

GIVEMORE SAMBADZI
versus
ANGELICA OTILIA GUZHA

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 6 June 2013, 12 June 2013, 11 July 2013,
12 July 2013, 16 July 2013 and 27 May 2015

Civil Trial

P. Chiutsi, for the plaintiff
R. Chingwena, for the defendant

TAKUVA J: The plaintiff instituted proceedings against the defendant for a refund of a sum of \$35 000-00 paid to the defendant for the purchase of a property known as stand No. 3091 Malbereign Township situate in the district of Harare. Further, the plaintiff sought an order ordering that the property be executable.

The defendant denied liability on the basis that she borrowed \$12 000-00 from an Estate Agent called Drew and Fraser. She denied selling her house to the plaintiff. The defendant averred that she was not the signatory to the Power of Attorney, the Seller's Declaration and the contract of sale. According to her, all these documents are forgeries.

PLEADINGS

In his declaration, Mr Sambadzi alleged that in January 2010, he entered into an agreement of sale of immovable property being number 3091 Mabelreign Township 16 of Stand 2259A Mabelreign situate in the district of Harare measuring 1343 square metres. He attached the agreement as annexure 'A'. The plaintiff further alleged that he paid the full purchase price of US \$35 000-00 to the defendant. In the following paragraphs, the plaintiff states:-

- “5. The transfer of title in the name of the plaintiff has not yet been effected up to day it appears the defendant fraudulently sold the property before the Estate had been wound up though she is the beneficial owner of the property.
6. The property which is the subject of the sale belongs to the late Brighton Matewere's Estate whose identity document is hereto attached as annexure 'B'.

- 7. Brighton Matewere died at Blantyre Malawi on 16 September 2007 and the Interim Liquidation and Distribution Account of the Estate is hereto attached as annexure ‘C’.
- 8.
- 9. The defendant was acting as an agent of Brighton Matewere pretending as if he was alive and being authorised to execute the sale by the SPECIAL POWER OF ATTORNEY dated the 13 January 2010.
- 10. In terms of the said Distribution Account, the said property is also subject to distribution among the beneficiaries to the Estate of the late Brighton Matewere, and is to be registered in the name of Brighton Matewere Trust (Registration Number MA780/2010) hereto annexed as Annexure ‘E’
- 11. The said agreement of sale is null and void and of no force and effect because the defendant had no legal capacity to act as an agent of Brighton Matewere for the sale of the property belonging to the Estate of the late Brighton Matewere.
- 12. The defendant fraudulently forged the deceased’s signature in The Special Power Of Attorney dated 13 January 2010.
- 13. Brighton Matewere died on 16 September 2007 therefore could not have signed a power of attorney on 13 January 2010 because he was long dead by that time.
- 14. The sale was in contravention of the ADMINISTRATION OF ESTATES ACT [Chapter 6:01] as s120 provides that the Estate of the deceased should be sold by the Executor with the consent of the Master of High Court.
- 15. The defendant was not the Executor when she sold the said property and is still not the Executor of the property in question.
- 16. The defendant therefore had no *locus standi* to execute the sale.
Wherefore the plaintiff claims against the defendant:-
 - i) The payment of US\$35 000-00 (Thirty five thousand united states dollars) as restitution thereto.
 - ii) Interest at the prescribed rate from date of summons to date of final payment.
 - iii) An order that stand No. 3019 Mabelreign T/Ship 16 of stand 2259 A Mabelreign situate in the district of Harare measuring 1343 square metres registered in the name of Brighton Matewere under Deed of transfer No. 148/83 be declared executable and
 - iv) Costs of suit on a legal practitioner and client scale”.

The defendant, Angelica Otilia Guzha denied the fraud alleged against her and denied the alleged contract of sale. Her plea can be summarised as:-

- “1. -----
- 2. Ad Paragraph 3
The defendant denies ever entering into an Agreement of Sale with the plaintiff in respect of the immovable property in question and in particular, signing annexure ‘A’ and puts the plaintiff to the strictest proof thereof. The defendant further avers that she does know the plaintiff and has never done any business with him.
- 3. Ad Paragraph 4
The defendant denies that she received the stated payment from the plaintiff or any other payment and put the plaintiff to the strictest proof thereof.
- 4. Ad Paragraph 5
The defendant denies that the plaintiff is entitled to the transfer of the immovable property in question and that she fraudulently sold same to the plaintiff.
- 5. -----

6. -----
7. Ad Paragraph 11 – 16
As indicated in the para 5 *supra* the defendant avers that she does know the plaintiff and has never entered into any agreement with him or anyone purportedly selling the property in question. Therefore, all the allegations contained in these paragraphs are not only baseless and but (*sic*) also irrelevant.
8. WHEREFORE the defendant denies that the plaintiff is entitled to the relief that he seeks, or any relief in the alternative and prays for the dismissal of his claims with costs on a legal practitioner and own client scale”.

