REPORTABLE ZLR (62)

Judgment No. SC 68/07
Civil Appeal 88/04

(1) M.B. ZIKO (PRIVATE) LIMITED (2) MANASE AND MANASE LEGAL PRACTITIONERS v (1) CESTARON INVESTMENTS (PRIVATE) LIMITED (2) KILBERRY INVESTMENTS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
MALABA JA, GWAUNZA JA & GARWE JA
HARARE, FEBRUARY 14, 2007 & JULY 9, 2008

H Zhou, for the appellants

E T Matinenga, for the respondents

MALABA JA: This is an appeal from a judgment of the High Court dated 11 February 2004 by which the first appellant was ordered to transfer to the first respondent within 14 days of the order a certain piece of land situate in the District of Salisbury known as Amsterdam Portion of Odar against payment of the balance of the purchase price whilst the second appellant was ordered to render to the second respondent within 30 days of the order a statement of account in respect of all moneys received by it on behalf of the second respondent, a debatement of such account and payment of all monies due to the second respondent in terms of the account. The appellants were ordered to pay the costs of suit jointly and severally one paying the other to be absolved.

On 11 April 1996 the first appellant represented by one of its directors M.B. Ziko, and Amsterdam Farm (1987) (Pvt) Ltd represented by M J Smith entered into an agreement of sale in terms of which the latter sold and the former purchased a piece of land situate in the District of Salisbury known as Amsterdam Portion of Odar ("the property") measuring 102,3821 hectares held under Deed of Transfer No 15/88 for $700 000. It was a term of the agreement of sale that the purchaser had to secure from Founders Building Society an offer of a loan for the full purchase price payable against transfer of the property within 60 days of the agreement. Transfer, which had to be done by the seller's legal practitioners Atherstone & Cook, had to be tendered within 14 days of the offer of the loan to the purchaser by Founders Building Society.

On 1 July 1998 *M J Smith* executed on behalf of Amsterdam Farm (1987) (Pvt) Ltd a Power of Attorney in terms of which the second appellant was given the power to transfer the property to the first appellant. It is clear from the Power of Attorney that the full purchase price had been paid to the seller. Transfer of the property into the first appellant's name was effected on 12 February 1999.

On 7 May 1998 the first appellant represented by M.B. Ziko, and the first respondent, represented by one of its directors G Dzubinsky, entered into an agreement of sale in terms of which the former sold and the latter purchased the property for $7 000 000.00. In the preamble to the agreement of sale the first appellant is referred to as "the owner of a piece of land Amsterdam Portion of ODAR"

Under Clause 2 of the agreement of sale the parties provided that the purchase price was payable as follows:

> "2(a) The Purchaser shall pay $1 051 181 upon signing of the agreement which amount will be forwarded to FOUNDERS BUILDING SOCIETY in order to obtain the Title Deed of the above Amsterdam Portion of ODAR.
>
> (b) $2 500 00 to be paid after we obtain the original Title Deed from Founders Building Society and the balance to be paid in six (6) monthly instalments."

Clause 3 authorised the purchaser to take occupation of the property immediately in order to develop the land. Under Clause 9 of the agreement of sale transfer of the property had to be effected by the second appellant upon payment by the first respondent of the purchase price or production of a guarantee from a Building Society or Bank of payment of the same upon registration of transfer.

On the day of signing of the agreement of sale the sum of $1 051 181 was given to the second appellant who forwarded it to Founders Building Society. The second appellant had been appointed on behalf of the first respondent as its agent with authority to forward the deposit to Founders Building Society. It had also been authorised to receive the original title deed for the property on behalf of the first respondent.

The first respondent ceded the right to develop the land to the second respondent. Mr and Mrs Dzubinsky were the directors of the respondent companies. On

22 July 1998 the second respondent, represented by G Dzubinsky, entered into an agreement of agency with the second appellant represented by *W T Manase*.

