CLEOPAS G RUSHESHA
versus
MHONDIWA MAGAYA
and
CITY OF HARARE

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 22 & 23 June, 5, 6 & 8 July 2022
& 23 June 2023

Civil trial

E Mangezi, for the plaintiff
E Chatambudza, for the 1st defendant
N B Nyati, for the 2nd defendant

MUSITHU J: This matter involves the double allocation of a piece of land owned by the second defendant to both the plaintiff and the first defendant. The dispute spilled over to this court with the plaintiff instituting proceedings seeking the following relief:

> "(a) An order declaring Plaintiff to be the rightful and lawful allottee of Stand Number 2627 Crowborough North Phase 4 Pay Scheme Harare and that 1st Defendant's occupation of the mentioned property is unlawful.
> (b) Costs of suit against 1st Defendant only."

Both defendants pleaded to the plaintiff's claim.

Background to the plaintiff's claim

The plaintiff is a member of the Harare Municipal Workers Union (hereinafter referred to as the HMWU or the Union). The union is a trade union which represents the interests of employees of the second defendant. Its membership is therefore exclusive to employees of the second defendant. From around the late 90s, the Union lobbied the second defendant for residential stands to cater for its members. As a result of that request, the second defendant set aside residential stands at Crowborough North Phase 4, Harare for allocation to the membership of the Union. The project was administered by the HMWU's Crowborough Housing Pay Scheme (the Housing Pay Scheme), a Committee tasked with overseeing the day to day management of the scheme.

On 22 September 2006, the plaintiff was allocated stand 2627 Crowborough North Phase 4 Pay Scheme, Harare (hereinafter referred to as the property) by the second defendant through the Housing Pay Scheme. The plaintiff claims that the stands were exclusively for employees of the second defendant and were not for sale. The plaintiff was shown the pegs and beacons demarcating the property on 22 September 2006.

Unbeknown to the plaintiff, the first defendant occupied the property and started building a structure on the property without his consent. The plaintiff confronted the first defendant who claimed to have purchased the same property from the second defendant. The parties failed to resolve the dispute amicably. The plaintiff claims that the second defendant recognises him as the lawful beneficiary of the property. He further claims that he paid the intrinsic value of the property and water bills from the second defendant bear his name.

The plaintiff further contends that the first defendant was never an employee of the second defendant, and as such could not have been allocated the same property. In short, that was the basis of the plaintiff's claim herein.

The first defendant's plea

The first defendant averred that the property was lawfully allocated to him, and he took effective occupation in 2011. There were certain payments that the original beneficiaries in the Union were required to pay. They defaulted on those payments resulting in the stands being sold to members of the public. The plaintiff was one such defaulter. Advertisements were circulated in the media urging defaulters to comply.

When the defaulters failed to comply, the stands were repossessed by the Executive Committee of the Housing Pay Scheme. The repossessed stands were sold to the public, and the first defendant acquired the property in 2011, after paying a sum of US$3, 000.00. He was shown the beacons and the pegs on the property. He had since completed a seven roomed house, and the property was walled and gated.

The second defendant's plea

The second defendant averred that it recognised the plaintiff as the rightful allottee of the property. Its records confirmed that position. It further averred that the first defendant did not appear in any of its records and was therefore unknown to the second defendant. Having said that, the second defendant however stated that it was not opposed to the relief sought by the plaintiff and would abide by the court's ruling.

The agreed issue for trial

The parties agreed on one issue for trial which was recorded as follows:

'Who between the Plaintiff and 1st Defendant is the lawful allottee to Stand Number 2627 Crowborough North, Phase 4 Harare'

The plaintiff's case

The plaintiff gave evidence first. He joined the second defendant in September 1982. Sometime in 1999, one Cosmos Bungu who was the executive chairperson of the Union proposed that they approach the second defendant for allocation of land for the benefit of employees of the second defendant. This was motivated by the need to secure residential stands for employees of the second defendant so that they had someplace to call a home in their retirement.

The plaintiff claims that he was allocated the property on 22 September 2006. The allocations involved officials from the second defendant's land survey office within the Department of Works. He was issued with what he called the beacon form by the second defendant's Mufakose District office. In the beacon form the plaintiff confirmed that he had been shown the pegs or beacons demarcating the property. The beacon form was signed by the plaintiff and the Site Surveyor. He was also required to complete a form generated from the Land Survey Office in the second defendant's Department of Works. The form was completed on 22 September 2006. In that form, the plaintiff acknowledged that he had been shown the pegs demarcating the property. The form was signed by the Chief Land Surveyor.

The plaintiff told the court that when the allocations were made, the beneficiaries were moving in groups that were led by a chairperson. His group was led by a chairperson called Chikombingo. On 4 August 2014, Chikombingo wrote to the district officer in the second defendant's Department of Housing and Community Services, Mufakose, forwarding a list of the beneficiaries of the Housing Pay Scheme. The witness also made reference to a letter dated 15 June 2015 from Bungu referenced 'To Whom It May Concern'. That letter also confirmed that the plaintiff was a member of the Union who had been allocated the property under the Housing Pay Scheme. The second defendant's Mufakose District Office also generated a similarly worded letter on 28 September 2017.

Having been confirmed as the allottee of the property, the plaintiff claims that he was cleared by the Housing Pay Scheme to pay the intrinsic land value. The Housing Pay Scheme confirmed this position by way of a letter of 4 August 2016 addressed to the Mufakose District office. The plaintiff stated that the intrinsic land value was US$920.00. He produced a receipt

confirming payment of an amount of US$720.00 on 14 October 2016. He claimed to have misplaced the receipt for the balance of US$200.00.

Having made these payments, the plaintiff claims that in 2019, he was invited to the Mufakose District Office to sign an agreement of sale for the property. The plaintiff averred that the intended beneficiaries of the Housing Pay Scheme were employees of the second defendant. The stands were never intended for sale, and for that reason it was false for the first defendant to claim that the property was sold to him. The defendant denies that he defaulted in making any payment. He averred that the advertisement allegedly placed in the media by the second defendant and the Union calling upon defaulters to update their payments within 14 days, was meant to encourage them to contribute towards the servicing of the stands as the contractors needed payment for their services. He insisted that his payments were up to date.