The following issues were agreed to and listed:

- (1) Whether or not the plaintiff and the defendant entered into an agreement of sale in respect of the immovable property.
- (2) Who signed the special power of attorney in the deceased’s name
- (3) Whether or not the defendant received any money or payment for the purchase of the immovable property
- (4) What is the amount due to the plaintiff from the defendant.

The plaintiff led evidence to the effect that he is a businessman who runs a number of retail shops in Harare where he sells clothes, furniture and gas. He told the court that he invests the profits from his business activities in property both residential and commercial. Sometime in January 2010, he entered into a contract of sale with the defendant involving immovable property being number 3091 Mabelreign Harare. He paid the full purchase price of US\$35 000 to the defendant who failed to effect transfer of title to the plaintiff. The plaintiff then issued summons claiming a refund of the purchase price. The plaintiff stated that he was looking for a house to buy through estate agents. Later, he was approached and told that there was a house for sale. He instructed them to obtain documents that were above board which documents he was shown and he decided to purchase the property. The plaintiff said he told the agent to bring the owner to his office so that he/she would receive payment. The defendant was then accompanied by one Tatenda to the plaintiff’s office where she received the full purchase price of US\$35 000-00. The plaintiff admitted that he did not issue the defendant with a receipt as he was under the impression that, that was the responsibility of the agent. He said he was buying the house for his children. Asked why he did not personally view the house before purchasing it, he said he was a

busy man and that he trusted his agent's assessment of price levels in the particular zone the property was situated.

Exhibits

The following were produced through this witness:-

1. Copy of Title Deed
2. Copy of the defendant's passport
3. Special Power of Attorney by B. Matewere
4. Marriage certificate between B. Matewere and the defendant
5. Copy of Brighton Matewere's identification document
6. Declaration by seller signed by the defendant
7. Agreement of sale between the plaintiff and the defendant
8. Letter dated 13 May 2010 from the defendant's legal practitioners to Drew and Fraser Estate Agents.
9. The defendant's affidavit in case number HC 4715/11

Asked about the defendant's contention that she had no knowledge of the sale of a house but a loan she obtained from Drew and Fraser, the witness said the defendant was not being truthful because if all she required was a loan, she would not have produced all the papers she produced. Under cross examination, the witness stated that he had purchased a number of houses using Estate Agents and would normally pay in cash raised from his business transactions. The plaintiff denied that it was Mildred Roki who produced most exhibits referred to above when she applied for a loan from Drew and Fraser. He insisted that the defendant signed the agreement of sale in his office.

The plaintiff indicated that he owns three companies operating in Harare namely.

- (1) ALCATRAZ FASHIONS
- (2) HOME GATE FURNISHERS and
- (3) G.P. Gases

In 2010 he had 15 shops while currently he runs 12 shops that employ 187 employees.

Miss Euphrasia Mpedzisi was the plaintiff's second witness. She is the Managing Director of Drew & Fraser Real Estate which deals with real estate business namely property

sales both residential and commercial, letting and property valuations. They do not have a money-lending or Loan Division. She knows the plaintiff through this transaction. Sometime in 2010 the defendant came to their offices in the company of a lady called Roki who was known to the witness in that the two had worked for a company called Elite Real Estate. Roki was employed by this company as a property negotiator.

The defendant was introduced to her as someone with property in Sunridge which she was selling and the witness discussed the property's description. The defendant indicated that her husband was in Malawi and the witness together with her colleague one Tatenda visited the house which they discovered to be a standard three bedroomed house. They discussed the purchase price and settled at US\$35 000-00. The defendant then mandated Drew and Fraser to sell her property.

The defendant supplied a copy of the title deed, power of attorney, copy of her marriage certificate and her identification document. The witness then carried out a deed search and discovered that there were no caveats or mortgage bonds registered on it. She also said the defendant produced her passport which was valid and a copy of Brighton Matewere's identification document. Subsequently, an agreement of sale and a declaration by the seller were signed by the defendant. The witness categorically denied that exhibits 1 – 5 were brought to her by Roki for purposes of applying for a loan. She also denied ever receiving any money from the defendant whom she said she had never seen since the time of the transaction.

