HH 197-03
HC 1693/01

VITORINO GONCALVES
versus
MARIA DELIA DE SOUZA RODRIGUES

HIGH COURT OF ZIMBABWE
NDOU J,
HARARE, 7 January, 2002 and 11 February, 2004

Adv *J B Wood* for plaintiff
Adv *R Fitches* for defendant

NDOU J: The plaintiff issued summons against the defendant in the following terms:-

"The Plaintiff's claim against defendant:

(a) an order directing that the property known as Stand 91 of Kensington Estate measuring 351 square metres be sold to the best advantage and nett proceeds divided equally; and
(b) Costs of suit".

The defendant entered appearance to defend the claim. She also filed a claim in reconvention seeking -

"a) An order declaring her to be the sole owner of the immovable property situate in the District of Salisbury, called Stand 91 of Kensington Estate measuring 351 square metres, also known as Number 19 McLoughlin Road, Avondale, Harare, as reflected in the Deed of Transfer;
b) An order that the Notarial Deed signed by the parties on 10 January, 1995 be declared *pro scripto* and of no effect.
c) Costs of suit".

The salient facts of the case are that the parties started living together in about 1990 and moved into the disputed property in 1994. The house was purchased through the defendant and is registered in her name. The deposit for the house was $50 000. The plaintiff made payments to the defendant including a payment of $50 000. The plaintiff made material improvements to the house and these enhanced the value of the property. It is the defendant's case that

these luxurious alterations and extensions to the already existing house, costing approximately $540 000, were made without her consent or authority.

By way of a Notarial Deed dated 17 January, 1995, signed by the parties, it was "agreed" as follows:

> "(a) That the property was jointly owned and had been jointly acquired;
> (b) That the property was registered in the name of defendant purely for the purposes of convenience.
> (c) That in the event of occupation by both parties being rendered difficult then the property would be sold to the best advantage through the agency of an estate (agent) nominated by both parties."

It is beyond dispute that at the commencement of these proceedings the occupation by both parties had been rendered difficult and the relationship between the parties had irretrievably broken down and the plaintiff had vacated the property. It is common cause that the defendant took no steps to have the above-mentioned notarial deed set aside until her claim in reconvention was filed over six years later. By 29 August 2000 the relationship between the parties had reached breaking point and the defendant tried to enforce the terms of the said notarial deed relating to her right to residence at the house. Thereafter the plaintiff was insisting on having the house sold unless the defendant opted to buy his share or was willing to have him buy hers. The defendant obtained a provisional order with an interim interdict against the plaintiff, on an *ex parte* basis, while the plaintiff was out of the country. The defendant, after opposing

papers were filed, filed an answering affidavit to set down the matter for confirmation (or discharge) of the provisional order.

The defence to the plaintiff's claim is dependant on the counterclaim, which as alluded to above, seeks an order declaring the notarial deed to be *pro non scripto*. In other words it has always been assumed that the basis of this defence/counterclaim was that the notarial deed was allegedly signed by the defendant as a result of some impaired volition. However, from the pleadings, it was never clear whether the impaired volition was supposed to have arisen from duress or from undue influence.

It is also been belatedly averred by the defendant that the notarial deed was *non scripto* because it purports to confer a personal right in immovable property. It purports to secure rights in immovable property without registation in the Deeds Registry. It is argued by the defendant that this is in contravention of section 56 of the Deeds Registries Act [Chapter 20:05] which states -

> "No deed or condition in a deed, purporting to create or embodying any personal right in respect of immovable property shall be capable of registration".

This latter assertion was not specifically pleaded. The defendant submits that the notarial deed is voidable on account of impairment of volition. The defendant's case was heard first and I propose to deal with evidence in that fashion.

DEFENDANT'S CASE

Maria Delia de Souza Rodrigues

She testified as follows.

She is employed by a firm of legal practitioners in Harare as Office Manager. Prior to that she had been employed at Barclays Bank for twenty-nine years since January 1971. She rose through the ranks at Barclays Bank from a clerk to a Property Administrative Manager at Head Office in Harare. She is the registered owner of the disputed property, 19 McLoughlin Road, Avondale, Harare. She says that contrary to the plaintiff's assertion, she is the legal owner of this property, having acquired and paid for it using her own resources. She says that the property was neither jointly acquired nor jointly owned. She testified that the property was registered in her name by virtue of the fact that she purchased it and paid for it using her own financial resources. She, therefore, denies and refutes that the property was registered in her name only for the purpose of convenience as reflected in the notarial deed. She further denies that the plaintiff has any entitlement in law either to have the property sold or to share the proceeds of the sale. She says the parties have been co-habiting since June 1990 at a different address and commenced co-habitation at the disputed property from 1993, prior to her purchase thereof, until when she obtained an order of this Court on 29 November 2000. She obtained the latter interdict arising out of the plaintiff's violent behaviour towards her and her family. According to her, the nub of the dispute arises from the fact that between 1994 and 1995, the plaintiff, without her consent or authority, unilaterally effected certain alterations and extensions to her already existing house. She says that she did not acquire the disputed property jointly

with the plaintiff. The Bank which financed the purchase of the property did not allow joint ownership. She says that she previously had a flat in Bulawayo which she sold and the proceeds thereof went to the purchase of the disputed property with the balance of the purchase price coming from her erstwhile employers, Barclays Bank. She produced documents in support of her testimony in this regard. From these records it is clear that she bought the Bulawayo flat on 14 April 1987. She only met the plaintiff in August 1989 i.e. over two years after she acquired the Bulawayo flat. She produced the Agreement of Sale in respect of the disputed property. The purchase price is reflected as $300 000,00 financed through a loan obtained from Barclays Bank, her then employer. The loan was secured through a mortgage bond. She serviced the bond through direct deductions from her salary. The property was registered in her name. Barclays Bank lent her the purchase price of $300 000,00 plus transfer costs less deposit which they took from the proceeds of the sale of the Bulawayo flat. Her salary at the time was between $18 000 and $20 000 and her package included payment of school fees for her children, medical aid for her and her children, parking and petrol allowances and payment of annual subscriptions at Chapman Gold Club and Health Studio. She also received bonds as shares. She had 5000 Barclays Bank shares. She produced documents to show the deductions in her salary towards the servicing of the mortgage bond when she left Barclays Bank to join CABS this necessitated the transfer of the mortgage bond to the latter. She paid around $20

