**REPORTABLE (65)**

**VERONICA NYONI**
**v**
**BERNADETTE EVA NDORO N.O**

**SUPREME COURT OF ZIMBABWE**
**UCHENA JA, MATHONSI JA & KUDYA JA**
**HARARE: JUNE 7 2022, & JULY 11 2022**

*A. Chimhofu,* for the appellant

*J. Dondo,* for the respondent

**MATHONSI JA:** On 22 September 2021, following a full trial, the High Court ("the court *a quo*") dismissed with costs the appellant's claim for payment of the sum of US$53 183. This appeal is against that judgment of the court *a quo.*

**THE FACTS**

The appellant is a professional realtor who, at the material time in 2008, ran a company known as Vercham Real Estate (Pvt) Ltd along with her former husband. She enjoyed the benefit of managing the real estate of the late Doctor Elias Zvenyika Ndoro. The respondent is the widow and executrix dative of the late doctor's estate who was substituted as respondent following the death of her husband during the course of the proceedings in this matter.

In February 2008, Dr Ndoro was in financial dire straits and desperately needed to pay University fees for his children studying in New Zealand. He instructed the appellant

to dispose of his immovable property known as Stand 905 Salisbury Township in Harare for a sum of US$140 000.

The appellant desired to purchase the property but was obviously conflicted, being the estate agent given the mandate to dispose of the property. She hatched a plan to use a Congolese national by the name Awak Haskour Jean as a front to masquerade as the purchaser of the property.

That way, a verbal sale agreement was entered into, ostensibly between Dr Ndoro and Jean when in reality, the appellant was the purchaser. There is no dispute between the parties as to the terms of the agreement which was deliberately not reduced to writing as they transacted in foreign currency at a time when Exchange Control Regulations did not permit it.

The purchase price was US$140 000.00 payable by an initial deposit of US$40 000.00 with the balance to be paid within a reasonable time. Upon payment of the deposit Dr Ndoro would register a company to which he would donate the property with the appellant and Awak Haksour Jean being appointed directors of the said company as a form of security.

In pursuance of the agreement, in March 2008 the appellant paid the cash deposit of US$40 000 to Dr Ndoro in the presence of his wife. Indeed a company called Kitkat Investments (Pvt) Ltd came into existence and on 18 March 2008 a new form CR 14 showing the appellant and Jean as directors was filed at the Companies Registry. At the same time Dr Ndoro and his wife resigned as directors. On 26 March 2008 following a donation, the property was transferred to Kitkat Investments (Pvt) Ltd.

In April 2008, at the insistence of Dr Ndoro, the appellant transferred a further sum of US$10 000.00 directly into the bank account of the University where his child was learning. Thereafter no further payments were made towards the purchase price. In September 2008, Dr Ndoro reversed the transfer of the property. He did that by reinstating himself and his wife as directors of Kitkat Investments (Pvt) Ltd and then transferring the property from that company to his other company called Gronton Investments (Pvt) Ltd leaving the appellant high and dry.

There is no convergence between the parties as to who paid the total sum of US$50 000.00 towards the purchase price. The appellant asserts that, to the knowledge of Dr Ndoro and his wife, she is the one who paid it. On the other hand, the late Dr Ndoro and his wife insist that the money was paid by Awak Haksour Jean. When the parties came on a collision course, on 28 July 2010 a meeting was convened at the offices of *Mbidzo, Muchadehama* and *Makoni* legal practitioners, then representing Dr Ndoro.

The meeting was attended by the appellant, *Harrison Nkomo* a legal practitioner for the appellant, Dr Ndoro and Daniel Mbidzo a legal practitioner then representing Dr Ndoro. It is at that meeting that the appellant alleges Dr Ndoro acknowledged indebtedness to her in the sum of US$50 000 and US$3 183, the latter amount representing the equivalent of conveyancing fees she had paid to a firm of legal practitioners attending to transfer of the property.

Following that meeting, *Mtetwa & Nyambirai*, then acting for the appellant, wrote a letter dated 17 August 2010 to Dr Ndoro's legal practitioners which reads in pertinent part thus:

"RE: VERONICA MURINGAI – DR NDORO
We refer to the above matter and specifically the round table conference of 28th July 2010 at your offices.

We record that yours acknowledged his indebtedness to ours in the sum of (US$53 183.00) fifty three thousand one hundred and eighty three dollars directly arising from the sale of immovable property in question. Kindly advise as to when the same can be paid in full.