The second appellant was authorised to sell on behalf of the second respondent 475 residential and 100 industrial stands making up the property and deposit the proceeds into an account which had to be opened with Barclays Bank Branch along Nelson Mandela Avenue in Harare. The money had to be transferred to the second respondent's bank account within 7 days of its receipt by the second appellant. The second appellant was to be paid 10% commission on the purchase price of each stand sold.

On 3 July 1998 W T Manase a senior partner in the second appellant, wrote a letter to the directors of the first respondent inviting them to pay transfer fees in the sum of $522 852.50 on behalf of the first respondent. When the money was not paid he wrote another letter on 15 July 1998 saying:

> "Dear Sir
>
> TRANSER: M.B. ZIKO (PVT) LTD TO CESTARON (PVT) LTD – AMSTERDAM FARM REMAINING PORTION OF ODAR
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> We write to confirm that title deeds are now with us for the above property to be transferred to Cestaron (Pvt) Ltd. … . We confirm that there are no incumbrances, liens, mortgages, or litigation over the property."

On 20 July Mr Manase wrote to the first respondent's directors again. He said:

> "Dear Sir

M.B. ZIKO (PVT LTD

We write upon instructions of the above who ask that you deposit with us $2 500 000 in terms of clause 2(b) of the agreement of sale between the parties. Once payment is made this will enable us to proceed to transfer the property to yourselves. Mr Ziko is adamant that this be done first and urgently as he has other commitments to meet hence his decision to sell the property to yourselves."

It appears that the first respondent's directors wanted transfer to take place before payment of the purchase price. The letter makes it clear that the obligation to pay the sum of $2 500 000 had become due. The first respondent's directors responded to the letter of 20 July by paying to the second appellant $1 million part of which they asked that it be for transfer fees. Mr Manase wrote to the first respondent's directors on 28 July 1998 saying:

"Dear Sirs

M.B. ZIKO (PVT) LTD

We acknowledge receipt of your cheque in the sum of $1 million which we accepted and deposited without prejudice. It seems we are unable to utilize part of that sum for the transfer of the farm to yourselves until the $2 500 000 is paid to Mr Ziko of the above. In this regard we shall disburse the $1 million to Mr Ziko as part payment of the $2 500 000 you owe him in terms of clause 2(b) of the agreement of sale. Mr Ziko has also directed as such. In fact it is the only way we can handle the matter as we are unable to transfer the property to you at this stage. To do so will prejudice our professional position.

Please therefore do pay the balance of $1 500 000 to enable transfer to take place."

The letter of 28 July makes it clear once again that the payment of the amount $2 500 000 had become due in terms of clause 2(b) of the agreement of sale. The fact that the first respondent was under the duty to pay the outstanding balance of $2 500

00 was discussed at meetings held between Mr Manase and Mr & Mrs Dzubinsky. The letter of 10 August 1998 makes reference to these discussions. It reads:

> "Dear Sirs
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> M.B. ZIKO (PVT) LTD
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> We refer to our previous letter of the 28 July 1998 in which we implored you to make payment to us the sum of $2 500 00 in terms of the agreement. We appreciate what Mr Dzubinsky told us that you are waiting for payment from Magamba Echimurenga Housing Co-operative but Mr Ziko is putting us under extreme pressure over the matter. As discussed at the luncheon at Monomatapa Hotel between the writer and yourselves, we will give to you all the assistance you require but we are unable to transfer the property prior to the payment as this will bring us into conflict with Mr Ziko."

On 13 August Mr Manase wrote a letter to the first respondent on behalf of the first appellant demanding the payment of $1 500 000 within thirty days from the date of the letter and threatening cancellation of the agreement of sale should the money not be paid within the time limit. The letter of demand reads:

> "Dear Sirs
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> M.B. ZIKO (PVT) LTD
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> We refer to previous correspondence in this matter. We have not received any response to our letter of the 10 August 1998 and any letter before it. Mr Ziko of the above company has requested us to give you notice to the effect that if no payment is forthcoming within a period of 30 days from the date of this letter they will proceed to cancel the agreement of sale entered between yourselves. M.B. Ziko (Pvt) Ltd is demanding that you settle with them in the sum of $1.5 million in terms of the agreement for transfer to be effected. Please therefore take note that if no payment is received by us within the 30 days period as counted from the date of this letter client will thereafter proceed to cancel the said agreement."

