REPORTABLE (7)

AGSON MAFUTA CHIOZA
v
SMOKING WILLIAMS SIZIBA

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA, & OMERJEE AJA
HARARE, NOVEMBER 13, 2012 & FEBRUARY 23, 2015

J B Wood, for the appellant

B Chikowero, for the respondent

ZIYAMBI JA: [1] During the week ending 29 December 2006, the Herald newspaper carried an advertisement inserted by Murenga Estate agents ("Murenga") wherein stand No. 1759 of 323 Midlands, Waterfalls, was being advertised for sale at a purchase price of twenty five million dollars. The respondent was interested in the property and visited Murenga's offices where he spoke to a Mrs Madziva, a sales agent thereat. He was referred to Stand 323 Thorn Road and, having viewed the property, returned to Murenga and expressed his desire to purchase the property at the asking price of $25 000 000.00. He was given Murenga's bank account number wherein he could transfer the purchase price. Later that week, having effected the transfer as directed, he met with the appellant at Murenga's offices where they were to sign the agreement of sale.

[2] According to the respondent, the appellant pleaded with Mrs Kasenza who drafted the agreement of sale to reflect the purchase price as $8 000 000 instead of the actual price of $25 000 000.00 that he had paid. Mrs Kasenza was reluctant to understate the purchase price but following consultations with her superior, Mr Murenga, and more pleading from the appellant, who claimed to be heavily indebted with medical bills and the like, the respondent, after an initial objection to this proposal since he had already paid $25 000 000.00, and it was generally known that properties in the area were fetching prices in excess of $8 000 000.00, finally agreed to the appellant's suggestion that the agreement be back-dated to September 8, 2006 and the purchase price be understated. The appellant, however, states that it was the respondent who requested the understatement of the price in order to evade stamp duties on transfer.

[3] Following these events and on 29 December 2006, the appellant, as seller, and the respondent, as purchaser, concluded an agreement for the sale of:

> "certain piece of land situate in the District of Salisbury being subdivision of 323 Midlands Township 2 of Upper Waterfalls Estate called Stand No. 1759 measuring 2 167 square metres. A residential stand with staff quarters partly walled measuring 2 167 square meters."

[4] In terms of the agreement, the purchase price was $8 000 000 (eight million dollars) which was to be deposited with Murenga and held by them pending transfer. Clause 2 of the General Conditions provided that the Seller was to tender transfer of the property within a reasonable period of the date of acceptance of this offer and the Purchaser was to provide the Seller's Conveyancers with the requirements specified in Clause 2 within fourteen days of the

date of such tender of transfer. The Conveyancers were to be *Messrs Gutu & Chikowero*. Vacant possession was to be given to the purchaser by mutual agreement.

[5] It is common cause that the agreement, notwithstanding the actual date of its conclusion and signature (29 December 2006), was dated 8 September 2006.

[6] On 10 January 2007, Murenga wrote to the Conveyancers with instructions to attend to the transfer of the property advising in the letter that the purchase price had been paid direct to the appellant. The Conveyancers, in turn, wrote to the appellant on 3 January 2007 requesting the title deeds for the whole property as well as the permit to subdivide, among other things, to enable them to attend to the transfer.

[7] Vacant possession of the property was given to the respondent on or about 1 February 2007. In or about April 2007, the appellant advised the respondent that when the surveying process was completed he might expect to lose or gain 100 square meters. After the completion of the process it turned out that the respondent had gained 47 square meters. The appellant asked him to pay 10 million dollars for this extra piece of land but he could only afford $3 000 000.00 which, and that is common cause, he paid to the appellant.

[8] Thereafter matters dragged on until 5 January 2009 when the Conveyancers wrote again to the appellant's legal practitioners requesting the documents necessary to process the transfer and advising that the purchase price had been paid to the appellant. The response was a request for proof of payment of the purchase price. On 30 January 2009, proof of payment in

the form of a letter of confirmation by Murenga that the purchase price had been paid, was forwarded to the appellant's legal practitioners.

[9] On 3 February 2009 the appellant's legal practitioners wrote to the respondent's legal practitioners alleging, *inter alia,* that their client was resiling, on their advice, from the agreement which they alleged was illegal. They tendered the purchase price, should any remain, after deducting rentals calculated from the date of occupation by the respondent on 1 February 2007.

