

REPORTABLE (6)

**JOEL SIMON SILONDA (SUBSTITUTED BY EXECUTOR
VUSUMUZI THOMAS SILONDA)
V
VUSUMUZI NKOMO**

**SUPREME COURT OF ZIMBABWE
GUVAVA JA, UCHENA JA AND KUDYA AJA
BULAWAYO: 21 JULY 2020
HARARE: 24 AUGUST 2020 & 25 JANUARY 2022**

T. Masiye-Moyo and G. Ndlovu, for the appellant

L. Nkomo for the respondent

KUDYA AJA: This is an appeal against part of the judgment of the High Court sitting at Bulawayo, dated 2 May 2019.

The court *a quo* granted the following order:

1. That the purported Deed of Sale concluded by the parties on 26 January 2010, in respect of a portion of Umguza 100 Acre Lot 5A be and is hereby confirmed to be null and void for want of compliance with the mandatory provisions of the Regional, Town and Country Planning Act [*Chapter 29:12*].
2. That the plaintiff's claim for payment by the defendant of reasonable rentals and holding over damages be and is hereby dismissed with costs.

3. That the plaintiff be and is hereby ordered to pay to the defendant the sum of \$125 000 being compensation for improvements effected by the defendant on the plaintiff's property.
4. That the prescribed rate of interest be levied on the amount under (3), *supra*, with effect from 24 June 2015 to the date of full payment.
5. That the plaintiff pays costs of suit.

The part under appeal relates to paras 3, 4 and 5 of the order. The appellant is also aggrieved by the court *a quo*'s failure to pronounce itself on the claim for eviction in that order.

THE FACTS

The facts that are relevant to this appeal are common cause. The appellant sadly passed away on 24 August 2019, before the appeal was heard. He was, by order of this Court substituted on 22 July 2020 by his duly appointed executor dative, who also happens to be his son.

The appellant is the registered title holder of Umguza 100 Acre Lot 5A in the District of Bulawayo measuring 67.2123 hectares held under deed of transfer No. 74/91 (the immovable property). It is situated in the outskirts of Bulawayo and falls under the administrative jurisdiction of the Umguza Rural District Council.

On 17 August 2000, the appellant sought but failed to obtain a sub-division permit for the property into units of less than 5 hectares. The responsible authority adjudged any plots that were less than 5 hectares not to be viable for agriculture.

The respondent resided on a fully developed 6 acre plot in the vicinity of the appellant's immovable property. On 12 January 2010, in anticipation of an agreement of sale to be consummated with the appellant, the respondent sold his plot for the sum of R 225 000.

On 26 January 2010, the parties concluded a written agreement for the sale of 10 acres (4. 047 ha) of the immovable property (the plot) for the sum of US\$20 000. A deposit of US\$10 000 was to be paid before the respondent could take occupation. The balance was payable at the rate of US\$2 000 per month from 1 May 2010. The other terms and conditions of the agreement were that the respondent would “pay the cost of all transactions connected with the transfer of the property, all charges of capital gains and draw electric power to the homestead of the seller”.

The respondent duly paid the deposit and took occupation on 1 April 2010. His building plans were approved by the Umguza Rural District Council on 3 April 2010. He constructed a three bedroom cottage and a four bedroom main house in 2010. In 2011 he installed electricity infrastructure for his two dwellings and the appellant's homestead but only drew electricity to his dwellings. He flushed a borehole previously sunk by the appellant, constructed 2 septic tanks and 2 Blair toilets. He also put up a perimeter fence around “his” plot. It was common cause that he expended the total sum of US\$ 34 158.75 and R2 220 on these developments.

The relationship between the appellant and respondent deteriorated soon after the respondent took occupation of the property. The appellant refused to accept the instalments tendered by the respondent and demanded that the respondent keep his money while he kept his land. The respondent tendered the balance of the purchase price and when it was rejected

he issued summons for specific performance in HC 491/11. Thereafter, with the help of their legal practitioners, a compromise was reached between the parties but was not honoured. In the result, the appellant then sued the respondent for the payment of the balance of the purchase price, in the sum of US\$10 000, in HC 2828/12.

During this tumultuous period, unbeknown to the respondent, the appellant sought to regularize the sale of the plot by applying for a sub-division permit to the department of Physical Planning Offices in Bulawayo on 10 January 2011. It was only in or about October 2012 that the respondent became aware that the appellant did not have a sub-division permit entitling him to subdivide the immovable property and sell the plot. On 27 February 2013, acting on the appellant's request, the respondent paid US\$550 to the appellant's former legal practitioners for the processing of a belated subdivision permit.

Notwithstanding that the immovable property measured 67.2123 ha, a permit for the sub-division of the immovable property into two stands measuring 4.047 and 37.6961 hectares was duly issued on 29 April 2013. The permit, however, turned out to be a fake document.

Acting on the erroneous belief that the permit was genuine, on 6 June 2013 and 30 January 2014 the respondent paid US\$5 000 and US\$ 4 000, respectively, towards the purchase price. The respondent, therefore, paid to the appellant a total sum of US\$19 000 for the purchase of the plot. He, in addition, expended US\$34 158.75 and R2 220 in the development of the immovable property.

By the time a pre-trial conference was held *a quo*, both parties had withdrawn their earlier actions against each other.

THE PARTIES' RESPECTIVE CLAIMS IN THE COURT A *QUO*

At the pre-trial conference, the parties agreed, *inter alia*, that their agreement of sale was invalid and illegal for breaching s 39(1)(i) and s 40 of the Regional, Town and Country Planning Act. This was because it had been concluded without a subdivision permit.