When asked to comment on the defendant's contention that the signatures on the agreement of sale and declaration by seller are forgeries, the witness said although she was not present when the defendant signed the agreement of sale, she was however present when the defendant signed the declaration by the seller. According to the witness, they were not concerned about whether or not the seller had acknowledged receipt of the purchase price to the buyer. All they did was to ask the defendant to sign a declaration by seller wherein the defendant acknowledged receipt of the purchase price. However, transfer could not pass because they received a letter from Ziumbe and Partners to the effect that the agreement between the defendant and the plaintiff was void because the defendant's husband was late. She said this surprised her as at the time the defendant signed the documents and received payment she did not

disclose this fact. Both defendant and Roki said the defendant's husband was alive but living in Malawi.

The witness said her understanding of exh 8 i.e the letter from Ziumbe & Mtambanengwe legal practitioners is that the defendant admitted signing an agreement of sale believing it to be a loan agreement. For this reason, she was baffled by the defendant's assertion that she did not sign that agreement at all and that her signature was forged.

Under cross-examination, the witness insisted that she was given a mandate to sell the house in writing by the defendant. She also insisted that the declaration by seller was prepared by KANDA & Company Legal Practitioners who were the conveyancers and that the defendant signed it in the witness's presence. Finally, she was adamant that the declaration by seller serves as a receipt. The plaintiff closed his case after the evidence of this witness.

The defendant took the oath and testified as follows:

She obtained a loan from Drew and Fraser after she had been introduced to Tatenda and Euphrasia by her friend one MILDRED ROKI. The two were introduced to her as money lenders and she visited their offices to apply for a loan but was informed that they would phone Roki when the money was available. After about two weeks Roki came to her work place asking for her identification documents and marriage certificate. Since she was busy, she gave her the keys to the stockroom where she (ROKI) collected the two documents plus her husband's identification document. Later she received a phone call and she went to Drew and Fraser where she collected US\$9200-00 although she had applied for US\$12000-00. The difference of \$2 800-00 went towards administration fees. She said she was given the money by Euphrasia on 28 February 2010.

The defendant testified that she was told by Euphrasia that there was no need to sign for the money as long as she remembered to repay it on 8 March 2010. She gave Roki \$6 000-00 to buy "things for resell" in South Africa. Roki took the money and disappeared. The defendant said she reported Roki's disappearance and her inability to repay the loan to Tatenda and Euphrasia who advised her to "just pay the interest" and she then paid US\$2 400-00 but did not get a receipt because she had not paid the amount in full. On 11 March 2010 Tatenda called her and asked her to visit their offices. She did and was then asked by Euphrasia to sign an agreement of sale so that they could sell her house in order to recover their money. The

defendant refused and left. She later told her lawyers Ziumbe and Mutambanengwe who wrote exh 8 on 13 May 2010. Further, she denied signing exh 6 and 7. She denied receiving US\$35 000-00 from the plaintiff. The witness also produced exhibits 9, 10, 12 and 13.

Under cross examination, the witness said her husband died on 16 September 2007 in Malawi and his estate was registered in January 2010 in Zimbabwe. Asked about the figure of \$6 000-00 mentioned in exh 8 and the fact that she was made to sign documents, the defendant said the letter contained errors. Further she said she was advanced US\$12 000-00 without providing collateral although “lenders” wanted collateral.

Regina Guzha is the defendant’s sister who testified that on 12 May 2010 she accompanied the defendant to Drew and Fraser where Euphrasia persuaded defendant to “sign documents so that you can have a way to pay us”. The defendant refused to sign the papers saying she would rather “speak with the owner of the money”. They left the office and went to defendant’s lawyers where she spoke to one Tendai Ndoro.

Under cross-examination, she said she did not capture the subject matter under discussion properly. Also she did not know what agreement they were discussing and she did not see any papers that were supposed to be signed. Further, she did not hear the defendant say she could not sign an agreement of sale because the house did not belong to her.

The defendant’s last witness was Leonard Tendai Nhari who was referred to as a handwriting expert. He holds the following qualifications; BSC Hons Degree from the University of Ibadan in Nigeria, MSC in Bio-Chemistry with special emphasis on forensic analysis. Currently the witness works as an independent forensic scientist consultant. Between 1980-1999, he was employed by the government as Chief Forensic Scientist. He told the court that he once worked for an independent scientist for the Common Wealth Fund as Special Advisor in Forensic Science for the government of Namibia for two years. The witness said his field of specialisation is scientific investigation of both criminal and civil matters which includes handwriting comparison.

