company?
2. If so, is it the company that the plaintiff and the second defendant dealt with?
3. Whether the plaintiff is entitled to the rights, title and interest in stand 449 Borrowdale Brooke township of Borrowdale Brooke or, in the alternative, a refund of the purchase price from the first defendant?
4. Whether the plaintiff is entitled to holding over damages of US$600, 00 per month from September 2010 to date of vacant possession of stand 449 Borrowdale Brooke?
5. Was there a legitimate agreement of sale between first defendant and second defendant or was it a loan?
6. Was there a legitimate agreement of sale between the first defendant and the plaintiff?
7. Has the property been transferred to first defendant?

At the hearing of the matter, plaintiff led evidence from its director and shareholder, Mr. Chandler Mayo. He testified and told the court that: He purchased the property in question on Plaintiff's behalf on 8 July 2010. He became aware that the property was for sale for US$100 000, 00 (one hundred thousand United States dollars) through Mr. Brian Machiego an estate agent plying his trade with a company known as "Property Plus". Mr. Machiego took the witness and his wife to view the property. He showed them what appeared to be the original title deeds to the property, and other transfer documents which appeared to indicate that the property had changed hands the previous year, in 2009, and that it was currently in the process of being transferred into the name of the first defendant.

The agreement of sale between plaintiff and first defendant was signed at a law firm known as Mambosasa & Associates. The witness was then taken to a Mr. Martin Murimbebeva who showed him a breakdown of capital gains tax, legal fees and so forth, required for the transfer of the property to the plaintiff. Satisfied that transfer was being effected into plaintiff's name, in October 2010, the witness decided to advise second defendant, the current occupant of the premises a tenant, that plaintiff now required the premises for occupation. Second defendant informed the witness that she would not vacate the premises, and that, far from being a mere tenant, she was actually the registered owner of the property.

The witness went back to first defendant, who reassured him that everything was in order, and advised him to disregard what second defendant had said because her allegations were baseless; she was merely a disgruntled tenant. Plaintiff successfully applied for, and was granted an order for second defendant's eviction from the premises. The eviction order was subsequently rescinded. Various documents were introduced into evidence on behalf of the plaintiff. A copy of first and second defendant's agreement of sale in respect of the property in question. Power of attorney to pass transfer from second defendant to first defendant, Consent to transfer by second defendant in favor of first defendant; consent to vacate the premises by second defendant in favour of first defendant. The witness produced the agreement of sale between plaintiff and first defendant. He produced a transfer slip showing that plaintiff paid US$ 95 000, 00 into the trust account of Property Plus realtors, being the agreed purchase price for the property in question.

Mr. Moyo told the court that he caused the property to be evaluated by Hammer & Tounges, and produced a copy of the valuation report. According to the sworn valuation certificate, dated 13 January 2011, the property was valued at US170 000, 00(one hundred and seventy thousand United States Dollars) open market value and US$150 000, 00 (one hundred and fifty thousand United States dollars) forced sale value. The witness told the court that Plaintiff has incurred costs for rentals from the time it was supposed to occupy the premises, at the rate of UD$600, 00 per month, from October 2010, to date. He produced a lease agreement signed between plaintiff and A Mrs. Mehlomakulu, in respect of number 345 Carrick Creagh Road, Harare, on or about 9 January 2012.

The witness denied that the sale between plaintiff and second defendant was a sham, and insisted that Plaintiff is entitled to take transfer of the property, to holding over damages of

US$600, 00 calculated from 1 October 2010 to date of payment in full, from second defendant, or alternatively to a refund of the purchase price by first defendant. Under cross examination by first defendant, Mr. Moyo denied having had a previous relationship with the first defendant, prior to entering into the agreement of sale with it, on behalf of the plaintiff. He told the court, that first defendant was represented by Mr. Akim Ndlovu when the parties signed their agreement of sale. He stated that he had not specifically requested that Ndlovu show him any documentation to prove that he was duly authorized to represent the first defendant. He relied on the original title deeds, and the transfer documents signed by second defendant in favour of first defendant to reassure himself that first defendant had rights in the property. He told the court that he had not asked the realtors Property Plus for proof that Ndlovu was duly authorized to represent the first defendant in the conduct of the sale of the property in question.

When examined further, the witness told the court that the purchase price was paid into the account of Property Plus and that he was assured that the money would be transferred to Mr. Martin Murimbabeva, the conveyancer, on behalf of first defendant, pending transfer. He confirmed that he had not asked, and had not been shown, a mandate by Property Plus to show that they were duly authorized to look for a buyer for the property, by first defendant. He confirmed that he never asked first defendant for confirmation that the purchase price had been transmitted to it by Property Plus. He admitted that neither the cash transfer slip, nor business receipt number 0114 from Property Plus mentioned first defendant. These exhibits show that money US95 000,00 was transferred from an account in the name of C. Moyo, to Property Plus, being payment for the property in question.

