GIVEMORE MATANHIRE
and
LOIS MATANHIRE
versus
PAULINE CHAPENDAMA
and
REGISTRAR OF DEEDS Case 1

PAULINE CHAPENDAMA
versus
GIVEMORE MATANHIRE
and
LOIS MATANHIRE Case 2

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 19 May 2014, 27 May 2014 & 3 July 2014

Civil trial

First & second plaintiffs (in Case 1) in person, (first & second respondents in Case 2)
R Matsika, for the first defendant (in Case 1, applicant in Case 2)
No appearance for second defendant in Case 1

MAFUSIRE J: The first and second plaintiffs in Case 1 above were husband and wife. On 10 February 2012 they issued a summons under HC 1546/12 against the first defendant. The second defendant was cited as a nominal party. The plaintiffs claimed an order for the cancellation of a certain agreement of sale between themselves and the first defendant in respect of a certain immovable property in Marondera (hereafter referred to as "***the Marondera property***" or simply "***the property***"). The plaintiffs also claimed an order directing themselves to reimburse the first defendant an amount in the sum of US$60 000! Finally, the action also sought an order for the cancellation of a certain deed of transfer over the Marondera property registered in the name of the first defendant.

Five days after the plaintiffs' summons the first defendant, in Case 2 above, applied in separate proceedings under HC 1703/12, for a *declaratur* and ancillary relief. For the

declaratur she sought an order to the effect that she had paid the plaintiffs (respondents in Case 2) the full purchase price for the Marondera property. As ancillary relief she sought an order for the eviction of the plaintiffs from the Marondera property, plus holding over damages at the rate of US$500 per month from 15 December 2011 to the date of eviction. She also sought an order that the plaintiffs pay all the utility bills in respect of the property from 15 December 2011 to the date of eviction.

Both proceedings were contested. Both parties claimed costs of suit. In November 2013 the two proceedings were consolidated. The costs would be in the cause. The matter came before me for trial on 19 May 2014. Henceforth I shall refer to the plaintiffs as "***Mr & Mrs Matanhire***" or "***the Matanhires***" or "***the sellers***", and to the first defendant as "***Mrs Chapendama***" or "***the purchaser***".

Much of the factual background or the circumstances giving rise to the claims were common cause. Mr and Mrs Matanhire sold their Marondera property to Mrs Chapendama in terms of a written deed of sale drawn up by a firm of legal practitioners and signed by the parties on 8 June 2011. The agreement was replete with grammatical and spelling errors. But in terms thereof, the purchase price for the property was US$65 000.

Clause 1 of the agreement said that the purchase price would be paid "*... by a mortgage through COMMERCIAL BANK OF ZIMBABWE in full and final settlement of the aforesaid amount*." (sic)

Clause 2 said transfer would be effected by the purchaser's conveyancer after due compliance with all her obligations. The clause went on to provide for, *inter alia*, the modalities of registering the mortgage bond and the furnishing of proof of the mortgage by the purchaser. The clause ended by stating that the sellers would pay the capital gains tax within thirty days from the date of notification to pay.

Clause 4 provided for breach. Either party would have the right to claim specific performance or to cancel the agreement without prejudice to the right to claim damages.

Clause 6 said the sellers would give vacant possession of the property "*...two months upon full payment of the purchase price*." (sic)

Finally, clause 8, titled "ENTIRETY OF AGREEMENT", provided as follows:

> "The parties hereto acknowledge that this Agreement of Sale constitutes the entire contract between the Sellers and the Purchaser and no warranties, representations or conditions not recorded herein shall be binding and signed by the part." (*sic*)

Contrary to whatever had originally been agreed to, or had been intended in terms of clause 8 above, the execution of the agreement of sale was anything but in terms of the written word. For example, upon signing, Mrs Chapendama paid the sellers US$10 000. By a written memorandum on that date the sellers acknowledged the payment as being part payment towards the purchase price. In terms of that written memorandum, the balance of US$55 000 would be paid "*...upon successful application of a mortgage loan with the Commercial Bank of Zimbabwe*."