On an aside issue, your client had also admitted that he owes ours a sum of (US$500.00) five hundred dollars which he borrowed when he was going to Mozambique. You will recall that yours had undertaken to pay same on that particular day. We advise that to date, he has not paid.

Kindly advise him to pay as a matter of urgency.

Yours faithfully
H. Nkomo
MTETWA & NYAMBIRAI"

Apparently, no positive response to that letter was ever given.

**PROCEEDINGS BEFORE THE COURT *A QUO***

As a result, the appellant sued out a summons against Dr Ndoro on 14 March 2013 claiming payment of the sum of US$53 183 together with interest thereon and costs of suit. She pleaded the following cause of action:

"3. On July 28th 2010 at the then offices of Mbidzo, Muchadehama and Makoni Legal Practitioners being 8. Phillips Avenue, Belgravia in Harare, defendant acknowledged being indebted to plaintiff in the sum of fifty three thousand one hundred and eighty three dollars (USD 53 183.00).

4. It was an implied term of acknowledgement of debt that the sum of fifty three thousand one hundred and eighty three dollars (USD53 183.00) would be paid within a reasonable time.

5. Defendant has despite demand failed, refused and or neglected to pay the sum of USD53 183.00." (The underlining is for emphasis.)

Dr Ndoro contested the suit. In his plea he categorically and vehemently denied the existence of an acknowledgment of debt. He added that, if indeed any such

acknowledgment had been made, it would have been reduced to writing. The stage was then set for what became a bruising court battle. In terms of a joint pre-trial conference minute signed by the parties, only one issue was referred to trial. It is:

> "Whether or not defendant admitted being indebted to the plaintiff in the sum of fifty three thousand one hundred and eighty three dollars (USD$53 183.00)"

The appellant gave evidence and also called her former legal practitioner, *Harrison Nkomo*, as a witness. At the close of the appellant's case, Dr Ndoro applied for absolution from the instance. The court *a quo* found at that stage that the evidence led did not show the existence of an acknowledgment of debt. It granted absolution from the instance.

The appellant was riled by that decision. She successfully noted an appeal to this Court. While the appeal was still pending Dr Ndoro died. As a result, by order of this Court dated 21 October 2019, Bernadette Eva Ndoro, the executrix dative of the estate, was substituted as respondent. On 29 September 2020 the appeal against absolution from the instance was allowed by consent. The matter was remitted to the court *a quo* for continuation of trial.

Upon resumption of trial, the respondent testified. She denied that her husband ever acknowledged being indebted to the appellant in the amount claimed or at all. She maintained that the only sale agreement which existed was that between her late husband and Awak Haksour Jean.

After a full trial, the court *a quo* dismissed the appellant's claim with costs. In its view, while Dr Ndoro probably acknowledged indebtedness to the appellant, he later on revoked the acknowledgment. The court *a quo* stated:

> "It is most probable that the late Zvenyika during the meeting in question had admitted being indebted to plaintiff but changed his mind thereafter insisting Jean Awak was the

rightful purchaser. That explains why his then lawyers could not respond to plaintiff's then lawyers' letter of 17 August 2010. That letter was responded to by the late Zvenyika who insisted the purchaser was Jean Awak.

The plaintiff sued on that alleged acknowledgment of debt. At the time of the suit the late Zvenyika had revoked the acknowledgment of debt. At the time of the summons there was no valid acknowledgment of debt by the late Zvenyika and suing on a cause of action which had been revoked was misplaced. Defendant submitted that it is not competent for plaintiff to base her claim on a verbal acknowledgment of debt."

I mention in passing that this pronouncement by the court *a quo* presents some difficulties. If indebtedness was indeed acknowledged then it would not, in the circumstances of this case, be open to the debtor to "revoke" the acknowledgment of debt. He would not be allowed to have his cake and eat it at the same time.