Under cross examination from the second defendant, the witness proved that he was plaintiff's officer, and shareholder. He told the court that the source of funds for the purchase price was from the proceeds of a property which he previously owned, and sold, in order to purchase the property in question. Mr. Moyo stated that, on 8 July 2010, when he signed the agreement of sale between Plaintiff and first defendant, he was satisfied that significant progress had been made to facilitate the transfer of the property from second defendant to first defendant, and ultimately to plaintiff. He admitted that the title Deeds shown to him were in the name of the second defendant, on 8 July 2010. The witness admitted, under cross examination that he attended at the Deeds Registry office in October 2010, three months after entering into the

agreement of sale, to check on registration of title. On further examination, he confirmed that he did not do a deeds search, prior to entering into the agreement of sale. On being questioned as to how it was possible that he viewed the house without going inside or talking to the alleged tenant, the witness simply said that the house was open plan, he viewed it from outside, and was satisfied by the explanation given to him by Brian Machiego of Property Plus. He said the purchase price was low to reflect the fact that the property was unfinished; it needed a lot of work. He denied that it was an unrealistic price, or that its inadequacy pointed to collusion or attempts to defraud second defendant of her property.

The witness admitted that he did not, at the time that he entered into the agreement of sale attempt to talk to the alleged tenant who was clearly in occupation. He only approached second defendant in October 2010. Finally, the witness admitted to filing affidavits where he made incorrect statements in the numerous protracted litigation between the parties, especially in relation to whether first defendant had taken transfer of the property from second defendant. Finally, the witness denied colluding with Brian Machiego of Property Plus, and or Akim Ndhlovu of first defendant and or various lawyers and conveyancers, to defraud second defendant of her property, at the time, and of continuing to do so. He denied any knowledge of the whereabouts of the title deeds to the property, held under Deed of Transfer 5208/09 which were in second defendant's name, or of the deeds of transfer in respect of the same property, number 4012/10 which are alleged to have been shown to him by first defendant. It is common cause that these files have gone missing at the Deeds Registry Office. The Plaintiff then closed its case.

The first defendant called Lloyd Hama as its witness. He produced a company resolution from first defendant, authorizing him to represent it during these proceedings. He testified and told the court that: he has worked as an administrator of the first defendant since 2007. He is fully conversant with everything that transpired in this matter, starting with the fact that second defendant approached first defendant in December 2009, selling the property in question. On 10 December 2009 second defendant sold, and first defendant bought, the property in question. First defendant subsequently, in July 2010, sold this property to the plaintiff. Plaintiff went back to first defendant when it was unable to get transfer of the property into its name. The three parties have been in protracted litigation ever since. He testified that he was present on the day that

second defendant sold her property to first defendant. He was manning the front desk on that occasion and he saw a Mr. Frank Buyanga sign the agreement of sale on behalf of the first defendant. He said that, in July 2010, when Plaintiff and first defendant entered into their own agreement of sale, it was Mr. Akim Ndhlovu who entered into the agreement of sale on behalf of the first defendant. He told the court that the sale was brokered by property Plus, a firm of estate agents.

The witness told the court that Property Plus used to sell a lot of properties on behalf of first defendant. He confirmed that first defendant received the purchase price, US$95 000, 00 from Property Plus. Finally, the witness told the court that second defendant was being untruthful in denying that she sold her property to first defendant, because she had signed an agreement of sale, consent to transfer, consent to vacate, power of attorney to pass transfer, in front of two witnesses. Under cross examination from the plaintiff, Mr. Hama confirmed that first defendant received the purchase price of US$95 000, 00 from the plaintiff. He also agreed that, in the event that plaintiff failed to take transfer, it was entitled to a refund of the purchase price together with interest thereon calculated from the date when the money was paid. The witness told the court that he did not dispute the fact that plaintiff has incurred rental costs at the rate of US$600, 00 per month. He did not dispute the schedule of rentals paid. He confirmed that plaintiff would be entitled to recover the rental money from first defendant, in the event that it failed to take transfer.

Under cross examination by the second defendant, Lloyd Hama told the court that the directors of first defendant were Mr. Frank Buyanga and another person whose name he had forgotten. Mr. Hama admitted that he initially used to work as a driver, not an administrator, with first defendant. He said that even though he was officially a driver at the outset, he would occasionally be assigned administrative duties. When asked why he admitted that Plaintiff was incurring rentals at US$600, 00 per month when the admission was detrimental to his principal the first defendant, he simply said that he had seen the schedule of rentals and there was nothing to dispute. Mr. Hama admitted that he lied when he said he had seen second defendant sign sale documents at first defendant's offices. The documents were signed in the offices of a lawyer and the witnesses, F. Majise and L. Chikomo, were not known to him. When challenges about the lack of a signature on the documents by Frank Buyanga as testified by him, he insisted that the

agreement of sale was signed at the offices of first defendant and subsequently transferred to Farai Muzuva's offices for witnessing.

Under father examination, the witness stated that Property Plus were registered estate agents but he did not know who the directors were. He insisted that first defendant received the purchase price from Property Plus. He said Mambosasa legal practitioners handled the conveyancing and were going to do a simultaneous transfer from second to first defendant to plaintiff. He told the court that they failed because of the caveat placed over the property by second defendant. The first defendant then rested its case at this point.