In terms of that written memorandum of acknowledgement of payment the sellers undertook to refund the purchaser the aforesaid part payment of US$10 000 upon the transfer of the original purchase price of US$65 000 by the Commercial Bank of Zimbabwe ("***CBZ***" or "***the bank***") into the sellers' account.

Mrs Chapendama did secure the mortgage finance from the CBZ. But that was for only US$48 000, not US$65 000. She said it was the bank's policy to advance only 75% of the mortgage amount applied for. An applicant for mortgage finance had to provide the remaining 25%. She did. On 3 August 2011 she deposited US$50 000 into Mrs Matanhire's bank account. With that, only US$5 000 of the purchase price remained outstanding.

Mrs Chapendama did pay the remaining US$5 000 between 29 August 2011 and 12 October 2011. But the payment was not made directly to the Matanhires. Part, US$3 250, was paid to the Zimbabwe Revenue Authority ("***ZIMRA***") for the capital gains tax as per ZIMRA's assessment. Part, US$1 105-80, was paid to the Municipality of Marondera for the outstanding rates as assessed by that local authority. Part, US$ 410-00, was paid to a firm of lawyers, Mawere & Sibanda, as their bond cancellation fee and collection commission for the release of the title deed to the property. Mawere & Sibanda had been holding the title deed on behalf of a financial institution from which the Matanhires had previously obtained mortgage finance. Mrs Chapendama paid the remaining part, US$234-22, into Mrs Matanhire's bank account. That was on 12 October 2011.

On 3 August 2011 Mr and Mrs Matanhire had signed a special power of attorney to transfer the property to Mrs Chapendama. That had been the day she had paid the US$50 000 into Mrs Matanhire's bank account. On 13 October 2011 the property was duly transferred to Mrs Chapendama under deed of transfer no 4821/2011. On that day Mrs Chapendama gave

the Matanhires two months' notice in writing to vacate the property. The Matanhires did not comply.

Mr and Mrs Matanhire's case was that Mrs Chapendama had breached the agreement of sale. They said she had not paid the balance of the purchase price of US$5 000. They did not recognise her payments to ZIMRA, Marondera Municipality and Mawere & Sibanda. They said she had purported to manage their affairs by herself purporting to meet their capital gains tax obligations to ZIMRA and their rates obligations to the Marondera Municipality. They said the payment to Mawere & Sibanda, for the bond cancellation, had been a duplication because they themselves had already paid that amount.

The whole dispute centred on this amount of US$5 000, or, to be more precise, US$4 765-78, because US$234-22 had been paid to the Matanhires. They claimed that by she paying directly to ZIMRA, and by she collecting the capital gains tax clearance certificate herself, Mrs Chapendama had prejudiced them in respect of their entitlement to apply for a roll-over of the purchase proceeds for the purposes of purchasing another property that they were buying from a third party. They said in terms of the deed of sale they had thirty days within which to pay the capital gains tax upon being called upon to do so and that Mrs Chapendama had paid it prematurely and had collected the capital gains tax assessment herself.

It was common cause that on 14 October 2011 Mrs Matanhire alone, not the two of them, had signed an agreement of sale of shares for the purchase of a flat on sectional title from a company called Grasmere Garden Flats (Private) Limited. The purchase price was US$35 000.

The Matanhires further alleged that by she paying for the outstanding rates to the Marondera Municipality Mrs Chapendama had prejudiced them in their entitlement to a discount on those rates in terms of a circular by that local authority that had been issued to all the rate payers. They said Mrs Chapendama had duped or tricked them into signing the power of attorney to transfer the property ahead of her paying the full purchase price.

All in all Mr and Mrs Matanhire maintained that it had not been Mrs Chapendama's business to have assumed their obligations as sellers and that she had not performed her side of the deal strictly in accordance with the written contract. They insisted that Mrs Chapendama was supposed to have secured mortgage finance from which they would have been paid their US$65 000 in one lump sum after which they would have refunded her the

US$10 000 that she had paid in advance. For that reason they said they were entitled to repudiate the agreement. They said they were not obliged to vacate the property, let alone pay any holding over damages. They would refund her the amount of US$60 000 as the total amount that they had received from her.