When no payment of $1 500 000 was made in terms of the letter of demand a letter of cancellation of the agreement of sale was written on behalf of the first appellant on 30 September. It reads:

> "Dear Sirs
>
> THE AGREEMENT OF SALE: M.B. ZIKO (PVT) LTD AND YOURSELVES
>
> We write in connection with the above agreement of sale wherein you purchased a piece of land Amsterdam Portion of ODAR in the District of Salisbury. It was a term of the agreement that you were to pay the seller M B ZIKO (PVT) LTD $7 million as follows:
>
> - $1 051 181 upon signing of the agreement, which was done;
> - $2 500 000 upon obtaining title deeds from Founders Building Society. Only $1 million of this amount has been paid;
> - The balance was to be paid in 6 monthly instalments. Nothing has been paid so far.
>
> The seller has concluded that a breach of fundamental part of the agreement has been occasioned by yourselves. In this regard they are cancelling the agreement of sale forthwith unless payment is effected immediately of the full balance of the purchase price including interest at 34%. M B Ziko (Pvt) Ltd is calling upon you to vacate the farm and hand over all items you currently hold relating to the farm."

On 8 October 1998 a cheque for $2 000 000 was drawn in favour of the second appellant. The cheque was dishonoured on two separate occasions upon presentation to the bank. It had been intended that of the sum of $2 million $1 500 000 would be part of the purchase price whilst $500 000 would be used to pay transfer fees.

On 14 September 1998 the second respondent had requested the second appellant to provide it with a list of stands sold, names and addresses of the purchasers and the prices at which the stands were sold. On 16 November the second appellant

wrote to the second respondent advising that they were holding a sum of $1 946 987.36 from the sale of stands. Mr Manase expressed reluctance in releasing the monies to the first respondent when the agreement of sale had been cancelled.

On 12 February 1999 the respondents made an application to the High Court for an interdict restraining the appellants from selling, offering for sale or dealing with the property in any manner prejudicial to their rights pending determination of an action to be instituted by them. They also applied for an order directing the second appellant to deliver to their legal practitioners a schedule showing all stands sold and forming part of the property, the purchase price of each stand, monies received in payment and interest accrued. The second appellant was to transfer into a joint interest bearing account in a financial institution to be agreed upon by the parties' legal practitioners all the monies received as well as the interest therein reflected in the schedule. The parties' legal practitioners were to be joint signatories to the account.

The ground on which the application for the interdict was made was that the cancellation of the agreement of sale by the first appellant was unlawful because the first appellant had not exhibited to the first respondent the original title deed in its name as the owner of the property in terms of clause 2(b) of the agreement of sale. Although the application was opposed the High Court nonetheless granted it. The respondents were ordered to commence action on or before 22 March 1999.

Summons commencing action was issued in case HC 4209/99 on 22 March. The cause of action pleaded in paras 6 and 7 of the declaration was that the first respondent had not obtained the original title deed to the property in terms of clause 2(b) at the time the agreement of sale was cancelled.

At the trial of the action G Dzubinsky gave evidence for the respondents. The material aspect of it was to this effect. W T Manase was authorised as the senior partner in the second appellant to forward the payment of $1 051 181 to Founders Building Society. He was to receive the original title deed for the property on behalf of the first respondent. After the payment of the deposit he visited the second appellant's offices asking for the original title deed. He was told by the employees in the conveyancing department that the title deed was in a locked safe. Mr Manase could not be contacted as he was said to be out of the country.