He told the court that he got involved in this case after he had been hired by Ziumbe and Mutambanengwe (defendant’s legal practitioners) to examine some documents on some disputed signatures. These disputed documents were

- (a) An Agreement Of Sale

- (b) Special Power Of Attorney and
- (c) Declaration By Seller dated January 2010.

He said he was given some standard documents namely:

- (i) Photocopy of a page of a Zimbabwe passport No. BM 227589.
- (ii) Grombridge Primary School Report Book for Rodney Matewere and
- (iii) First Mutual Insurance document.

All these documents bore the defendant's signatures which he examined against "standard signatures" and compiled a report in which he concluded that the two sets of signatures are not the same.

Specifically, the witness said;

"I was looking at how the two sets were designed or constructed and carry out a scientific comparison. My observations from the examination thereof was that the design and construction of the signatures on the questioned documents were not similar and therefore not consistent with the standard signatures of the defendant. The apparent differences between the standard and disputed ones could not be attributable to natural variation ... My conclusion was that the design and construction is not consistent with defendant having authored signatures on the questioned documents". (the emphasis is mine).

Under cross-examination, the witness conceded the following:

- (i) that his proper qualifications were
 - (a) Bachelor of Science Hons' Degree in Physiology
 - (b) MSC in Bio-Chemistry
- (ii) that physiology deals with the biological set up of the body i.e blood, stomach protein etc.
- (iii) that Bio-Chemistry deals with the chemistry of the biology i.e DNA, proteins.
- (iv) that he had no specific academic qualifications relating to any handwriting expertise other than attending conferences in the United Kingdom, Sweden and United States of America.
- (v) that he was not certified by any institution as a handwriting expert.
- (vi) that his handwriting expertise arises from experience since forensic science is an applied science that borrows from other disciplines.
- (vii) that for one to practice as a handwriting expert, one must be certified after undergoing an apprenticeship post ordinary level.

- (viii) that he did not verify the signatures on the standard documents he obtained from Ziumbe and Mutambanengwe.

Finally the witness was referred to his comparison of the signatures on the passport page which was photocopied and he agreed that the letter A was added in the photocopy rendering that particular comparison unreliable.

However, he insisted that this did not mean that all his results were compromised. He further said that due to the numerous variations among the questioned signatures he could not attribute them to one person unless that person signed them at “three different times”.

Analysis of Plaintiff's Evidence

The plaintiff struck me as a truthful witness who gave a simple and straightforward account of what happened. His version is fully corroborated by Euphrasia Mpedzisi an employee of Drew and Fraser International who was an impressive witness whose evidence furnished a far more detailed and clearer picture of the circumstances surrounding plaintiff's purchase of the property.

The plaintiff is also supported by the following factors. If all that the defendant obtained through Roki as she says was a loan from Drew & Fraser, how would the plaintiff enter the scene? If indeed the declaration by seller, the power of attorney and the agreement of sale were not signed by the defendant as she alleges, the question becomes who could have forged those documents bearing her particulars and for what reason? If the suggestion is that the plaintiff, and or Drew and Fraser employees forged her signature, why would they have done that if the agreement between them and her was one of lender and borrower. If the answer is that they wanted to secure their money, surely that is unconvincing in that it would be fool hardy for one to hope to secure such a large amount using forged documents.

While ordinarily it might raise eyebrows why the plaintiff purchased a house he had not viewed and why he did not insist on the defendant acknowledging receipt of the purchase price, in *casu*, the plaintiff gave a plausible and credible explanation that is satisfactory. The plaintiff is a Harare based businessman who knows the area the house is located. He said he was buying the house for his children and had a general idea of price levels for properties in that area. Further, he said he was a busy man who relied on estate agents. He trusted his agent would handle the transaction professionally.

For these reasons, I find the plaintiff to be an honest and truthful witness whose evidence I accept.