The second defendant testified in person. She told the court that: In September 2009 she decided to start a small business manufacturing soft drinks. She needed seed money. Her bank turned down her application for a loan. She is a member of a Christian church known as ZAOGA, and her pastor referred her to one of her fellow congregants, a man named Mr. Frank Buyanga (hereinafter referred to as Buyanga), who was giving out small loans at the time. second defendant applied for a loan of US$10 000, 00. A Mr. Akim Ndhlovu was present in the office during these discussions. Buyanga told her that she would have to provide security, and she proffered a motor vehicle. She was told to go to Southerton Police station to have the vehicle vetted, and she complied, returning with a police report and a valuation of the vehicle as being worth US$8 000,00.

Buyanga offered second defendant a loan in the sum of US$4 000, 00. He gave her an agreement of sale to sign. She said he told her it was standard procedure adopted by his company, Hamilton Property Holdings (the first defendant), which gave out the loans. He told her that first defendant did not have a money lending license, so in order to circumvent the legalities; the loan would be disguised as a sale of her vehicle to first defendant. The witness told the court that she trusted Buyanga because they attended the same church, and her pastor had vouched for his good character. At that stage, she signed an agreement of sale, an acknowledgement of receipt, and an agreement to change ownership. These documents were signed at an office on Park Street, which belonged to a legal practitioner named Farai Muzuva, on 10 September 2009, and thereafter, second defendant received the US$4000, 00. It was transferred into her bank account with Stanbic Bank.

During the next couple of months, second defendant would service the loan by making cash payments at the office. On one occasion she gave the cash to Lloyd Hama who she described as a driver/messenger, inside Stanbic bank. No receipts were issued. When she defaulted, in November 2009, she was charged a punitive rate of interest. Rather than lose her car, she decided to borrow more money from first defendant in order to bail her car out, and to raise more capital for her business of buying and selling clothes. second defendant was given US$22 500, 00(twenty two thousand five hundred United States Dollars) in December 2009, by first defendant. As security for the loan, she surrendered the original title deeds to her property, the property in question. She described her actions, as, desperate. Her feelings towards Buyanga, as total trust, because of their religious connection.

On or about 15 December 2009, second defendant signed the following documents, which she was given by Akim Ndhlovu, in the presence of Lloyd Hama: Agreement of sale, Power of Attorney to pass transfer, Declaration by seller, Acknowledgement of receipt, and Consent to vacate. She told the court that Akim Ndhlovu assured her that this was not a real sale. It was a simulated sale, just like the one regarding her car, a mere tool to protect first defendant, who still did not have a money lending license. She inquired about the wisdom of this from her pastor, who assured her that he himself had benefitted from a similar loan and signed similar documents in regards to his own property. By 31 December 2009, the second loan amount had been transferred into second defendant's Stanbic Bank account, by first defendant.

Second defendant then fell out with Buyanga over her car. The US4 000, 00 loan was now in the region of US13 000, 00 when penalty interest had been levied. The rate of interest was 17% per month. She refused to pay. Buyanga assured her that her car would not be sold and that it would remain in her name until she paid. The car is still in her name, although she lost physical possession of it to Buyanga during that period. The witness told the court that her house had been evaluated by Mr. Brian Machiego. All the documents signed were witnessed by Farai Muzuva the lawyer and his wife Linda Chikomo. Second defendant was given a computer generated schedule, which she introduced into evidence, which showed that if she made her repayments on time, she would re-pay a total US28 957, 50. She said that she made her first payment of US$4 000, 00 on 1 February 2010, to Akim Ndhlovu, in the presence of Lloyd Hama, and Buyanga. No receipt was issued. In March 2010, she made a second payment of

US$4 200, 00. Again, no receipt was issued. She told the court that Buyanga was visibly upset on that occasion, and that he accused her of being one of the people who had gone to complain about him to the police. It was her first time to hear of the allegations being made against Buyanga. It was also the last time she ever saw Buyanga in person. In April she made 2010, she made a police report after being contacted by a group of alleged victims of Buyanga's fraudulent activities.

Second defendant testified that, it was around 4 May 2010 when someone telephoned her and advised her that her name was in the Herald newspaper in a notice inserted by first defendant, that she was required to buy back her property within seven days of that date. She was advised by the police to place a caveat over her property to stop it from being transferred without her knowledge. On or about June 2010, second defendant issued summons against the first defendant, under case number HC3637/10, seeking a decclaratur that her property had never been sold to the first defendant. That matter is still pending before this court, to date. The witness told the court that, after she served summons on first defendant, between June and September 2010, that is when first defendant purported to sell the property to the plaintiff. This is based on the fact that the agreement of sale between Plaintiff and first defendant was signed sometime on 8 July 2010.

She told the court that Mr. Chandler Moyo, who testified on behalf of the plaintiff, attended meetings at the Attorney General's office where negotiations were going on with Buyanga's lawyers. She said that he posed as a victim and that he knew or ought to have known that her position has always been that she never intended to sell her property. She told the court that ZIMRA officials placed the value of her property at US$300 000, 00 for tax purposes, in September 2010. She said plaintiff only came to talk to her on 28 September 2010, and that she advised him that she had no intention of vacation the premises. On 20 November 2010, she was evicted, at Plaintiff's instance, on the basis of an order obtained in default. Mr. Moyo had used the documents signed by her to first defendant, to obtain an eviction order, and cited Akim Ndlovu as second defendant in those proceedings, as if he were the current occupant of the premises. second defendant was able to get that default judgment rescinded, under case number HC8873/10, and is currently in occupation of her property. During the course of investigating how Mr. moyo had obtained default judgment, she discovered that the original title deeds file at

the Deeds Registry office, relating to her property, had been removed and could not be located. She told the court that the file is still missing, to date.