In August 1998 he got a copy of the title deed from a land surveyor. He discovered that the property was still registered under Amsterdam Farm (1987) (Pvt) Ltd. He had been made to believe that the original title deed was in the name of M B Ziko (Pvt) Ltd. W T Manase admitted that he knew that the property was registered under Amsterdam Farm (1987) (Pvt). He also spoke to M J Smith who assured him that the registration of the property under Amsterdam Farm (1987) Pvt Ltd would not affect transfer to the first respondent. The letters dated 10 and 13 August 1998 demanding payment of the balance of $2 500 000 by the first respondent in terms of clause 2(b) of

the agreement of sale were not received by the first respondent. The court *a quo* found G Dzubinsky a credible witness. It said it believed all that he said in evidence.

Wilson Tatenda Manase gave evidence to this effect. He drew up the agreement of sale. Mr and Mrs Dzubinsky and Mr and Mrs Ziko representing their respective companies came to his office on 5 May 1998. They asked him to draw up an agreement of sale relating to the property. The title deed was not produced at the time. From the information the parties gave him on what they had agreed upon he drew up the agreement of sale. The parties signed the agreement of sale on 7 May 1998. On that day he was given the sum of $1 051 181 on behalf of the first respondent. The money was forwarded to Founders Building Society in terms of clause 2(a) of the agreement of sale.

At the end of May 1998 the original title deed on the property was brought to the office. He said he looked at the title deed and realised that the property was still registered under Amsterdam (1987) (Pvt) Ltd. Mr and Mrs Dzubinsky were called to the office where he showed them the title deed. He explained to them that the fact that the property was still registered under Amsterdam Farm (Pvt) Ltd would not affect transfer to the first respondent. There would be a double transfer of the property from Amsterdam Farm (1987) (Pvt) Ltd to M B Ziko (Pvt) Ltd and then to the first respondent.

Mr Dzubinsky asked him to investigate further whether there could be any other encumbrances on the property. Having carried out the investigations he wrote to

the first respondent's directors on 15 July 1998 telling them that there were no encumbrances, liens, mortgages or litigation on the property.

The first respondent's directors asked him to transfer the property to the first respondent before payment of the balance of the purchase price. He wrote the letters on 20 and 28 July and held meetings with them to make clear the fact that the first respondent was under the obligation to pay the sum of $2 500 000 before transfer of the property could be effected. He explained to them that performance of the obligation to pay the money under clause 2(b) of the agreement of sale had become due. It was in response to the letter of 20 July in which payment of $2 500 000 was demanded on the basis that performance of the obligation under clause 2(b) of the agreement of sale to pay had become due that the sum of $1 million was paid on behalf of the first respondent.

When payment of $1 500 000 was not forthcoming he wrote to the first respondent on behalf of the first appellant on 13 August 1998. He put the first respondent *in mora* by telling it that if the money was not paid within 30 days from the date of the letter the first appellant would cancel the agreement.

No payment was made in terms of the letter of demand. The agreement of sale was cancelled by letter of 30 September. In response to the cancellation the directors of the first respondent gave him a cheque of $2 000 000. Of this amount $1 500 000 was for the payment of the balance of $2 500 000 whilst $500 000 was for the payment of transfer fees. On two separate occasions the cheque was dishonoured upon presentation

to the bank for payment. On the order for an account, the matter was dealt with in terms of the order of 22 February. Considering that the agreement of sale had been cancelled he paid back all the money received for the stands sold to the purchasers. At the time of commencement of the action there was no money in the custody of the second appellant.

The learned Judge was impressed by the witness's respectful demeanour. She, however, said he lacked knowledge of details of some of the matters in dispute. The learned Judge said that where the evidence of Mr Manase differed from that given by Mr Dzubinsky, she preferred the evidence of the latter. She accepted the evidence that the first respondent's directors were not shown the original title deed and that the letter of 10 and 13 August 1998 were not received by the first respondent.

M B Ziko gave evidence for the first appellant to this effect. In 1996 the first appellant purchased stand No 194 in Chitungwiza with a loan from Founders Building Society. A Mortgage bond was raised over stand 194 in favour of Founders Building Society. A few days later some one at Founders Building Society asked him whether he was interested in purchasing Amsterdam Portions of ODAR which was on sale. He was interested in purchasing the property.