The plaintiff dismissed the beacon form allegedly issued to the first defendant on the basis that it was forged. The witness also dismissed copies of receipts that were submitted by the first defendant's bundle to confirm that he made monthly payments to the Housing Pay Scheme towards the purchase of the property. He insisted that the stands were not meant for sale. In any case, those receipts did not reflect what the payments were for.

The plaintiff stated that there was a time that the first defendant approached him and requested that they discuss about the expenses he had incurred in developing the property. The first defendant produced a sheet of paper showing that he had spent about US$4,000.00 on developments. He decided to take the litigation route since he felt that he could not compensate the first defendant for expenses incurred in developing a property that was not his. In any case he had asked the first defendant to leave the property, when he discovered his unlawful occupancy in 2012. He had asked the first defendant's workers why they were building on his property, and they had told him that it belonged to the first defendant. He had instructed them to stop further developments, but they refused and gave him a mobile number for the first defendant's wife. When he spoke to her she was uncooperative leaving him with no choice but to approach the courts.

The plaintiff admitted under cross examination that the first defendant was in occupation of the property and had since put up structures. He admitted that he had never taken occupation of the property ever since it was allocated to him in 2006. The witness also admitted under cross examination that beneficiaries were required to pay monthly subscriptions towards the stands. The subscriptions were deducted directly from their salaries. His payslips were however not tendered in court as exhibits to confirm the monthly deductions. Asked to explain

why his name appeared on the list of defaulters which had been published by the second defendant in the media if his payments were up to date, the witness stated that the notice was meant urge beneficiaries to pay funds for services and not to purchase stands.

The witness admitted though that the stands could be repossessed and reallocated in the event that payments were not updated as directed in the notice. He insisted that he made the necessary payment within the 14 days as directed by the notice. The witness told the court that payments were being made via the bank. The servicing of the stands had started in 2012, and there was a committee which oversaw that process. He had however misplaced the receipts confirming that payment. He denied that the property was ever repossessed from him.

Despite being allocated the stand in 2006, the plaintiff only discovered in 2012 that the property had been occupied by the first defendant. He admitted that he only issued summons in 2019, despite having made the discovery some seven years back, and some 13 years after the property was allocated to him. He had however approached the civil court in 2015. He could not explain why he did nothing to assert his rights between 2012 and 2015. He claimed to have approached the Union when he found the first defendant's workers on the property. It was at that stage that he was given the letter of 15 June 2015 by Bungu. He explained the delay in taking action after having discovered the occupation of the property by the first defendant, by alleging that during that time he had also approached the Committee to look into the issue.

At the time he made the discovery in 2012, the first defendant was in the process of building a cottage. The defendant then moved into the cottage between 2013 and 2014. The witness stated under cross examination that the confirmation letter was only issued to him after he complained that someone had occupied his property. At the time that the confirmation letter was issued, the first defendant had already started construction on the property. Further, at the time that the plaintiff paid for the intrinsic land value and signed the agreement of sale with second defendant, the first defendant was already in occupation.

The plaintiff admitted that the agreement of sale that he signed with the second defendant misrepresented the correct position on the ground to the extent that it referred to the property as undeveloped, yet there was already a dwelling house. Further at the time of the signing of the agreement of sale, the plaintiff had already instituted proceedings at the Magistrates Court against the first defendant. That court did not settle the dispute, but urged the parties to approach the second defendant for resolution of their dispute, failing which they had to approach the High Court which had jurisdiction over the matter. At that stage, the

plaintiff was only in possession of the beacon form and the acknowledgment form issued by the Chief Land Surveyor.

At the time the property was allocated to the plaintiff, the late Cosmos Bungu was the chairperson of the Committee. Under cross examination, the witness could not deny that Peter Gosha who came in as the vice chairperson after the Bungu Committee left office, was the one who oversaw the repossession and reallocation of stands. The first defendant was allegedly allocated the same property by the Gosha led Committee. The plaintiff also admitted that while the land belonged to the second defendant, the administration of the land and the allocation of stands was delegated to a committee of the Union. It was the committee in office at the material time that also allocated the property to the plaintiff. Both the plaintiff and the first defendant acquired their rights through committees that were in the office at the material time. Under re-examination, the plaintiff however averred that the committee had no mandate to allocate stands. Its mandate was limited to overseeing the servicing of the land.

The plaintiff also alleged under re-examination that although he was aware that the property now had structures at the time that he signed the agreement of sale, the second defendant had informed him that the structures were illegal. The second defendant therefore still considered the property to be an undeveloped residential stand.

The evidence of Thomas Magwaza

The plaintiff's first witness was Thomas Magwaza. He is employed by the second defendant in the Water Department as an operator. His evidence corroborated that of the plaintiff to the extent to which he explained the circumstances under which the plaintiff acquired the property. That part of the evidence shall therefore not be restated herein.

The witness told the court that in 2006, he was assigned to work with staff from the Department of Housing and Community services and the Surveyor General's office which is under the Department of Works. He represented employees of the second defendant in the allocation of stands by the second defendant through the Union. The beneficiaries were identified from a list that was prepared by the Union. The witness was responsible for calling out names of the beneficiaries, and once a person's name was called, they would proceed to the allocation officer and the surveyor general would issue a beacon form and a receipt. Thereafter, the beneficiary would be shown their stand.

The witness confirmed that he called out the name of the plaintiff and he was shown his stand after all the processes were followed. The beneficiaries were employees of the second

defendant who were members of the Union. The witness denied that the first defendant was allocated the stand by the second defendant through the Union. Under cross examination, the witness stated that he was no longer involved in the allocation of stands after September 2006 when the plaintiff was allocated his stand.

The witness denied that the second defendant repossessed any stands from beneficiaries who failed to update their payments. When he was shown the list of defaulters who included the plaintiff that was flighted in the media by the Union, the witness conceded that stands could be repossessed but reallocated only to members of the Union. Asked if he was aware that they were non-employees of the second defendant who also benefitted from the reallocations, the witness stated that he heard about it later, but that was never the original plan.

