

MARTHA MAKOSA
Versus
ESTATE LATE FELIX CHASI
Represented by Francis Chasi, the Executor

HIGH COURT OF ZIMBABWE
MUZOFA J
CHINHOYI, 14 July, 29 September, 13 October 2023 & 8 February 2024

Civil Trial

F Murisi for the plaintiff
J Zuze, for the defendant

MUZOFA J

The Claim

The plaintiff issued summons for compensation in the sum of US\$25 000 for improvements on Stand number 3701, Cold Stream, Chinhoyi ‘the property’ after the death of Felix Chasi alternatively that, in the event the defendant fails to pay then the plaintiff buys off the defendant from the property and costs of suit. The claim is based on unjust enrichment.

The defendant resisted the claim and alleged that the plaintiff fraudulently bought the property therefore the loss must lie where it falls. In addition the defendant filed a counter claim for the following order,

- a. That plaintiff pays and compensates the defendant the sum of US\$ 93 000 or the local equivalent for rentals received by the Plaintiff from house number 3701 Coldstream, Chinhoyi from the time she illegally took over the property.
- b. That plaintiff pays and compensates the defendant in the sum of US\$213 000 000 or its local equivalent being patrimonial loss damages for loss of shelter, comfort, pain and suffering by defendant’s beneficiaries.

Factual Back ground

The background facts are largely not in dispute. The late Felix Chasi was married to Monica Chasi ‘Monica’, who sadly at the time of litigation had passed on too. Felix Chasi died on 22 June 2005. His estate comprised among other things stand number 3701 Cold Stream, Chinhoyi. The property had a four roomed house on it.

The late Monica as the surviving spouse, duly registered the estate. She was appointed the executrix to the Estate late Felix Chasi, the defendant. On 14 April 2006 Monica sold the property to the plaintiff. After purchasing the property, the plaintiff improved the property from a 4 roomed house to a 10 roomed house under asbestos. Monica used the proceeds of the sale to buy a property in Bulawayo where she relocated to and eventually passed on.

After Monica's demise some of the defendant approached the High Court seeking cancellation of the sale agreement under HC3943/20. An order by consent was granted. Monica had no authority to sell the property. The court ordered that the property revert to the defendant. By this time a new executor had been appointed.

After the cancellation of the agreement of sale, the plaintiff approached the court for compensation for the developments on the property based on unjust enrichment.

The Issues

A number of issues were referred to trial after parties failed to agree at the pretrial stage. They were listed as follows,

1. Whether or not the defendant was unjustly enriched by the improvements on the property.
2. Whether or not the plaintiff is entitled to compensation for the value of her developments on the property after the death of Felix Chasi.
3. Whether or not the defendant's counter claims have prescribed.
4. Whether or not the defendant is entitled to rentals for the period the plaintiff was in control of the property.
5. Whether or not the defendant can claim damages on behalf of the dependents for being rendered homeless and destitute.
6. Whether the plaintiff fraudulently caused the transfer of the property into her name.
7. Whether the litigation under HC 3943/20 was an *actio rei vindicatio*.

The listed issues in my view raise the following for determination by this court, whether the defendant was unjustly enriched and the plaintiff impoverished, whether the defendant's claim has prescribed, whether the defendant is entitled to rentals and the quantum, and whether the defendant is entitled to an award of damages on behalf for its dependents for being rendered homeless and destitute.

Plaintiff's Case

The plaintiff was the only witness in her case. Her evidence was that she entered into an agreement of sale for the property with Monica. Monica showed her marriage certificate to the late Felix Chasi. She believed as the surviving spouse Monica was entitled to sale the property. When she paid the purchase price she commenced making some improvements on the property.

At some stage she was warned that there could be some problems with the sale. She asked Monica about it. Monica produced a Certificate of Authority from the High Court. The Certificate of Authority which was part of her bundle of evidence produced by consent was

addressed to the Director of Housing, Chinhoyi Municipality the 'Municipality'. It directed the Municipality to change the name on the property from the late Felix Chasi to Monica the surviving spouse. She was satisfied that everything was above board. She continued with the developments on the property.