Under cross examination, second defendant sated that her level of education is basic, she has some 'O' levels, and a secretarial course. She said that she is 40 years old, and that, at the time that she entered into these transactions, she was 36 years old. She worked for the World Health Organization. She admitted that she knew the nature of the agreements and documents that she signed. She said she did not sign the documents in ignorance, or under duress or on the basis of a misrepresentation. She told the court that Buyanga made a video recording of her signing the second set of documents, presumably to prove the circumstances under which she did so, should it become necessary. She reiterated that Buyanga was a fellow Christian, they went to the same church, her pastor said he was trustworthy, and various members of her church had signed similar documents, in circumstances similar to hers, on faith. She did not deny that an ordinary person, who had sight of those documents, would get the impression that she had sold her property.

She denied that plaintiff was such an ordinary person because he did not view that property, or investigate title, or talk to the occupant, prior to entering into the agreement of sale with first defendant, which is what an ordinary purchaser of property would do. She also stated that the purchase price paid by the plaintiff, US$95 000, 00 for a property valued at US$300 000, 00, was an indication that the plaintiff and first defendant intended to enter into another 'simulated' sale, to defraud her, of her property. She insisted that plaintiff connived with Buyanga, Akim Ndlovu, Lloyd Hama, Brian Machiego, and various lawyers to unlawfully deprive her of her property.

Second defendant called Susan Mutandawari to give evidence in support of her case, which testified and told the court that she also borrowed money from first defendant, through Buyanga. The witness told the court that a friend personally introduced her to Buyanga. She said that he only dealt with people who were introduced to him by people that he knew and trusted. On 18 August 2009, she paid an administration fee, of US$250, 00 just like second defendant, and was not issued with a receipt. She filled in a loan application form and gave it to Buyanga. She surrendered the title deeds to her property as collateral. She was shocked when she was asked to sign an agreement of sale before she could receive her loan of US5 000, 00 (five

thousand United States dollars). She asked Simon, who was manning the first defendant's office whether her three bed roomed house in Marlborough was worth US$5 000, 00. He told her the agreement of sale was fake, to protect first defendant who was not a registered moneylender. She signed other documents such as power of attorney to pass transfer, declaration of seller, consent to vacate, before a lawyer named Nyamushaya.

The witness told the court that the lawyer reassured her that the agreement was 'simulated', it was not real, and that her property was safe. She was given a computer generated schedule of re-payments. She said that she trusted Buyanga totally, that he inspired confidence in her by his gentlemanly conduct. He would rush to open doors for her and to pull up a chair like a real English gentleman. She told the court he had beautiful manners, and was articulate and well spoken. She paid her first of US$7 00, 00 installment in September 2009 to Simon, who did not issue her with a receipt. No receipt was issued when she paid her second installment of US$700, 00. In December, she paid a third installment of US$600, 00 to Buyanga's sister Ruvimbo, who did not issue her with a receipt. When the media began to report about the people who had allegedly been duped by Buyanga, the witness went to the Deeds Registry office and was shocked to discover that her house had already been transferred into the name of a company known as Mbalambala Investments, on 27 January 2010. The power of attorney she had signed was attached. She went to see Nyamushaya the lawyer who had promised her to keep her original title deeds safe and he denied any involvement in the transfer. She later found out that Nyamushaya's name had been crossed out, and the transfer done by a Shakespear Karuva, who she then reported to the police.

Despite being a three bed roomed house which was fully constructed and finished, the property was transferred as a vacant stand. No tax was paid. The property was valued at US$95 000, 00. After being transferred to Mbalambala Investments, the property was subsequently transferred to another company, Sonylits Private Limited. She was evicted from the property. She told the court that she signed the documents that she did because Buyanga exuded integrity. She trusted him. He assured her that the agreement of sale was fake. She admitted to misjudging his character. Finally, she denied that she ever intended to sell her property, and certainly not for a paltry US$5000, 00. Under cross examination, the witness told the court that she had no knowledge of the transactions between first and second defendant. She is in a worse off situation

and is fighting a legal battle to have three agreements of sale declared void in order to regain her property.

Second defendant then called her third witness, Richard Makwara, who testified and told the court that: in September 2009 he applied for a loan with NDH bank and was turned down. A Mr. Mharamasimba, who worked at the bank, introduced him to Buyanga. He wanted a quick loan of US$15 000, 00. He surrendered original title deeds to his house, number 42 Harare Drive Marlborough. He was referred to Shingai Chibhanguza at first defendant's offices who told him to pay US$250, 00 application fee. He refused to issue a receipt, saying it was their standard procedure not to issue receipts. A few days later, Mr. Brian Machiego went to view his house. After that he was presented with an agreement of sale that said that he had sold his house to the first defendant, for US$15 000, 00. He was referred to Farai Zuva's office on Park Street. He was told that everything was above board, that lawyers would monitor all the documents signed and make sure that nothing untoward happened to his property,. He was told that this was necessary to protect first defendant who was not a registered moneylender.

