HB 235/18
HC 2742/13

**ISRAEL GAMUCHIRAI CHIDAVAENZI**
**(Duly represented by NORMAN MLINGO)**
**Versus**

**GLOBAL ELECTRICAL MANUFACTURING**
**(PVT) LTD**

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 1-2- MARCH & 20 SEPTEMBER 2018

**Civil Trial**

*J. Nyarota* for the plaintiff
*J. Magodora* for the defendant

**TAKUVA J:** Plaintiff issued summons against the defendant. His claim is for judgment as follows:

> "1. Payment of thirty-five thousand six hundred and thirteen United State dollars and ninety cents (US$35 613,90) being the amount of which defendant was unjustly enriched.
> 2. Interest thereon at prescribed rate of interest with effect from date of summons to date of payment in full.
> 3. Costs of suit."

The facts which are in the main common cause are as follows:

The parties voluntarily entered into an agreement of sale in respect of which defendant sold a certain piece of undeveloped stand being stand 3 of stand 1202A Kwekwe Township measuring 3 561 square metres. The agreement of sale was reduced to writing by the defendant and signed by both parties on the 16th of April 2003. In accordance with the agreement, plaintiff paid the full purchase price and on the 14th of May 2003 defendant acknowledged receipt thereof in writing through exhibit 2. Despite receiving the full purchase price, defendant was not forthcoming to transfer the property to plaintiff resulting in plaintiff making a court application to compel transfer on the 27th of August 2013.

Defendant opposed the application arguing *inter alia* that he cancelled the agreement of sale after plaintiff failed to pay services for electricity, water connections and sewerage drain laying charges. Defendant in his notice of opposition, also relied on prescription and that the agreement of sale was a nullity as it contravened section 39 (1) (b) of the Regional Town and Country Planning Act Chapter 29:12 in that at the time the agreement was concluded there was no subdivision permit issued by the City of Kwekwe. Faced with such opposition, plaintiff withdrew the court application and sued defendant for the current value of the property based on unjust enrichment. Later, on 24 July 2014, plaintiff filed a notice of amendment whose effect was the deletion of the amount of thirty five thousand six hundred and thirteen United States dollars and ninety cents. (US$35 613,90) on the face of the summons, paragraph 9 of the declaration and paragraph (a) of the prayer and substitution thereof with an amount of fifty three thousand four hundred United States dollars (US$53 400,00). On the date of the hearing, plaintiff applied for the above amendment and it was granted.

Defendant in his plea, denied being liable to the plaintiff in the amount claimed or in any lesser amount. He relied on the following grounds:

(a) That plaintiff's claim had prescribed since it arose in 2003.
(b) That plaintiff failed to fulfill all his obligations pertaining o the said agreement and the defendant cancelled the sale agreement by notifying the plaintiff in writing.
(c) That the defendant was financially prejudiced and lost millions of dollars as a direct consequence of having to cancel the agreement due to plaintiff's failure to fulfill all the terms and conditions of the agreement.
(d) That plaintiff is not entitled to any damages because the agreement was illegal.
(e) That defendant disputes the amount claimed by the plaintiff.

The matter proceeded to pre-trial conference stage and the parties agreed that the following issues be referred to trial:-

1. Whether plaintiff failed to fulfill any obligations pertaining to the agreement of sale? If so whether defendant was justified to cancel the agreement of sale?

2. Whether or not defendant was unjustly enriched by receiving the full purchase price and keeping the stand?
3. Whether or not plaintiff is entitled to receive United States dollars when he paid the purchase price in Zimbabwe dollars?
4. Whether plaintiff is entitled to receive the sum of US$53 400, 00 or any lesser amounts?

It should be noted that at this stage defendant had abandoned the issues of prescription and illegality.

