TADIOUS NYIKA & 152 OTHERS

Versus

CITY OF KWEKWE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 28 OCTOBER 2021 & 3 FEBRUARY 2022

Civil trial

A. Sibanda for the plaintiffs
J. Nyarota for the defendant

DUBE-BANDA J: On the 29 November 2018 plaintiffs sued out a summons against defendant (council) claiming that on payment of the sum of $1 782.00, the defendant complete the designs for roads, water and sewerage at stands 4475 to 4633 Mbizo 18, Kwekwe, that were allocated to the plaintiffs under an agreement with Carslone; that the defendants enters into sale agreements with each plaintiff for the stands as shown in Survey Diagram for the section 18 Extension; and in the alternative that the defendant pays each plaintiff the sum equivalent to the current value of the stands and the defendant refunds the plaintiffs the sum of money paid for the designs; and finally that defendant pays the costs of suit.

Defendant filed an exception and a special plea. The exception is anchored on the basis that the claim is bad at law and embarrassing. The special plea is based on two grounds that the claim has prescribed and that plaintiffs' lack *locus standi*. The special plea and exception were not set down in terms of the rules of court. Defendant then pleaded over on the merits.

At the commencement of the trial, before evidence was presented Mr *Nyarota* counsel for the defendant argued both the exception and special plea. Counsel did not persist with the special plea in respect of lack of *locus standi*. I dismissed both and at the time indicated that I would provide the reasons in this judgment.

By dismissing the exception and the special plea of prescription soon after the conclusion of argument, I intended no disrespect to the submissions advanced by both counsel but, rather, I intended to facilitate continuation of the trial. What follows are the reasons.

Exception

The principles governing exceptions have recently been restated by the Constitutional Court of South Africa in *Pretorius and another v Transport Pension Fund and Others* 2019 (2) SA 37 (CC), para [15]. The Court held thus:

> In deciding an exception the court must accept all allegations of fact made in the particulars of claim as true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts. The purpose of an exception is to protect litigants against claims that are bad in law or against an embarrassment which is so serious as to merit the costs even of an exception. It is a useful procedural tool to weed out bad claims at an early stage, but an overly technical approach must be avoided.

The court, on exception, is required to assume that all the facts pleaded by the plaintiff are correct and may be established at trial. Also, while the court should not hesitate to strike down clearly unmeritorious claims and defences, exception proceedings are not ordinarily the forum to decide a complex mix of factual and legal issues. See: *Pretorius and another v Transport Pension Fund and Others* para. 42. The excipient in the present matter thus bears a burden to persuade the court that on any reading of the plea and the facts pleaded therein, the claim is excipiable. See: *Chimakure & Anor v Mutambara & Anor* SC 91/20.

In summary defendant contends that the plaintiff's claim is bad at law and embarrassing because the plaintiffs' are seeking an order for defendant to be compelled to enter into contracts of sale with them. This is contended to be against the defendant's right to freedom of association and against the doctrine of privity of contract. Further it is contended that plaintiffs' have not established any justifiable right at law for defendant to be compelled to enter into agreements of sale with them.

Further it is contended that plaintiffs' summons and declaration are not a concise statement of the nature, extent and grounds of cause of action as required by order 11(c) of the High Court Rules. That the summons and declaration are embarrassing and bad at law in that it is not clearly stated whether plaintiffs' claim is based on breach of contract or unjust enrichment. It is said the two are not pleaded separately and in the alternative.

It is argued that plaintiffs have not established a recognizable cause of action against defendant at law. It is contended that plaintiffs' summons and declaration do not establish that there was a contractual relationship with defendant for which defendant could be held liable for breach of contract. It is argued that plaintiffs have not shown any recognizable cause of action against defendant which would give them the right to enforce an agreement of sale entered between their employer and defendant. To that extent it is argued that plaintiffs have not demonstrated that the agreement between defendant and Carslone confer rights on them to sue defendant for specific performance.

I do not want to overburden this judgment by dealing with each and every issue raised in this exception. The declaration was not framed in elegant terms. What it does however is to provide a factual basis for the claim. Whether the factual allegations have no basis in law is a question I cannot answer at this stage. Generally issues of what the correct legal position is and interpretation of law cannot be settled at exception stage. In any event an exception is only open to the excipient when the defect contented for appears *ex facie* the pleadings. At this stage I am obliged to adopt a generous approach to reading of the declaration. I am prepared to accept, adopting a benevolent reading, that the plaintiffs' declaration is not excipiable. See: *Marney v Watson and Another* 1978 (4) SA 140 (C) at 144 F-G; *Murray & Roberts Construction Limited v FINAT Properties (Pty) Ltd* 1991 (1) SA 508 (A); *Edwards v Woodnut NO* 1968 (4) SA 184 (R) at 186 E-H; and *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 754 F-G

Again my view is that the defendant in its exception seeks to resolve the factual disputes it has against the plaintiff. The purported exception is a conglomeration of various defences that defendant has against plaintiffs' case. In this exception defendant is asking the court to decide a complex mix of factual and legal issues. This is not the purpose of an exception and I cannot embark on such a complex exercise at this stage. For the above reasons and conclusions, I found that the exception was not well taken and it must fail.