The evidence of Oguard Muchemedzi

He is employed by the Union as an administrator. He told the court that the Union lobbied for stands from the second defendant in 1999. In 2005, the Union was allocated land to parcel out to its members who were employees of the second defendant. His role was to identify and provide a list of the employees of the second defendant who were affiliated to the Union and eligible for allocation of stands. The allocation was done by the second defendant. He confirmed that the plaintiff was allocated the property in dispute. He also confirmed that the first defendant was not an employee of the second defendant or a member of the Union. He was thus not eligible for allocation of a stand.

The witness denied that the first defendant was allocated the stand by a committee insisting that the allocating authority remained the second defendant. The role of the committees was to monitor the development of the land. The witness further stated that the payment of subscriptions was done through a CBZ account. The executive chairperson of the Union had the controlling signature. The witness denied that cash payments were made at the Housing Pay Scheme site. Anything of that sort would be illegal. The witness further stated that the Union never received any cash payments. He denied that committees had the mandate to repossess or reallocate stands.

The notice with the list of defaulters was placed by the Union. It was meant to urge members to pay up their subscriptions as the development of the area had stalled. There was an overwhelming response as the beneficiaries, including the plaintiff, heeded the call and paid up their arrears. None of the beneficiaries had their stands repossessed. In any event, the Union did not have the authority to repossess stands over arrears. Only the second defendant had the power to repossess stands. The witness also stated that there was a waiting list of union

members that were also waiting to benefit from the allocation of stands. That list was exclusive to employees of the second defendant.

The witness also stated that the first defendant never approached the Union in connection with the stand. On its part, the Union tried to reach out to him so that his issues with the plaintiff could be resolved, but he never responded.

Under cross examination, the witness stated that the Union required the beneficiaries to pay their subscriptions up to a certain amount. No specific deadline had been given within which payment ought to be made. In 2012, the Union went back to the beneficiaries and urged them to pay up. The witness could not deny or confirm that the notice calling upon beneficiaries to pay up their subscriptions was placed in the newspaper in 2009. This was because the Econet Wireless mobile number which accompanied the article, 0912886009, had its prefix changed to 077 in 2009.

The witness insisted that the plaintiff had paid up his subscriptions even in the absence of receipts confirming that he had paid. The witness denied under cross examination that committees were responsible for the allocation of stands, insisting that allocation was the prerogative of the second defendant.

The witness stated that beneficiaries were issued with beacon forms and a confirmation letter from the Department of Housing upon request. He was not aware that the plaintiff did not have the confirmation letter. He conceded that the wording of the notice in the media suggested that if one failed to pay their subscriptions within 14 days, then the stand would be repossessed and reallocated to other beneficiaries on the waiting list. When the notice was placed in the newspaper, Peter Gosha was the chairperson of the Housing Pay Scheme. He denied that Gosha had authority to allocate stands. He however admitted that Gosha remained an employee of the second defendant as no action had been taken against him. The Union itself had not reversed decisions that had been made by the Gosha led committee leaving it to affected individuals to find ways to resolve their disputes.

The witness told the court that the Gosha led committee was removed by the Union after several misdemeanours. It was replaced by the Chikombingo Committee, whose membership was not confined to Union members alone. Its membership was drawn from different unions which included the HMWU. The Housing Pay Scheme remained under the management of the Union. The witness admitted that when the Chikombingo committee came into office, it sought to reverse the decisions of the Gosha committee especially on the allocation of stands to non-council employees. That reversal was not done through the courts.

The witness admitted that the conflicting decisions of the two committees is what led to the escalation of disputes within the Scheme. He denied that the Union sanitised the decisions of the Gosha committee, arguing that they advised the affected individuals to go to court.

THE FIRST DEFENDANT'S CASE

The first defendant gave evidence first. He told the court that he was in possession of the property from 2012, having acquired it in 2011. At the time he acquired it, he was staying in the Kuwadzana suburb of Harare. He was informed by colleagues that there were stands for sale in Crowborough. He visited the offices of the Housing Pay Scheme, which are located in the Crowborough phase 4, suburb. Outside the offices of the Housing Pay Scheme, there was a billboard, announcing stands for sale. Officials of the Housing Pay Scheme informed him that the stands were for sale to people who had funds and were on the second defendant's waiting list. He showed the officials a receipt from the second defendant's Remembrance offices to confirm that he was indeed on the waiting list. He was asked to pay an amount of US$3,000.00 into the Housing Pay Scheme's CBZ Bank account. That amount would guarantee him a stand.

The amount was paid in instalments of different sums from February 2011. The balance was paid off in November of 2011. He made payments at the bank where he was issued with a slip confirming payment. He would take the slip to the site office where he was issued with a receipt. The receipts which were produced as exhibits show that they were issued by **"City of Harare HMWU-CROWBOROUGH HOUSING PAY SCHEME".** One of the receipts which confirmed payment of $100.00 on 16 November 2012, showed that the payment was for "Roads".

After paying the full amount of US$3,000.00, the first defendant claims that he proceeded to the site office where he was given a beacon form and the site plan. He was shown a vacant stand between the month end of November 2011 and the beginning of December 2011. There was nothing on the ground to show that the stand had been allocated to someone else. He started building a cottage on the stand between January and February 2012. He did not face any challenges or claims from anyone up to the time that he completed construction between the end of 2013 and the beginning of 2014. He started building the main house in 2015 and completed it within 6 months.

He only became aware of the plaintiff's claim to the property sometime in 2015, when the plaintiff instituted motion proceedings in the Magistrates Court claiming the property. The first defendant told the court that after the Magistrates court proceedings in 2015, Chikombingo

informed him that the plaintiff wanted to meet with him over the property. When they met, the plaintiff told him that the property belonged to him. Nothing was however resolved. The plaintiff allegedly asked for a breakdown of the costs of putting up a similar structure of his own on the property. The first defendant obliged by giving him a piece of paper with that breakdown. He was surprised to see the piece of paper attached to the plaintiff's papers at the Magistrates Court.