Plaintiff's evidence as testified by himself and his witness Claudius Muza is as follows:

After defendant advertised the stand in question plaintiff approached him and entered into an agreement of sale which defendant reduced to writing. He paid the purchase price in full and defendant acknowledged receipt in writing. In September 2013 the defendant opposed the application to compel transfer arguing that he cancelled the agreement because it was an illegal one for non-compliance with statute. Defendant also alleged that the plaintiff's claim had prescribed. The witness knew from the 1st of September 2013 that the agreement was null and void and therefore unenforceable at law when defendant said so.

Further, plaintiff said that defendant could not have cancelled an agreement which according to him was a nullity. It was plaintiff's contention that defendant was unjustly enriched and he cannot keep both the land and the money. In my view the witness' evidence is credible and straight forward. He was never shaken under cross examination. His testimony was never challenged on any material issues save for the issue of service which was later clarified by his witness Claudius Muza, the Valuer. Accordingly, I accept this witness' evidence as true.

Plaintiff called a qualified Valuer of fifteen (15) years experience who is registered with the Valuers Council of Zimbabwe Number 3 and a member of the High Court Panel of Valuers. After instructions from plaintiff's legal practitioners to carry out a valuation of the property in question he visited the stand and observed that it was not developed but fully serviced. The

witness explained that by "fully serviced" he meant that the area is serviced with tarred roads, water, sewer, electricity, drainage and telephone lines. These services are available and it is up to the owner of a property in the area to tap into the services. The witness also testified that within the vicinity of the stand in issue is Zimbabwe Electricity Supply Authority depot, gym, vehicle inspection depot and Techmate Engineering Services (Pvt) Ltd which defendant used to own before he sold them with developments. As regards the method of valuation, the witness stated that he used the "comparative method" of valuation a method acceptable and as in line with international best practices. Such a method which is widely used in undeveloped land entails comparing with recently sold land within the same locality.

It was his evidence that the City of Kwekwe had recently sold a piece of land opposite the stand in question at fifteen dollars ($15,00) per square metre. He multiplied the stand size of 3 563 by $15,00 and arrived at the value of fifty three thousand four hundred dollars (53 400,00). This witness produced a Valuation Report which was marked exhibit 5. In that report, the witness outlined the methodology he used to arrive at the current market value of the stand. Under cross-examination the witness clarified the difference between service and development as these terms apply to stands. According to him the plaintiff bought a fully serviced but undeveloped stand. He dismissed defendant's contention that plaintiff should have "put services" as unsound in that these services were already there. Further, he explained that a person can be connected to the services only after developing the stand and making the necessary application to Council for connection. It was his evidence that "development" means putting up immovable structures on which services would be connected. Plaintiff closed his case after the evidence of this witness.

Defendant admits entering into a contract with the plaintiff in which he sold his stand. The purchase price was paid in full and he was ready and willing to effect transfer had it not been for plaintiff's breach of the agreement. In so far as defendant is concerned, the breach relates to plaintiff's failure to fully comply with City Council requirements. When asked to specifically point out in what way plaintiff breached the contract, he said plaintiff failed to

ensure that there was "electricity, water and sewerage pipes." For that reason he maintained that he not refuse to transfer but the City of Kwekwe refused to do so.

The argument that he was willing to pass transfer to plaintiff is inconsistent with this plea, synopsis of evidence and evidence in chief that he cancelled the agreement for reasons of breach. It cannot be both as the two are mutually destructive. Similarly defendant's argument that plaintiff was supposed to put services on the undeveloped stand is not sound in that it defies logic. How plaintiff was supposed to install services like electricity and sewer in a bush is surprising to say the least. In any event, the obligation to provide services is imposed on the owner at the time of sale in terms of the Regional Town and Country Planning Act Chapter 29:12.

Defendant argued that he cancelled the agreement because plaintiff had beached it. He, however on the other hand said the agreement was null and void *ab initio*. What this means is defendant purported to cancel an illegal agreement. This is not possible at law. The evidence also shows that the agreement does not have a cancellation clause and plaintiff was never given notice to rectify the breach if indeed there was any. Defendant said he sent the letter to plaintiff's legal practitioners of record.