When she was done with the construction she leased the property and collected rentals. Later in 2009, she approached the Municipality for cession into her name. She continued to collect rentals until the High Court cancelled the agreement. Upon cancellation, the defendant evicted the tenants and took over control of the property. It is unclear at what stage the defendant's executor changed.

To prove the quantum, she relied on annexures A and B which were part of her bundle of documents. The property was evaluated during the course of the trial, plaintiff claimed the executor was so hostile, it was difficult to access the property. The evaluator simply evaluated the part of the house that represented the four rooms that were initially on the property and then assessed the value of the property comprising the 10 rooms. The market value of the property was US\$40 000. The core house was valued at US\$15 000 and the improvement thereon was US\$25 000.

She also stated that prior to filing the claim she engaged the executor with a number of options either to buy out the defendant or to purchase another property for the defendant which offers were spurned with contempt. The executor would have none of the offers as he firmly believed the plaintiff was part of the grand conspiracy to fraudulently deprive the respondent's beneficiaries of the property.

She was cross examined extensively particularly on her knowledge of the illegality surrounding the sale agreement. She was adamant that she did not know the late Monica had no authority to sale. Although she admitted that on proper legal advice and hindsight she realized that the sale agreement was a nullity, she insisted that since she was an innocent purchaser she is entitled to the value of improvement. She was adamant that an estate cannot increase its value.

The plaintiff then closed her case.

The Defendant's Case

The defendant's bundle of documents was produced by consent and marked as exhibit 2. The paper trail from the documentary evidence showed that on 7 March 2006 Ignatius Chasi wrote a letter to the Provincial Magistrate complaining that Monica had placed the property on the market for sale for \$90 000 before the winding down of the estate. On 10 March 2006 the Provincial Magistrate wrote to the Housing Officer Chinhoyi Municipality blocking cession of the property until finalization of the deceased estate. A letter from Mr. P. Nyamakato from the Magistrates Court dated 18 July 2006 advising Monica that the sale was a nullity. The letter was copied to the plaintiff and Municipality of Chinhoyi.

In his evidence Francis explained how the late Monica was appointed and when the family discovered that she intended to sell the property they tried to stop the sale by approaching all the relevant offices, the Magistrates Court dealing with the Estate and the Municipality. Letters were written to the late Monica and copied to the plaintiff. When the property was sold at some point they decided to live with it, however when Monica passed on they decided to pursue the matter and approached the High Court for cancellation of the agreement of sale.

Under cross examination he insisted that the plaintiff was well aware of and participated in the fraudulent sale. She took the risk therefore loss must lie where it falls. In another breath he said if the plaintiff has a claim it must be against the late Monica's estate. This issue was not taken further. However it would not succeed since the plaintiff's claim is not based on the agreement of sale but on unjust enrichment. A claim on unjust enrichment is meant to make sure that one does not reap where they did not sow.

I deal with issues in seriatim.

Whether the defendant was unjustly enriched and the plaintiff impoverished.

The first, second and sixth issues are naturally subsumed in addressing the above issue.

The law

In order for the plaintiff to prove her case under unjust enrichment, she has to satisfy the following requirements as stated by the learned author Du Plessis¹ 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*).”

In *Gamanje (Pvt) Ltd v City of Bulawayo* SC 94/04 at p 8 the court summarised the requirements as follows,

“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.”

All the requirements must be satisfied for the plaintiff to obtain relief.

Factual and legal Analysis and application of the law to the facts.

¹ *The South African Law of Unjustified Enrichment* Juta 2012 at p 24

Whether or not the defendant was unjustly enriched and the plaintiff impoverished is a question of fact *Evans v Rapper* SC 55/04. The court must therefore look to the evidence placed before it.

The first requisite is that the defendant must be enriched by the receipt of a benefit. There is no doubt that the defendant was enriched. The defendant's property had an improvement of a four roomed house at the time of sale. The plaintiff further improved it to a ten roomed house. The defendant was clearly enriched by the additional six rooms on the property.