On her part, Mrs Chapendama maintained that she had been perfectly entitled to pay the capital gains tax directly to ZIMRA for the capital gains tax clearance certificate which was part of the documentation required for the registration of transfer. She pointed out that although the capital gains tax had been the sellers' obligation, the agreement of sale had not specified the manner of its payment and that therefore she had not been precluded from deducting it from the balance of the purchase price and effecting the payment herself.

Mrs Chapendama highlighted quite a number of other salient features regarding the capital gains tax assessment and the capital gains tax clearance certificate. On 3 August 2011, after she had already paid the US$10 000 and the US$50 000, both sides had appeared before the ZIMRA officers, albeit separately, for the customary interviews that are conducted in preparation for the issuance of the capital gains tax assessment. Mrs Chapendama said the Matanhires had said nothing about an intention to roll-over. In Case 2 above, one Nanzelelo Mhlanga, a professional assistant employed by Mrs Chapendama's legal practitioners of record, had sworn to an affidavit. She said she had subsequently called on the ZIMRA offices to inspect the capital gains tax return that the Matanhires had filed. On it they had said nothing about a roll-over. She had inspected the notes of the ZIMRA official on the Matanhires' interview. Nothing had been noted about any roll-over. On the contrary, Mr Matanhire had indicated that the capital gains tax would be paid on the balance of the purchase price.

To all this the Matanhires' response had been that the payment of the capital gains tax had been their responsibility; that they had not defaulted on it; that they had attended the ZIMRA interview separately and that therefore Mrs Chapendama or her lawyers could not speak on what had transpired at their own interview.

Mrs Chapendama said contrary to the Matanhires' claim that she had paid the capital gains tax prematurely, she had in fact waited for over thirty days. She had paid it on 9 September 2011. She said the fact that she herself, and not the Matanhires, had collected the capital gains assessment was neither here nor there. The assessment for capital gains tax is not made on the collection of the assessment but on the information supplied on the capital

gains return and at the interviews conducted by ZIMRA. Furthermore, and at any rate, if the claim for a roll-over had been genuine, the Matanhires had, in terms of the Capital Gains Tax Act, *Cap 23:01,* six years from the date of payment to apply for a refund if they thought that the capital gains tax ought not to have been paid.

Finally on the capital gains tax, Mrs Chapendama pointed out that the alternative property that the Matanhires claimed to have bought had not been bought by them jointly but only by Mrs Matanhire and that the purchase price had only been US$35 000. Therefore no right to a roll-over would have applied in such circumstances.

Regarding the payment to the Marondera Municipality, Mrs Chapendama again maintained that she had made it properly. She said a rates clearance certificate is another document that is required for the registration of transfer. She had made the payment for it only on 12 October 2011 after having waited for over two months. The period of the alleged discount offered by the Municipality of Marondera to its rate payers had since lapsed. The discount had only been for six months from January 2011 to June 2011.

Regarding the payment to Mawere & Sibanda, Mrs Chapendama said that she had remitted the amount upon demand by those lawyers who had said they needed it to enable them to release the prior deed of transfer which was also part of the documentation for the registration of transfer. She said upon being advised subsequently that the amount had already been paid; and following an agreement by the parties and their legal practitioners on a settlement out of court, Mrs Chapendama would retrieve the amount from Mawere & Sibanda and pay it to the Matanhires. On their part the Matanhires would follow-up on ZIMRA and the Marondera Municipality on their alleged entitlements to a roll-over on the capital gains tax and the alleged discount on the rates respectively. Mrs Chapendama said on her part she had retrieved the payment to Mawere & Sibanda. She had tendered the amount to the Matanhires. However, the Matanhires had reneged on their undertaking and had subsequently purported to repudiate the agreement.