**PROCEEDINGS BEFORE THIS COURT**

The appellant was still unhappy with that outcome. She noted this appeal on the following grounds:

"1. The court *a quo* erred and grossly misdirected itself in not finding that Awak Jean was just a façade who posed as the buyer when the evidence placed before the court established that the appellant was the buyer and was the one who paid the purchase price.
2. The court *a quo* erred and misdirected itself in not finding that the fact that appellant's name was included in the CR14 as the director of Kitkat Investments explained that appellant was the purchaser of the property in question and not Jean Awak.
3. The court *a quo* having accepted that the parties were in the habit of not recording their agreements erred and grossly misdirected itself in finding that the appellant failed to establish all the requirements of an acknowledgment of debt and therefore not entitled to a judgment in terms of the cause of action.
4. *A fortiori*, the court *a quo*, having found from the evidence that it was most probable that the late Elias Zvenyika Munemo Ndoro had admitted being indebted to the appellant but changed his mind thereafter, erred in dismissing the appellant's claim after it had agreed on the probability of the acknowledgment of debt which formed the basis of the cause of action.
5. The court *a quo* erred and grossly misdirected itself in not finding that the sale agreement was one in which both the appellant and the respondent were equally in the wrong and public policy did not require one party being unjustly enriched at the expense of the other."

Most of the grounds of appeal do not speak to the *ratio decidendi* of the judgment *a quo* as they relate to extraneous considerations. There is only one preeminent issue for determination in this appeal. It is whether the court *a quo* erred in holding that the appellant failed to prove her cause of action. The question of unjust enrichment appears for the first time in the notice of appeal. It was neither pleaded nor related to *a quo*.

Mr *Chimhofu* for the appellant submitted that the appellant proved her case on a balance of probabilities. In his view, once the court *a quo* made a finding that it was probable that the acknowledgment of debt was made and later revoked, the inquiry should have ended there. The court *a quo* should have forthwith entered judgment in favour of the appellant because once the acknowledgment was made, it could not be revoked unilaterally. This was so, according to counsel, because the appellant's cause of action was the existence of a verbal acknowledgment of debt made at the meeting of 28 July 2010.

It was further submitted on behalf of the appellant that, in any event, the court *a quo* could not relate to the question of the alleged revocation which was never placed before it by the parties. By engaging it, the court *a quo* was on "a frolic of its own" which it was not entitled to do.

Mr *Chimhofu* further entreated this Court to find that the respondent was unjustly enriched by the money paid by the appellant. At the same time, so it was argued, the appellant was impoverished and considering that the respondent now retains both the money and the property, the court must do justice between man and man, or is it man and woman, by ignoring that both parties were to blame by entering into an illegal contract. The court should thus enter judgment for the appellant.

On the currency involved, it was urged of this Court to grant judgment in United States Dollars, being the currency the parties transacted in. For this proposition, Mr *Chimhofu* drew attention to s 23 of the Finance (No. 2) Act, 2019. He submitted that s 22 of the Supreme Court Act [*Chapter 7:13*] allows the court to grant relief in foreign currency in the "interests of justice."

*Per contra*, Mr *Dondo* who appeared for the respondent, contended that there was no valid acknowledgment of debt proved by the appellant at the trial. In counsel's view, what was before the court *a quo* was the question whether or not the appellant was owed the sum claimed arising from an acknowledgment of debt made by the late Dr Ndoro at the offices of *Mbidzo, Muchadehama* and *Makoni* on 28 July 2010 as pleaded. The rest of the issues raised by the appellant, so the argument goes, are irrelevant.

Regarding the argument on unjust enrichment, Mr Dondo strongly submitted that it cannot be raised now when it was not pleaded and the court *a quo* was not invited to address it at all. On the currency of the claim, counsel made reference to the case of *Zambezi Gas (Pvt) Ltd v N.R. Barber (Pvt) ltd & Anor* SC 3/20 as authority for the proposition that a debt that was due in United States Dollars before 22 February 2019, the effective date, should be paid in RTGS dollar at the parity rate of 1 to 1.

**THE LAW**

The first port of call is an examination of the principles governing pleadings in civil matters. Pleadings in civil litigation are the cornerstone in the resolution of disputes between litigants. They have the dual purpose of giving the opposite party fair notice of the case he or she has to meet and also play the role of clarifying the issues between the parties

requiring determination by the court. See *Medlog Zimbabwe (Pvt) Ltd v Cost Benefit Holdings (Pvt) Ltd* 2018 (1) ZLR49 (S) at 45G and 454G.