The first defendant claimed to have visited the offices of the second defendant to have his building plans approved but the request was declined. When he visited the Mufakose District office, he was told to pay for the land intrinsic fee first. He was further advised to visit the Committee led by Chikombingo, to get the requisite clearance to enable him to pay for the land intrinsic value. The Chikombingo Committee did not sanction the clearance citing the dispute between the first defendant and the plaintiff, which was pending at the Magistrates Court.

The first defendant however continued making payments for rates and related charges at the second defendant's offices, and for which he was issued with a receipts. The receipts were tendered into evidence by consent.

The first defendant was later to be informed that the plaintiff had paid for the land intrinsic value at the Mufakose District office. He had been cleared by the Chikombingo committee. According to the first defendant, there was never an attempt by the Committee or the second defendant to resolve the dispute before they gave the plaintiff clearance. He claimed that on 22 June 2019, he wrote a letter to the Chikombingo committee expressing his concerns about being denied clearance to pay the land intrinsic value.

The letter of 22 June 2019 was followed up by another letter of 24 July 2019, in which the first defendant made similar complaints to the chairperson of the Committee. A separate letter dated 17 September 2019, was also dispatched to the second defendant's Director of Housing and Community services. It made reference to a meeting held at that office on the same day. The meeting involved the vice chairperson of the Committee, Matsika, the plaintiff and the first defendant's wife. The meeting was held in an attempt to find a solution to the dispute between the plaintiff and the first defendant. There was yet another letter of 23 September 2019, addressed to the chairman of the committee.

The first defendant received not a single response to these letters. The Chikombingo Committee turned a blind eye to these letters as they went ahead and processed papers for the plaintiff. The first defendant also claimed that at the time he was allocated the property in 2011,

the Peter Gosha led committee was in office. The Chikombingo led committee came into office in 2013. It was elected into office by beneficiaries of the Housing Pay Scheme. According to the first defendant, when the Chikombingo committee came into office, it actually recognised him as a member of the Housing Pay Scheme. He moved around with the committee members during the years 2013, 2014 and 2015 and they actually installed a water metre at the property.

The committee also accepted the first defendant's payments for servicing of roads. The committee only turned around when he approached them for clearance to pay for the land intrinsic value. On 25 September 2020, the first defendant wrote to the second defendant's Director of Housing and Social Services requesting the office to facilitate his signing of the agreement of sale for the property. In the letter, he attributed his failure to get the relevant clearance papers to corruption as some of the second defendant's officials had solicited a bribe of US$2, 500.00 from him. He also implored the second defendant's officials to reverse the double allocation of the property to the plaintiff. Again there was no response from the second defendant's officials.

The first defendant conceded under cross examination that he had no papers to confirm that he had ownership rights in the property. The only evidence that connected him with the property was the beacon form and the plan. The plan was not however tendered in evidence. The witness admitted under cross examination to inconsistencies with regards to the date on which he was allocated the property. In his evidence in chief he referred to February and August 2011, while in his summary of evidence he referred to February 2011. The beacon form itself showed that it was issued on 22 November 2006. He was asked to comment on whether it made sense that he claimed to have been allocated the property in 2011, yet the beacon form referred to the year 2006. His response was that all beacon forms were endorsed with the year 2006, and the beneficiaries were only required to append their signatures.

The first defendant admitted that the official signature of the Chief Land Surveyor on the beacon form tendered by the plaintiff in evidence was different from the one he tendered himself. Further, there appeared to have been an attempt to make alterations on the signature that had originally been endorsed on the form. He knew that the person who signed the beacon form was Simango, but he did not know his signature. He dismissed the acknowledgment form issued to the plaintiff as fake. He insisted that the person who issued the beacon form to him was authorised to do so. The beacon form was issued by the Gosha led committee. While acknowledging that the second defendant was the owner of the stands, the first defendant denied that the property was allocated to the plaintiff.

Under cross examination, the first defendant insisted that he purchased the property from the second defendant which was represented by the Committee on the ground. According to him, the signing of the agreement of sale was actually in progress.

Concerning the issue of payments, the first defendant maintained his position that payments were made to the bank, after which they would proceed to the site office where he was issued with receipts. He also averred that he had the deposit slips confirming the deposits made to the bank. These had not been tendered in evidence. The receipts issued at the site office indicated that one could either make a cash or cheque payment. However, the cheque option was cancelled out meaning that payment was made in cash. The first defendant insisted that even though payments were made at the bank, the site office would issue a receipt that recorded it as a cash payment.

The witness told the court under re-examination that he was not aware of a separate waiting list for employees of the second defendant. As far as he was concerned, there was only one waiting list at the second defendant's Remembrance Offices which included members of the public. He claimed to have been allocated a waiting list number in 2004.

The evidence of Zimbariro Zimbariro

His evidence was as follows. He is employed by Printflow (formerly Government Printers) for the past 15 years. He was never employed by the second defendant. He resides at No. 2669 Crowborough Phase 4, which he claims to own. He acquired the stand in 2009, after he heard from friends that there were stands for sale under the HMWU pay scheme. He attended meetings arranged by officials from the second defendant and the Union which confirmed that the arrangement was genuine. He was informed that he could acquire the stand on condition he was on the second defendant's waiting list, and that he also paid a development fee of US$3,500.00. Payment could be made at the bank or at the site office. He chose to make payment at the site office and was issued with receipts to confirm the payment.

After the payment at the site office, he was issued with a beacon form and shown the pegs for the stand. He was also given a plan for a three roomed house. Everyone was required to build according to that plan. He denied the allegation that the scheme was exclusively for employees of the second defendant. He averred that when he went to the site office he was informed that they were a few stands that were reserved for members of the public. He also stated that the Committee on the ground at the material time had a representative from members

of the public. His name was Baradza. He was not an employee of the second defendant. The chairperson of the Committee at that point was Chikombingo.