[10] It was following these events that the respondent lodged a court application in the court *a quo* seeking an order compelling the appellant to pass transfer of the property to him failing which the Sheriff or his lawful deputy be authorized to effect the transfer on the appellant's behalf. He based his application on the fact that he had paid the purchase price for the property and that the appellant was not entitled to be unjustly enriched at his expense.

[11] The application was opposed by the appellant who, in turn, filed a counter application for the eviction of the respondent from the property as well as payment of rentals at the rate of USD$250 per month from 1 February 2009. The basis of the counter application was that the respondent had not paid the purchase price of the property.

[12] On behalf of the appellant, it was argued before the court *a quo* that the agreement being in contravention of the Stamp Duties Act, and in *fraudem legis,* was illegal and could not be enforced by the court.

[13] The respondent however sought the relaxation of the application of the in *pari delicto* rule on the grounds of public policy which, it was submitted, should properly take into account the doing of simple justice between man and man. It was submitted on his behalf that the illegality – the understatement of the purchase price- having been instigated by the appellant, the court ought to take cognizance of the moral blameworthiness of the parties in determining where the justice of the case lay. It was submitted that it was contrary to public policy, for a party to persuade another to commit a wrong, as did the appellant, and then use that wrongful act as a shield of defence in the face of a legitimate suit by the respondent for his bargain.

[14] The Court *a quo* found that it was the appellant who had hatched the plan to understate the purchase price of the property in order to avoid payment in terms of the Stamp Duties Act [*Cap 23:09*]. It found further that the appellant, through his agent, Murenga, had received the full purchase price of the property. It granted the order sought by the respondent for the transfer to him of the property and dismissed the counterclaim by the appellant.

THE ISSUES ON APPEAL

[15] The grounds of appeal, as amended, raise three issues, namely, the correctness of the finding of the court *a quo* that the respondent had paid the full purchase price of the property; whether the court erred in enforcing a contract which was found by it to be illegal and which was, in any event, prohibited by s39 of the Regional Town and Country Planning Act; and whether the court erred in finding that the appellant would be unjustly enriched if the counterclaim were granted. I deal with each issue in turn.

[16] **Whether the court erred in finding that the purchase price of the property was paid in full to the appellant**.

The court *a quo* made factual findings in this regard. The general rule regarding factual findings made by a trial court is that they will not be upset by an appellate court unless there has been such a gross misdirection by that court on the facts so as to amount to a misdirection in law in the sense that no reasonable tribunal applying its mind to the same facts would have arrived at the conclusion reached by the lower court. As it was put by KORSAH JA in *Hama v National Railways of Zimbabwe*[1]

> "… there can be misdirection as to the law applicable to the case being tried; and there can be misdirection as to the evidence in the case. For an appellant to avail himself of a misdirection as to the evidence, the nature and the circumstances of the case must be such that it is reasonably probable that the Tribunal would not have determined as it did had there been no misdirection. In other words, that the determination was irrational….
>
> The general rule of the law, as regards irrationality, is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion. *Bitcon v Rosenberg* 1936 AD 380 at 395--7; *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1976] 3 All ER 665 (CA) at 671e - h; *Council of Civil Service Unions v Minister for the Civil Service,* supra, at 951a - b; *PF-ZAPU v Minister of Justice, Legal and Parliamentary Affairs* (2) 1985 (1) ZLR 305 (S) at 326E—G".

In the absence of such a misdirection (and none has been alleged by the appellant), it is not open to this Court on appeal to substitute its own findings of fact for that of the trial court.

[1] 1996 (1)ZLR 664 (S) @ 670

[17] In any event, the probabilities clearly support the factual conclusions reached by the court *a quo*. The respondent produced the RTGS transfer form showing the transfer of $25 000 000 into the bank account of Murenga; the respondent was given vacant possession of the property; four months after the agreement was concluded, and in April 2007, the appellant approached the respondent to ask for an additional $10 000 000 for the 47 square meters which he had gained after the subdivision and received, from the respondent, payment in the sum of $3 000 000.