A loan was advanced by Founders Building Society. The first appellant purchased Amsterdam Portion of ODAR from Amsterdam Farm (1987) (Pvt) Ltd. The title deed for the property was with Atherstone & Cook. Instead of a separate mortgage bond being registered over the property in favour of Founders Building Society one

mortgage bond relating to stand 194 was used to secure the total amount advanced to the first appellant.

During the negotiations with Mr and Mrs Dzubinsky on behalf of their respective companies on the sale and purchase of Amsterdam Portion of ODAR he told them that there was money owed to Founders Building Society that had to be paid for the original title deed to be released. On the day the agreement of sale was drawn up by Mr Manase he went to Founders Building Society and ascertained the amount still owed by the first appellant. The figure given was the outstanding balance of the total indebtedness of the first appellant to Founders Building society in respect of stand 194 and the property. As one mortgage bond was used to secure the total amount of money advanced to the first appellant to purchase the two properties the outstanding amount had to be paid for the title deed for Amsterdam Portion of ODAR to be released.

The sum of $1 051 181 was paid on behalf of the first respondent and forwarded by the second appellant. He said the original title deed to the property was released into the custody of the second appellant. As the property was still registered under Amsterdam Farm (1987) (Pvt) Ltd the first appellant was referred to in the preamble to the agreement of sale as the owner of the property. The reason was that it had purchased the property from Amsterdam Farm (1987) (Pvt) Ltd. He had told Mr and Mrs Dzubinsky that the property was still registered under the previous seller's name.

The learned Judge was not impressed by the witness's demeanour when he gave evidence. She noted that he kept his eyes directed at the ceiling.

On the basis of the assessment of the credibility of the witnesses the learned Judge made the following finding of facts on which the judgment appealed against was based. She said:

> "On a balance of probabilities I find that the first plaintiff's directors were not shown the deed after they had paid the deposit. It is probable that the defendants did not want the first plaintiff to discover that it had been tricked into paying the deposit meant for Founders Building Society to release the deed. It is common cause that the deed was with Messrs Atherstone & Cook and not with Founders Building Society. It is further common cause that the payment that was made to Founders Building Society was for the first defendant's other indebtedness to that institution and had nothing to do with the piece of land sold to the first plaintiff … . It is not clear from the testimony of both defendants when the deed was obtained from Messrs Atherstone & Cook. Thus it cannot be stated with any certainty as to when the obligation by the first plaintiff to perform under clause 2(b) of the agreement became due. The time for performance was not set nor was it clear. In such circumstances it was incumbent upon the first defendant to place the first plaintiff *in mora*. The defendants have argued that the first plaintiff was placed *in mora* by letters from the second defendant dated 28 July, 10 August and 13 August 1998. George Dzubinsky on behalf of the first plaintiff testified that the last two letters were never received. I believe him and agree with the submission by Mr Matinenga that these two letters were an obvious creation on the part of the defendants to meet the case that the first plaintiff was making. … . In the absence of a proper demand having been made upon the first plaintiff the purported cancellation of the sale agreement is of no force and effect."

On the claim against the second appellant, the learned Judge did not consider the evidence that the order made on 22 February 1999 covered the same subject matter of the imposition of the duty on the second appellant to render to the second respondent an account of the stands sold, the names and addresses of the purchasers and the monies received on its behalf. She held that the second appellant was bound to account to the second respondent in terms of the order sought.

The question on appeal is whether the findings of fact made by the court *a quo* are correct. The determination of that question necessitates an inquiry into the question whether considering all the circumstances of the case the learned Judge's assessment of the credibility of the witnesses can be supported.