The witness signed the same set of documents signed by second defendant and Susan Mutandawari. He paid an installment of US$3 000, 00 to Akim Ndlovu, and was not issued with a receipt. He then encountered problems and defaulted in paying. After a few months he approached Buyanga, but his property had been transferred to Bishop Jeche around May 2010, who had bought it from first defendant, through a company called Rafisa Investments, under Deed of Transfer 434/10. The conveyancer was Shakespear Karuva. Farai Zuva's name had been cancelled on the power of attorney to pass transfer. The property had been simultaneously transferred from Richard Makwara to first defendant to Rafisa Investments. It appeared as if Makwara had sold the property to first defendant for US$21 000, 00. His loan had been for US$15 000, 00. The property was referred to as a vacant stand on the transfer documents. No tax was paid. In actual fact the property is a house worth much more than that. Finally the witness told the court that he never intended to sell his property to first defendant or to anyone else. Under cross examination from the plaintiff, the witness confirmed that he had not been present at the time that first and second defendant entered into their agreement.

The second defendant then closed its case.

Witnesses' Credibility

Plaintiff' witness, Mr. Moyo's demeanor did not inspire confidence that he was being candid with the court. Although he was very cool and appeared to be unrattled during vigorous cross examination by both defendants, he came across as an opportunistic businessman who was not afraid of pulling up his sleeves and getting his hands dirty, all in the name of a good deal, or bargain. Frankly I did not believe his denials that he was not acquainted with the first defendant prior to entering into the agreement of sale in July 2010. He did not call Brian Machiego as a witness, to buttress his evidence that it was Machiego who contacted him and told him that the property in question was for sale, it was Machiego who took him to view the property and told him second defendant was a disgruntled tenant, it was Machiego who receipted the purchase price, it was Machiego who assured him transfer from second defendant to first defendant was imminent, it was Machiego who showed him the original title deeds and the documents signed by second defendant in favor of first defendant, it was Machiego who transferred the purchase price from Property Plus to first defendant. Much of this witness's testimony hinged on the role allegedly played by Machiego.

Plaintiff would have benefitted a great deal if Machiego had been called to verify its allegations. As things stand, the court got the impression that the witness was not telling the whole story. He was evasive. What struck the court was his apparent lack of visible emotion in a matter where tempers and emotion were running high. Some of the second defendant's witnesses had allegedly lost their homes to the first defendant under similar circumstances. The court had to issue a no cell phones order in the middle of the proceedings. It was alleged that one of first defendant's officers who was sitting in the gallery was texting the evidence being given in court to another officer sitting outside who had yet to testify in court. Before the court could investigate the allegations fully, two witnesses allegedly assaulted each other as they waited outside the courtroom for their chance to testify. Proceedings were halted whilst they reported the incident to the police post here at the High Court. One of the witnesses allegedly ended up in hospital suffering from hypertension as a result of intimidation by another witness. Yet Mr. Moyo, plaintiff's officer, appeared to be unmoved, cool as a cucumber.

The court did not believe significant aspects of his testimony. I will illustrate this point using two examples. The first one relates to the basis of plaintiff's claim for holding over

damages from 1 October 2010 to date of payment in full. The agreement of lease tendered as proof that plaintiff incurred this loss is dated 1 January 2012. No evidence was led to prove that as at 1 October 2010, plaintiff was paying rentals of US600, 00 per month. It is also not clear why, if first defendant held itself out as the holder of title deeds to the property, on 8 July 2010 when it entered into an agreement of sale with plaintiff, holding over damages are being claimed from the second defendant. It would have been logical to claim holding over damages from the first defendant, only, calculated from the date when transfer became due.

Secondly, Mr. Moyo produced a handwritten piece of paper, which appeared to be duly commissioned, which he alleged had been obtained by him at the Deeds Registry office, on 14 October 2010. The paper stated that the property in question was registered in the name of the first defendant, under Deed of Transfer 4012/10, at that date. It is common cause that second defendant had already placed a caveat over Deed of transfer 5208/09, by August 2010. Plaintiff did not give a satisfactory explanation as to how transfer was effected from 2nd to first defendant, in respect of the same property that was purported to be held under a different Deed of Transfer. This is especially so in light of the express admission by Mr. Moyo for the Plaintiff, that first defendant's attempt to take transfer from second defendant, on or about September 2010, failed because second defendant had placed a caveat over the property in question. A caveat on which Deed of Transfer 5208/09 or 4012/10? Logic implies that the caveat could only have been placed over the original Deed of Transfer 5208/09, which was registered in second defendant's name. It is curious that the agreement of sale entered into between Plaintiff and first defendant is silent in relation to the vehicle that the property is held under. The property is merely described by its stand number. The agreement of sale between 1st and second defendant clearly describes the property as being held under Deed of Transfer 5208/09 dated 8 December 2009.

The court finds that Mr. Lloyd Hama was not a credible witness. He admitted to telling outright lies when cross examined. He said he was confused about the sequence of events. The court discredited his testimony. The only reasonable inference is that this witness was coached to testify about events that he had no direct knowledge of. His simplistic admission of Plaintiff's rental claims smells of a scheme, a backroom deal designed to bolster the Plaintiffs claim. The court got the sense that he was a mere errand boy whose status had been jumped up for purposes of representing first defendant at these proceedings. If he was plaintiff's administrator he would

know who its directors are. Similarly he did not know the directors of Property Plus, who according to his evidence in chief, sold a lot of properties for first defendant. I accept that this witness was first defendant's driver, or runner. To call him an administrator is stretching the truth, especially when his level of understanding of the issues clearly belies that.