[18] It seems unlikely that the respondent would have been given vacant possession of the property by the appellant if the purchase price had not been paid as required by clause 2 of the agreement. Further, the fact that four months later, at a time when the respondent was already in occupation of the property, the appellant claimed from the respondent only the value of the additional 47square meters and not the full purchase price of the property is supportive of the respondent's evidence that payment for the property had been made in terms of the agreement.

[19] This Court can take judicial notice of the fact that during that period, hyperinflation was taking its toll on the economy and it was in the interest of sellers of property to recover the sale proceeds as quickly as possible rather than await the tedious process of transfer by which time the money paid (or agreed as the purchase price) would have lost some of its value. Clause 2 of the SPECIAL CONDITIONS of the agreement (which were to prevail over the GENERAL CONDITIONS) bears this out. The purchase price was to be paid in cash. Clause 2 reads in part:

"2. This sale is conditional upon the purchaser being able to raise cash on the property of not less than $8 000 000,00 …"

[20] In addition to the above, the appellant's agents, on two occasions, confirmed, in writing, that the purchase price had been paid. In my view, the conclusion reached by the court *a quo* is unassailable.

[21] **Whether the court erred in enforcing a contract which was found by it to be illegal and which was, in any event, prohibited by s 39 of the Regional Town and Country Planning Act**.

The court *a quo* decided the matter on the basis that it was dealing with a contract that was illegal by virtue of its contravention of s 44 of the Stamp Duties Act [*Cap 23:09*] ("the Stamp Duties Act"). For completeness the section is set out below:

"**44 Agreements to evade duty shall be void**
Every contract, agreement or undertaking made for the purpose of evading, defeating or frustrating the requirements of this Act as to the stamping of instruments, or with a view to precluding objection or inquiry relative to the due stamping of any instrument shall be void."

[22] In his heads of argument, as also in his submissions before this Court, counsel for the respondent made the concession that the agreement of sale between the parties also contravened the provisions of s 39 of the Regional Town and Country Planning Act [*Cap. 29:12*] and that consequently, the appeal from the court *a quo's* judgment ordering the transfer of the stand ought to succeed. He submitted, however, that since both parties were in the wrong, this Court should relax the *in pari delicto* rule and remit the matter to the court *a quo*

to ascertain the present value of the property with a view to granting a refund to the respondent of the value paid for the property in order to avoid a situation where the appellant is enriched at the expense of the respondent. This submission was resisted by Mrs *Wood* who, on behalf of the appellant, contended that the court *a quo* ought to have granted the counter application as it was the respondent who would be enriched at the expense of the appellant.

[23] Although the issue as to the illegality of the agreement by virtue of its contravention of s39 of the Regional Town and Country Planning Act was not argued in the court *a quo*, it is a point of law and, there being no prejudice caused to the respondent by the taking of the point for the first time on appeal, counsel for the respondent, therefore, acted properly both in allowing the point to be raised by the appellant unopposed and in making the concession.

[24] Section 39 of the Regional Town and Country Planning Act [*Cap 29:12*]("the Act") reads, in relevant part, as follows:

> "39 (1) Subject to subsection (2), no person shall—
> (*a*) subdivide any property; or
> (*b*) enter into any agreement—
> (i) for the change of ownership of any portion of a property; or
> (ii) …
> (iii) …
> (iv) …
> (*c*) consolidate two or more properties into one property; except in accordance with a permit granted in terms of section *forty:*"

It is common cause that the agreement *in casu* was for the sale of an unsubdivided portion of a stand and that at the date of conclusion of the agreement, there was, in existence, no permit granted in terms of s 40 of the Act. Therefore, in terms of clear authority emanating from this Court, the agreement was illegal and unenforceable at law. See X-*Trend-A-Home (Pvt) Ltd*

v Hoselaw Investments (Pvt) Ltd 2000(2) ZLR 348(SC) where McNALLY JA at 348F stated as follows:

> ".. s 39 forbids an agreement for the change of ownership of any portion of property except in accordance with a permit granted under s 40 allowing for a subdivision. The agreement under consideration was clearly an agreement for change of ownership of the unsubdivided portion of a stand. It was irrelevant whether the change of ownership was to take place on signing or on an agreed date, or when a suspensive condition was fulfilled. The agreement itself was prohibited."