In *Mthimkhulu v Nkiwane & Anor* S-136-01 at p 3-4 of the cyclostyled judgment it is stated that:

> "The principles that govern the approach by an appellate court to the question of the correctness of the trial court's finding of fact is that as a general rule the trial court's finding on the credibility of witnesses should not be lightly disturbed because that court would have seen the witnesses give evidence and from that position was better placed to comment accurately on their demeanour. An appeal is however a re-trial on recorded evidence. An appellate court may still disagree with the finding of the trial court if on examination of the evidence and considering all the circumstances (such as inferences from unquestioned facts and probabilities) of the case, it comes to the conclusion that the trial court's findings on the credibility of witnesses cannot be supported. See *Forbes v Golach & Cohen* 1917 AD 559 at 560 – 561; *Lewis v Elske* 1921 AD 36 at 38–42, *National Employers Mutual General Insurance Association v Gany* 1931 AD 187 at 199."

With every respect to the learned Judge, I have come to an entirely different conclusion on the credibility of the witnesses. I reached this conclusion after a careful examination of the recorded evidence of the witnesses and consideration of the documentary evidence. I bore in mind the fact that the learned Judge was better placed to comment accurately on the demeanour of the witnesses. I was nonetheless mindful of the fact that whilst demeanour is an important factor to be taken into account in the assessment of a witness's credibility the weight to be placed on it in determining the

question whether the evidence given is reliable and probative of the facts in issue must depend on all the circumstances of the case.

The first question for the determination of which the credibility of the witnesses became a decisive factor was whether or not the first respondent became aware of the fact that the original title deed for the property had been obtained as a result of the forwarding of $1 051 181 to Founders Building Society. The first respondent's directors appointed the second appellant as its agent and authorized W T Manase to obtain the original title deed on its behalf. Mr Manase gave evidence to the effect that the original title deed came into his possession at the end of May 1998. It is highly unlikely that the letter of 3 July would have been written to the first respondent's directors calling upon them to pay transfer fees on its behalf if the title deed was not in the second appellant's possession. The letter of 15 July put the fact that the original title deed was in the possession of the second appellant by that date beyond any doubt. The learned Judge accepted as a fact that the title deed was in the possession of the second appellant. She held that the first respondent did not "obtain" the original title deed because it was withheld from its directors by the second appellant's witness.

The learned Judge overlooked the fact that the first respondent's directors appointed the second appellant as its agent for the purposes of obtaining the original title deed in terms of clause 2(b) of the agreement of sale. Knowledge of the second appellant's witness that the title deed had been obtained and was in the agent's custody as disclosed in the letter of 15 July 1998 was imputable to the first respondent as the

principal for the purposes of the fulfilment of the condition precedent to the performance of the obligation to pay the sum of $2 500 000 in terms of clause 2(b) of the agreement of sale.

Mr *Manase's* evidence that after the title deed came into the possession of the second appellant at the end of May 1998 he called the first respondent's directors and showed them the document is supported by probabilities. His conduct would be consistent with the fulfilment of the mandate in terms of which the second appellant was required to obtain the title deed on behalf of the first respondent.

The Power of Attorney signed by Mr Smith on behalf of Amsterdam Farm (1987) (Pvt) Ltd, on 1 July 1998 appointing the second appellant as the conveyancers to transfer the property to the first appellant was overlooked by the court *a quo*. The Power of Attorney states that as of 1 July 1998 the full purchase price at which the property had been sold to the first appellant had been paid. It is common cause that all the indebtedness of the first appellant to Founders Building Society in respect of the property had been discharged upon payment of $1 051 181. The first respondent undertook to pay this money as part of the purchase price. That the money was used to discharge the indebtedness of the first appellant to Founders Building Society in respect of stand 194 and the property was of no consequence to the interests of the first respondent provided the payment had the effect of having the original title deed to the property released into the custody of the second appellant.