Mrs Chapendama said her claim for holding over damages stemmed from clause 6 of the agreement. She said it gave her the right to vacant possession of the property two months after payment of the purchase price. The last bit of the purchase price had been paid on 12 October 2011. She had given the Matanhires the notice to vacate on the following day. The two months had expired on 15 December 2011. The Matanhires had refused to vacate. The rate of US$500 per month as damages for holding over was based on written advice from a

firm of estate agents. It had advised that the level of rentals for that kind of property would be US$550 dollars per month.

Mr and Mrs Matanhire both gave evidence. At the close of their case Ms *Matsika*, for Mrs Chapendama, applied for absolution from the instance. I dismissed the application primarily on account of the fact that it was plain that the terms of the original written agreement had not been followed scrupulously. Mrs Chapendama had to explain why.

Mrs Chapendama gave evidence and closed her case. The parties opted to file written closing submissions.

Plainly the Matanhires had no case. Their intransigence and persistence with their claims in the action and their defence in the application were manifestly ill-conceived.

There was no dispute that Mrs Chapendama had subsequently paid the amount of US$500 that had remained outstanding on the purchase price. The nub of the matter was whether by paying that amount, not directly to the sellers, but to those bodies to which the sellers had direct monetary obligations, she had, in fact, discharged her own obligations in terms of the deed of sale. In other words, by she paying the Matanhire's creditors for the conveyance of the property had she discharged her own obligations to them as her creditors for the balance of the purchase price? Plainly she had.

Generally speaking, the debtor's payment to his creditor's creditor does not discharge him from his obligation. But there are exceptions. If the creditor benefits from the debtor's payment to his own creditor then the debtor is discharged. In the case of *C. Pettigrew (Private) Limited* v *Cone Textiles (Private) Limited* 1976 (1) 293, 1976 (3) SA 569, the main contractor applied for provisional sentence against the client or owner of the project in an amount of which over 97% was money owed by the contractor to its sub-contractors. The client had paid those sub-contractors directly. The question was whether that direct payment by the client to the sub-contractors had discharged the client's obligations towards the main contractor to the extent of those payments.

Whilst on the facts before it the court was not able to decide the issue, nonetheless it accepted the principle that such a payment would relieve the debtor from his obligations to the creditor. The court, BECK J, at p297D – E, quoted with approval POTHIER's *Obligations*, Part III, Chapter 1, Article 1 as follows:

> "It is not essential to the validity of the payment that it be made by the debtor, or any person authorised by him; it may be made by any person without such authority, or even in opposition to his orders, provided it is made in his name, and in his discharge,

> and the property is effectually transferred; it is a valid payment, it induces the extinction of the obligation, and the debtor is discharged even against his will."

The learned judge also quoted from VOET 46.3.7 approvingly as follows:

> "I may not correctly pay the creditor of my creditor without the consent of my creditor, except in so far as my creditor's affairs have been advantageously managed by me without his knowledge."

In terms of the Capital Gains Tax Act, and subject to the exemptions therein, the seller of an immovable property is obliged to pay capital gains tax on the capital gain received by him on the sale of his property during the year of assessment. The conveyancer of the property is obliged to withhold the capital gains tax from the purchase price and remit it to ZIMRA within three days of the date that he pays out the purchase price to the seller or transfers the property. ZIMRA may allow an extension of the three-day period for good cause shown. The conveyancer becomes personally liable for the capital gains tax if he fails to withhold and remit it. In terms of s 30A of the Capital Gains Tax Act, no transfer of land will be registered in the deeds office unless the capital gains tax has been paid.

In terms of s 21(2) of the Capital Gains Tax Act, the seller of an immovable property, if it is his residential stand as defined, can elect, by applying to ZIMRA, to expend the whole or any part of the capital gain on the sale of that property, to purchase or construct another residential stand. In terms of sub-section (2a) of s 21 that election must be made on the date when the seller submits the return for the assessment of the capital gain. In this case Mr Matanhire submitted his capital gain assessment on 3 August 2011.