It follows from the above that the grant of the remedy sought by the respondent in the court *a quo* would amount to an enforcement of the illegal contract. That was the substance of the concession made by counsel for the respondent.

[25] It is now established that an illegal agreement which has not yet been performed either in whole or in part will never be enforced by the Court. See *York Estates Ltd v Wareham* 1950 (1) SA 125 at p 128 where LEWIS ACJ, said:-

> "The Court has no equitable jurisdiction to grant relief to a plaintiff seeking to enforce a contract prohibited by law. See *Matthews v Rabinowitz* 1948 (2) SALR 876 W.L.D. In fact the Court is bound to refuse to enforce a contract which is illegal even though no objection to the legality of the contract is raised by the parties. *CAPE DIARY and GENERAL LIVESTOCK ENGINEERS v SIM (*Supra)[2]

This rule is absolute and admits of no exception. It is expressed in the *maxim ex turpi causa non oritur actio*. See *Dube v Khumalo* 1986(2) ZLR 103 (SC) at p 109. It is based on the principle, expressed variously, that the Court cannot aid a party to defeat the clear intention of an ordinance or statute; that Courts of justice cannot recognize and give validity to that which the

[2] 1924 AD 167

legislature has declared shall be illegal and void; and that the courts will not permit to be done indirectly and obliquely what has expressly and directly been forbidden by the legislature.

> [26] In the *Dube v Khumalo* case GUBBAY JA (as he then was), put it this way:
>
> "There are two rules which are of general application: The first is that an illegal agreement which has not yet been performed, either in whole or in part, will never be enforced. **This rule is absolute and admits no exception**. See *Mathews v Rabinowitz* 1948(2) SA 876(W) at 878: *York Estates Ltd v Wareham* 1950(1) SA 125 (SR) at 128. It is expressed in the *maxim ex turpi causa non oritur actio*. The second is expressed in another *maxim in pari delicto potior est conditio possidentis*." (My emphasis)

The principle which emerges from the decided cases is that the courts will not enforce an agreement prohibited by law. The order of the court *a quo*, having, as it did, the effect of enforcing the illegal contract concluded by the parties, cannot be allowed to stand. However that is not the end of the matter.

I turn to determine the third issue which will involve a consideration of the application of the second maxim.

[27] Whether the court erred in finding that the appellant would be unjustly enriched if the counterclaim were granted.

THE *PAR DELICTUM* (or the *IN PARI DELICTO*) RULE

The name derives from the maxim *in pari delicto potior est conditio defendentis* which literally means that if the plaintiff and the defendant are tainted by turpitude ('in the wrong'), the position of the defendant is stronger, and that the plaintiff must fail[3]; or *in pari delicto potior est conditio possidentis* which may be translated as meaning where the parties are

[3] Du Plessis : The South African Law of Unjust Enrichment at p204.

equally in the wrong, he who is in possession will prevail. The effect of the rule is that where something has been delivered pursuant to an illegal agreement, the loss lies where it falls, the objective of the rule being to discourage illegality by denying judicial assistance to persons who part with money, goods or incorporeal rights, in furtherance of an illegal transaction.[4]

[28] The distinctive character of the two maxims was explained by STRAFFORD CJ in *Jajbhay V Cassim*[5] as follows:

> "In my view the first maxim prohibits the enforcement of immoral or illegal contracts and the second curtails the right of the delinquents to avoid the consequences of their performance or part performance of such contracts."[6]

And at p 542:

> "I repeat that the two maxims, although they have a common inspiration and purpose, are clearly distinct in that they deal with different types of claim. The maxim *ex turpi causa* is self- explanatory and requires no elucidation. It is complete and unquestioned in our Courts as in the Courts of England. But we must leave it in its own department where it reigns supreme and not unwarrantably extend it to the province of the other maxim which is designed to supplement the deficiencies of the first in regard to deterring illegality. The two separately operating and properly applied are, I venture to think, adequate for that designed purpose. When I say that the law is not settled, I mean in regard to the application only of the second maxim *in pari delicto potior conditio defendentis.* This is the only maxim which, in my judgment, concerns us in the present case, for the appellant is not seeking enforcement of the illegal contract but seeks release from its operation. This maxim is not so self-explanatory as the first, for the nature of the plaintiff's claim is not immediately indicated and the degree and nature of the delinquency is but vaguely defined."[7]