It appears the defendant does not dispute that the plaintiff was enriched but raises the defence that the plaintiff took the risk by involving herself in the illegal sale. I will revert to the issue later in the judgment.

The second requisite is that the defendant must be enriched at the expense of the plaintiff. The plaintiff must be impoverished and there must be a causal connection between the enrichment and impoverishment. See *Industrial Equity v Walker* (supra).

This too was not disputed, the plaintiff out of her own expense effected the improvements with no contribution from the defendant. If the additional six rooms remain on the property, the plaintiff shall remain impoverished to the extent of the improvement while the defendant continues to derive a benefit from the said rooms. There exists a clear causal link between the enrichment and the impoverishment in this case.

Thirdly, the enrichment must have been unjustified. In the *Industrial Equity* case (*Supra*) it appears that the court must consider the plaintiff's conduct. If the plaintiff was negligent and did not guard against her impoverishment relief may not be granted. This is how the court expressed itself on paragraph F-H,

'Certainly the negligence of the plaintiff is a factor which is of substantial relevance in deciding whether the enrichment is unjustified. It seems to me that the passage quoted from *Willis Faber Enthoven (Pty) Ltd* supra is apposite...It is not possible, nor would it be prudent to define the circumstances in which negligence on the part of the plaintiff in an unjust enrichment action can be said to be excusable or, conversely, to supply a compendium of instances where it is not. All that need be said is that, if the plaintiff's conduct is so slack that he does not in the court's view deserve the protection of the law he should, as a matter of policy, not receive it. There can obviously be no rules of thumb; conduct regarded as inexcusably slack in one case need not necessarily be so regarded in others and vice versa.

The matter, to my mind, needs to be determined taking into account the general sense of justice of the community and deciding whether based on the legal convictions of society, liability should arise in these circumstances...'

I must determine if the plaintiff's conduct was so negligent or reckless to guard against being impoverished such that she does not deserve the protection of this court.

In her evidence the plaintiff said she did not know that the late Monica had no authority to sale the property. However when she had commenced the developments she got wind of the problems surrounding the property. She did not tell the court what exactly she heard. She

decided to ask Monica about it which any reasonable person in her situation would do. When Monica eventually produced the Certificate of Authority she was convinced that everything was above board and she continued with the developments. Of note though she did not tell the court when the Certificate was produced .However she said when it was shown to her she was still building and was putting up the perimeter wall.

The Certificate of Authority addressed to the Director of Housing Chinhoyi Municipality authorised cession from the late Felix Chasi to Monica. The Certificate is undated. That would mean once the cession is effected to Monica she could deal with it the way she pleased. Whenever the law refers to negligence, the test is really based on the reasonable person. It is a societal norm, a community standard to measure conduct. In my view such a person would have taken the document as an authentic one seeing it appeared to originate from the Courts and she had been advised the property belonged to the late Felix Chasi. We cannot fault her for believing that Monica had the authority to dispose of the property. Sight must not be lost that, Monica at the time was the lawful executrix of the defendant. To impute that the plaintiff must have gone to the court to verify the Certificate's authenticity, in my view amounts to raising the standard of a reasonable man to one knowledgeable on legal issues, one knowledgeable on succession laws.

There is evidence that Monica approached the Municipality for cession and it was declined based on the letter from the Provincial Magistrate. I say this because on 12 July 2006 Monica wrote a letter to the Provincial Magistrate seeking clarity why cession of the property was blocked by the court.

I reproduce the letter below of ease of reference,

RE: Estate late Felix Chasi house No 3701 Cold Stream

Address you to (sic) the instance above that I am the widow of the late Felix Chasi. My husband passed away on 22nd day of June 2005. We registered the estate at Chinhoyi Magistrates Court DR CN173/05 and I was lawfully appointed heir of the Estate and over the above house.