Consequently, the appellant tendered the purchase price of US\$19 000 and sought the eviction of the respondent from the plot. He also claimed an ascertainable amount for unjust enrichment for the period of the respondent's stay to the date of his eviction. The *quantum* for the enrichment claim was based on what the appellant perceived to be the reasonable rentals that the respondent would have paid for the occupation of the property. He, therefore, claimed US\$18 000 for the occupation of the plot from March 2010 to April 2015 and "holding over damages at the rate of US\$10 per day...from 1 May 2015 to the date of vacation" and costs on the higher scale.

The respondent contested the action. He disputed being unjustly enriched and averred that he was a *bona fide* occupier by virtue of the invalid agreement. He also averred that in the absence of a lease agreement, the appellant did not have a valid cause of action for the payment of reasonable rentals and holding over damages.

He, in turn, counter claimed for unjust enrichment for the improvements he had made on the immovable property. He averred that the appellant was enriched at his expense by these improvements. He further alleged that the appellant was enriched by the payment of

US\$19 000 towards the purchase price and US\$550 for the procurement of the subdivision permit. The respondent, therefore, sought the repayment of the denominated amounts, a refund of the expenses incurred in erecting the electricity infrastructure and the depreciated replacement cost (being the current cost of reproduction or replacement of an asset less deductions for physical deterioration, obsolescence and optimization) of the improvements he made on the plot. He specially entreated the court to award him “such payments as will be sufficient to enable the defendant to purchase a property of comparable value including all the improvements he had effected.” He also sought interest at the prescribed rate from the date of summons to the date of payment in full and costs on the higher scale.

In his plea to the counterclaim the appellant, again, tendered the refund of US\$19 000. He disputed to being unjustly enriched by the developments made by the respondent on the immovable property. He averred that the respondent had failed to draw electricity to his homestead and had fraudulently facilitated the issuance of the fake permit. He also alleged that the respondent’s dwellings were constructed without his authority and that he was therefore a *mala fide* occupier. Lastly, he stated that these dwellings would not be useful to him.

The two issues referred to trial *a quo* were whether or not:

1. The appellant was entitled to a reasonable rental arising from the respondent’s occupation of the plot, and
2. The defendant has been unjustly impoverished and plaintiff unjustly enriched as a result of the alleged developments made by the defendant upon the plot and if so the *quantum* thereof.

THE FINDINGS OF THE COURT A QUO

The court *a quo* confirmed the invalidity of the agreement of sale on the ground that it was contrary to the mandatory dictates of ss 39 (1) (i) and 40 the Regional, Town and Country Planning Act. The confirmation was in accordance with established authority emanating from this Court in such cases as *X-Trend –A Home (Pvt) Ltd v Hoselaw (Pvt) Ltd* 2000 (2) ZLR 348 (S) and *City of Gweru v Kombayi* 1991 (1) ZLR 333 (S).

It held, on the authority of *Magodora & Ors v Care International Zimbabwe* 2014 (1) ZLR 397 (S) at p 398F that a lease agreement could not possibly be extrapolated from the invalid agreement of sale. And resultantly, dismissed the claim for rentals and holding over damages sought by the appellant in the main. It is clear from a reading of the judgment that the court *a quo* did not relate the request for reasonable rentals and holding over damages to the appellant's own enrichment claim against the respondent. The appellant pleaded such a cause of action. He testified during the trial that the respondent derived benefit from the farming activities he conducted on the plot. He also asserted that another benefit that accrued to the respondent was in the form of rental savings that he would have been obliged to pay elsewhere but for his stay on the plot. These assertions were not and could not be controverted by the respondent. However, it appears that counsel for the appellant misconceived the appellant's case and did not pursue the claim to fruition.

The court *a quo*, on the basis of credibility findings and the probabilities of the case, further found the respondent to have been a *bona fide* occupier and the appellant a *mala fide* seller. Consequently, it relaxed the *in pari delicto* rule in favour of the respondent. It, thus, held that the appellant had been unjustly enriched at the expense of the respondent, who was

concomitantly impoverished by the transaction. The court *a quo*, therefore, upheld the respondent's counter claim.

In computing the measure of the benefit that accrued to the appellant, the court *a quo* applied the *pari delictum* rule. In the exercise of its broad discretion, it relaxed the *pari delictum* rule in a bid to do justice between the two protagonists. It had no difficulties in finding the appellant to have been enriched in the sum of US\$19 550, constituted by the payments towards the purchase price and the facilitation of the procurement of the subdivision permit. The correctness of this finding is beyond question. After all, the appellant did not retract his tender of US\$19 000, and conceded the payment of US\$550 for the stated purpose.

The parties disagreed on whether or not the respondent was entitled to compensation for the improvements that he made on the immovable property. The appellant submitted *a quo* that the respondent was not entitled to the value of the improvements. Firstly, because the respondent had not properly framed them under the enrichment cause of action in his pleadings. The second was that the improvements were not nor would they be useful to him. He, in any event, agitated for their urgent removal from his property.

The court *a quo* held that, while on the pleadings, the cause of action for the improvements was poorly and inelegantly framed, the respondent had obliquely included them in his enrichment cause. Further, that the purported defective pleadings had in any event been amplified and cured, firstly, by the inclusion of the developments in the second issue referred to trial at the pre-trial conference. And secondly, by the overwhelming evidence adduced by the respondent at the trial together with the scope and tenor of the questions asked and answers rendered during cross examination.

The court *a quo* also held on the authority of *Reza v Nyangani* 2001 (1) ZLR 202 (S) at 205G that usefulness was to be measured, objectively and not subjectively, on the basis of added value. It, therefore, found the improvements to be objectively useful to the appellant. It also found that they could not be removed because they were fixed to the immovable property.

The court *a quo* estimated the added value of the improvements at \$125 000 and not US\$132 833.33 claimed by the respondent. It adopted the lowest depreciated replacement value of \$90 000 provided in one of the three valuation reports produced in January 2018. The court *a quo* then added the depreciated replacement value of the plot, estimated in two of the valuation reports at \$35 000, to this figure. It, therefore, awarded the aggregate amount of \$125 000 to the respondent as a fair and equitable amount that adequately represented the enrichment that accrued to the appellant and constituted his concomitant impoverishment.