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[4] Dube v Khumalo (supra)

[5] 1939 AD 537

[6] At p540

[7] Jajbhay v Cassim supra at pp542-543

[29] The harsh effect of the unqualified application of the *par delictum* rule is illustrated in the case of *Brandt v Bergstedt*[8]. The Plaintiff who had sold his cow to the defendant on a Sunday in contravention of an ordinance which prohibited any form of trading on a Sunday was not assisted by the court when he sought payment from the defendant for the cow. The defendant had set up the defence *inter alia* that he was not obliged to pay because the sale was prohibited by statute.[9] No doubt there are many similar cases in which the courts have strictly applied the maxim.

[30] However, in *Jajbhay and Cassim*[10] the appellate division of the Supreme Court of South Africa, headed by STRAFFORD CJ, held that the general rule expressed in the maxim is not one that can or ought to be applied in all cases and that it is subject to exceptions which in each case must be found to exist only by reference to the principle of public policy.

It was there said that:

> "Courts of law are free to reject or grant a prayer for restoration of something given under an illegal contract, being guided in each case by the principle which underlies and inspired the maxim. And in this last connection I think a court should not disregard the various degrees of turpitude in delictual contracts. And when the delict falls within the category of crimes, a civil court can reasonably suppose that the criminal law has provided an adequate deterring punishment and therefore, ordinarily speaking, should not by its order increase the punishment of the one delinquent and lessen it of the other by enriching one to the detriment of the other. And it follows from what I have said above, in cases where public policy is not foreseeably affected by a grant or a refusal of the relief claimed, that a court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment."[11] (My underlining)

[8] 1917, C.P.D. 334

[9] The Court in Jajbhay v Cassim was of the view that this was one of the cases where the Plaintiff ought to have been assisted by the Court. See para [31] .

[10] *Supra* at para [28]

[11] At pages 544-545. The above passage was quoted with approval by GUBBAY JA in Dube v Khumalo (supra)

[31] At page 543 of the judgment the learned Chief Justice expressed his view that:-

> "The case of Brandt v. Bergstedt (1917 CPD 344) and the decision of the Transvaal Provincial Division in Rex v. Maseko (1915 TPD 1) appear to me to be in conflict. In the first the reasoning implies that the learned Judge felt himself bound by the authorities he quoted to refuse relief to the plaintiff, whereas I respectfully suggest that he should have approached the matter from the more fundamental point of view as to whether public policy was best served by granting or refusing the plaintiff's claim. If the learned Judge had so approached the case and had considered that as an equitable Judge he was free (as I think he was) to order the restoration of the cow, I cannot doubt that he would have granted the relief prayed. Indeed the facts of that case afford a typical example which called for a decision on which side public policy is best served"[12] (Underlining for emphasis)

[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.

Thus while the general rule is that illegal transactions will be discouraged by the courts, the exceptions show that where it is necessary to prevent injustice or to promote public policy the courts will not rigidly enforce the general rule. The identification of the exception to the rule, however, is a task which the court must undertake in each case. As WATERMEYER JA observed[13]:

> "the real difficulty lies in defining with any degree of certainty the exceptions to the general rule which it (the Court) will recognize."

[12] See also at p558

[13] At page550 of the same judgment

In the Dube v Khumalo case[14] it was said that:

> "… in suitable cases the courts will relax the *par delictum* rule and order restitution to be made. They will do so in order to prevent injustice, on the basis that public policy "should properly take into account the doing of simple justice between man and man."

[33] It would seem quite clear that the appellant seeks to benefit, unjustly, from the transaction. Having sold the property and received the proceeds through his agent, he now seeks the return of the property and thus, so to speak, 'have his cake and eat it'. The respondent, on the other hand, has parted with the full value of the property and stands to incur great financial prejudice if an order for eviction is granted in terms of the counter claim. It would appear then, that the court *a quo* was correct in its finding that the appellant sought to benefit from its own wrongdoing. It said:

> "It is clear to me that the 1st respondent seeks to benefit from its own wrong doing. Therefore rigid application of the *ex turpis causa* rule will result in an unjust enrichment of the party who engineered the result of the illegality. It is on this basis alone that the counter application should fail. In the result therefore the application is granted and the counter application dismissed with costs".