Special plea - prescription

In summary, regarding the special plea of prescription, defendant contends that Carslone and defendant entered into an agreement of sale on the 21st August 2008. In terms of clause 7 thereof Carslone was obliged to fully service the stands within twenty-four months failing which the stands would revert back to defendant. It was a further term of the said

agreement that in the event of breach defendant could forthwith cancel the agreement. It is contended that Carslone failed to complete development in accordance with the time line provided and defendant cancelled the agreement through a letter dated 6 September 2011. It is argued that the cause of action arose on the 6 September 2011, and this action was issued on the 27 November 2017 and therefore plaintiffs' claim against defendant is said to have prescribed at law.

Plaintiffs' contend that the claim has not prescribed. It raises some factual issues to buttress its point that the claim has prescribed. Mr *Sibanda* contends that there being factual disputes whether or not the claim has prescribed, such cannot be resolved without evidence. I agree. In a plea of prescription the *onus* is on the defendant to show that the claim is prescribed. When one speaks of the need to discharge an *onus*, it immediately becomes clear that there is an evidentiary burden that must be met. See: *Van Brooker v Mudhanda & Another AND Pierce v Mudhanda & Another* SC 5 / 2018.

Bold assertions made in heads of argument and oral submissions in this court do not amount to evidence. What is required is evidence. The defendant did not even begin to discharge the *onus* to prove that the plaintiffs' claim is prescribed. I cannot find *at this stage* that plaintiffs' claim has been extinguished by prescription. The special plea that plaintiffs' claim has prescribed has no merit and is refused.

Merits

For the purposes of completeness and clarity, I reproduce the material parts of the plaintiffs' declaration. It is this:

1. The plaintiffs' are listed in the headings to this claim, formerly employees of a company known as Carslone Enterprises (Pvt) Ltd (Carslone).
2. The defendant is the city of Kwekwe, a local authority with corporate status and responsible for allocating lands within the Kwekwe urban area.
3. The plaintiffs were employees of Carslone, a company duly incorporated and engaged in gold mining.
4. As and by way of security for the future of the employees after the mining establishment or on leaving employment for any reason Carslone and the workers agreed that the

employees would pool their resources together and buy stands in the defendant's jurisdiction (*sic*).

5. It was agreed that Carslone would be the nominee of the employees but the plaintiffs' would individually and exclusively pay for their stands.
6. The understanding between the plaintiffs' and Carslone was done with the knowledge of the defendant's Director of Housing and Community Services and the defendant's Town Clerk and the two defendant's officials were at all material times aware that the deal was for the benefit of the plaintiff's rather than Carslone.
7. As *per* the agreement between Carslone and employees the plaintiffs pooled their resources together and paid off all the stands defendant had allocated to Carslone on behalf of the employees.
8. The plaintiffs paid for the stands and Carslone was not the beneficiary but the individual beneficiaries per the plaintiffs' understanding with Carslone.
9. It amounts to unjust enrichment for the defendant not to deliver the stands and at the same time keep the money paid for the stands.
10. The plaintiffs will emphasise that at all materials times the defendant was aware that the stands belonged to the plaintiffs and the defendant knew that the plaintiffs were the ones who were paying for the stands.

Pleading on the merits, defendant averred that: it has no knowledge that plaintiffs' were employees of Carslone. It was not privy to the agreement between plaintiffs and Carslone. It disputes that its Director and Town Clerk were aware of the agreement between Carslone and the plaintiffs, even if they had such knowledge it was informal and did not constitute an agreement with defendant. Defendant disputes that it allocated stands to Carslone on behalf of the plaintiffs.

Further defendant avers that it entered into an agreement with Carslone on the 21 August 2008, in terms of which it sold certain stands to it. Defendant avers that it was a term of the agreement that Carslone would be responsible for the subdivision and full servicing within twenty-four months from the date of signing failing which the stands would revert to the plaintiff. Defendant avers that contrary to the agreement and in breach thereof Carslone did not complete servicing as agreed or at all. Consequently defendant cancelled the agreement of sale on the 6 September 2011.