With the powers voted(or she meant vested?) in me by virtue of the certificate of authority I then sold house number 3701 Coldstream Chinhoyi to Mrs Mkosa a copy of the agreement of sale I forwarded to the Clerk of Court.

We were however , informed that the Court has given a directive to the Director of Housing not to make any transfers see letter date (sic) 13/03/06.

Can you please treat this matter with urgency since I have decided to relocate to Bulawayo where I am also purchasing another house. My relatives and children stay in Bulawayo, being the prime reason why I have decided to relocate to this side'

The letter is baffling to say the least. A reading of that letter exhibits some innocent transaction by Monica. One wonders if she even saw the letter written in March advising her not to sell the property. If Monica was well aware of that, she would not have written a letter querying the Provincial Magistrate's decision. She even disclosed that she sold the property. As if everything was fine. That as it maybe, the letter also shows that cession was attempted

and declined. Since the plaintiff was the cessionary there is a high probability that she must have known about this. There is no way Monica would have gone to effect cession in the absence of the plaintiff. The agreement of sale was entered in April 2006 and in July cession was declined. This was about three months after the sale. There is no way she could have improved the property in that short space of time. Despite the probabilities, I am inclined not to place high probative value on this. There was no evidence to confirm that the plaintiff the e Municipality. Drawing an inference maybe speculative. There is a possibility that Monica may have gone alone to verify if she could go ahead with the cession, especially if she knew that there was some chicanery in the sale.

Nothing turns on the letters written to Monica and eventually copied to the plaintiff. The letter filed of record does not indicate the address to which it was to be delivered. There was no evidence that the letter was delivered to the plaintiff. It is insufficient to simply show that a letter was written to an addressee, there must be evidence of delivery at a given address. Under cross examination, the defendant conceded that he had no such proof. Even if he tried to remedy the delivery that the letters were sent to the property. It was not disputed that the plaintiff did not reside at the property. Tenants occupied the property. It is farfetched to conclude, in the absence of evidence that the tenants received the letters and subsequently handed them to the plaintiff.

In 2009 the plaintiff effected cession in the absence of the seller. All things being equal, cession is effected in the presence of both the seller and the purchaser. The seller as the cedent has to sign for the cession. In this case the plaintiff went all the way without the seller. Without casting any aspersions to any officials at the Municipality, the Court and the plaintiff herself it would seem there were under hand dealings in this case. Firstly how was the Certificate of Authority issued when the last meeting of the beneficiaries to the defendant required birth certificates? At that time Monica had not been declared the lawful heir. She might have been the lawful heir by virtue of being wife to the deceased but someone jumped the gun thus some underhand dealings. Secondly how was cession effected at the Municipality in the face of the letter from the Provincial Magistrate blocking such cession? It is my considered view that plaintiff cannot be said to be wholly innocent.

In the final, it is my considered view that at the time of the sale the plaintiff did not know about the illegal sale. However while she effected the improvements she must have known that the sale was tainted. The defendant actually claimed that the plaintiff fraudulently purchased the property. There was no evidence of fraud on the part of the plaintiff. The issue really is whether she was negligent in her conduct.

That, however is not the end of the matter. The court must consider whether despite her knowledge she should be denied the protection of the law and let the loss lie where it falls as pleaded by the defendant bearing in mind that Monica at all times was acting in her capacity as the executrix of the defendant. If there was any misrepresentation leading to the sale and encouragement to develop the property it largely was from Monica.

This takes me to the applicable principle in such cases where parties enter into an illegal contract. In *Dube v Khumalo* 1986(2) ZLR 103 (SC) para D – H, the court expressed the principle as follows,

‘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*, which may be translated as meaning "where the parties are equally in the wrong, he who is in possession will prevail." The effect of this rule is that where something has been delivered pursuant to an illegal agreement the loss lies where it falls. The objective of the rule is to discourage illegality by denying judicial assistance to persons F who part with money, goods or incorporeal rights, in furtherance of an illegal transaction. But 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." (my underlining for emphasis)

Again, James Sprague² discussed how the *ex turpi causa non oritur actio* that ‘no action arises out of an immoral or illegal act interfaces with the *In pari delicto potior est conditio defendentis* that “in a case of equal or mutual guilt. . . the position of the [defending] party . . . is the better one.” He opines that under the *ex turpi causa* doctrine a plaintiff is completely barred from relief if their cause of action arose from illegal or wrongful conduct. However, the *In pari delicto*’s weighs the parties culpability, and provides an exceptive mechanism considering equity rather than law.