The court's view is that second defendant was candid with the court. She came across as very honest in her account of what transpired. She went to Buyanga to obtain an off the grid loan after a mainstream bank turned her down. She agreed to a punitive rate of interest. She was desperate for capital. Even after the repayments on the car loan proved exorbitant, she took a second loan. She trusted Buyanga. She had faith in his word that these were simulated agreements of sale to protect first defendant who did not have a money lending license. She said she was afraid when she handed over the original title deeds. She knew the danger she had placed her property in. She knew what Buyanga could do to her property if he decided to be dishonor their arrangement. She knew that these 'simulated' agreements were against the law. Yet she entered into them anyway. I was impressed by second defendant's determination not to sugarcoat the nature of the transactions that she entered into with first defendant. She did not portray herself as an innocent unsophisticated person laboring under a misapprehension or influenced by a misrepresentation. She borrowed money from a loan shark whom she trusted because they went to the same church. She put up her house as collateral. Then she crossed her fingers and hoped for the best.

The court found Susan Mutandawari's testimony believable. She was honest about why she entered into this agreement. She was simply mesmerized by Buyanga's charm. She misjudged his character. She knew exactly what she was doing and she was aware of the implication of signing transfer documents and surrendering original title deeds. She took a calculated risk, and lost.

Richard Makwara was articulate, and impressed the court with his account of what happened to him and to his former home. He seemed resigned to the fact that he lost his property through an illegal loan scheme, which he entered into with full knowledge of the implications. I did not get the impression that he was dissembling on the witness stand. I believed his account. The court declined to allow the second defendant to lead similar fact evidence from eighteen

other witnesses, all alleged victims of Buyanga and first defendant. They all lost immovable properties in similar circumstances, under the same *modus operandi*.

The issues that fall for determination are, firstly whether the agreement of sale between first and second defendants, of December 2009, in respect of the property in question is valid and enforceable, and secondly, whether the Plaintiff entered into a valid agreement of sale with first defendant, in July 2010. If the answer to all these questions is yes, then plaintiff is entitled to the relief that he seeks from both defendants.

The Law

> "A basic principle of our legal system, and of most others, is that seriously concluded agreements should be enforced…however, in no society will all agreements be enforced without exception. Where agreements are perceived to be incompatible with general social mores, the principle that contracts seriously concluded should be enforced is overridden by other policy considerations. Such contracts are usually labeled "illegal' contracts. In this context illegal does not mean criminal. More often it simply means that there are reasons of public policy for not enforcing the agreement in question." *Farlam & Hathaway, Contract,* 3rd ed, by Lubbe & Murray, p237.

Second defendant testified that the agreement of sale entered into between her and first defendant was 'simulated'. So did Susan Mutandawari and Richard Makwara. They all agreed to enter into fake agreements of sale to disguise the fact that they had been given loans by an unregistered moneylender. The parties expressly intended to circumvent the requirement that moneylenders ought to be registered. The Moneylending and Rates of Interest Act [*Cap 14:14*], provides as follows.

3 Moneylenders' licences

(1) No moneylender shall carry on business as such, whether alone or in partnership or association with any other person, unless he is the holder of a valid moneylender's licence taken out in his true name in respect of every address at which he carries on business as a moneylender.

In terms of sec 7, it is a criminal offence to operate as a moneylender without a licence, and the penalty is imprisonment for a period of not less than one year or a fine up to level seven or both. The act only allows for the prescribed rate of interest to be charged currently at 5% per annum, not 17% per month as allegedly charged to second defendant. The court finds that the agreement of sale between first and second defendant, of December 2009, was illegal, and

unjustifiable, a *pactum commisorium.* It was in direct violation of the Moneylending and Rates of Interest Act. The agreement was void *ab initio.* As a result, nothing can stand on it. *See LORD DENNING in McFoy* v *United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172 I, "every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

A *pactum commisorium* has been defined as follows:

A *pactum commissorium* is defined as "a pact by which the parties agree that if the debtor does not within a certain time release the thing given in pledge by paying the entire debt, after the lapse of the time fixed, the full property in the thing will irrevocably pass to the creditor in payment of the debt". See *Van Rensberg* v *Weiblen* 1916 OPD 247 at 252.

A full discussion of why the law reprobates a pactum commissorium is to be found in the judgment of *DE VILLIERS AJA in Mapenduka* v *Ashington* 1919 AD 343 at 351 where, quoting Voet 20.1.25, he says such a pact has been reprobated by the law since the time of Emperor Constantine as being unduly oppressive to debtors:

> "In as much as if it might be agreed that when a debt is not paid within a certain time the creditor is to retain (as his own) the thing pledged for the debt, things of the greatest importance and value would often be ceded in payment of a very trifling debt; the debtor, needy and pressed by the straitened condition of his pecuniary circumstances, readily submitting to the insertion of hard and inhuman conditions (in the bond) and holding out to himself the promise of better times and fortune before the arrival of day fixed by the pactum commissorium, and hoping that the asperity of the pact will be averted from him by payment, a slippery and fallacious hope, however, to which the event not rarely fails to respond" *(Gane's translation of Voet 20.1.25).* See also *Abbott v Cawood 1982 (2) SA (NC) 153 at 155H-156A* .