Defendant denies that plaintiffs paid the sum of $5 670, even if they did, it was their private arrangement with Carslone. It is averred that most of the plaintiffs were not on the Council's waiting list such that they would have benefited in accordance with the agreement with Carslone. It is averred that defendant is not obliged to give plaintiffs agreements of sale.

At the pre-trial conference held before a judge eight issues were identified as the issues for trial, these being:

1. Whether or not the plaintiffs have a recognizable cause of action against the defendant.
2. Whether or not the plaintiffs have *locus standi in judicio* to sue the defendant.
3. Whether or not the plaintiffs' claim has prescribed at law.
4. Whether or not defendant cancelled the agreement of sale with Carslone, and if so, whether such cancellation should be imputed to the plaintiffs.
5. Whether or not Carslone was a nominee of the plaintiffs when stands were purchased from the defendant.
6. Whether or not the defendant was aware that the stands were being purchased for the plaintiffs.
7. Whether or not the defendant was obliged to work on the road network and sewer and water reticulation.
8. Whether or not the defendant is obliged to transfer the stands to the plaintiffs on the basis of unjust enrichment or whether or not the plaintiffs are entitled to amounts equivalent to the value of the stands against their names on the basis of unjust enrichment.

It is important at this point to put some issues off the way. The issue of prescription was raised at the commencement of trial. I dismissed it. During the presentation of evidence there was no direct reference to the issue of prescription. The sole witness for the defendant did not testify regarding prescription. On the totality of the evidence adduced at the trial there is no basis for me to revisit the ruling on prescription. Therefore the dismissal of this issue remains, no further reference shall be made to it in this judgment.

Having looked at the pleadings and the evidence on record, I take the view that the main issues for determination are the following: *viz* whether or not in entering into the agreement with defendant Carslone was a nominee of the plaintiffs; and whether or not the defendant is obliged to transfer the stands to the plaintiffs on the basis of unjust enrichment; and whether or not the plaintiffs are entitled to the amounts equivalent to the value of the stands against their names on the basis of unjust enrichment. However the central issues for determination which this judgment seeks to address, will require an answer to some subsidiary questions identified in the pre-trial conference memorandum.

Plaintiffs are one-hundred and fifty three in number. In their endeavour to prove their case, plaintiffs adduced the evidence of four witnesses and tendered a number of documentary exhibits. Defendant adduced evidence from its Housing Director. At this point I propose to outline the evidence adduced by the plaintiffs.

Plaintiffs' case

The first witness was Tadious Nyika. He is 1st plaintiff. He testified that he was employed at Carslone in the administration department. He testified that in 2008 the employees of Carslone agreed that they should engage defendant to get stands. The employees elected a committee to engage the defendant regarding the issue of stands. The employees informed the employer, i.e. Carslone about this development. The committee reported to the employees that stands were available, each measuring 300 square metres and at a prize of $18 million dollars. This witness testified that it is at this stage Carslone intervened and offered to pay the full purchase price for all the stands. According to this witness the purchase price for the stands was paid in full.

This witness testified that in October 2009, the committee had a meeting with defendant. The defendant was represented at the meeting by the one Eng. Mike. The engineer told the employees to view their stands. The stands were viewed and the employees were happy with such stands. The stands were pegged. The employees were told to pay $7000.00 each for the designing, and each paid $5000 promising to pay the balance on a later date. When the employees wanted to pay the balance the defendant refused to accept such payment.

Through this witness a letter from the defendant addressed to the consultant Eng. M. Mawere was tendered into evidence. The letter says defendant has received designs for servicing Mbizo 18 Extension belonging to Carslone. Approval fees in the sum of $7 452.00 should be paid before any work could start. The letter is before court as Exhibit A1. Receipts showing various amounts made to the defendant were tendered into evidence. These receipts show that payment was made to defendant; by Carslone housing project; for plans approval. These are marked Exhibit A2, A3, A4, A5, A6 and A7. The witness testified that the committee was collecting money from stand holders to pay to the defendant.

Plaintiff tendered into evidence a document entitled "Carslone Housing Stands – Mbizo 18 Extension (Stands Holders Names), which was described as a list of stand numbers and names of stand owners. This document is marked Exhibit A8.

The witness testified that Carslone was then liquidated. It stopped operating on the 1st February 2012. The liquidator did not communicate with the employees about the liquidation. This witness testified that plaintiffs sued defendant because it had turned and refused to accept the balance payments in respect of the designs. The witness testified that the defendant now contends that the stands were repossessed from Carslone.