‘This common law doctrine was developed to preserve the decorum of the courts, to ensure that the law does not enforce illegal agreements. The doctrine enables a defendant to escape liability when sued to enforce an illegal agreement. The rationale really is that courts should not lend their good offices to mediate disputes among wrongdoers. However, a plaintiff could overcome *in pari delicto* by showing that the defendant was more morally culpable, which required courts to balance the parties’ relative guilt.’

Thus where parties enter into an illegal agreement, and the plaintiff does not sue on the illegal agreement but seeks relief from the consequences of his illegal action courts have intervened and granted such actions on the basis of public policy. The rationale is to prevent one party from being unjustly enriched at the expense of the other. See *Chioza v Siziba* SC 4/15; *Silonda v Nkomo* SC 6/22.

In this case both parties, the plaintiff and the defendant as represented by Monica entered into an illegal agreement. A strict application of the *in pari delicto* rule would mean that loss must lie where it falls as argued by the defendant. The plaintiff does not seek relief from the cancelled agreement of sale. What she wants is the value of the improvements and these are the consequences of the illegal sale. The defendant has not shown that the plaintiff was ‘more morally culpable’. To prevent an injustice on the plaintiff, the notion of justice between man and man requires the relaxation of the *in pari delicto* rule. In this case denying the claim would

² The Fault in In Pari Delicto : How Illegality Bars and Moral Culpability Collide with Tort Law, 10 Wake Forest L Rev Online 107

mean the value of the estate, will increase at the expense of the plaintiff. I am of the firm view that the *in pari delicto* rule must be relaxed. It would appear the executor in this case lost sight of two important issues that Monica was married to the late Felix Chasi as a wife she was the preferred heir to the property, secondly that at the time of the sale Monica was the executrix and as such she represented the defendant at that time.

I now consider the quantum. The defendant has not disputed that quantum claimed. The evidence in chief addressed irrelevant issues on how the evaluation was conducted without Francis's authority. It also went to town about the addressee of the evaluation which are really peripheral issues. Francis said he did not know about the value claimed. What is important though is that he insisted that they did not want to sell but to keep the property. I comment in passing that obviously these were sentiments from a person not privy to succession laws. The defendant was married, therefore the wife would be the preferred beneficiary only that Monica disposed of it prematurely. In any event it is not possible to detach the 6 rooms since the improvements are fixed to the ground. In the *Silonda* case (*supra*) the court upheld a decision where compensation was awarded based on evaluations and not on the actual expenses incurred.

One report was produced. In such cases it is advisable to provide at least two valuations to assist the court to make a proper comparative of the values.

Despite the defendant's feeble resistance in my view there is no justification for an award of US\$25000 as claimed. The evaluator provided two values of the property, the market value and the forced sale value. The plaintiff opted for the market value which is higher than the forced sale value in respect of the property. There was no justification for the claim based on the market value. The forced sale value in my view would meet the justice of the case. This is because the sale values include the property and the improvements thereon. The plaintiff's claim is basically for improvements only she has no claim on the unimproved property. The forced sale for the property is US\$ 28 000 and for the 4 rooms is US\$10 000. The plaintiff must be awarded US\$18 000. This value will also in a way take into account depreciation.

The alternative claim was not motivated at all. On that basis it is taken as abandoned. No facts were placed before the court to make a determination.

The plaintiff claimed costs on an ordinary scale. No reason was given for me not to follow the old age standard that costs follow the cause. Costs shall be granted.