Lastly, the court *a quo* declined to immediately evict the respondent from the immovable property on two grounds. The first was that he had a real improvement lien on the property, dischargeable on full payment of the award. The second was that the respondent had invested all the resources he had on the plot. To evict him from the plot, empty handed, would not only be intolerable but would consign him and his family to the indignity of homelessness and destitution. I quote below the concluding remarks of the court *a quo* in this regard. At p 15 of its cyclostyled judgment it stated that:

“This Court firmly believes that this is a proper case to exercise its discretion in the interest of equity and fairness by ordering that the defendant be evicted only upon payment of the full compensation ordered by the court *per* the defendant’s counter claim. This is mainly because the defendant has a real lien over the portion of the land in issue. (Underlining of the court *a quo*).”

Notwithstanding the firm belief, the court *a quo* omitted to make the contemplated order of eviction in the final order that issued.

THE GROUNDS OF APPEAL

The appellant initially raised six grounds of appeal. At the commencement of the appeal hearing in Bulawayo, Mr *Masiye-Moyo*, for the appellant, moved for the deletion of the second ground of appeal and the amendment of the fourth ground. Advocate *Nkomo*, for the respondent did not oppose the amendments. We, accordingly, granted the amendments by consent of the parties. Resultantly, the following five grounds of appeal remained in contention.

1. The Honourable Court *a quo* misdirected itself in law in holding that, despite the respondent's failure to plead unjust enrichment with regards to the improvements upon the property at issue, such failure to specifically plead unjust enrichment was curable by the evidence.
2. The court *a quo* misdirected itself at law by failing to order either for or against the appellant on a claim of eviction of the respondent from the appellant's land when such a claim was put before the court *a quo* for determination by that court.
3. The court *a quo* misdirected itself in its application of the law in awarding what amounts to contractual damages in the relaxation of the *in pari delicto* principle in that the court *a quo* relied on valuations provided by the respondent when in fact the court *a quo* could only have relied on the actual proof of expenditure upon such land having been pleaded and proof provided.
4. The Honourable Court *a quo* erred in ordering that interest on the judgment debt be paid by the appellant from 24 June 2015 when in fact the valuation relied upon for the monetary award in issue was done in 2018.

5. The Honourable Court *a quo* misdirected itself at law by ordering that the appellant pays the costs when in fact the appellant was partially successful in the court *a quo*.

The relief sought from these grounds of appeal was, firstly, that the appeal succeeds with costs. Secondly, that the judgment *a quo* be altered by setting aside the paragraphs relating to the payment of the sum of \$125 000, interest and costs. These were to be substituted by an award for the payment of the purchase price paid of \$19 000, and the actual expenditure proved to have been incurred in the improvements to the immovable property in the sum of \$34 158.75 and ZAR 2 220. The interest on these sums was to run from the date of the order and each party was to bear his own costs. The appellant further sought the inclusion of an order of eviction to the substituted order.

THE ISSUES FOR DETERMINATION

The issues that arise from the grounds of appeal are these.

1. Whether or not the court *a quo* erred in finding that the respondent had proved his case and was therefore entitled to damages for unjust enrichment.
2. Whether or not the court *a quo* erred in relaxing the *pari delicto* rule and in awarding the respondent compensation in the nature of contractual damages.
3. The date on which interest should commence to run and the appropriateness of a cost order against the appellant *a quo*.

THE CONTENTIONS BEFORE US

During Mr *Masiye-Moyo*'s oral submissions, it appeared to the court that the parties required an opportunity to attempt settlement of the matter. Mr *Nkomo* was amenable to such

a course of action. The parties requested for a period of 3 weeks to pursue the attempt at settlement. We accorded them the opportunity to do so. The matter was accordingly postponed for continuation in Harare on 24 August 2020. The attempt at settlement was, however, not successful. The appeal proceeded in Harare. Mr *G Ndlovu*, substituted Mr *Masiye-Moyo* as counsel for the appellant at the resumed hearing.

Counsel for the appellant made the following submissions. That the court *a quo* erred in awarding compensation for improvements under the enrichment cause in circumstances where the respondent had not specially pleaded such a cause. While he conceded that the respondent had in oral testimony specifically premised his claim for compensation for the improvements on unjust enrichment, he argued that oral testimony could not in law cure such a glaring defect in his pleadings.

We directed Mr *Ndlovu*'s attention to the averments, as amended by consent of the parties at the hearing *a quo* on 16 January 2018, embodied in paras 3, 4 and 5 of the respondent's counterclaim (on p 40 of the record of proceedings) and para 4.1 of his replication to the appellant's plea in reconvention (on p 48 of the record of proceedings). Counsel maintained that these averments did not specifically plead unjust enrichment in respect of the improvements but only did so in regard to the purchase price and the amount paid to procure the subdivision permit.

Mr *Ndlovu* further argued that, as no contractual rights could ever arise or be enforceable from an illegal agreement, it was incompetent, firstly, for the respondent to pray for "contractual damages" under an enrichment claim. And secondly, that while the court *a quo* correctly relaxed the *in pari delicto* principle in this case, it was also incompetent for it to award

such “contractual damages” to the respondent. The court *a quo* had done so, the argument went, by awarding compensation which included the amount of money that the respondent would require to purchase a piece of land similar in size to the one he had lost. And by further awarding an aggregate sum, which would enable the respondent to erect structures of an equivalent value to the improvements. He contended that an award of compensation based on improvements was limited to the actual expenses incurred by the respondent.

He also contended that it was against public policy and therefore improper for any court of law to accord judicial recognition to and approval of an illegal and void agreement. To do so would undermine the tenets of public policy upon which the *in pari delicto* principle was premised.