The witness told the court that out of about the 640 beneficiaries of the stands, 100 of these were not employees of the second defendant. He was issued with an agreement of sale by the second defendant in 2019. He had been issued with a letter authorising him to build a cottage around 2009. During the years 2009-2010, the Gosha led Committee was the one in office. That Committee left office in 2012 and was replaced by the Chikombingo Committee. The new Committee welcomed them and urged them to update their payments for road services.

At one time, members of the Chikombingo Committee moved around asking beneficiaries to pay an amount of US$2, 000.00. The witness challenged them to justify that payment but he was not given a satisfactory answer. He refused to pay the amount. He was later to be called by the treasurer of the Committee, one Dangarembwa who warned him that the Committee was going to recall all the people who refused to pay the amount and replace them with employees of the second defendant who were on the shortlist. The witness claimed that after this threat, sometime in 2014 an employee of the second defendant's Department of Housing by the name Cathrine Mudzamiri, came claiming his stand to be hers. She came wielding several papers which had been generated from several offices of the second defendant.

The witness did not have any documentation at that stage. He wrote letters to the Committee and to the second defendant informing them of the developments. The second defendant did not respond. The committee members verbally informed him that the committee had the prerogative to repossess the stand and reallocate it to employees of the second defendant. The committee proceeded to disconnect his water as a way of forcing him out of the stand. At that stage he was already staying at the stand having built a structure. He approached the courts seeking an order for the eviction of Mudzamiri and the reconnection of the water. Mudzamiri also approached the courts for his eviction around 2014 and 2015. Mudzamiri however gave up the fight leaving the witness in possession of the stand.

At the time that he was fighting court battles, the witness had not yet been issued with an agreement of sale by the second defendant. The committee members made it difficult for him to secure the relevant paperwork and authorisations from the second defendant since they were either employees or former employees of the second defendant. After several engagements with officials of the second defendant's Department of Housing, it became clear that the witness had fully paid for the stand through his wife, Violet Zisengwe. It was also at

that stage that Mudzamiri realised she had no case against him having had a chance to peruse the relevant paperwork for the stand at the second defendant's offices. The witness and Mudzamiri went together to the second defendant's Remembrance offices where Mudzamiri informed the officials that she had withdrawn her court case against the witness. She requested that she be allocated another stand.

The witness further told the court that he was allocated the stand through the Housing Pay Scheme, the Union and the second defendant. The three entities were working together on the project. He confirmed that the first defendant was also allocated a stand in the same area even though he was not an employee of the second defendant.

Under cross examination, the witness did not dispute that the second defendant had the prerogative to allocate the stands being the owner of the land. He stated that his evidence was beneficial to the extent that the Housing Pay Scheme was not exclusively for employees of the second defendant, and that non-employees of the second defendant were being heavily oppressed by the officials of the second defendant.

The evidence of Peter Gosha

He has been an employee of the second defendant for the past 22 years. He is a member of the Union. He explained the Housing Pay Scheme as a scheme for employees of the second defendant. Two committees, comprising the Union and the Housing Pay Scheme were responsible for administering the stands. The two entities got their mandate from the second defendant's workers after the second defendant had failed to service the area. He served as the Vice Chairperson of the Committee between 2006 and 2011. The Committee was in charge of developing and servicing the stands.

The witness stated that funds for development purposes were paid by beneficiaries into the Housing Pay Scheme's bank account. The signatories to the bank account who also had the mandate to administer the funds were the late Union chairperson, Cosmos Bungu, a Mrs Zhou, the treasurer Onward Mutasa and the witness himself. The witness stated that beneficiaries were first allocated stands by the second defendant and the Committee then came in to carry out developmental works on the land. It was the responsibility of the Committee to find developers who would carry out development works on the land. The Committee divided the number of stands against the amount required by the developer. Once that amount was established it was then apportioned amongst the beneficiaries who were required to make payments through the bank.

After payments were made, it was realised that the amounts paid remained way below what the developer had charged. The process was taking long and the developer wanted to remove its equipment from site. A meeting involving the beneficiaries of the stands was then held. Out of about 600 beneficiaries, only an estimated 450 attended the meeting. The meeting resolved that since the developer was about to remove its equipment, it was best that a notice be placed in the media inviting the beneficiaries to pay up their development fees failing which the stands would be repossessed and reallocated. A notice was subsequently flighted in the media warning the beneficiaries that if no payment was made within 14 days, then the stands would be repossessed. The notice was tendered in evidence as an exhibit by consent.

According to the witness, after the 14 days lapsed, a further seven days' notice was sent out to all the departments of the second defendant. The seven day notice had the same effect as the 14 day notice. After the expiry of the seven day notice, the Housing Pay Scheme wrote a letter to the Union requesting an Annual General Meeting (AGM) at the end of the month. The AGM was approved and it was held at the end of the month. The attendees of the meeting who included beneficiaries of the stands, were informed of those beneficiaries that had failed to pay up their subscriptions in line with the notices flighted in the media. The meeting agreed the stands belonging to defaulters be repossessed and reallocated to members of the public who had funds to pay for the development fees. Thus the reallocation of stands was no longer confined to employees of the second defendant, but was open to members of the public. That decision was approved by the Union.

After the decision to repossess and reallocate the stands was passed by the AGM, members of the public started visiting the site office submitting their applications for stands. When the number of applicants reached 15, the Committee sought the requisite approval and the applicants were cleared to deposit their funds into the Scheme's bank account.

Concerning the property in dispute, the witness stated that the property was reallocated to the first defendant after the plaintiff defaulted on his subscriptions. The witness further stated that the receipts bearing the first defendant's name were issued by the Housing Pay Scheme after he made payments at the bank. The receipts also bore the address of the Union because payments were made with the approval of the Union. The telephone number on the receipts also belonged to the Union. According to the witness, the Union supervised the transactions. After payments were made, the Committee then approved the membership of the 15 applicants.

The witness also stated that during his tenure of office, the Committee never encountered any challenges from the defaulters who had their stands repossessed. He denied

that the allocation of stands to non-employees of the second defendant was fraudulent, arguing that had that been the case, then the committee members would have been dismissed from employment the second defendant. He also averred that the notice in the media was actually placed by the Union with the full support of the second defendant. The telephone numbers on the notice were those of the Union. Further inscriptions at the top of the advert showed that the key parties, that is, the Union, the Housing Pay Scheme and the second defendant were all involved in the process.