Under cross examination this witness confirmed that the agreement of sale was between Carslone and the defendant. He confirmed that in the agreement of sale there is no mention that Carslone was a nominee of the plaintiffs, but insisted that the defendant knew that plaintiffs were the people behind Carslone in the agreement of sale. It was put to this witness that paragraph 6 and 7 of Exhibit B1 is about development, the witness agreed. It was further put to the witness that he was not part to the agreement, he insisted that defendant knew that the stands were for the plaintiffs. It was put to the witness whether to his knowledge Carslone completed servicing the stands within twenty four months of the agreement of sale, the witness answered that it was not the obligation of Carslone to service the stands but of the plaintiffs, being the owners of the stands. The witness confirmed that there is no agreement between defendant and the plaintiffs, the only agreement available is that between Carslone and defendant, but insisted that Carslone was merely assisting the plaintiffs.

The witness was asked how payment i.e. Exhibits A1 to A7 were made to the defendant, his answer was that payments were made at the defendant's offices. He could not dispute that all such payments are made at the Rates Office. He could not dispute that the cashier would not know whether the agreement between Carslone and defendant still subsisted or not. It was put to this witness that it could not be said because a receipt was issued after 6 September 2011, there was an agreement between the defendant and the plaintiffs, he answer was "I cannot dispute that." It was put to this witness that the fact that defendant did not inform the plaintiffs that the agreement with Carslone had been cancelled, does not make the agreement valid, the answer was "that is correct."

This witness insisted that defendant knew that plaintiffs were the people behind the agreement of sale between Carslone and Defendant. This assertion is not supported by the documentary exhibits before and the accepted evidence of defendant's witness. The only inference to be drawn is that the witness was untruthful in this respect, and so the other plaintiffs who supported him in making this assertion. All in all this witness was somehow evasive in cross-examination and his testimony where it is at variance with the defendant's witness is not worthy of belief.

The second witness was Nehemiah Matarise. He is plaintiff number 15. He testified that he was an employee of Carslone. The employees elected a committee to engage the employer to look for stands for the employees. Each person was supposed to pay $18 million, and some employees sold their properties to raise such payments. The employees were taken to the site and shown their respective stands, and his stand number is 4448. After the liquidation of Carslone the defendant asked the plaintiffs to pay for the site plan. Defendant refused to accept the balance of the payments on the basis that it had repossessed the stands. He disputes that the stands were repossessed. This witness testified that defendant was aware that Carslone was buying the stands on behalf of the plaintiffs.

Under cross examination this witness confirmed that the agreement regarding stands was between Carslone and defendant. He said Carslone was buying the stands on behalf of the plaintiffs and the defendant was aware of that position. It was put to the witness that the agreement contains no provision which says the stands were bought for the plaintiffs, he maintained that the stands were bought for the plaintiffs and defendant accepted payments after

the closure of Carslone. When it was put to him that the defendant cancelled the agreement with Carslone on the 6 September 2011, his answer was "we were not given the letter." It was put to him that the agreement was between Carslone and defendant only, his answer was "I agree."

Like the previous witness he said a lot but had no documentation to support his assertion that defendant was aware of the agreement between Carslone and the plaintiffs. Again his assertion that defendant accepted payments after closure of Carslone is incorrect. I say so because the payments he is referring to are reflected in exhibits A2 to A7, which payments were made in 2012. Going by the evidence of the Brainah Dube Johnstone the 3rd plaintiff that in 2015 Mr Tsomondo was still writing as managing director of Carslone because it was not yet liquidated, it is incorrect for this witness to say defendant accepted payments in 2012 after the closure of Carslone. Again like the previous witness he was evasive, where his evidence is at variance of that of defendant's witness I reject it.

The third witness was Nicholars Kukuriro. He is plaintiff number 33. He was employed by Carslone. This witness testified that as workers they asked their employer Carslone to assist in getting them stands from Council. Council officials showed each plaintiff his or her stand. Plaintiffs were paying some money towards the cost of designs. The plaintiffs were given a document containing the following: names; Identity Numbers and stand number for each person. He referred to Exhibit A8 as such a document. This witness referred to Exhibit A9, this is a letter from Carslone to Council, it says in part: "Carslone has handed over the above residential stands to its workers. The company can no longer assist with the project due to the fact that the lease agreement between the Reserve Bank of Zimbabwe and Kwekwe Consolidated Gold Mines is about to expire." The letter concludes by saying the workers have been encouraged to form a co-operative and continue with the project. This witness testified that he did not receive a letter informing him that his stand has been repossessed.