Lastly, he conceded that an improvement lien constituted part of our law. He, however, argued that such a right of retention could not avail any party whose improvements flowed from an illegal agreement. Concomitantly, the court *a quo*, therefore, misdirected itself in failing to grant the order of eviction to the appellant.

Mr *Nkomo* made contrary submissions. Firstly, he contended that the respondent had actually pleaded unjust enrichment not just for the actual expenditure he incurred in purchasing the plot, in procuring the permit and drawing electricity to the appellant’s homestead but also for the improvements. Secondly, that on the authority of *Reza v Nyangani, supra*, and *Derby Farms (Pvt) Ltd v Chirunga* HH 82/2007 at p 15, once the court relaxed the *in pari delicto* rule it had the further discretion to do justice between the parties by awarding an equitable amount of the value added by the improvements. In so doing, the court could consider the real and not the nominal value of the improvements.

He argued that in *Reza v Nyangani, supra*, this Court had ignored the exact expenditure that had been incurred in favour of the depreciated replacement value of the improvements. This was because by the time the dispute was adjudicated the actual expenses were too negligible while the depreciated replacement value, which catered for the fall in the value of money, represented the fair and equitable value added to the property by the improvements. He, therefore, contended that the respondent was entitled to the value added to the immovable property by the improvements and not just the actual expenditure he had incurred. Hence his submission that the correct value added to the immovable property by the improvements was constituted by the depreciated replacement value of such improvements.

Finally, he submitted that the invocation of the improvement lien was again an exercise of the court's discretion, which the appellant had not and could not impugn on any of the irrationality grounds known to our law articulated in the case of *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S). He, however, conceded in exchanges with the court that the court *a quo* failed to capture the conditional eviction of the respondent in the operative part of its order. He entreated us to exercise the powers conferred on the Supreme Court by s 22(1) (b) (ix) of the Supreme Court Act [*Chapter 7:13*] to "correct" the order and achieve justice between the parties.

In reply, Mr *Ndlovu*, argued that both this Court and the High Court had adopted the depreciated replacement value in decided cases because of the endemic hyperinflation that characterized the local economy at the time. He sought to distinguish the two cases cited by Mr *Nkomo* from the present case on the basis that this country did not experience similar inflationary pressures but was stable between 2010, when the actual expenses were incurred and 2019, when the enrichment order was granted.

Mr *Ndlovu*, however, conceded that this Court could in terms of s 22(1) (b) (ix) of the Supreme Court Act, correct the omission to grant the conditional eviction in the operative part of the order of the court *a quo* rather than remit the case for this to be done.

THE LAW

The requirements for an action of unjust enrichment were set out by ZIYAMBI JA in *Gamanje (Pvt) Ltd v City of Bulawayo* SC 94/04 at p 8 in the following terms:

“The requirements for an action for unjust enrichment are, firstly, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the expense of the plaintiff; thirdly, that the enrichment is unjustified (in the sense that it would be unjust to allow the defendant to retain the benefit); fourthly, that the enrichment must not come within the scope of one of the classical enrichment actions; and fifthly, there must be no positive rule of law which refused an action to the impoverished person. See *Industrial Equity v Walker* 1996 1 ZLR 269 AT P 300; See also *Wille’s Principles of South African Law* 8th edition at pp 633-5.”

To the same effect is Du Plessis in his seminal work *The South African Law of Unjustified Enrichment* Juta 2012 at p 24 where he writes that:

“To succeed with a claim based on unjustified enrichment, the plaintiff must meet four general requirements, or, as it is sometimes said, four general elements of enrichment liability have to be present. First, the defendant must be enriched; secondly, the plaintiff must be impoverished; thirdly, the defendant’s enrichment must be at the plaintiff’s expense and finally, the defendant’s enrichment must be unjustified, which means that it must be without legal ground (*sine causa*).”

ANALYSIS AND APPLICATION OF THE LAW TO THE FACTS

Whether or not the court a quo erred in finding that the respondent had proven his case and was therefore entitled to damages for unjust enrichment.

In the court *a quo* and in this Court, the appellant conceded that the respondent had pleaded and proved unjust enrichment in respect of the part payment of the purchase price in the sum of US\$19 000. Counsel for the appellant, however, argued *a quo* and in this Court that the respondent was not entitled to the measure of enrichment based on the valuations produced *a quo*. Firstly, because unjust enrichment was not specifically pleaded and could not, as held by the court *a quo*, be properly cured by evidence. Secondly, because the award granted *a quo* was for contractual damages and not for unjust enrichment.

The law on what constitutes a cause of action is settled. A cause of action is simply a factual conspectus, the existence of which entitles one person to obtain from the court a remedy against another person. In other words, it is an entire set of facts upon which the relief sought stands. See *Peebles v Dairiboard (Private) Limited* 1999 (1) ZLR 41 (H) at 54E-F and *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626 at 637.

To determine whether the respondent raised an enrichment cause on the improvements, regard must be had to his plea to the appellant's declaration in the main matter and to the subsequent averments he made in his counterclaim. The facts pleaded by the respondent upon which his relief rested appear in para 10.2 of his plea and para 3 of the appellant's replication in convention; paras 2, 3, 4 and 5 of his counterclaim, as amended on the first day of trial *a quo* (16 January 2018). It is also necessary, for completeness, to refer to para 1 of the appellant's plea to the counterclaim and para 1 of the respondent's replication. I set these below.