The witness averred that the payment for the Land Intrinsic Value and the signing of the agreement of sale by the plaintiff was done through the back door after his committee had left office. This was because from the time he was in office right up to the point he left office, the first defendant was the lawful allottee of the property. Problems arose when the Matsika-Chikombingo led Committee came into office. The two were coming from a different Union (the Zimbabwe Urban Councils Workers Union (ZUCWU)). At one time they caused his arrest and prosecution for the fraudulent allocation of land, but he was never convicted.

The witness claimed that the removal of his Committee from the office was a result of the fights between the HMWU and the ZUCWU. The witness averred that everything was done above board, and about nine non employees of the second defendant were still members of the Housing Pay Scheme. He insisted that the first defendant was the lawful allottee of the property since the Mufakose District office was actually billing him for water consumption on the property.

The witness insisted under cross examination that the first defendant was issued with a clearance which paved the way for him to proceed to build on the property. He also stated that the beacon forms issued to beneficiaries were identical (every copy had the 2006 date). One would simply sign and insert the date they were allocated the land. This was because the first defendant did not have sufficient copies and as a result they had to resort to photocopying the only one form that was available and use it for every beneficiary.

The witness insisted that his Committee had the authority to repossess and reallocate stands because it was responsible for the day to day management of the land under the authority of the second defendant. The repossessions were done by the Committee with the approval of the second defendant.

The Second Defendant's Case

Mr *Chatambudza* appearing for the first defendant raised an objection as Mr *Nyathi* for the second defendant rose to lead his witness. Mr *Chatambudza* submitted that no relief was

being sought against the second defendant by the plaintiff. The dispute was between the plaintiff and the first defendant. Counsel further submitted that r 37 of the High Court rules specifically referred to a defendant's plea, as an answer to a plaintiff's claim. The second defendant had no case to answer before the court, and this explained why its plea did not attempt to refute any averments made in the declaration. Mr *Chatambudza* cited the case of *Chamisa v Mnangagwa & 24 Ors*[1], where the court at p 27 of the judgment said the following:

> "When a person acts as a respondent in terms of r 17(2) of the Rules, he or she does so for the specific purpose of opposing the granting of the relief sought by the applicant and challenging the veracity of the grounds on which the application is based. He or she must meet the procedural and substantive requirements, compliance with which confers on a respondent the right to appear before the Court and be heard in his or her own cause."

Counsel further submitted that a plea was a shield and not a means of attack. The second defendant was attempting to fight in the plaintiff's corner, yet in its plea it had indicated that it would abide by the decision of the court. It would constitute a procedural irregularity to allow the second to lead its own evidence in the trial yet it had nothing to defend.

In his reply, Mr *Nyathi* argued that Mr *Chatambudza's* objection had been overtaken by events since counsel for the second defendant had extensively engaged with witnesses and evidence. He submitted that the first defendant had waived his rights by implicit conduct when he allowed the second defendant to be intimately involved in the proceedings up to this point. At any rate the second defendant's evidence would shade light on the issue before the court.

Having considered counsels' submissions, the court found merit in the first defendant's objection. Indeed a plea sets out a defendant's defence to a claim. Rule 37 requires a defendant's plea to *"set forth concisely the nature of his or her defence, and deal with the allegations in the declaration…"* The plea must deal with the allegations made in the summons and declaration, which in essence constitute the claim against a defendant. As correctly submitted by Mr *Chatambudza*, no claim was made against the second defendant in the plaintiff's declaration. The second defendant's attitude to the proceedings can be gleaned from paragraph 3 of its plea. It states that the *"2nd Defendant is not opposed to the relief being sought by the Plaintiff and will abide by the court's ruling"*. Surprisingly, in the very last paragraph of its plea, the second defendant prayed "for the dismissal of Plaintiff's claim".

Whoever prepared the second defendant's plea did not appreciate the nature of the dispute before the court. No substantive relief was sought against the second defendant. It was

[1] CCZ 21/19

just cited as an interested party since it was the owner of the property in dispute. In paragraph 2 of the plea, the second defendant sought to set the record straight by alleging that it recognised the plaintiff as the lawful allottee of the property. The first defendant did not appear anywhere in its books.

What is clear to the court is that the evidence of the second defendant was critical in disposing of the dispute between the parties. It is however the manner in which the second defendant sought to place that evidence before the court that was wrong. In *Indium Investments (Pvt) Ltd v Kingshaven (Pvt) Ltd & 2 Ors*[2], GOWORA JA (as she was then), said of a plea:

> "A plea is a defence and as such can be likened to a shield. It is not a weapon or a sword. No relief can attach to a party through a plea"

Despite all that was said in the said plea, the second defendant bizarrely sought the dismissal of the plaintiff's claim, the same plaintiff it claimed was the lawful allottee of the property. The second defendant, through its officials, should have appeared as witnesses either for the plaintiff or first defendant in order to set the record straight, being the holder of ownership rights in the disputed property. Alternatively, the second defendant could have been cited as a co-plaintiff since it is clear that it also had a potential claim of its own against the first defendant. It could still have instituted a claim of its own against the defendant instead of seeking to utilise the plea procedure in such an unorthodox fashion.

Both the plaintiff and the second defendant's counsels blundered in the manner they sought to place the second defendant's evidence before the court. Having realised that the second defendant's evidence was critical to the resolution of the dispute, they ought to have devised a well-structured and coordinated way of placing that evidence before the court, and not in the manner they sought to do it herein. The second defendant had nothing to plead to. There was therefore merit in Mr *Chatambudza's* submission that the second defendant had no case to open and consequently no evidence to lead since it had nothing to defend. The objection was accordingly upheld.

At the conclusion of the oral testimonies, the parties agreed to file closing submissions. Both parties were required to file their closing submissions on 13 July 2022. The plaintiff filed his submissions on 14 July 2023, but the first defendant did not file any submissions by the said date.