There was no question of the first respondent being tricked into doing what it had voluntarily undertaken to do in pursuance of its interest to purchase the property. Mr *Manase* said after the directors of the first respondent had sight of the original title deed and noted the fact that the property was still registered under Amsterdam Farm (1987) (Pvt) Ltd they asked him to carry out further investigations and ascertain whether there were any further incumbrances on the property. The letter of 15 July 1998 is in substance a report to the first respondent's directors that the investigations carried out as directed revealed that there was no incumbrance, lien, mortgage bond or litigation on the property. The first respondent's directors did not deny that they received the letter. They also did not deny the evidence that after receipt of the letter of 15 July 1998 they sought to have the property transferred into the first respondent's name before payment of the sum of $2 500 000 in terms of clause 2(b) of the agreement of sale. How could they have the property transferred into the first respondent's name without the knowledge that the original title deed was available?

The learned Judge's finding that it was not clear from the evidence of the appellants when the performance of the obligation to pay the sum of $2 500 000 became due was a clear misdirection. It was in the contemplation of the parties that the performance by the first respondent in terms of clause 2(b) would become due immediately following the obtaining of the original title deed. Mr Manase said the original title deed came into the possession of the second appellant as the first respondent's agent at the end of May 1998.

There is no doubt at least that upon receipt of the letter of 15 July the first respondent's directors became aware of the fact that the condition precedent to the due performance of the obligation to pay the money had materialised. The letter of 20 July 1998 was an unequivocal demand for the payment of $2 500 000 in terms of clause 2(b) of the agreement of sale. At least as of that date the first respondent's directors were made aware of the fact that performance by the first respondent of the obligation to pay the money had become due. Payment of $1 million made in response to the demand made in the letter of 20 July was an acknowledgement of the fact that the performance of the obligation under clause 2(b) of the agreement of sale had become due. Had sufficient weight been placed on the evidence of the letters, the court *a quo* would have arrived at a different conclusion in its assessment of the credibility of the witnesses.

The second question the determination of which was based on the assessment by the court *a quo* of the credibility of witnesses was whether or not the first respondent was put *in mora* before the agreement of sale was cancelled. It is important to bear in mind the fact that the parties entered into an agreement of sale of land in terms of which the purchase price was payable in two or more instalments. The first appellant was obliged by the provisions of s 8 of the Contractual Penalties Act [*Cap* 8:04]("the Act") to give the first respondent not less than 30 days within which to pay the balance of the purchase price which was due before cancellation of the agreement of sale.

It is clear that the letter of 13 August 1998 would have had the effect of putting the first respondent *in mora* for the purposes of s 8 of the Act if the evidence that

it was received was accepted. Mr Dzubinsky said the letters of 10 and 13 August were not received on behalf of the first respondent. He did not say the letters were not written on the dates they bear.

Mr *Matinenga* suggested to Mr *Manase* during cross-examination that the letters were written after the commencement of the action to meet the case being made by the first respondent. The basis for this proposition was that the photocopies of the two letters were of dark shading. It was also said that when further particulars of the letters of demand the first appellant had alleged in its plea to have sent to the first respondent were ordered as requested on behalf of the first respondent, for purposes of replication, the letters were referred to as annexure A, B, C, D and E whilst the letter of 13 August appeared as annexure E1. It was suggested that annexure E1 was inserted to meet the case the first respondent intended to make against the first appellant at the trial. The contention was that the two letters were fabricated and given the dates they bear to create the impression that they were written on 10 and 13 August 1998. Mr *Manase* denied the accusation. The learned Judge accepted the proposition put to the witness by Mr *Matinenga*.

The learned Judge failed to appreciate the fact that there had to be reasonable grounds before so serious allegations of deliberate fabrication of documentary evidence for purposes of meeting a case for the opposing party is made against a legal practitioner who is an officer of court. In this case there was no basis for the accusation leveled against the legal practitioner.

When Mr *Manase* explained in evidence in answer to the suggestion by Mr *Matinenga* that the letters of 10 and 13 August 1998 were referred to as annexures E and E1 when further particulars were provided in terms of the order of 9 March 2000 the explanation ought to have been accepted. The reason is that there was no evidence with which the veracity of the explanation could be challenged. In the replication it was not alleged that the letters were not written on the dates they bear. It was even not suggested that they were not received. The allegation made was that the letters did not constitute demand at law. Apart from the speculative cross-examination of Mr *Manase* there was no basis in the evidence for the first respondent for the finding by the learned Judge that the letters of 10 and 13 August 1998 were fabricated to meet the case the first respondent intended to make at the trial.