“RESPONDENT’S PLEA IN CONVENTION

10.2 The defendant avers that if the contract were to be found to be null and void then he stands to be prejudiced and the plaintiff to be unjustly enriched because in pursuit of his obligations in terms of the sale, he had built a house on the land,

paid US\$19 000 to the plaintiff, commenced to draw electricity to the plaintiff's homestead and through his own funds facilitated the issue of a subdivision

WHEREFORE, the defendant prays for the dismissal of the plaintiff's claims with costs on the punitive scale. In the event, however, that the Honourable Court holds that the agreement is null and void, then the defendant prays that the plaintiff be ordered to compensate the defendant in such sum of money as at the time of judgment would be sufficient for the defendant to acquire a property of comparable value including all improvements effected by the defendant on the land in issue, a refund of the money spent in drawing electricity for the plaintiff's benefit and money spent in procuring a subdivision permit.

RESPONDENT'S COUNTERCLAIM

1.
2. On 26 January 2010, the parties entered into an agreement of sale wherein the plaintiff sold and the defendant purchased an undeveloped piece of land identified in the agreement of sale as "a portion of land 10 acres in extent being part of Plot 5A 100 Acres Lot, Bulawayo".
3. In pursuit of his obligation in terms of the agreement of sale, the defendant paid to the plaintiff the total sum of US\$19 000 and, *inter alia*, for the benefit of the plaintiff commenced drawing electric power to the defendant's homestead and paid for the procurement of a subdivision permit by the plaintiff.
4. The defendant avers that the plaintiff has been unjustly enriched at his expense in that the defendant paid to the plaintiff the sum of US\$19 000, which the plaintiff accepted and further commenced to draw electricity for the benefit of the plaintiff, and paid to the plaintiff US\$550 to procure or cause the procurement of a subdivision permit at his expense.
5. The defendant, as he is entitled to do, had developed the piece of land and he will be unfairly prejudiced if the improvements were to accrue to the plaintiff without any compensation from him."

THE APPELLANT'S REPLICATION IN CONVENTION

Ad paragraph 10.2

Plaintiff denies that he stands to be unjustly enriched from the property built by the defendant and avers that:

- 3.1 Defendant built the property contrary to a warning against such development by the plaintiff.

- 3.2 Plaintiff has no use for the property so built by the defendant as he already has other plans with regards to the use of the land upon which the defendant built the property.

THE APPELLANT’S PLEA TO THE COUNTERCLAIM

1. There is no cause of action disclosed in the counter-claim.

THE RESPONDENT’S REPLICATION TO THE COUNTERCLAIM

1. Ad para 1

This is disputed. The defendant’s cause of action is founded on a claim of unjust enrichment.”

Ad para 4

- 4.1 The defendant will accept payment in the sum of US\$19 550 and persist in its claim for damages as contained in the counterclaim. (Underlining for emphasis).

The above pleadings clearly show that the respondent specifically pleaded to an enrichment claim in respect of improvements in defence to the main action but did not specifically carry this through to the counterclaim. The substance of the enrichment cause is, however, embodied in para 5 of the counterclaim. The deliberate use of choice words such as “developed piece of land” “improvements” “unfairly prejudiced” “accrued to plaintiff without compensation” connote a direct benefit to the appellant at the expense of the respondent and clearly encapsulate all the four requirements of an enrichment cause recognised in our law.

I am satisfied that the court *a quo*'s finding that the respondent did plead unjust enrichment in his counterclaim is unassailable.

But, even if it had not been so pleaded, such a failure would, as was noted *en passant* by the court *a quo*, have been cured by the evidence led at the trial. This finding accords with both judicial precedent and the academic works of reputable legal writers.

In *Mtuda v Ndudzo* 2000 (1) ZLR 710 (H) at 719B- F, GARWE J, as he then was, held that where an issue is not raised in the pleadings but has been identified for determination at a pre-trial conference and fully canvassed at the trial, even if an amendment is not moved, a court is entitled to adjudicate on it. This effectively means that a defective pleading will be cured by evidence.

To similar effect is *Herbstein and Van Winsen's Civil Practice of the High Courts of South Africa* 5th ed by Cilliers *et al* at p 575-576 where it is stated that:

“Even where no amendments have been applied for, both trial and appeal courts have adjudicated on issues not raised on the pleadings but fully canvassed at the trial.”

Again *du Plessis, supra*, at p 3 footnote 10 writes that:

“A plaintiff who initially pleads the incorrect action may be allowed to amend his claim (see *Hughes v Levy* 1907 TS 276). But even if such a plaintiff did not amend his claim, the court can still award the action that he should have relied on, as long as its requirements were fully canvassed in evidence and the defendant would not be prejudiced by reliance on the incorrect action in the pleadings. ...If the pleadings contain some of the customary allegations of a specific enrichment claim, and the defendant was alive to the basis of the claim, the defendant may not maintain a passive stance; he must raise an exception if he considers that the case has not been properly pleaded.” (My underlining for emphasis).

I note in passing, that the underlined words also accorded with Order 21 r 137 of the High Court Rules, 1971.

It is apparent to me that, in the present case, the symbiotic relationship between the main claim and the counterclaim birthed the twin issues that were referred to trial at the pre-trial conference. The second issue thereof aptly captured the enrichment cause. The appellant clearly understood that respondent's claim for the improvement "damages" was predicated upon the unjust enrichment cause. This is further confirmed by the excerpt of the evidence in chief of the appellant, which appears at p 325-326 of the record.

- "Q. The point I am putting across to you which he said is that if you had to live with the improvements without him receiving compensation, you would have benefitted because you have buildings now?
- A. I do not benefit anything from the building, if he decides to go and destroy those buildings I will still not benefit anything I would remain the same person.I would not do anything with the development or the houses he constructed because I have my own house which is very comfortable.
- Q. What would you do if he left everything, what are you going to do?
- A. It would be his own fault due to his stubbornness. I would destroy the buildings or leave them like that without anyone occupying them."

The record of proceedings further reveals the prominence to which the enrichment cause was fully ventilated during the cross examination and re-examination of the appellant.