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[2] SC 40/15

The Plaintiff's Submissions

It was submitted that based on the evidence placed before the court, it was not in dispute that the plaintiff was allocated the property. This was confirmed by: the beacon form that was issued to the plaintiff, and a further form acknowledging that the plaintiff had been shown pegs and beacons. This position was corroborated by the evidence of Magwaza and Muchemedzi.

In addition, there was also the agreement of sale signed between the second defendant and the plaintiff; a written confirmation from the second defendant as well as from the Union confirming the plaintiff as the lawful allottee. Plaintiff also paid for the land intrinsic value after receiving clearance from the Housing Pay Scheme. The clearance confirmed that the plaintiff was up to date with his subscriptions. The argument that the plaintiff was in arrears with his subscriptions was therefore without merit.

It was further submitted that the notice placed in the media inviting the listed members to update their subscriptions also confirmed that the plaintiff was allocated the property. No further notice or documentation had been availed to show that the plaintiff had indeed defaulted. On his part, the first defendant averred that he purchased the stand in 2011. He produced receipts which showed that he paid a sum of US$3000.00. The receipts confirmed cash payments yet the first defendant claimed he had made bank deposits. The bank deposit slips were not tendered as evidence in court. Payments were allegedly made to the Housing Pay Scheme and not to the second respondent as the owner of the land. That raised suspicion.

There were also inconsistencies in the first defendant's testimony. In his plea, he did not state from whom he purchased the property. In his evidence in chief he stated that he bought the stand from the Gosha led Committee. Under cross examination, Gosha maintained that the stands were not for sale. The first defendant had only paid subscriptions for development. Further, in his plea, the first defendant claimed that he was allocated the stand in February 2011. In his evidence in chief he said it was in November 2011. He then further mentioned the September 2011 date. The beacon form showed the event as November 2006. There was therefore a clear misrepresentation.

Gosha's evidence was dismissed as unhelpful and unreliable. His evidence was that his Committee had reallocated stands that had initially been allocated by the second defendant. The fact still remained that the stands belonged to the second defendant. Nothing was proffered by Gosha to confirm that his Committee had mandate to reallocate stands. Gosha had not assisted the first defendant to regularise his alleged acquisition of the property when he was

facing difficulties. This was because the Gosha led Committee was acting on a frolic of its own. The first defendant was allegedly a victim of an elaborate fraud. He had purchased the property from people who had no ownership rights. He had no right to be on the stand. He had failed to discharge the onus upon him to show that he was lawfully allocated the property. The Gosha led Committee had no rights to allocate stands since it did not own the stands.

It was also submitted that the allegation of a double sale did not save the first defendant's cause. There was no double sale because the second respondent never sold the stand to the first defendant. It sold to the plaintiff as confirmed by the agreement of sale.

Analysis

The standard of proof required in resolving civil disputes is on a balance of probabilities. The concept was explained by CHIGUMBA J in the case of *Lewenod Enterprises (Private) Limited v Freight Africa Logistic*[3], a judgment cited in the plaintiff's closing submissions. The court said:

> "What this brings to mind is a mental picture of the scales of justice, the embodiment of the underlying principle that underpins the justice system. It entails a balancing of the plaintiff's claim against the defendant's defence. It necessitates a decision of which of their versions of events is more likely to be true. In other words which version is more believable, or most likely to have transpired, than the other? It is my view that the preponderance of probabilities is an exercise which involves an evaluation and an assessment of the likelihood of the plaintiff's version being the correct one as opposed to the defendant's, or *vice versa*. In making this determination we look at the pleadings, at the documentary evidence, at what the parties' representatives said and did when they were in the witness stand, and finally at what the law says in light of the evidence that we will have accepted. Then we determine what ought to be done in order to do justice between the parties."[4]

In evaluating evidence in order to determine which of the parties version of events is more probable, or believable, the court must engage on a balancing act. It may occur that the version of events given by both parties are plausible, but nevertheless the court must strive to draw that inference which is most probable from the pleadings, the evidence and the totality of the circumstances.[5]

Only one issue stood out for determination in this matter. It is about who the lawful allottee of the property as between the plaintiff and the first defendant. There could not have been a better starting point than inviting the owner of the land to come and explain how the Housing Pay Scheme started, its policy objectives, how it was to be administered, the roles of

[3] HH 653/15
[4] At p 1 of the judgment
[5] See also *British American Tobacco Zimbabwe v Chibaya* SC 30/19

all the parties involved from the second defendant itself, the Union and the Housing Pay Scheme. In fact, had the second defendant been more proactive, and assumed its role as the owner of the land, the chaos which degenerated into the double allocation of the same land as what happened in *casu*, would have been averted.

That the plaintiff was allocated the property is not in dispute. It appears things went awry when the notice of defaulters was published in the media. The exact date that the list was published was not stated. The mobile contact numbers on that notice are given as 0912 886 009 and 0912 734 300. The prefix to the phone number confirms that the notice was published before Econet Wireless transitioned to the new prefix starting with a 077. According to an online publication, TECHZiM, Econet Wireless changed its prefix phone numbers from 091 to 077, with effect from 2 October 2010[6].

The first defendant's second witness Gosha, told the court that the notice was published at the time his Committee was in office. That Committee was in office during the period 2006 to 2011. It was that Committee which lobbied for the notice in order to warn defaulters since the developer was almost pulling out of the project citing non-payment for his services. According to Gosha, the 14 day notice was followed by another 7 day notice whose consequences were the same. An AGM of the Union resolved to repossess stands from defaulters and offer them to members of the public. This is how the first defendant and other non-council employees benefited from the scheme.

The heading to the notice that was placed in the media is inscribed with the words **"City of Harare HMWU-CROWBOROUGH HOUSING PAY SCHEME".** After the list of defaulters who included the plaintiff, was the following warning:

> "This serves to notify, members of HMWU who have been allocated stands at the above to come and update their payment within the next 14 days, failure of which will result in HMWU reallocating these stands to other members who are on the waiting list."