As pointed out above, Euphrasia gave a detailed account of how she met the defendant and her friend Roki and how the various exhibits came into her possession. Her version of the reason why the defendant brought copies of her identification document, marriage certificate, copy of passport page, copy of Brighton Matewera's identity document and a copy of the title deed is that the defendant was selling a house. Her evidence is logical and consistent with the documents brought by the defendant. It follows that if the defendant was selling a house registered in her husband's name she would require a power of attorney to do so. In pursuit of this arrangement, the defendant produced the power of attorney. Surely if the defendant had not mentioned the fact that her husband was in Malawi how would Euphrasia had known that? Also, this witness's testimony ties up with the processes that she alluded to, namely that after the defendant received the purchase price she signed the agreement of sale in the plaintiff's office and came to Drew & Fraser where she signed the Declaration by seller. Her explanation as regards the failure to obtain a receipt from the defendant is reasonable in that ex 6 the declaration by seller in para 3 reads:

“3. I further declare that the full consideration passing to me for such sale is US\$35000-00 (thirty five thousand United States dollars) made up as follows:

In cash: \$35000-00, otherwise than in cash: NIL” (my emphasis).

Quite evidently, the declaration in this paragraph is an acknowledgement that the defendant received the full purchase price in cash.

Further the witness' evidence is corroborated on a material point by the defendant in that in a letter addressed to this witness, Ziumbe and Mutambanengwe did not dispute that the defendant signed an agreement of sale but rather that the agreement was a nullity for reasons they gave – see ex 8.

I find for these reasons that Euphrasia was a truthful witness whose evidence I accept.

Analysis of defendant's evidence

In my view, the defendant's version is riddled with contradictions, inconsistencies and improbabilities. It is simply an incoherent and confusing litany. The following are examples of how her evidence is unsatisfactory in material respects.

1. In her evidence in chief, defendant said she personally borrowed US\$12 000-00 from Drew & Fraser International after being introduced to them as money lenders by Roki, yet in exh 9 (her founding affidavit under case number HC 4715/11) she said Roki and herself applied for the loan and she used her house as collateral.
2. In her evidence in chief, she stated that although she had not met Euphrasia and Tatenda prior to that date she was given US\$12 000-00 without providing any form of collateral. This is highly improbable in that US\$12 000-00 is a considerable amount of money which could not be dished out just like that.
3. Further, in exh 9 she said she personally was given US\$12 000-00 and she gave Roki US\$9 000-00. Yet in her evidence in chief she said she was only given US\$9 200-00 and she gave Roki US\$6 000-00.
4. Also in her evidence in chief, she said she did not sign for the money as she was told to simply “remember to pay”. Yet in exh 9 she said she signed an acknowledgment of receipt although she was not given a copy of this document.
5. In her evidence in chief, the defendant gave the impression that her friend Roki collected her marriage certificate and her husbands’ Identify Document by mistake, yet in exh 9 she said;

“Roki indicated to me that it was expedient to give her my identity documents to enable her to facilitate the loan application I then gave her the following documents:

- 3.4.1 my I.D
- 3.4.2 proof of residence
- 3.4.3 copy of my marriage certificate
- 3.4.4 copy of the deceased’s identity document” (My emphasis).

Now, the real reason why the defendant departed from her opposing affidavit (exh 9) is that she could not profer cogent reasons why, if she was simply applying for a loan her marriage certificate and more significantly her late husband’s identity document would be required. These were totally irrelevant documents in such a transaction. The defendant realised this did not make sense. That is why she concocted a story about Roki visiting her at her work place when she was busy in a meeting and that she gave Roki keys to her stockroom where from

Roki retrieved the documents on her own. Quite interestingly, the defendant does not provide an explanation for not retrieving those documents from Euphrasia upon being given the money if indeed they were not required for purposes of securing the loan?

6. The defendant's evidence concerning the alleged repayment of the interest is unconvincing. This is so in that, in her evidence in chief she said she repaid the US\$2 400-00 to Euphrasia but was not given a receipt because it was alleged she had not paid the full amount. What is noteworthy here is the reason she paid that amount. In her evidence in chief she said it was Euphrasia and Tatenda who suggested to her that if she was unable to pay the "instalment", she should just pay the interest and she ended up paying the US\$2 400-00.

Yet in her opposing affidavit (exh 9) she stated the following:

"We then resolved to apply for a loan of US\$12 000-00 which I was told was payable within 30 days with an interest of 20%. My agreement with Roki was on the following conditions:

- 3.3.1 Out of the US\$12 000-00 Roki was going to get US\$9 000-00 and will be liable to pay back the full capital grant i.e the US\$12 000-00 and
- 3.3.2 I would get US\$3 000-00 and will be liable to pay back only the interest payable on the capital grant i.e 20% of the sum of US\$12 000-00".