In the same vein, the respondent fully canvassed the enrichment cause on the improvements in his evidence in chief, under cross examination and in re-examination. Under cross-examination (p 382 of the record), the respondent maintained that para 5 of his counterclaim constituted an unjust enrichment cause of action. The response appeared to have stopped counsel in his tracks for counsel subsequently, in his follow up question, in that cross

examination, properly conceded (at p 387 of the record) that unjust enrichment constituted the respondent's cause of action in respect of the improvements.

Whether or not unjust enrichment exists is a factual finding. See *Evans v Rapper* SC 55/04 at p 5. In the present matter, the court *a quo* made the factual finding that the appellant had been enriched at the expense of the respondent and was therefore entitled to recoup the value of the enrichment. That finding has not, and on the facts, cannot be impeached by the appellant. The existence of the improvements was not disputed *a quo*. Nor were the valuation reports on which they are all itemized, controverted. Indeed, the appellant accepted that the respondent expended US\$ 34 158.87 and R2 220 in making the improvements. I am satisfied that the court *a quo* correctly found that the respondent had proved his case for unjust enrichment on a balance of probabilities.

It seems to me, therefore, that the first ground of appeal was misconceived and cannot succeed.

The measure of the award for the improvements is closely linked with the second issue, to which I now turn.

Whether or not the court a quo erred in relaxing the pari delicto rule and in awarding the respondent compensation in the nature of contractual damages.

In our law, a Court is precluded from enforcing an illegal contract, which has not been performed in whole or in part. The rule is of absolute application. It emanates from the *maxim ex turpi causa non oritur actio*. It is based on the principle of public policy that prohibits

the recognition and enforcement of illegal contracts that are contrary to law. See *York Estates Ltd v Wareham* 1950 (1) SA 125 at p 128 and *Dube v Khumalo* 1986(2) ZLR 103 (SC) at p 109.

The *in pari delicto potior est conditio possidentis* maxim is a fraternal twin to the *ex turpi causa* maxim. In *Dube v Khumalo, supra*, GUBBAY CJ translated it to mean "where the parties are equally in the wrong, he who is in possession will prevail." The learned CHIEF JUSTICE further explained the import and purpose of the rule.

The import of the maxim is that where something has been delivered pursuant to an illegal agreement the loss lies where it falls. The purpose of the rule is to discourage illegality by denying judicial assistance to persons who part with money, goods or incorporeal rights, in furtherance of an illegal transaction. It, however, is not an inflexible rule. In appropriate cases the courts will relax the rule and order restitution on the public policy ground of preventing injustice by rendering simple justice between the parties involved in the illegal transaction. It is applied so as to release the parties from the harmful effects of their illegal agreement and is inspired by, and anchored on, the public policy principles of justice and equity whose focus is to prevent unjust enrichment. See *Rubin v Botha* 1911 AD 568 at 578-581; *Jajbhay v Cassim* 1939 AD 537 at 544-545, *Chioza v Siziba* SC 4/15 at para (27) and *Du Plessis, supra*, at p 204.

Counsel for the appellant argued that the court *a quo* erred in relaxing the *in pari delictum* rule in a manner that, resultantly, enforced the illegal agreement. He further argued that the award of the value of improvements as at the date of judgment and not the actual amount expended in rendering the improvements constituted enforcement of the illegal agreement.

Mr *Ndlovu* failed to impugn the exercise of the court *a quo*'s discretion in relaxing the *in pari delictum* rule. In the present matter, the respondent sought to unravel the effects of the illegal agreement and not to enforce it. He acted in the same fashion as did the appellant in the analogous case of *Chioza v Siziba* SC 4/15, in which an agreement consummated between the parties was void and illegal for violating s 44 of the Stamp Duties Act [*Chapter 23:09*] and s 39 of the Regional Town and Country Planning Act. At para [32] ZIYAMBI JA, pertinently held that:

“[32] Where a party to an illegal contract seeks not to enforce the illegal contract but to obtain relief from the consequences of his illegal action, the courts have, in order to prevent an injustice or to satisfy the requirements of public policy, or obviate a situation where one party is unjustly enriched at the expense of the other, intervened and granted relief from the rigid application of the rule.”

I, therefore, agree with Mr *Nkomo*, that the court *a quo* properly exercised its discretion in relaxing the *in par delictum* rule in order to do just between the two protagonists.

The further question raised by the appellant is whether *restitutio in integrum* applies solely to contractual damages and not unjust enrichment. The answer to the question requires an appreciation of the differences between compensation for unjust enrichment on the one hand and contractual and delictual damages on the other.

In *The South African Law of Unjustified Enrichment* at p 1 and footnote 3 Du Plessis distinguishes unjustified enrichment, on the one hand, from contract and delict, on the other, in the following manner:

“Unjustified enrichment, like the law of contract and delict is a source of obligations. But unlike contract, unjustified enrichment creates obligations by force of law, and not by virtue of the actual or deemed consent of the parties. And unlike delict, the purpose of imposing liability is not to balance out a loss with an award of damages, but to correct a gain by obliging the defendant to return or surrender enrichment to the plaintiff. Put more

simply, unjustified enrichment gives rise to an obligation to provide restitution ...or to a right of retention or the power to remove the improvements.”

There is no magic attached to *restitutio in integrum*. Regarding contractual damages, it is a term of art, which denotes the unwinding or unravelling, physically or by payment of a monetary equivalent, of what has been done back to its original or pre-contractual position. See *Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd* 1999 (2) SA 719 (A) at 732B and *Sackstein NO v Proudfoot SA (Pty) Ltd* 2006 (6) 358 (SCA) para (11) and *Mackay v Fey NO* 2006 (3) SA 182 (SCA) at para (10), *Jacobs v United Building Society* 1981 (4) S.A.37 at 39C-E and Du Plessis p 70 para 4.4.2.2.