Under cross examination this witness was asked whether he paid the purchase prize direct to Council, his answer was that Carslone paid to Council. He said the fees for the designs were paid to the committee which then paid to Council. He confirmed that the receipts were issued in the name of Carslone. He said Exhibit 8 was prepared by Council. When it was put to him that Exhibit 8 did not emanate from Council, his answer was "we just received the

document from the committee." This witness was evasive under cross examination, and could not answer simple questions straight. I reject his evidence that Exhibit 8 the list was prepared by Council.

The fourth witness was Brainah Dube Johnstone. He is plaintiff number three. He was employed by Carslone in the position of Finance and Administration Manager. This witness gave a background to the agreement between Carslone and Council. He testified that Carslone was going to close operations in a few years' time and it was agreed that it leaves something for the employees. Council was then approached with a request for stands for the employees. Council agreed. Carslone paid $18 million for each stand, and this amount was deducted from salary of each employee. He testified that from the beginning the Council knew that the stands were bought for the employees.

This witness testified that Council said it had no money to service the stands. Carslone then contracted Eng. M. Mawere to work on the plans and the designs. He produced the designs. He referred this court to Exhibit A1 being a letter from Council to Eng. M. Mawere in respect of approval fees for the designs i.e. road, water and sewer designs. Carslone was about to close down and it then wrote a letter to Council which concluded by saying the workers have been encouraged to form a co-operative and continue with the project – Exhibit A9. Council did not reply this letter. Stands could not be developed before plans had been approved.

This witness referred this court to a letter from Chaka Gold Plant Housing Project to Council. The letter is before court marked Exhibit A10. It gives a history of the purchase of the stands and concludes by saying "We kindly appeal through your office, to please extend for the first time clause 6 of the agreement with the City of Kwekwe, for a further 6 months to end in July 2013 to allow the co-operative to complete the servicing of stands and trudge forward to build structures." Council did not reply Exhibit A10.

This witness referred to Exhibit A11. This is an agreement between Carslone and this witness. The witness testified that each plaintiff has a similar agreement. The preamble to the agreement says:

> Whereas the company on the 21st August 2008 purchased from the City of Kwekwe certain residential pieces of land being hundred and fifty eight (158) stands in Mbizo

> 18 Extension. And whereas the company made the said purchase in its name but on behalf of various beneficiaries. And whereas the parties now wish to record the beneficiaries' interest in the stand.

According to this witness the purpose of these agreements was to transfer the stands to the plaintiffs.

Through this witness a letter written by one Mark Tsomondo to Council was placed before court. The letter is marked Exhibit A14. In this letter Mr Tsomondo says he was a signatory to the agreement between Carslone and Council, and that the purpose of the project was to provide housing for Carslone employees. Again Exhibit A15 is a letter from Mr Tsomondo to Council, he explains that Carslone entered into the agreement on behalf of its employees. The employees paid $18 000.00 to Carslone which amount was paid to Council. He says the employees are the legitimate stand holders, and Council must assist them to carry on with the project.

Under cross examination this witness confirmed that the plaintiffs were not part of the agreement but it was for their benefit. He agreed that the agreement does not state that it was for the benefit of the plaintiffs, but said clause 7 of the agreement speaks to residential purposes only, which shows that it was for the benefit of the employees. It was put to him that clause 7 is a standard clause in agreements with developers, his answer was he did not know that but would like to think it is the case. It was put to this witness that clause of the agreement allows Council to cancel the agreement if there was no development after a period of two years, his answer was Carslone did not fail. He was asked whether Carslone completed the development of the stands within a period of two years, his answer was it did not because of reasons. It was put to him that because of the failure to develop within a period of two years Council was entitled to cancel the agreement, his answer was "correct" if Carslone was given an opportunity to develop the stands.

It was put to the witness that in terms of clause 9 of the agreement, Carslone could not prior to completion of the development in terms of clause 6 be entitled to sell, cede, lease or dispose of its rights in terms of the agreement of sale without the written consent of Council. His answer was "I do not agree. Carslone did not sell. Defendant knows that the stands where for the workers." The witness was asked whether at the time Carslone entered into agreements

with the workers (Exhibit A11) did it seek authority from Council. His answer was we did so but did not put it in writing." He testified that if given another chance he would make sure the agreement stated that Carslone was a nominee of the employees. He says he did not see the letter of cancellation of the agreement. This witness confirmed that Council was not part the agreement between Carslone and the employees (Exhibit A11).

This witness made factually unfounded claims, e.g. that because Council did not reply to letters from the co-operative it then means it agreed with the position stated in such letters. He continued with the unfounded claim that defendant knew that the stands were bought for the workers. All in all I am satisfied he is equally an unimpressive witness.