The plaintiff contended that following that notice, he updated his payments and was therefore not in arrears. This explained why he was cleared to pay the Land Intrinsic Value in October 2016. He was later to be invited to the second defendant's Mufakose District Office where he signed the agreement of sale in 2019. The plaintiff did not explain how much he owed in respect of the development levy which caused his name to be listed amongst other defaulters. The plaintiff's second witness, Muchemedzi insisted that the plaintiff was up to date with his payments. This explained why the plaintiff was able to sign the agreement of sale with the

[6] The report is found on the link https://www.techzim.co.zw/2010/09/econet-number-prefix-change/ of 10 September 2010.

second defendant. The plaintiff and his witnesses denied that stands were repossessed from defaulters. According to them, the notice was intended to nudge defaulters into updating their payments.

From an analysis of the evidence, the plaintiff's version of events cannot be entirely true. It is not in dispute that the second defendant delegated to the Union, the management of the land where the stands were eventually parcelled out. The Union put in place the Housing Pay Scheme committee which oversaw the day to day management of the scheme. The plaintiff and his witnesses averred that the Committee on the ground did not have authority to allocate or repossess land. The defendant and his witnesses on the other hand insisted that the Committee on the ground had that delegated authority to allocate and repossess stands. I have already highlighted that what is missing from the evidence of all the parties is the evidence of the owner of the land, the second defendant herein. The absence of that evidence works to the disadvantage of the plaintiff herein and I proceed to explain why.

The evidence of the second defendant would have helped delineate the roles of the parties in the whole scheme that is the second defendant itself, the Union and the Housing Pay Scheme Committee. The notice in the media confirms that it was inserted jointly by these three parties. The receipts confirming the payment of subscriptions by the first defendant bear the names of these three parties. At the time that Gosha's Committee oversaw the repossession and reallocation of stands to non-council employees, Gosha was an employee of the second defendant. Gosha remains an employee of the second defendant to this date. The court is satisfied that non council employees also benefited from the scheme. These include the first defendant, and his first witness, Zimbariro Zimbariro.

The court is also satisfied that although the scheme was initially intentioned for the benefit of employees of the second defendant, at some point it was opened up to members of the public. Whether this was done through a deliberate policy shift by the second defendant, or clandestinely through the manipulation of the blurred systems by some dubious officials within the structures of the second defendant, the Union or the Committee, can be anyone's guess in the absence of testimony from the second defendant. What is however clear to the court is that non-council employees also benefited from the scheme.

That the scheme was beset with chaos is clear from the evidence of Gosha, and even the plaintiff himself. Gosha claims that at some point the Chikombingo Committee that came into office after his Committee vacated office caused his arrest on some allegations of impropriety in the allocation of stands. He boasted that he was never convicted. He also averred

that if he had committed any wrongdoing, then surely the second defendant would have hauled him before a disciplinary panel and dismissed him from employment. Gosha is probably right. The land belonged to the second defendant. All the chaos were unfolding right under the second defendant's watch. It did not take any action to arrest the situation on the ground.

The plaintiff discovered in 2012 that his property had been occupied by the first defendant. At that point, the first defendant was in the process of erecting a cottage. The defendant moved into the cottage between 2013 and 2014. The plaintiff only approached the Magistrates Court for some relief in 2015. He informed the Bungu led committee of the first defendant's presence at his property. The Committee gave him a letter confirming him as the lawful allottee of the property in June 2015. In the meantime the first defendant started building the main house in 2015. He had completed it in 6 months. The plaintiff did not take any legal action against the first defendant between 2012 and 2015 because he believed that the Committee was looking into his issue. This court was only approached in August 2019. At the time that all the processes leading to the signing of the agreement of sale between the plaintiff and second defendant in 2019 were initiated, the first defendant had long been in occupation of the property.

The second defendant, the Union and the Housing Pay Scheme were all aware that the first defendant was in occupation of the property. They did not take action and left it to the plaintiff to fight his own battles with the first defendant. By their inaction, the second defendant and the Union, who are legal entities in their own right, sanitised what they now claim to be a fraudulent acquisition of the property by the first defendant. The second defendant remains the owner of the land. It retains vindicatory rights against anyone in possession of its property unlawfully. It has not taken action to this date.

The Union is the entity that had lobbied for land for its members. It had a right to intervene on behalf of its members. It did not take action. The two ought to have taken action as far back as 2012 when the presence of the first defendant on the stand was brought to their attention. Right now the second defendant is billing the first defendant for water consumption at the property, and yet it claims he is not the lawful allottee. That certainly does not make any legal sense. The second respondent can only be billing the first defendant for water consumption because it recognises him as a lawful occupant of its land. If his occupation was unlawful then the second defendant would have long taken legal action, and even disconnected water supply to that property.

The court determines that the alleged inconsistencies in the first defendant's testimony are immaterial, and do not detract from the fact that he benefited from the chaos that were spawned by those managing the scheme, as well as the second defendant. The first defendant is in possession of receipts that were issued from the offices of the second defendant and the Housing Pay Scheme. A former vice chairperson of the Committee gave evidence explaining the circumstances under which he was allocated the property. The absence of the testimony by the second defendant is the plaintiff's Achilles heel. The court determines that the plaintiff has failed to prove, on a balance of probabilities, that he is entitled to the relief he seeks.

COSTS

The plaintiff and the first defendant find themselves victims of a poorly managed Housing Pay Scheme. Neither should be penalised with an adverse award of costs. I consider it unfair to penalise the plaintiff as the losing party, with an adverse order of costs under the circumstances. I would not have hesitated to penalise the second defendant with an order of costs had it continued to participate in these proceedings. It is the one responsible for the chaos that resulted in the plaintiff approaching this court. I therefore find it befitting to order that each party bears its own costs of suit.

DISPOSITION

Resultantly it is ordered that:

1. The plaintiff's claim is dismissed.
2. Each party shall bear its own costs of suit.

Mangezi, Nleya & Partners, plaintiff's legal practitioners
Rubaya & Chatambudza, first defendant's legal practitioners
Gambe Law Group, second defendant's legal practitioners