It appears to me that unjust enrichment, which seeks to avoid manifest injustice has the same effect of unravelling the benefit accrued to the enriched as does *restitutio in integrum* in contractual matters. The difference being that *restitutio in integrum* in unjust enrichment is invoked by operation of law while *restitutio in integrum* in contract is premised on actual or deemed consent of the contracting parties. However, both have the same effect.

This view is in consonance with the sentiment expressed in *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198 to the effect that the courts are willing to consider *restitutio in integrum* for unjust enrichment if in the pleadings, the claim for unjust enrichment is accompanied by a tender of what the claimant received. See also Du Plessis, *supra*, p 70 footnote 69. It appears to me that the willingness of the respondent to vacate the property, of course subject to payment of the value by which he has enriched the appellant and concomitantly impoverished himself, constitutes the envisaged tender. The respondent is therefore a suitable candidate for the extension of *restitutio in integrum* to him.

The real issue for determination is therefore whether the court *a quo* was correct in awarding a *quantum* based on the depreciated replacement value instead of the nominal value of the original amounts paid.

In the *Gamanje* case, *supra*, at p 10, this Court stated that:

“The value of the enrichment is the amount by which the appellant is enriched”.

According to Du Plessis, *supra*, at p 378, the measure of compensation for unjust enrichment in South Africa has faithfully followed the principles of the classical Roman Dutch law writers. He observes that:

“The most important of these principles is that the measure of the defendant’s liability is the lesser of the plaintiff’s impoverishment and the defendant’s enrichment at the time of the institution of the action. See *Skyword (Pvt) Ltd v Peter Scales (Pvt) Ltd* 1979 (1) SA 570 (R); *Jan van Heerden & Seuns BK v Senwes Bpk* [2006] 1 All SA 44 (NC) para 47.2]; *Mndi v Malgas* 2006 (2) SA 182 (E) para [25] and *Kudu Granite Operations (Pty) Ltd v Cartena Ltd* 2003 (5) SA 193 (SCA) para (17).”

At some point, the Zimbabwean courts subscribed to the same principle. One need only refer to *Skyword (Pvt) Ltd v Peter Scales (Pvt) Ltd*, *supra*, and the High Court decision of *Reza v Nyangani* 2000 (1) ZLR 398 (H).

The parting shot was fired by McNALLY JA in the appeal case of *Reza v Nyangani* NO 2001 (1) ZLR 203 (S) at 205C-206D and followed by ZIYAMBI JA in *Chioza v Siziba*, *supra* at para (39). I derive the following six principles that are relevant for assessing compensation in claims for unjust enrichment in Zimbabwe, as espoused by McNALLY JA in the former case.

1. The court has a broad discretion, which is circumscribed by the facts of the case, to effect an equitable remedy between the contesting parties. The exercise of the wide discretion can be traced to the civil law as adopted by the courts of Holland.
2. A *bona fide* occupier is entitled to compensation for necessary and useful expenses less an equitable amount for his use and occupation of the land.
3. Usefulness does not connote aesthetics or personal likes and dislikes of the owner but denotes added value to the property.
4. The general common law principle for awarding an enrichment claim is that the improver plaintiff is entitled to the lesser of the amount between his impoverishment and the owner defendant's enrichment, (which Du Plessis at p 380 labels the "double ceiling rule" See *Skyword (Pvt) Ltd v Peter Scales (Pvt) Ltd* 1979 (1) SA 570 (R) 573.
5. The measure of compensation (*quantum*) takes into account the actual expenses incurred by the occupier plaintiff in 'purchasing', preserving or protecting the property and any resultant physical and legal fruits that accrue to him from the occupation. These benefits that accrue to the occupier must per force be discounted from the added value.
6. In the Zimbabwe setting, in order to achieve an equitable and fair result to the parties, the common law position must necessarily take into account the prevailing economic and monetary factors, such as currency revaluations and rampant inflation, which impact on the value of the enrichment.

In the *Chioza v Siziba* case, *supra*, at para [39] this Court stated that:

"[39] In my judgment this is a suitable case for making an exception to the strict application of the *par delictum* rule. The justice of the case would be met by remitting the matter to the court *a quo* for the reasons advanced by counsel for the respondent. Such a course would enable the respondent to recover the value of the money paid under the illegal contract and the appellant, on payment of compensation, to recover possession of the property."(my emphasis)

Additionally, para 3 of the order in the *Chioza* case discloses how the value of the money paid was to be computed. It reads:

“The matter is remitted to the court *a quo* for hearing of evidence to enable it to determine:-

- (i) the value of the property including any improvements made thereon by the respondent;
- (ii) the amount by which the appellant has been enriched at the expense of the respondent;
- (iii) the amount by which the respondent should be compensated by the appellant; and
- (iv) to make such order as to it seems appropriate in order to achieve justice between the parties.
- (v) an order in terms of para (iv) herein may set a period during which the amount determined in para (iii) shall be paid by the appellant to the respondent failing which payment the Deputy Sheriff shall transfer the property to the respondent.

In *Reza v Nyangani*, the impoverished improver’s actual expenses were in the sum of \$15 934.78. He, however, claimed the value of improvement of \$90 000 from the enriched beneficiary. The High Court awarded him the right of removal. On appeal, this Court set aside the order and substituted it with an award of \$60 000 (which discounted labour costs), as at the date of judgment in the High Court. It made the pertinent observation at p 206 C that;

“If one were simply to add up Reza’s expenses in 1992 and 1993 one would come to a ridiculously low figure, given that the cost of the building materials has escalated enormously since then. We are dealing with an equitable remedy. This gives the judge a very wide discretion as was stressed by both INNESS CJ in *Fletcher & Fletcher v Bulawayo Waterworks Co Ltd* 1915 AD 636 at 649 and OGILVIE THOMPSON JA in *Nortje v Pool NO* 1966 (3) SA 96 (A) at 103H. The approach was endorsed by FAGAN J (as he then was) in *Wynland Construction (Pty) v Ashley-Smith & Ors* 1985 (1) SA 534 (C) at 538G. One must be careful to be fair to both parties.”