The question for determination is whether Mr Dzubinsky told the truth when he said that the two letters were not received by the first respondent. For the letter of 13 August to constitute demand for purposes of putting the first respondent *in mora* as required by s 8 of the Act, it had to be received by the first respondent. The two letters were addressed to the first respondent's directors and posted to the same Post Office address to which all the other letters that were received by the first respondent's directors were sent.

The other letters had not been replied to and no acknowledgement of their receipt had been communicated to the appellants. The two letters were also not returned

by the Post Office as not having been claimed. It is also important to note that the postal address was given by the first respondent's directors in the agreement of sale as the reliable address to which correspondence between the parties on matters arising from their contractual relationship should be sent.

The post was chosen by the first respondent's directors as the reliable method of communication between the parties. Where a specific method of communication has been chosen by the parties and all the necessary requirements for its use such as proper addressing and posting have been complied with as directed, a presumption arises of the fact that the letter was delivered or received unless there is proof to the contrary. *Van der Merwe v Colonial Government* (1904) 21 SC 520; *Dougan v Estment* 1910 TPD 998.

There is also a presumption that a document was executed on the day of the date it bears. In other words unless the contrary is proved the date on a document must be taken as its true date. *Phipson On Evidence* 13 ed para 35-03.

The first respondent's witness merely denied having received the letters of 10 and 13 August 1998 on behalf of the first respondent. There was no suggestion that the letters were not sent at all by post or that they were sent to a wrong address. The bare denial of receipt of the letters was not sufficient to discharge the *onus* on the first respondent to rebut the presumption that the letters were delivered at the address to which they were posted. There was also no basis on which the first respondent could be said to

have discharged the *onus* to rebut the presumption that the two letters were written on the dates they bear. The court *a quo* ought to have found that the first respondent's directors received the letters of 10 and 13 August 1998. The first respondent was put *in mora*.

On the relief sought against the second appellant by the second respondent it is clear that the former was authorised to sell the stands to members of the public and receive the proceeds thereof on behalf of the second respondent. The second appellant was under the duty as an agent to account to the second respondent for the stands sold, the names and addresses of the purchasers and the proceeds received on its behalf. The second appellant could not defeat the claim for a statement of account by raising the rights of third parties such as the purchasers. In *Blaustein v Maltz Mitchell & Co* (1937) 1 ALL E R 497 at p 502 SLESSER LJ said that:

> "Where an agent would otherwise be bound to account to his principal in respect of moneys paid to him, he cannot resist the claim of his principal by alleging some claims made to it by some other person."

SCOTT LJ at p 505 said:

> "The law is perfectly clear that an agent receiving money rightfully for his principal is not liable in respect of that money to the owner of the money even where the principal, upon receiving it, would be bound to pay it over to the owner."

At the time the second appellant sold the stands and received the proceeds thereof the second appellant did so on behalf of the second respondent. It was under the duty to account to the second respondent for the number of stands sold and the proceeds received even if the monies had been refunded to the purchasers.

The point raised on behalf of the second appellant which was not dealt with by the court *a quo* was that the obligation to account to the second respondent was enforceable under the order to account made against it on 22 February 1999. It appears to me that whilst the order which dealt with the same subject matter had not been abandoned the second respondent was debarred from instituting an action claiming an order to account against the second appellant. It should have enforced the order of 22 February 1999.

As a result the appeal succeeds with costs. The order of the court *a quo* is set aside and substituted with the following –

"The action is dismissed with costs."

GWAUNZA JA: I agree

GARWE JA: I agree

Manase & Manase, appellants' legal practitioners

Musunga & Associates, respondents' legal practitioners