I am satisfied that the Matanhires' claim to a right to a roll-over of the purchase proceeds was a subterfuge. It was probably an after-thought. I am satisfied with Mrs Chapendama's version of events on this. The time for the Matanhires to have indicated their intention to apply for a roll-over was on the submission of the capital gains tax return and during the ZIMRA interview. On both instances they had not.

The capital gains tax assessment return is a prescribed document. As pointed out by Ms *Matsika*, under item 16 the seller of an immovable property is required to indicate "***Yes/No***" his or her election to roll over the purchase proceeds. Mrs Chapendama's evidence was that the Matanhires had not. Neither had they made that indication during the interview. Furthermore, even by the time of the trial they were still within the six year period within which a seller of an immovable property who would have paid capital gains tax in

circumstances in which he was not obliged to pay, or whose payment had been excessive, would be entitled to apply to ZIMRA for a refund. Section 22I(1) of the Capital Gains Tax Act provides as follows:

> "If it is proved to the satisfaction of the Commissioner that any person has been charged with capital gains withholding tax in excess of the amount properly chargeable to him in terms of this Part, the Commissioner shall authorise a refund in so far as it has been overpaid.
>
> Provided that the Commissioner shall not authorise any such refund unless a claim for it is made within six years of the date on which the tax was paid."

The plain truth is that the Matanhires just did not want to have anything to do with seeking a refund of the capital gains tax. After the apparent dispute had emerged the parties and their lawyers had agreed on a course of action to resolve the matter amicably. Among other things, the Matanhires would pursue the issue of the refund with ZIMRA. But they had subsequently reneged on it. On 1 February 2012 Coghlan, Welsh & Guest, their lawyers at the time, wrote to Mrs Chapendama's lawyers in the following terms:

> "Your letters dated 20 January 2012 and 27 January 2012 refer. We regret the late response. Our clients are adamant that they will not go to ZIMRA for rollover verification. We have tried to convince them to do so but they remain adamant. We will revert to you once we find a way forward. ……."

Nothing can be plainer.

Even the claims by the Matanhires that they had been prejudiced by Mrs Chapendama's supposedly precipitous payment of the capital gains tax well ahead of the deadline and by she herself collecting the resultant assessment had no merit. They had not paid the tax more than thirty days after it had become due. They had submitted the capital gains tax return on 3 August 2011. That was the day they had received the bulk of the purchase price which brought Mrs Chapendama's total payments to over 92% of the purchase price. That was also the day that they had signed the special power of attorney to pass transfer. Mr Matanhire said he had gone to ZIMRA offices to collect the capital gains tax assessment some two days later but that he had been told that the purchaser had already collected it. Mrs Chapendama said Mr Matanhire could have just got a copy from ZIMRA or asked her for the original as he had been advised by ZIMRA. She had remitted the capital gains tax, through her conveyancer, only on 9 September 2011.

The payment by Mrs Chapendama to ZIMRA was intrinsically and inexorably linked to her getting transfer of the property that she had purchased. It was in her interest that the Matanhires' obligations in that regard be discharged expeditiously. But since the amount was due anyway, there can be no question that the Matanhires' affairs had "*...been advantageously managed…*"[1]

Ultimately, Mr and Mrs Matanhire's claim was essentially that they, and not Mrs Chapendama, should have remitted the capital gains tax. But that was no ground to repudiate the sale. Their situation is comparable to that of the purchaser in the case of *Sing* v *McCarthy Retail Ltd t/a McIntosh Motors* 2000 (4) SA 795. Therein the purchaser had purported to repudiate an agreement of sale on the ground of an alleged breach of contract. The breach had allegedly stemmed from the seller delivering, or causing it to be delivered, a certain Mercedes Benz motor vehicle from the supplier to the purchaser by having it driven under its own power instead of by road transportation carrier. The odometer had been disconnected. It had clocked a delivery mileage that was 760 km more than that displayed. But the difference in the mileage had not been the issue. The court, after accepting a claim by the purchaser for the rectification of the contract, but discounting other claims by him, ultimately came to the conclusion that[2]:

> "His real complaint, therefore, was not that the car was driven from King William's Town to Durban, but that it was not driven by himself. The appellant relied on this solitary fact; he did not rely on any substantial damage to the vehicle due to its having been driven as explained. ***The breach, in this form, does not justify rescission***." (my emphasis)

The breach in *Singh's* case was said to be no justification for the rescission of the contract because it was said to be not so serious.