Given that the trial is premised on pleadings, it is imperative that a litigant has to carefully plead its case. See *Nexbak Invetments (Pvt) Ltd & Anor vs Global Electrical Manufacturers (Pvt) Ltd & Anor* 2009 (2) ZLR 270 (S) at 275E-G, *Makgatho v Old Mutual Life Insurance Zimbabwe Ltd* 2015 (2) ZLR 5 (S) at 11D-G; *Easy Credit (Pvt) Ltd & Ors vs Infrastructure Development Bank* SC85/21 at p 7; *Infrastructure Development Bank of Zimbabwe v Engen Petroleum Zimbabwe* (Pvt) Ltd SC16/20 at p 19 and *Smith v Smith* SC 50/20 at p13.

The necessity to plead a cause of action was aptly set out in *Mashonaland Tobacco Company (Pvt) Ltd v Mahem Farins (Pvt) Ltd & Anor* SC 152/20 at p9 where this Court remarked;

> "As a general rule, judgment cannot be granted on a cause of action that is not pleaded. The pleadings must clearly set out the precise parameters of the issues contested between the parties. Thus, in the Namibian case of *Courtney-Clarke vs Bassingthwaighte* 1991(1) SA 684 (Nm) at 698, it was explained that:
>
> > '… there is no precedent or principle allowing a court to give judgment in favour of a party on a cause of action never pleaded, alternatively there is no authority for ignoring the pleadings … and giving judgment in favour of a plaintiff on a cause of action never pleaded. In such a case the least a party can do if he requires a substitution of or amendment of his cause of action, is to apply for an amendment.'"

Having said that, it must also be mentioned that the legal principles applicable to pleadings are not inflexible. A litigant is generally permitted to depart from or amend its pleadings with the rider that, before that occurs, the leave of the court must be sought and granted. Rule 132 of the repealed High Court Rules, 1971, which were applicable at the time the trial in this matter was held, permit an amendment of the pleadings at any stage of the proceedings;

"… for the purpose of determining the real question in controversy between the parties."

See *Raftsman Investments (Pvt) Ltd v Tebb & Anor* SC 138/20; *Timbe v Ngonidzashe Family Trust* SC 53/09.

I should add that it is a celebrated principle of our law that he who alleges bears the onus of proving the fact so alleged. See *Nyahondo v Hokonya & Ors* 1997 (2) ZLR 457 (S) at 459.

Related to the principles of pleading as they apply to the present case is the question of what it is that constitutes an acknowledgment of debt in our law. An acknowledgment of debt is regarded as a document containing an unequivocal admission of liability by a debtor. Apart from that, such a document must be coupled with an express or implied undertaking to pay the debt. In other words, there must be an intention to pay the debt. See *Adams v SA Motor Industry Employees Association* 1981 (3) SA 1189 (A) at 1198.

According to *Black's Law Dictionary*, 8 ed, relied upon by Mr *Dondo* for the respondent, the following requirements must exist for a valid acknowledgment of debt:

(a) full names of the debtor;

(b) full names of the creditor;

(c) *domicilium, citandi et executandi* or address for service;

(d) the amount in full being acknowledged;

(e) the time period in which the debt will be paid;

(f) the number of instalments if any; and

(g) how payment will be made.

To illustrate the importance of a written document in an acknowledgment of debt, useful insight may be gained from *Amler's Precedents of Pleadings*, 6 ed (2003) at p 231 where a precedent for properly pleading a claim based on an acknowledgment of debt is given:

> "**Claim – on acknowledgment of debt**
> 1. On [date], defendant acknowledged in writing his indebtedness to plaintiff in a sum of [amount] together with interest payable thereon at [percentage] per annum as from [date]. A copy of the said acknowledgment of debt is annexed hereto." (The underlining is for emphasis).

I am mindful of the fact that Amler's precedents of pleading cannot possibly be elevated to legal authority. I have deliberately cited the above precedent to demonstrate that the acknowledgement of debt, by legal necessity, is a written document meeting the characteristics I have outlined.

**ANALYSIS**

The authorities show that a litigant is bound by his or her pleadings. The court determining a dispute is also bound by the pleadings of the parties and is precluded from giving judgment based on a cause of action not pleaded. The appellant nailed her colours to the mast when she premised her claim on an acknowledgment of debt. The onus was therefore on her to prove, on a preponderance of probabilities, the existence of such an acknowledgment of debt.

That a claim, as the one pleaded by the appellant, must be based on a written acknowledgment of debt is made abundantly clear even by Amler's precedents of pleadings. The appellant did not plead an alternative cause of action like a verbal agreement entered into between herself and the late Dr Ndoro. Neither did she plead a claim based on unjust enrichment. She could only succeed or fail depending on whether the evidence led established the existence of an acknowledgment of debt.