With the evidence of this witness the plaintiffs closed their case.

Defendant's case

Defendant called the evidence of Edson Chiyangwa. He is employed by Council as the Director of Housing. He has been an employee of Council, in various capacities for a period of thirty years and has been a Director of Housing since 2018. He holds a degree in Local Governance and a Master of Business Administration. This witness testified that he stays in Kwekwe and he knows many of the plaintiffs as are all residents of the same town. He says he is very knowledgeable about this matter.

This witness testified that he perused the agreement between Carslone and Council. It does not state that the plaintiffs are part of the agreement. Carslone breached the agreement and Council cancelled it by letter dated 6 September 2011.

Under cross examination it was put to this witness that he became Director of Housing in 2018, almost ten years after the signing of the agreement between Carslone and Council and therefore he was not privy to the background matter. His answer was he was privy to the background of the matter, he was a signatory to the agreement. At the material time he was an Administration Officer and he is the one who prepared the agreement. It was put to this witness that Carslone was a mining company and not in the business of land development, his answer was that it was given the contract because it had earth moving equipment which it could use to

service the land. He was shown Exhibit A8 the list containing names, Identity Numbers and Stand numbers, his answer was he saw it but it was not prepared by Council. He testified that allocation of stands is only done by Council and no allocation was done to the plaintiffs. He does not know that it is the plaintiffs who paid the purchase price, he heard that in evidence in this court. This witness testified that the payment of the purchase price was made by Carslone, and not the plaintiffs. He agreed that the stands were paid for in full.

It was put to the witness that Council now wants to re-sell the stands, he agreed and said Carslone would be refunded the purchase price less 5% administration fee. He testified that the refund has not been made because of this pending case.

This witness was subjected to lengthy and determined cross-examination. He is very familiar with the facts of this case. He is actually a signatory to the agreement between Carslone and Council. His evidence is supported by the documents tendered as exhibits before court. I am satisfied that he gave his evidence well. He is a truthful witness. At the end of the day I find that he is a credible witness.

Whether Carslone was a nominee of the plaintiffs when stands where purchased from the defendant

The evidence shows that there was no agreement between defendant and the plaintiffs. The agreement was between Carslone and the Council. The agreement is before court and marked Exhibit B1. It was signed on the 21st August 2008. In terms of the agreement Council sold 158 planned and surveyed residential stands ranging from 4475 – 4633 in Mbizo section 18 Kwekwe to Carslone Enterprises (Pvt) Limited. The agreement clearly states the terms of agreement and the parties. There is no mention of the plaintiffs in the entire agreement. On the basis of the pleadings, the evidence i.e. oral and documentary it is clear that the parties to the agreement were Council and Carslone.

Plaintiffs in some way recognized this when in their prayer sought an order that the defendant be ordered to enter into sale agreements with each plaintiff for the stands shown in the Survey Diagram for section 18. If there was an agreement between them and the defendant such a prayer would have been irrelevant in the circumstances. In their evidence all they could

allude to is that defendant was aware that the Carslone was buying the stands for them, and that it was their nominee. No documentation was produced in support of such an assertion. There is simply no agreements of sale between Council and plaintiffs in respect of the stands in issue and the court cannot contract for the parties.

The high watermark of plaintiff's case is that Carslone entered into the agreement with Council as their nominee. A nominee is defined as someone who holds the property for the benefit and on behalf of another person. A nominee is therefore not the true owner of the property. The remarks made in the case of *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Company (Pty) Ltd* 1971 1 SA 441 (A) at 456F are apposite. The court had this to say:

> The nominee does not have the authority to transfer the shares he holds; for such authority he must refer to his principal, the beneficial owner. Where a nominee has stolen or misappropriated shares registered in his name and transferred them without authority of the beneficial owner, our courts have permitted the beneficial owner to vindicate the shares from a *bona fide* third party who purchased the shares from the nominee.

It is therefore clear that a nominee holds the property on behalf of the beneficial owner who is the person who is the real, *de-jure* owner of the property, and entitled to all gains, profits and benefits accruing through such property. The agreement between Carslone and council does not state that Carslone was a nominee of the plaintiffs, or that it entered into the agreement on their behalf or for their benefit.

The letters from Mark Tsomondo the former managing director of Carslone are telling. In Exhibit A14 he confirms that the agreement was between Carslone and Council. He says the purpose of the project was to provide housing for the employees. In Exhibit A15 he says the stands were purchased on behalf of the employees. What is telling is that he does not say Council was aware or made aware of the fact that the stands were being purchased for the employee / plaintiffs.