Where there has been a breach of contract by reason of malperformance, rescission of the contract is more burdensome than specific performance. It is a more radical remedy. The court must strike a balance between the competing interests. Ultimately it makes a value judgment. The test was set out by OLIVIER JA in *Singh's* case in the following terms[3]:

> "I perceive the correct approach to be as follows: the test, whether the innocent party is entitled to cancel the contract because of malperformance by the other, in the absence of a *lex commissoria*, entails a value judgment by the Court. It is, essentially,

[1] *C. Pettigrew (Private) Limited* v *Cone Textiles (Private) Limited* 1976 (1) RLR 293, @ p 297F - G
[2] At p 803 - 804
[3] At p 803F - G

> a balancing of competing interests – that of the innocent party claiming rescission and that of the party who committed the breach. The ultimate criterion must be one of treating both parties, under the circumstances, fairly, bearing in mind that rescission, rather than specific performance or damages, is the more radical remedy. Is the breach so serious that it is fair to allow the innocent party to cancel the contract and undo all its consequences?"

In casu the amount of the capital gains tax that Mrs Chapendama paid to ZIMRA in discharge of Mr and Mrs Matanhire's liability in respect of the transaction in question was in the sum of US$3 250. That was a trifle 5% of the total purchase price. Even assuming that Mrs Chapendama had not been entitled to pay it directly to ZIMRA and would therefore have been guilty of malperformance, the Matanhires would plainly not be entitled to rescission. Such a breach would not have been one going to the root of the contract. It would not have been one so serious as to warrant rescission. As stated by R H CHRISTIE: *Business Law in Zimbabwe* [4], at p120, and citing the case of *Marlin* v *Moore* 1966 RLR 289, 295 – 6:

> "…a trivial breach of a material term does not justify cancellation …"

I adopt the test for seriousness of a breach of a contract as laid out in *Singh's* case, *supra*, at p 803B – C. The learned judge of appeal quoted approvingly from VAN DER MERWE: *et al Contract, General Principles*, 1st ed (1993) at 255, as follows:

> "The test for seriousness has been expressed in a variety of ways, for example that the breach must go to the root of the contract, must affect a vital part or term of the contract, or must relate to a material or essential term of the contract, or that there must have been a substantial failure to perform. It has been said that the question whether a breach would justify cancellation is a matter of judicial discretion. In more general terms the test can be expressed as whether the breach is so serious that it would not be reasonable to expect that the creditor should retain the defective performance and be satisfied with damages to supplement the malperformance."

Mrs Chapendama was not, and in my view, would not have been, guilty of a substantial failure to perform. The payment to ZIMRA being a mere 5% of the purchase price, I would not, in the exercise of judicial discretion, order rescission of the contract even if it had been that the payment had been improper. The Matanhires would have had to live with it and be content with a claim for damages. But I hold that Mrs Chapendama's payment to ZIMRA was proper and that it was made in discharge of her obligations to the Matanhires.

[4] 2nd ed, JUTA & CO LTD 1998

The same goes for Mrs Chapendama's payment to the Municipality of Marondera for the rates clearance certificate. In terms of s 282 of the Urban Councils Act, *Cap 29:15*, the registrar of deeds will not register transfer of an immovable property unless a rates clearance certificate from the local authority with jurisdiction over the property is lodged with him certifying that the rates for the relevant period have been paid. So it was in Mrs Chapendama's interest that the rates clearance certificate be issued expeditiously for the transfer of the property to be registered.