The evidence presented at the trial did not come anywhere near proving the existence of a written document in which the late Dr Ndoro acknowledged indebtedness within the requirements of the law. Even that which the appellant set about to prove, namely a verbal acknowledgment of debt, was also not proved. She relied on a letter written by her legal practitioner on 17 August 2010 which creates more problems for her than solutions.

To begin with, the letter was written on the appellant's behalf and not on behalf of the late Dr Ndoro and could not therefore constitute an acknowledgment of debt by Dr Ndoro. Even assuming generously that it was meant to record what the late Dr Ndoro said, it is not helpful to the appellant at all. The essentials of a valid acknowledgement of debt are missing. For instance, a sum of $53 183 is mentioned in that letter when evidence led suggests that only $50 000 was paid. Although the balance is said to relate to conveyancing fees, how that is so is not apparent from both the oral evidence and the letter in question.

More importantly, the letter does not show any express or implied undertaking to pay the debt. If anything, the evidence of *Harrison Nkomo* itself seems to invalidate any suggestion of an acknowledgment of debt having been made on 28 July 2020. *Nkomo* stated:

> "Mr Mbidzo advised that he and his client wanted to sit down, consider their means and thereafter, the parties would sit and prepare an acknowledgement of debt and the instalments payable to the plaintiff. That initially concluded the meeting, but there is a remark here to say that this thing happened close to six years ago, a [remark] which was made by the defendant when I was persisting with a payment plan. This is what he said, 'Nkomo I have told you that I am a professional, I will pay but I do not want to be pushed.' That is in so far as that meeting in Mr Mbidzo's office is concerned." (The underlining is for emphasis).

Both Mr *Nkomo*'s letter and his *viva voce* evidence, far from establishing the existence of an acknowledgment of debt, instead show that the parties were still wide apart. Whatever transpired on that date was only "work in progress" and nothing more. While the

court *a quo* misdirected itself in its assessment of the evidence, finding that there was an acknowledgment of debt which was later revoked, its conclusion that the appellant's claim was not proved was a correct one which cannot be faulted.

Mr *Chimhofu* sought to argue that the appellant's claim was based on a verbal acknowledgment of debt. In my view that proposition is untenable. Where the claim is based on an acknowledgment of debt, there is still need to prove the written and valid acknowledgment of liability. This is so as long as the claim is not premised on another form of liability.

Accordingly, for different reasons from those relied upon by the court *a quo* I find no basis for impugning the conclusion that the appellant failed to prove the claim that she pleaded.

I mentioned in passing earlier that there was no basis for concluding that the acknowledgment of debt having been made, was later revoked. For completeness, the court *a quo* did not cite any authority for holding that an acknowledgement of debt, once made, can be unilaterally revoked by the debtor. It is only in limited circumstances that a person may be permitted to resile from an acknowledgment of debt consciously made. This may occur, for instance where duress or undue influence were used to induce it.

I have already stated that it was improper for the appellant to attempt to rely on unjust enrichment on appeal because it was neither pleaded nor argued *a quo*. The authorities are consistent not only that a court cannot pass judgment on a cause of action not pleaded but

also specifically that in a general action for unjust enrichment, it must be pleaded. See *Industrial Equity v Walker* 1996 (1) ZLR 269 (H).

While it is a general principle of our civil practice and procedure that omissions in a pleading can, in appropriate circumstances, be cured by evidence, in the present case the question of unjust enrichment did not even arise in evidence. See *Silonda v Nkomo* SC 6/22. The court *a quo*, whose judgment is under interrogation herein, cannot be faulted for not engaging the issue of unjust enrichment for that reason.

**DISPOSITION**

The appellant failed to discharge the onus resting squarely on her to prove that the respondent made an acknowledgment of debt in her favour. There is no merit in grounds of appeal 1, 2, 3 and 4 which stand to fail. By equal measure, ground 5 relating to unjust enrichment should fail by reason that it was not supported by the pleadings and evidence. No case has been made for upsetting the judgment *a quo*.

Regarding the question of costs, I find no reason to depart from the usual position that they should follow the result.

Accordingly, it be and is hereby order as follows:

The appeal is dismissed with costs.

**UCHENA JA** I agree

**KUDYA JA** I agree

*Rusinahama-Rabvukwa Attorneys,* appellant's legal practitioners

*Dondo & Partners*, respondent's legal practitioners