DISPOSITION

[34] Both parties sought the enforcement in whole or in part of the illegal agreement. The respondent, in moving the court to order the transfer to him of the property on the basis that he had paid the full purchase price of the property, prayed, in effect, for specific performance of the contract. The appellant, in his counter application for eviction on the basis that vacant possession of the property was given by him to the respondent in the mistaken belief that the latter had complied with clause 2 of the general conditions of the agreement and paid the

[14] *Supra* at para [24]

purchase price when in fact he had not, was seeking relief from the Court on the basis of an alleged breach of the illegal contract by the respondent.

[35] While the provisions of s 39 of the Act may not have been present to their minds at the time of conclusion of the agreement in this matter, no comfort can be gained by the parties from that fact since ignorance of the law is no excuse. In any event, the contravention of the Stamp Duties Act was agreed upon by both parties albeit with some persuasion, as the court found, from the appellant. They were both in the wrong. They fell squarely within the ambit of the *in pari delicto* maxim.

[36] After hearing submissions by counsel at the hearing of the appeal the parties were afforded time in which to attempt a settlement of the matter. Part of the delay in writing this judgment is attributable to this postponement of the hearing. Needless to say, the parties were unable to reach agreement and I must now consider the real issue to be determined in this appeal which is whether the present case is a suitable one for a departure from the general rule or, as it was put by the parties, for a relaxation of the *par delictum* rule by the Court.

[37] In that connection, it appears that the court *a quo* confused the two maxims. It referred to relaxing the *ex turpi causa* rule. The tenor of the judgments of this court is that the *ex turpi causa* rule does not admit of exceptions[15]. It cannot be relaxed. Different considerations apply however where the *in pari delicto* maxim is concerned[16]. Judging by the reference to his

[15] York Estates v Wareham (supra); Dube v Khumalo (supra)

[16] Dube v Khumalo (supra)

judgment in *Logan v Sibiya*,[17] it seems likely that the learned Judge meant to relax the application of the *in pari delicto* maxim. In that case, where an applicant sought the return of money paid to a respondent in pursuance of an illegal contract, the court found it to be an appropriate case in which to relax the *par delictum* rule in order to prevent the unjust enrichment of the respondent at the expense of the applicant.

[38] A strict application of the *par delictum* rule in the instant matter would result in a situation where the appellant holds the title deeds but the respondent retains possession of the property. While neither party could resort to the Courts for enforcement of the contract, it is quite conceivable that the appellant could transfer title to a third party against whom the respondent might have no recourse. In the circumstances of this case it seems to me that public policy would not countenance the unjust enrichment of the appellant at the expense of the respondent. Indeed it might well be thought that the respondent had been the subject of a great injustice and the Court would be expected to come to his assistance. A failure by the Court to assist the respondent might, far from deterring illegality, prove to be to the advantage of some unscrupulous members of the public. In this regard I am in respectful agreement with the following remarks by STRAFFORD CJ in the *Jajbhay v Cassim* case:

> "It may be said that contracts of that nature are more discouraged by leaving the bereft plaintiff unhelped and the doubly delinquent defendant in possession of his ill-gotten gains. I cannot agree with this view, which I think would not so much discourage such transactions but would tend to promote a more reprehensible form of trickery by scoundrels without such honour as even thieves are sometimes supposed to possess, and public policy should properly take into account the doing of simple justice between man and man."

[17] *2002(1)ZLR 531*

[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.

[40] On the question of costs, since both parties have achieved some measure of success, I deem it reasonable that each party should pay its own costs on appeal.

[41] Accordingly it is ordered as follows:-

1. The appeal is allowed in part with each party paying its own costs.
2. The judgment of the court *a quo* ordering transfer of the property to the respondent is set aside with each party to pay its own costs;
3. 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.

GARWE JA: I agree

OMERJEE AJA: I agree

Messrs Sakutukwa & Partners, appellant's legal practitioners

Messrs Gutu & Chikowero, respondent's legal practitioners