Defendant argues that the agreements between plaintiffs and Carslone (Exhibit A9) are inconsequential. It is contended that those agreements are not binding on the defendant because

it was not a party to them and therefore creates no obligation on defendant in respect of the plaintiffs. I agree. These agreement between Carslone and the plaintiffs has no bearing on Council. It was a private matter between Carslone and the plaintiffs.

I take the view that the nominee relationship, even if it existed is a matter between Carslone and the plaintiffs and cannot be litigated against Council. It cannot found a cause of action against Council. It has absolutely nothing to do with the Council. Again the agreement between Council and Carslone does not even speak to such relationship. If Carslone was the nominee holder of the stands, such remains the issue between Carslone and the plaintiffs. The relationship between Carslone and plaintiffs has no bearing on the defendant. Going by the joint pre-trial conference memorandum the seat of the *onus* on this issue is on the plaintiffs, I find that that such *onus* has not been discharged. The issue whether Carslone was a nominee of the plaintiffs is answered in favour of Council.

Was the agreement between Carslone and Council cancelled? Clause 6 and 7 of the agreement provides thus:

> Clause 6 Development
>
> It is hereby placed on record that the purchaser shall at his cost subdivide and secure approval of the subdivision with the Surveyor General's office. Super structure development will only commence once full servicing of the area (i.e. water, sewage and roads) has been completed and approval by the Director of Works.
>
> Clause 7 Transfer
>
> That council shall pass transfer of all the properties to individuals from council's waiting list after payment of full purchase price and completion of super structures.
>
> The area shall be fully serviced by the purchaser within 24 months from the date of the agreement, failure which the property will revert back to council.

Defendant contends that contrary to the agreement and in breach thereof Carslone did not complete full servicing within the agreed timeline. As a consequence thereof it cancelled the agreement. Exhibit B2 a letter dated 6 September 2011 from Council to Carslone states that "Council is hereby advising that clause 7 of the agreement of sale has been applied and that the agreement of sale was signed on the 21 August 2008, (four years) 4 years is a clear indication that you have failed to comply with the conditions."

It is important to note that at the time of cancellation Carslone had not yet been liquidated. Under cross-examined on the reason why Mr Mark Tsomondo would on the 10 February 2015 still write Exhibit A15 as managing director of Carslone, his answer was that by then it was not yet liquidated.

I take the view on the evidence that on the 6 September 2011 Carslone was still in a position to challenge the cancellation of the agreement if it so wished. There is no evidence that such cancellation of the agreement of sale was challenged or set aside. Again Brainah Dube Johnstone a plaintiff and a witness in court, and chairman of the Chaka Gold Plant Housing Project (Co-operative of the former employees of Carslone) in a letter (Exhibit A10) to council acknowledged that the agreement between Carslone and Council had been cancelled, the letter concludes by saying "we kindly appeal through your office, to please extend for the first time clause 6 of the agreement with the City of Kwekwe, for a further 6 months to end in July 2013 to allow the co-operative to complete the servicing of stands and trudge forward to build structures." Therefore the contention that Carslone did not receive the letter of cancellation is not borne out by the facts.

They cannot be heard to be saying the agreement between Carslone and Council was not cancelled because they did not receive the letter of cancellation, the simple reason they did not receive the letter of cancellation was because they were not part to the agreement. Going by the seat of the *onus* as per the pre-trial conference memorandum I take the view that defendant has discharged the *onus* on balance of probabilities of showing that on the 6 September 2011 it cancelled the agreement with Carslone Enterprises (Pvt) Limited.

Unjust enrichment.

In this matter the *onus* on the alternative claim based on unjust enrichment is on the plaintiffs. To succeed with a claim based on undue enrichment the plaintiff must comply with four general requirements: 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 a legal cause. See: *Jacques Du Plessis, The South African Law of Unjustified Enrichment* (2012) page 24 at para 2.1. See LAWSA, Vol 9 at para 76 by Lotz revised by Horak and also *Bowman De Wet Du Plessis NNO & Others v Fidelity Bank Ltd* 1997

(2) SA 35 (A) at 43D-F. The requirements of unjust enrichment were also explained in *Dendairy (Private) Limited v Zimbabwe Electricity Transmission and Distribution Company (Private) Limited* SC 65 of 2019.