Defendant abandoned the defence of prescription without an explanation. He conveniently chose not to challenge plaintiff's evidence that he only knew for the 1st time in September 2013 that defendant was relying on illegality as a defence. During the trial, the defendant said he was offering to reimburse plaintiff seven thousand dollars (US$7 000,00) plus 100% interest thereon to make it US$14 000,00. He said the money plaintiff paid to him was equivalent to US$7 000,00.

Upon realising that the defence of illegality was inconsistent with his testimony that he was always ready to reimburse plaintiff, he totally disowned it and blamed it on his legal practitioner. Defendant did not provide any scientific basis of arriving at the amount he is offering.

I take the view that defendant performed poorly as a witness. He failed to provide any sound argument why he is refusing to reimburse the plaintiff. On the defendant's evidence the issue of unjust enrichment is proved. This is why the defendant offered to reimburse a certain amount that is lower than what the plaintiff has claimed. Defendant's evidence however was difficult to follow through as he could at times prevaricate and avoid direct answers. For these reasons I reject his testimony on why he failed to reimburse plaintiff.

After the evidence of this witness, defendant's legal practitioner indicated that they had one more witness to call but that witness was not available. The matter was then rolled over to the following day for continuation. When the hearing resumed on the following day, *Mr Magodora* for the defendant informed the court that he had challenges in securing the witness who was indisposed. He then applied for a postponement to the next week. Upon being questioned by the court, *Mr Magodora* said the witness was a professional Valuer who had done his own assessment on the status of the stand. He conceded that the defendant did not discover that evidence despite having been aware of it.

The application was opposed on the grounds that it was an afterthought as no mention of this evidence was made in the synopsis of defendant's evidence. Further no questions were put to the plaintiff during cross-examination on the Valuer's report. Thirdly, defendant himself said in his evidence that no valuation was done on the stand because he could not afford it. To turn around at this late stage and claim that the stand was evaluated by a professional Valuer is to insult the intelligence of the Court. Finally, despite having been served with the notice of set down 2 months before the trial, the defendant did not ensure that the witness attends court. Defendant travelled all the way from Ireland to attend court and it's not good enough to offer wasted costs. I concluded that there were no good grounds for a postponement and dismissed the application.

*Mr Nyarota* for the plaintiff submitted that in the interest of finality his client proposes that the court appoints a Valuer from a list of Valuers to go and carry out a valuation of the property in question. The results of such evaluation would be binding and final. Both parties

would share the cost of such valuation equally. *Mr Magodora* concurred and the defendant closed its case.

Faced with the value of the stand as the sole issue for determination, I proceeded with the consent of both parties to issue the following order:-

"1. The court will appoint a Valuer from the list of Vaulers to go and carry out a valuation of the property in question.
2. The report of such valuation shall be final and binding on the parties in respect of the value of the property.
3. The cost of the valuation shall be borne by both parties equally.
4. The matter is provisionally postponed to the 23rd March 2018 pending the production of the report.
5. Costs shall be in the cause."

When the matter came up for hearing on the 23rd of March 2018, *Mr Magodora* made a startling submission that on instructions from his client he will challenge the process and the outcome of the independent Valuer. He said there was conclusion between plaintiff and the Valuer because the defendant was never consulted. *Mr Nyarota* submitted that he was at a loss to hear such malicious and unfounded accusations from the defendant. He explained that all he did was to follow up on the order which was delayed in the Registrar's office. When the order was released, he paid for his copy and took the court order to the Master's office where he explained the urgency of the matter. In so far as the processes that were followed and the outcome that was reached, he was never involved at any stage. He saw the report for the 1st time in court. According to him the defendant's attitude can only be explained in its reluctance to have the matter finalised.