This court must decide whether to accede to the plaintiff's claim for transfer of the property in question, bearing in mind that the indirect result of making such an order is to uphold and enforce an illegal agreement.

STRATFORD CJ in Jajbhay v *Cassim* 1939 AD 537 at 544-545, said :

> ". . .Courts of law are free to reject or grant a prayer for restoration of something given under an illegal contract, being guided in each case by the principle which underlies and inspired the maxim. And in this last connection I think a court could not disregard the various degrees of turpitude in delictual contracts. And when the delict falls within the

> category of crimes, a civil court can reasonably suppose that the criminal law has provided an adequate deterring punishment and therefore, ordinarily speaking, should not by its order increase the punishment of the one delinquent and lessen it of the other by enriching one to the detriment of the other. And it follows from what I have said above, in cases where public policy is not foreseeably affected by a grant or refusal of the relief claimed, that a court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment."

Gubbay JA (as he then was) followed this dicta with approval in *Dube* v *Khumalo* 1986 (2) ZLR 103 at 109D-F:

> "There are two rules which are of general application. The first is that an illegal agreement which has not yet been performed, either in whole or in part, will never be enforced (by the courts). This rule is absolute and admits no exception. *See Mathews* v *Rabinowitz* 1948 (2) SA 876 (W) at 878*; York Estates Ltd* v *Wareham* 1950 (1) SA 125 (SR) at 128. It is expressed in the maxim ex turpi causa non oritur actio. The second is expressed in another maxim in pari delicto potior est conditio possidentis, which may be translated as meaning 'where the parties are equally in the wrong, he who is in possession will prevail'. The effect of this rule is that where something has been delivered pursuant to an illegal agreement the loss lies where it falls. The objective of the rule is to discourage illegality by denying judicial assistance to persons who part with money, goods or incorporeal rights, in furtherance of an illegal transaction. But in suitable cases the courts will relax the par delictum rule and order restituion to be made. They will do so in order to prevent injustice, on the basis that public policy 'should properly take into account the doing of simple justice between man and man".
>
> See *Independence Mining (Pvt) Ltd v Fawcett Security Operations (Pvt) Ltd 1991 (1) ZLR 268 (H).*
>
> 'Now this court has the power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals. It is not a power to be hastily or rashly exercised; but when once it is clear that any arrangement is against public policy, the court would be wanting in its duty if it hesitated to declare such an arrangement void':

per INNES CJ in Eastwood v Shepstone 1902 TS 294 at 302.

Disposition

The first and second defendants entered into their agreement of sale in respect of stand 449 Borrowdale Brooke on or about 15 December 2009. The plaintiff and first defendant entered into their agreement of sale on or about 8 July 2010. At the time that first defendant entered into the

second agreement of sale in respect of this property, with plaintiff, transfer of the property had not passed from second defendant to it. Plaintiff knew this, and its witness, in his evidence in chief stated that he was told there would be a simultaneous transfer. The court accepted the evidence of Irene Chiwara, and Susan Mutandawari, and Richard Makwara that they never intended to sell their properties, that first defendant knew that they never intended to sell their properties, that the agreements of sale were 'simulated 'agreements to protect first defendant who was not a registered moneylender. The deliberate and flagrant breach of the Rates of Interest and Moneylednig Act, not only constitutes a criminal offence, it renders the 'simulated agreements illegal. The agreements were void at the outset, and this court will not hesitate to declare that these agreements were contrary to public policy, a *pactum commisoria*, *see Eastwood v Shepstone Supra, Jajbhay* v *Cassim supra, Dube* v *Khumalo supra, and McFoy* v *United Africa supra.*

First defendant through Buyanga, assured the three witnesses for the second defendant that their properties would never be sold. Lawyers were used to inspire confidence. Buyanga's alleged mesmeric charisma, impeccable manners, and gentlemanly demeanor endeared him to his fellow conspirators, especially the females. Trust was fostered by others who had undergone similar procedures. And yet, these property owners were not overly naïve, or unsophisticated or dangerously uneducated. They knew that they were rolling the dice with their properties. They knew that they stood to lose their properties, based on the types of documents that they signed. None of them was coerced into signing. Or duped. They signed voluntarily. They were desperate for cash for various reasons. They had been turned down by mainstream lending institutions. So they willingly and knowingly resorted to a shady loan shark. They convinced themselves to trust an unregistered moneylender who charged usurious rates of interest. Their behavior was risky. It was illicit.

The evidence before the court is that Deed of transfer 5208/09 is more probably than not, still in second defendant's name. It was in second defendant's name between April and August 2010 when the police assisted her to register a caveat on it. The legal implication of that is that transfer of that property into another's name was impossible after August 2010, in the absence of upliftment of the caveat by second defendant. The evidence is that the file is currently missing at

the Deeds Registry office. I find that it is highly improbable that the property was transferred into first defendant's name, on or before August 2010, or at any other time thereafter.