The Matanhires' claim that they were entitled to a discount on the amount of the rates due for the period in question was not borne out by the evidence. Amongst the documents attached to their notice of opposition in a matter that had been brought by Mrs Chapendama in the magistrate's court and which she had subsequently withdrawn, but which documents were part of Case 2 above, was an undated circular from the Municipality of Marondera to all its rate payers. Among other things, the circular stated that of the balances on rates, water, refuse, supplementary and other charges outstanding as at 31 December 2010, the council was now offering discounts over a six month repayment period. Among Mrs Chapendama's bundle of documents was a letter to her from the Municipality of Marondera dated 12 May 2012. The letter advised that the council had offered that discount for six months only from January 2011 to June 2011. That is one of the reasons why I preferred Mrs Chapendama's version to that of the Matanhires,

Regarding the payment of US$410 to Mawere & Sibanda, again it was inexorably linked to the registration of transfer. Mrs Chapendama had every reason to expedite the release of the prior deed of transfer. But when it was discovered that her payment had been a duplication the parties had agreed on a course of action that entailed her retrieving the payment and tendering it to the Matanhires. She had done that. But the Matanhires had changed their mind. For that they could not possibly have any ground to cancel. At any rate, the amount paid to Mawere & Sibanda was a minuscule 0.6% of the purchase price.

Mrs Chapendama is entitled to judgment in her favour. Mr & Mrs Matanhire's behaviour has been quite callous. Not only did they receive Mrs Chapendama's money and use it to buy an alternative property for themselves, but also they refused to hand over to her the property that she had bought. She has been denied the enjoyment of that property for so long. It has been almost three years that they have kept her out. They have refused to pay her anything. They now ought to pay. She is entitled to compensation in the form of holding over

damages. The normal measure of holding over damages is the rental value of similar premises: *Van der Merwe* v *Erasmus & Anor* 1945 (2) TPD 97, at p 102.

Mrs Chapendama is entitled to damages for holding over from the day that she was entitled to vacant occupation of the property. This was 15 December 2011. Amongst her bundle of documents was an e-mail exchange on 13 February 2012. In her evidence she stated that the e-mail was advice from a firm of estate agents called Bard Properties. They said the average rental for that kind of property was US$550 per month. That evidence was not challenged. Mrs Chapendama's claim herein is for US$500 per month. It is hereby granted.

In the result I make the following orders:

1 The plaintiffs' claims in HC 1546/12 are hereby dismissed in their entirety.

2 The applicant's claims in HC 1703/12 are hereby granted as follows:

2.1 It is hereby declared that the applicant paid the full purchase price for the property known as certain piece of land situate in the District of Marandellas, called Stand 427 Marandellas Township, measuring 2 215 m^2 and originally held under deed of transfer no 9589/2002 but now held under deed of transfer no 4821/2011, otherwise known as 89 First Street, Paradise Park, Marondera ("**the property**").

2.2 The respondents, Mr Givemore Matanhire and Mrs Lois Matanhire, and all those claiming occupation through them, shall vacate the property within seven (7) days of the date of this order and give vacant occupation of the same to the applicant or her authorised agent, failing which the Sheriff for Zimbabwe, or his lawful deputy, or assistant deputy, duly assisted by the police if need be, shall be authorised, empowered and directed to evict from the property the respondents and all those claiming occupation through them.

2.3 The respondents shall pay the applicant holding over damages at the rate of five hundred United States dollars (US$500) per month from 15 December 2011 to

the date on which the respondents, and all those claiming occupation through them, vacate the property and handover vacant occupation of the same to the applicant, or are evicted from the property.

2.4 The respondents shall pay all the rates, water, electricity and any other utility charges in respect of the property from 15 December 2011 to the date that they vacate the property.

2.5 The costs of suit in HC 1546/12 and HC 1703/12 shall be paid by the respondents.

2.6 The respondents' obligation to make any payment in terms of this order is joint and several, the one paying the other to be absolved.

Wintertons, 1st defendant's legal practitioners in Case 1 and applicant's legal practitioners in Case 2