Plaintiffs' contend that they paid the full purchase price and they have had no refunds. It is argued that the value of the properties has shifted. The best refund would be what would allow them to buy other stands. It is contended that defendant has not suffered any prejudice and has been offered the balance of the designs approval costs. It is submitted that defendant has no justification at all in refusing to continue with the agreement. It is argued that holding on to technical aspects such as sanctity of contract are simply excuses. It is argued that defendant was always aware that it got money from the plaintiffs. It is submitted that justice demands that the plaintiffs should have homes of their own as opposed to the defendant reselling stands that were paid for in full. It is contended that defendant spent plaintiffs' monies and the conversion of that money at this stage will be impossible. It is argued that it is not Carslone that would be prejudiced but the plaintiffs who paid the purchase price.

Defendant contends that the alternative claim for defendant to pay plaintiffs an amount equivalent to the current value of the stands and refund the money paid for the designs must fail for the same reason that they were not party to the agreement and can therefore not seek to enforce rights reserved for Carslone. It is argued that clause 12.1.1. of the agreement Exhibit B1 says defendant has a discretion to refund the money only after another developer takes over. Defendant disputes that its two officials had knowledge of the agreement between Carslone and the plaintiffs. It is argued in the alternative that whatever knowledge the officials had was informal and did not constitute an agreement with them.

The argument that Council has always been aware that payment for the stands was from the plaintiffs is equally not borne out by the evidence. Defendant is a local authority established in terms of Urban Councils Act [Chapter 29:15]. Its decisions or resolutions must be recorded and in English language. See: Section 88 of the Act. There is simply no evidence that Council was aware that Carslone paid for the stands and subsequently recovered such monies from plaintiffs.

There is simply no evidence on record that the two council officials were aware of the agreement between Carslone and the employees. Again it is important to separate Council as a local authority established in terms of the Urban Councils Act [Chapter 29:15] and its officials. Knowledge by its officials is not knowledge by Council. In my view to argue that because some Council officials were aware that it is plaintiffs who were paying then it follows that Council was aware is unsustainable.

The argument that defendant was always aware that it got payment from the plaintiffs is not borne out by the evidence. The witness for the defendant testified that payment of the purchase price was made by Carslone, and not the plaintiffs. In the overall adjudication of this case, I take into account that defendant's witness is an office functionary. I did not detect in him an intention to mislead or peddle untruths. Again his evidence sits well with the probabilities of this case. I say so because the agreement is between Carslone and Council, and the plaintiffs are not mentioned in the agreement. The agreement does not state that Carslone was a nominee of the plaintiffs, or that it entered the agreement on their behalf or for their benefit. The receipts issued in respect of the agreement are in the name of Carslone. The evidence shows that payment to Council was made by Carslone, and not the plaintiffs.

It is not in dispute that Carslone paid the purchase price in full. Whether Council was enriched cannot be litigated between plaintiffs and the defendant. Plaintiffs says although the payment was made by Carslone it was deducted from their incomes, i.e. salaries. However the evidence is that the purchase price was paid by Carslone. I cannot say on these facts that Council was enriched at the plaintiffs' expense. I cannot say the defendant is obliged to transfer the stands to the plaintiffs on the basis of unjust enrichment or that plaintiffs are entitled to amounts equivalent to the value of the stands against their names on the basis of unjust enrichment. Plaintiffs have not shown on a balance of probabilities that they are entitled to any relief based on the principle of unjust enrichment.

Conclusion

The agreement was between Carslone (Private) Limited and the City of Kwekwe. Carslone in entering into the agreement was not a nominee of its employees i.e. the plaintiffs. The agreement of sale was cancelled on the 6 September 2011.

The prayer that on payment of the sum of $1 782.00 Council complete the design for roads, water and sewerage at the stands that have been allocated to the plaintiffs under an agreement with Carslone is at variance with the pleadings and evidence. First in terms of the agreement between Council and Carslone the obligation to prepare designs for servicing of the stands was on Carslone. Council had to approve such designs on payment of an approval fee (Exhibit A1). Second no stands were allocated to the plaintiffs. Again I agree with defendant that Exhibit A8 (the list of names and stand numbers) was not prepared by Council. This list was prepared by the plaintiffs.

The prayer that defendant be ordered to enter into agreements with plaintiffs for the stands is incompetent. In general this court cannot order a party to enter into an agreement with another. It is for this reasons that plaintiffs' claim must fail.

The general rule in matters of costs is that the successful party should be given its costs, and this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why I should deviate from this general rule. I therefore intend awarding costs against the plaintiffs.

Disposition

There is no basis for granting both plaintiffs' main and the alternative claims.

Accordingly, this matter be and is hereby dismissed with costs of suit.

Mhaka Attorneys plaintiffs' legal practitioners
Wilmot & Bennet defendant's legal practitioners