I find that the Plaintiff is not an innocent third party purchaser for value. Having already found that the agreement of sale between 1st and second defendant was void *ab initio*, a *pactum commisoria,* it follows that the agreement of sale between Plaintiff and first defendant was also *void abnitio*, it was premised on nothing. I am persuaded by second defendant's allegations and the evidence supports the inference that there was connivance between Mr. Moyo for the Plaintiff, Brian Machiego of Property Plus, Akim Ndhlovu, Lloyd Hama, Buyanga, and first defendant. It is inconceivable that a person can purport to sell a property in Borrowdale Brooke, an affluent suburb, for US$22 500, 00 when its current value is US$300 000,00. Its market value at the time, in 2010, was US$170 000, 00. Its forced sale value was US$150 00, 00. It is inconceivable that Plaintiff picked it up for a song, at US$95 000,00. Plaintiff's explanation that it was unfinished, that it needed tiles was not believed by the court. Plaintiff did not behave like a normal house hunting citizen of Zimbabwe. Mr. Moyo did not check the title to the property at the Deeds Registry office prior to signing the agreement of sale. He saw the original title deeds, in second defendant's name, and for reasons best known to himself believed the stories he was told by first defendant. But the title deeds were clearly not in the name of first defendant.

It was clear that, whatever the power of attorney to pass transfer, consent to vacate, sellers declaration, and all the other documents signed by the second defendant in favour of first defendant clearly represented, the simple fact, which is common cause, is that, title was still in the name of second defendant on 8 July 2010 when Plaintiff purported to enter into an agreement of sale with first defendant. It is common cause that first defendant never took title from second defendant, in September 2010, or on any other date. It could not purport to tender transfer to Plaintiff when it never acquired title. Plaintiff acquired bottled air, which has now fizzled out. Plaintiff is not entitled to claim transfer of the property from first defendant when first defendant itself never acquired title. As Gubbay JA said in *Dube v Khumalo supra*:

> "in pari delicto potior est conditio possidentis, which may be translated as meaning where the parties are equally in the wrong, he who is in possession will prevail'. The effect of this rule is that where something has been delivered pursuant to an illegal agreement the loss lies where it falls. The objective of the rule is to discourage illegality by denying

> judicial assistance to persons who part with money, goods or incorporeal rights, in furtherance of an illegal transaction".

Second defendant is in possession of the property in question, so she prevails. The loss has fallen on Plaintiff, and it currently lies there. The court will consider whether to relax the "in pari delicto" rule in favor of Plaintiff and order restitution in order to do justice between man and man. By implication, if Plaintiff was never entitled to take transfer from the first defendant, it stands to reason that this fact defeats its claim for rentals in the sum of US$600,00 per month from the date when it ought to have taken transfer, being October 2010, from second defendant.

First defendant's representative, Lyoyd Hama who was discredited thoroughly during cross examination, and exposed as a mere driver, a runner, admitted that first defendant received US$95 000, 00 from Plaintiff. No proof was proffered, and the court is loath to take the word of a discredited witness on such a vital issue. The court accepts that Brian Machiego of Property Plus receipted US$95 000, 00 from plaintiff. A copy of the receipt and the transfer slip was tendered in evidence. There is no evidence as to whether the US$95 000, 00 made its way to first defendant, or when that transpired. The court did not find either Mr. Moyo or Mr. Hama credible witnesses. There was a general sense, from the demeanor of these witnesses, of more mischief afoot, of underhand deals, and connivance. In the absence of concrete evidence of the fact of transfer of the funds, I find that there is nothing before me to sustain a claim for a refund of monies that were not proved, on a balance of probabilities, to have reached first defendant's coffers. Plaintiff did not cite Property Plus as a party to these proceedings. Plaintiff did not ask that the court order Property Plus to refund the purchase price to it. There is no valid basis on which the court can be persuaded to relax the "*in pari delicto*" rule.

It would be too easy in considering the issues for determination in this matter, to become mired in the moral turpitude of the players who entered into sham agreements designed to circumvent the law. It would be too easy to berate desperate loan seekers for their apparent lack of judgment in trusting conmen. It would be too easy to become bogged down with similar issues and the different alleged victims of this colossal fraud. In my view, this court, in order to separate the wheat from the chaff, is required to determine a simple issue. Having determined that first defendant never acquired lawful title to pass to plaintiff, the rest of plaintiff's issues, which constitute its claims in terms of the summons, fall, like dominos, into their correct place.

The court finds that the agreement of sale between the first and second defendant, of December 2009, was a sham, a *pactum commisoria*. First defendant lent and advanced, and second defendant borrowed, a cash sum of US$22 500, 00. There was no intention to buy, or to sell the property known as stand 449 Borrowdale Brooke, for that sum. The court finds that the agreement of sale between the first defendant and the plaintiff, of 8 July 2010, was not legitimate, or lawful, because first defendant claim that it had title to the property was incorrect. Its agreement of sale was a *pactum commisoria*, and nothing which emanated from it was lawful, or enforceable. It follows that Plaintiff is not entitled to any rights, title or interest in stand 449 Borrowdale Brooke township of stand 137 Borrowdale Brooke. For these reasons, all of the Plaintiff's claims are dismissed, with costs.

Messrs Sawyer & Mkhushi, plaintiff's legal practitioners
Messrs Mutumbwa, Mugabe & Partners, first defendant's legal practitioners
MessrsGranger & Harvey, second defendant's legal practititoners