Again, in *Chioza v Siziba*, the impoverished purchaser had paid a purchase price of \$25 000, and other ascertainable costs of a stand and for effecting transfer. The effect of the order of this Court negated the strict application of the common law position of paying the lesser amount between the value of the improvement and the actual expenses incurred by the impoverished buyer. Rather, it sought the value added by the improvement as at the prospective

date of the valuation to be carried out at the instance of the court *a quo*. These two case authorities underscore the wide equitable discretion the court of first instance has in computing compensation for the enhanced improvements as at the date of judgment.

The court *a quo* adjudged the structures to be useful improvements. The improvements are enumerated in three evaluation reports that were procured by the respondent from different valuers on 8 and 9 January 2018. The valuations were based on the depreciated replacement value, which denotes the amount it would cost the respondent to put up similar structures and the cost of purchasing a similar sized piece of land. The replacement by a similar piece of land was valued at \$35 000 and of the improvements at \$90 000, being the lower of the three valuations based on the parity rate of US\$1 to RTGS\$1.

The invoices filed of record by the respondent covered the period from September 2009 to 22 February 2011. The aggregate expenses that were actually incurred by the respondent in making the improvements in 2009, 2010 and 2011 was in the sum of US\$34 818.92. In the exercise of its equitable discretion the court *a quo* declined to assess the reasonable rental that the respondent would have incurred on the property on the basis that the parties never concluded a lease agreement. It accepted the lower of the evaluations inclusive of the value of the land and computed the enhanced value at US\$125 000. It awarded this amount to the appellant in the prevailing local currency at the parity rate of 1:1 between the USD and the RTGS.

I take judicial notice of the notorious fact that between 2010 and 19 February 2019, the value of improvements denominated in United States dollars did not change. However, the introduction of the RTGS dollar initially at par with the USD but gradually depreciated in

response to market forces introduced hyper inflationary pressures into the local economy. By the time the order was granted the United States dollar value of the improvements had not changed while the RTGS value of the same improvements had dramatically changed.

Accordingly, the submission advanced by Mr *Ndlovu* that the court *a quo* erred in computing the enrichment award on the depreciated replacement value instead of on the actual expenses incurred by the respondent was, therefore, incorrect.

In the circumstances, I am therefore satisfied that the court *a quo* properly exercised its discretion in both relaxing the *in pari delictum* rule and in assessing the value of the compensation due to the respondent.

Accordingly, the third ground of appeal ought to fail.

The only thing that exercised my mind was whether or not to remit the matter *a quo* for new evaluations to be undertaken in the light of the ravages of inflation that have continued to beset our local currency. I decided against such a course of action after taking into account that a fair award of compensation for the value of improvements ought rightly to have taken into account the value by which the respondent was enriched and the appellant impoverished by his long 11 year stay at the plot. In doing so I am cognisant of the fact that the appellant's claim in that regard was misconceived by his own counsel and the court who regarded it simply as a claim for rentals and holding over damages. The onus was of course on the appellant to establish the value of that enrichment. He failed to do so. In any event, no appeal was raised on this point.

The date on which the appropriate interest commences to run.

In respect of contractual damages, unless stated in the contract, interest normally commences to run on the date the subject matter of the claim was made. In respect of interest for unjust enrichment, interest is normally claimed from the date of summons. However, this Court in *Reza v Nyangani* suggested that interest should commence to run for the depreciated replacement cost, from the date of judgment *a quo*. This is because the award granted is often different from the actual expenses incurred.

The submission by Mr *Ndlovu* that the interest should have commenced to run on the date of judgment is therefore correct. The fourth ground of appeal is, therefore, upheld.

The failure to make a substantive order of eviction.

In *Director of Customs & Excise v ABSA Bank & Anor* 1998 (2) ZLR 71 (S) at 73F-74A, it was held that an improvement lien was a real lien that conferred rights of retention until the amount that is due is paid. The holder of the lien is entitled to retain it until paid for value of the expenditure not just his expenses. Further, that equity requires that he be evicted after paying for the improvements. See *Hales v Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H) at 253F-G.

It was common cause before us that the second ground of appeal ought to succeed. The court *a quo* misdirected itself in failing to make a conditional order for eviction as it had intimated in its reasons for judgment. See *Wepener v Schraader* 1903 TS 629 at 637. In the exercise of the powers reposed in this Court by s 22 (1) (b) (ix) of the Supreme Court Act, I will correct the order of the court *a quo* in this respect.

COSTS

In respect of the costs *a quo*, it seems to me that the appellant was properly mulcted with costs on the ordinary scale. He sold the plot to the respondent well knowing from his 2000 debacle that he could not sell an unsub-divided plot let alone one less than 5 hectares in size.

Both counsel are agreed that each party should bear its own costs on appeal. Each party will accordingly bear its own costs.

DISPOSITION

The appellant partly succeeds in regards to the second ground of appeal. The court *a quo* “omitted” to impose conditional eviction in its order. It also wrongly imposed interest from the date of the counterclaim instead of the date of its order. Ground of appeal 4 also succeeds. The other grounds of appeal fail.

Accordingly, it is ordered that:

1. The appeal succeeds in part with each party bearing its own costs.
2. The order of the court *a quo* is set aside in respect of para 4 and substituted with the following:
 - “4. The prescribed rate of interest in respect of the amount in para 3 shall be with effect from 2 May 2019.
 5. The respondent shall vacate the immovable property within two weeks of the payment of the judgment debt together with interest thereon at the prescribed rate failing which the Sheriff or his Deputy shall evict him from the immovable property.”

GUVAVA JA:

I agree

UCHENA JA:

I agree

Masiye-Moyo and Associates, appellant's legal practitioners

Calderwood, Bryce Hendrie & Partners, respondent's legal practitioners