What is baffling is the remarkable coincidence that what Tatenda and Euphrasia suggested sits in accord with the defendant's agreement with Roki. More surprising is the defendant's evidence that after informing Euphrasia that Roki had disappeared into thin air with the money and that she did not have the capacity to repay the 'loan', they granted her further time to pay i.e another grace period of 30 days. This, despite lack of any evidence of how she was to raise the money and without any further demand for security.

7. The defendant was also unable to explain how she claims not to have signed an agreement of sale when in one of her letters (exh 8) she claims to have been forced to sign an agreement of sale. The witness also failed to explain why she had to use her husband's identity documents in her application for a loan when he was deceased at the time.

8. Another strange coincidence is that although the defendant's husband died on 16 September 2007 his estate was only registered in January 2010, the same time the defendant is alleged to have sold the house to the plaintiff.

For these reasons I find the defendant to be an incredible witness.

The defendant's next witness was her sister one Regina Guzha. Her evidence is unhelpful in resolving the issues before the court in that although she accompanied the defendant to Drew & Fraser, she did not hear or comprehend what Euphrasia and the defendant were talking about. Although she said she heard the phrase "agreement of sale" being uttered, she was unable to say in what context it was uttered, other than say the defendant explained to her after they left the offices. I would therefore disregard her evidence in *toto*.

Leonard Nhari was the defendant's third witness. He was called to testify as a handwriting expert. He conceded that his qualifications have nothing to do with handwriting expertise. His expertise is based on experience.

Section 18 of the Civil Evidence Act [*Chapter 8:01*] states:-

"18 Disputed handwriting

Comparison of any disputed handwriting with any handwriting proved to be genuine may be made by any witness, and such writings and the evidence of any witness with respect to them may be adduced to prove the genuineness or otherwise of the handwriting in dispute." (my emphasis).

Hoffman and Zeffertt South African Law of Evidence – 3rd ed at p 87 state:-

"More difficult problems arise when attempts are made to identify a handwriting by comparison with another specimen which has been proved to be genuine. The courts have frequently emphasised that this method of identification must be used only with the greatest caution. A witness who is looking for similarities in two specimens of handwriting is unlikely not to find any, and this may involve him in an unconscious circularity of reasoning." (my emphasis)

Commenting on statutory provisions for both civil and criminal cases that specifically permit the courts to rely on a comparison of hand writings, the learned authors state:-

"Only a handwriting expert is entitled to give evidence on the similarities or differences between two specifications of handwriting which are not personally known to him since the opinion of an unskilled person could add nothing to the court's own observations

Even when expert evidence is available the court should not place too great a reliance upon it. Some of the strictures upon handwriting experts which are to be found in early cases may be regarded as overstated, but the court is still required to consider their evidence very carefully. In *Annma v Chetty* 1946 AD 142 at 155, Greenberg JA said the function of the expert was -

“to point out similarities or differences in two or more specimens of handwriting and the court is not entitled to accept his opinion that these similarities or differences exist but once it has seen for itself the factors to which the expert draws attention, it may accept his opinion in regard to the significance of these factors. Thuswhere the court sees an absolute identity between two signatures an expert’s opinion as to the unlikelihood of such an identity in two genuine signatures is an opinion by which the court may be guided.” (my emphasis).

In *R v Chidota* 1966 RLR 178 Quenet JP held that:

“the vital question was whether the similarities were so strong as to exclude as a matter of reasonable possibility, that the dissimilarities were not the result of deliberate disguise or simply variations of the same hand. In such a case, every possible precaution should be taken to remove the possibility of error.” (my emphasis)

Analysis of Nhari’s evidence

What comes out from the authorities is that the proper approach is that the court must make its own observations on the dissimilarities or similarities of the two samples before coming up with its own conclusions.

I now proceed to do exactly that, Mr Nhari relied on three documents as standards documents containing what he was told to be the defendant’s genuine signatures. These documents are:

1. First Mutual Life Policy Document.
2. Groombridge Primary School Report for the period 10 April 2003 to 4 December 2003.
3. Copy of the defendant’s passport page penned on 3 January 2006.