Prescription

As stated in *Brooker vs Mudhanda and Anor; Pearce v Mudhanda and Anor*, 2018(1) ZLR 33(3), for a court to determine whether or not a claim has prescribed, a finding has to be made as to when the cause of action arose. This is a question of fact determined on the evidence placed before the court. A cause of action has been defined as 'the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim', See *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626 at 637), *Patel v Controller of Customs & Excise* 1982 (2) ZLR 82 (H) at 86. In

Dube v Banana 1998 (2) ZLR 92 (H) at 95, it was defined as “ the combination of facts that are material for the plaintiff to prove in order to succeed in his action”.

The onus is on the plaintiff to show that the counter claim is prescribed. This onus is only discharged through evidence before the court. In her evidence the plaintiff did not even address the issue. In the Mudhanda case (supra) it was also held that the court must resolve the factual issue on when the cause of action arose before making a determination. As if that was not enough both legal practitioners in their closing submissions did not even relate to the issue.

The plaintiff having failed to adduce evidence for the court to make a decision on, the issue shall be considered as abandoned.

Whether the defendant is entitled to rentals.

In *Silonda v Nkomo* (supra) the court held that to valid lease can be inferred or extrapolated from an illegal agreement. See also *Magodora & Ors v Care International Zimbabwe* 2014 (1) ZLR 397 (S) at p 398F cited therein. At the time the plaintiff was in control of the property she operated under an illegal contract between her and Monica. As such the defendant’s claim must be dismissed.

Even if I was wrong on this finding, the claim would not succeed. Damages are a function of evidence. There was nothing in his papers to show where these figures came from. There was no proof for these claims. There was no evidence on comparative rentals in the area neither was there any evidence why the defendant settled for US\$50 a room. In the absence of such proof the court cannot pluck figures from the air, as it were. It is trite that in our law, he/she who asserts must prove all the damages.

Whether or not the defendant is entitled to claim damages on behalf of its dependants.

The defendant’s claim was badly prosecuted and the closing submissions could not even salvage it. As a starting point the defendant’s claim was made on behalf its dependants. There was no evidence about the dependants, their ages, their circumstances and their identity. The defendant did not take the court into his confidence to divulge the information. Under cross examination Francis conceded that he had no evidence to prove the claim. One wonders why the claim was made in the first place. It appears it was just meant to spite the plaintiff.

In the final I comment on the way the legal practitioners handled the case. In their closing submissions made in terms of rule 56(16) of the High Court Rules, 2021 they did not even address the relevant legal principles. The closing submissions in a trial cause, are similar to heads of argument in an application procedure. Thus the legal practitioners summarise the evidence and refer to the applicable law and case law to support their points. The closing submissions were pre dominantly factual arguments which do not resolve issues in the absence of the application of the law. Preparation for court is important for legal practitioners to assist the court in the determination of the case.

Whether the litigation under HC 3943/20 was an actio rei vindicatio.

This was an irrelevant issue to the claims as couched by both parties. Both the plaintiff and the defendant did not allude to it. It was simply a place holder irrelevant in the resolution of the matter. The court considered it as abandoned.

Disposition

1. The plaintiff managed to show that she developed the property from 4 rooms to 10 rooms. The defendant has since taken over the property and is enjoying the fruits of the additional rooms. Although the plaintiff entered into an illegal agreement, equity requires the relaxation of the in pari delicto rule and grant the applicant's claim. No reason was given to depart from the principle that costs follow the cause. The costs therefore shall be borne by the defendant.
2. The Defendant failed to substantiate all its claims and they must be dismissed with costs.

Accordingly, it is ordered that

1. The plaintiff's claim be and is hereby granted.
2. The defendant to pay the plaintiff US\$18 000 being compensation for improvements on stand number 3701 , Cold Stream , Chinhoyi
3. Defendant to pay costs.
4. The defendant's counterclaims are hereby dismissed with costs.

Murisi and Associates, the plaintiff's legal practitioners.

Mangwana and Partners, defendant's legal practitioners.