The court then heard from Manuel Gwande who was appointed by the Master by way of a letter dated 19 March 2018. He is a registered Estate Agent Valuer and an Associate of Real Estate Institute. He has 14 years of experience. According to him he got instructions from the master and was ultimately answerable to the Master. That being the case, he had no reason to call the parties. After obtaining the necessary information from the Town Planner for the City of Kwekwe and the Deeds Office he proceeded to the stand in question.

The witness observed that the area was fully serviced with tarred roads, electricity and storm water drainage among other services. He also observed a fence at the front of the stand and a wall of cement brick pillars and concrete panels on the western boundary which was newly constructed. According to the witness the wall is valued at $12 000,00 as indicated to him by a quantity surveyor. He concluded that since the going rate for partially services stands was US$15,00, the stand in issue which is fully serviced must have a higher rate. As a result, he reviewed the value to the subject property at US$16,50 per square metre. Using this method, he arrived at US$65 000,00 (sixty five thousand dollars) as the current market value of the property. Since the improvements add value to the property, he divided the value of improvements by 2.

Under cross-examination by *Mr Magodora* the witness said when they get instructions from the Master, the practice is to proceed without consulting the parties. Payment is done after the assignment has been completed. He said in such cases they do not worry about payment because the Master is their guarantee. The witness denied the City of Kwekwe sales similar stands at US$10,00 per square metre. According to him, the Council officials informed him that their selling price was US$15,00 per square metre. Finally, the witness said the conclusion of a Valuer is an opinion based on facts he observes at the property.

Surprisingly, the allegation of collusion was not put to the witness. His testimony that the stand is located in an area that is fully serviced was not challenged. His testimony that a boundary wall adds value to the property accords with common sense. The witness' report which summarises the procedure and value was produced and marked exhibit 7. I take the view that the allegations of collusion and any impropriety have no merit at all. In its closing submissions, defendant dwelt on an unfounded claim that the court order directed that the valuer must consult the parties before commencing his work. Needless to say there is no such clause in the order. In any event, the valuer said they are not supposed to talk to the parties at all. This is meant to avoid allegations of connivance.

In my view, this witness was very impressive in every material respect. He gave reasons why he arrived at certain conclusions. I therefore accept the bulk of his evidence except where

he made a distinction between what he termed "partially serviced" and "fully serviced" stands. It was pointed out that in the former, one would find dusty roads whilst in the latter there would be tarred roads. The witness did not mention any other differences that would warrant an increase in the price per square metre. In view of this deficiency, I find that it is fair and just to use the City of Kwekwe's rate of US$15,00 per square metre. The 10% increase per square metre has not been sufficiently justified. I come to this conclusion fully cognisent of *Mr Nyarota's* logical reasoning that in view of the parties' agreement if the value was pegged at thirty thousand ($30 000,00) plaintiff would have been bound by it and so should defendant by the value of US$65 000,00.

While the parties are bound by their agreement the court is not so bound because it must as part of its duty do justice between man and man, by assessing the methodology used and the result. In casu, the rate of $15,00 per square metre coincides with Mr Claudius Muza's evidence. This is also the rate at which plaintiff claimed in his summons and declaration. I find also that plaintiff fulfilled all his obligations in terms of the agreement. Plaintiff is entitled to be paid in United States dollars because defendant offered to pay in that currency.

In the premises, I find that defendant was unjustly enriched at plaintiff's expense in the sum of US$53 400,00.

Accordingly, it is ordered that :-

1. Defendant pays plaintiff the sum of US$53 400,00 (fifty three thousand four hundred dollars) being the amount by which defendant was unjustly enriched.
2. Defendant pays interest thereon at the prescribed rate of interest with effect from date of summons to date of payment in full.
3. Defendant pays plaintiff's costs of suit.

*Wilmot & Bennett*, applicant's legal practitioners
*Messrs Magodora & Partners*, defendant's legal practitioners