The witness also received photocopies of “questioned signatures” on the following documents;

1. Special power of Attorney (Exh 3)
2. Declaration by Seller (Exh 6)
3. Agreement of Sale (Exh 7).

From the examination of these documents he concluded in his report (Exh 15) that:-

- “1. I have found the design and construction of the signatures on the questioned documents (i.e. Agreement of Sale, Special Power of Attorney, Declaration by Seller dated January 2010) not to be similar and therefore not consistent with the standard signatures of Angelica Otilia Guzha. The apparent difference in the standard and questioned signatures cannot be attributable to natural variation. Natural variation is a common feature of an individual’s handwriting. See attached chart.
2. The physical evidence (i.e. the design and construction) is therefore not consistent with Angelica Otilia Guzha having authored the signatures on the questions and documents (i.e. Agreement of Sale Special Power of Attorney Declaration by Seller dated January 2010)” (my emphasis)

The attached chart highlights the alleged inconsistencies in the design and construction of the three signatures. The chart is Exh 15 and in his explanatory notes (Exh 16) he states the following:-

“SL10/13 Notes

Top part of letter A above the letters O and G then letter O and G (sic) joined in a continuous pen movement as it moves to construct the letter G. Letter constructed and designed with the net effect that it appears as W.

Note consistency in the design and construction of the signatures. Top part of letter H is formed with a loop with the bottom end part of the letter H going to join the letter. Note design of letter A. Note how letter U is joined to the letter Z.

QUESTIONED SIGNATURES

Note inconsistencies in the design and construction of the 3 signatures.

Differences cannot be attributable not natural (sic) variation.

Top part of letter A within the letters G and letter O not apparent. Initials part of the signatures different in the design and construction.

Squashed and spread out in appearance.” (my emphasis)

My own observations are that the witness’ findings as outlined above are not supported by the design and construction of the signatures on both sets i.e. standard and questioned documents. I say so for the following reasons:

The finding that on the questioned documents, the top part of the letter A within the letters G and O is not apparent is based on the witness’ observation that the top of that letter is apparent on all standard documents. However, this finding is fallacious in that in one of the standard documents namely the passport page the letter A is not apparent. Put differently, the

defendant's genuine signature in her passport does not have this feature. The witness conceded under cross examination that while the A is not apparent in the original signature on the passport page, it is apparent on the photocopy that was given to him. When it was put to him that the documents given to him as "standard documents" had been tempered with, the witness conceded that there were definite differences in the design and construction of the letter A. What this means is that one of the standard documents given to the witness was definitely tempered with in order to make the top part of the letter A appear above the letters G and O.

Quite clearly, this constitutes conclusive evidence that this document (exh 2) was altered before it was handed over to the witness. By the time it was received by the witness it contained disguised handwriting designed to differentiate it from the three signatures on the questioned documents. In these documents, the top of the letter A is within the O and G.

In fact, in order to make this disguise more convincing, it was also done on the signatures penned in the school reports on 4 August and 10 April 2003 as well as the First Mutual Life Policy dated 10 May 1999. In all these documents, there is a distinct line extending the top part of the A in such a way that it protrudes outside the letters O and G. When it was put to the witness that since his findings on inconsistencies were based on tempered documents or standard signatures, they are unreliable, he said; "...it does not follow that all my results are compromised. The other portions are similar." (my emphasis)

By that answer, the witness meant that his findings relating to the design and construction of the rest of the letters on defendant's signature are valid. I disagree for the following reasons;

Firstly, the witness noted that on the standard signatures, the letter U is constructed and designed in such a way that it appears as W. However, this is not the case in respect to all standard signatures in that in the Life Policy Document (Exh 14) the letter U does not look like the letter W. It is a proper U.

Secondly, he stated that the other difference is how the letter U is joined to the letter Z. In so far as exh 14 is concerned, this is a none existent difference because the two letters are completely disjointed. On exh 2, the passport page, the letters are joined in such a way that the Z looks like a C, where as in the school report dated 4 August 2004, the two signatures show that the loop from the U join the Z at the top left part. However, contrary to this design, the signature

in the school report dated 10 April 2003 shows a totally different design and construction of these two letters in that the letter U joins the letter Z at the bottom.

Thirdly, the witness noted that on standard signatures, the top part of letter H is formed with a loop with the bottom end part of the letter H going to join the letter A and that the design of the letter A should be noted. This finding is only correct in respect of the loop and how the letter H joins the A. However, what is different is the design of the letter A in that in the report dated 10 April 2003, the letter A has a line inside the circle, while in the rest of the standard signatures this line is not there.

This analysis of the physical evidence shows that there are variations in the standard signatures. When asked about this, the witness said some of them can be attributed to natural variations due to age and the state of the writer's health.

I now turn to the most critical part of the assessment, namely the comparison of the QUESTIONED DOCUMENTS on one hand and the STANDARD DOCUMENTS on the other, with specific focus on the design and construction of the rest of the letters in defendant's signature. I have already discussed the design and construction of the letters A, O and G where the letter A sits inside the letters O and G. The next letters that the witness noted differences are U and Z in that on the questioned documents these letters are not joined such that the letter U does not look like W as in the standard signatures.

Unfortunately this conclusion is a fallacy in that the witness was under an illusion that this was the case when the reality is that there is no such difference. This apparent confusion arose from the nature of documents supplied by the defendant to her lawyers and in turn to the witness. These are photocopies of the questioned documents that are different from the originals in that the thinning of the pen on the originals is not visible on the photocopies. Put differently, the design and construction of the letters U and Z on the original questioned documents is similar to that on the original standard documents. The same applies to the loop on the top of the letter H that is clearly visible on the signature on the Special Power of Attorney and Declaration by Seller, but is missing on the photocopies used by the witness to compile his chart attached to exhibit 15.

Finally, the witness referred the court to what he called a difference in how the letter A after H is constructed in both documents. Indeed there is a difference in the manner in which

that letter is constructed. However, the difference is not unique to the questioned documents, rather, it is common to both signatures i.e on questioned and standard documents. As an illustration of this point, the way that letter is constructed in the agreement of sale and the special power of attorney is similar to its construction in the First Mutual Policy and the passport page.

On the other hand, its construction in the Declaration by Seller is similar to that in the school report dated 4 August 2004. The sole odd design and construction of this letter is to be found in the school report dated 10 April 2003 where it appears with a distinct line in the centre.

From the above analysis and illustrations, it is clear that Mr Nhari's conclusions in his report are not consistent with the design and construction of letters in defendant's signature. For that reason, his findings are rejected as they do not prove on a balance of probabilities that the defendant did not sign the questioned documents.

Having analysed all the evidence, I make the following factual findings:-

1. The defendant entered in to an agreement of sale with the plaintiff in respect of the immovable property, namely stand 3091 Malbereign Township Harare.
2. The plaintiff paid the full purchase price of US\$35 000-00 to the defendant.
3. The defendant received the full purchase price in the plaintiff's office.
4. The defendant supplied Drew and Fraser International with the following documents;
 - (a) The Special Power of Attorney in Defendant's deceased husband's name Exh 3.
 - (b) Copy of Defendant's passport page – Exh 2.
 - (c) Copy of her marriage certificate Exh 4
 - (d) Copy of her late husband's national registration document Exh 5.
 - (e) Copy of the Deed of Transfer No 148/83 –Exh 1
5. All the documents mentioned in 4 above were supplied for purposes of facilitating the agreement of sale and not for purposes of securing a loan from Drew and Fraser.
6. The defendant signed the following documents in pursuance to the agreement of sale;
 - (i) the Agreement of Sale – Exh 7
 - (ii) the Declaration by Seller – Exh 6

(iii) the Special Power of Attorney in the defendant's deceased husband's name.

7. The amount due to the plaintiff from the defendant is US\$35 000-00.
8. The agreement to register the property in the name of a trust is a perpetuation of the defendant's fraud against the plaintiff.

As regards costs, I find the defendant's conduct utterly reprehensible. She signed the Special Power of Attorney as a witness at a time that her husband had been deceased for three years. She used this document to convince Drew and Fraser International and ultimately the plaintiff that she was authorised to sell the house which was registered in her husband's name. Not only that, she spent US\$35 000-00 belonging to the plaintiff and when sued, provided a plea that does not make sense at all. As if that was not enough, she went further to manufacture evidence and put up a spirited defence based on nothing.

For these reasons the defendant must be penalised by an order of costs at a higher scale.

Accordingly, IT IS ORDERED THAT:-

1. The defendant be and is hereby ordered to pay to the plaintiff US\$35 000-00 (Thirty five Thousand United States Dollars).
2. The defendant pays interest at the prescribed rate from the date of summons to the date of final payment.
3. Stand No. 3019 Mabelreign Township 16 of stand 2259 A Mabelreign situated in the District of Harare measuring 1343 square metres, registered in the name of Brighton Matewere under Deed of Transfer No. 148/83 be declared executable.
4. Costs of suit on a legal practitioner and client scale.

P. Chiutsi Legal Practitioners, plaintiff's legal practitioners
Messrs Ziumbe & Mtambabebgwe, defendant's legal practitioners