000,00 plus allied charges for CABS to take over the bond. She says that the plaintiff was aware of all these transactions as he was living with her. Their relationship was okay. As the plaintiff is a wealthy man he could have purchased the disputed property for cash if he wanted to be involved. He did not, and she felt that the servicing of the bond was within he means and did not involve him. The plaintiff, however, later made alterations and extensions to the property. At the time she asked him whether it was worth it but he nevertheless went ahead. He constructed a luxury area with a thatched structure. This area was out of bounds for her and her children as the plaintiff kept it locked. He constructed a snooker room which he used with his friends. He added two outside toilets. He extended the lounge and dining-room. She did the curtaining. The plaintiff also made extensions in the kitchen by adding kitchen fittings. He also built two carports. He added a new bedroom to the main house. The extensions were made between 1994 and 1995. The plaintiff did not consult her on the necessity and the nature of these extensions and alterations. As soon as he completed these alterations his attitude changed. He stopped her and her children from bringing friends to the property. He started referring to the property as his house and informed his family that the property was his. Tension crept into their relationship. Things went from bad to worse. The plaintiff controlled access to parts of the house, especially those affected by the extensions and alterations. The plaintiff started assaulting her daughter. The situation deteriorated to such an extent that she

wanted to move out of the house but she had children at school. She felt that she had to take action when her children were old enough to look after themselves. She has no family support in the country. The plaintiff made the rules and told her that she and her children had to abide by them. Plaintiff shouted at her daughter in front of her friends. Eventually no one visited them.

She states that they were "actually living in prison". The plaintiff himself, brought his friends and his family from South Africa. The situation was very stressful for her and her 23 year old daughter. After a big scene at the house she arranged for her daughter to emigrate to the United Kingdom. The situation was so stressful that she and her daughter (before her emigration) were continuously on anti-depressant medication. His eldest daughter from a previous relationship came and the plaintiff started breaking fittings and said they were his. He became so violent that she had to seek Police intervention. The situation got out of control. After her third visit to the Police they advised her to seek a court order to deal with her domestic problems. She obtained an order as she felt threatened and feared that the situation would explode. She obtained a restraining order on 29 November, 2001.

She explained the circumstances under which she signed the notarial deed in the following terms -

> "There was no peace of mind. I was just about to collapse. Basically I just went and signed. I didn't question it. It was done by his lawyer……. I got a draft from the plaintiff. I just read through it. I didn't argue----. I had my life to think about, I felt that if I signed that I would stop this continued bothering

> about the plaintiff not having title to the property---. He did not explain the document to me it was like something to sign and perhaps make peace. The bank would never transfer the title anyway".

She says when she signed the notarial deed before a legal practitioner she did not express her reservations and lack of volition to him. She said that after the signing of the notarial deed the situation did not get better. She had signed in the hope that things would become better. She accepted that she received moneys from the plaintiff by way of living expenses and also for bookkeeping services that she offered to his business. The situation did not improve after the signing of the notarial deed and the plaintiff continued to subject her to "mental and physical blackmail". She stated that there was, however, no argument about the signing of the notarial deed. She did not take the deed seriously so she never bothered to give thought to the terms thereof. She, however, conceded that she understood the contents. Although she did not agree with the contents, she just signed without protest because she wanted peace for her children and herself. She was in a state of stress when she signed. She states that she could not move out of the disputed property because she was the one who was servicing the mortgage bond. She did not ask the plaintiff to move out. She did not consider selling the disputed property because she did not want to jeopardize her life because of their relationships which had turned sour.

In a nutshell she signed the notarial deed to keep peace without having regard to the consequences of her signature. She states that

she did not, in any event, anticipate any serious consequences arising from signing the notarial deed as the title deeds were still under her sole name. She did not bother to have the notarial deed nullified because she considered it to be incomplete and did not take it seriously. She conceded that at some stage, through her erstwhile legal practitioner tried to enforce her rights arising from the notarial deed. A letter by her legal practitioner was produced and she confirmed that the letter was written by her legal practitioners to the plaintiff to the defendant at her behest. In this letter she did not seek to resile from the notarial deed. She said that she only launched legal proceedings against the plaintiff after the latter wrote letters seeking to enforce his rights arising from the notarial deed. She says after obtaining the provisional order she did nothing to have it confirmed as things returned to normal. She disputes ever threatening to sell the property. She concedes that the improvements were in excess of $500 000 -- thus enhancing the value of the disputed property. She, however, still claims sole ownership of the property and does not want to share it with plaintiff. She is unable to give reasons why she should be enriched at the expense of the plaintiff save to allege that the property is registered in her name. She stated that she was, at the time of her testimony, using a Mazda M3 vehicle that the plaintiff bought for her for $300 000. She accepted that the plaintiff took her on expensive holidays, drove her children to school and helped her ex-husband. She is adamant that this has nothing to do with the issue before the court.

PLAINTIFF'S CASE

Vitorino Goncalves

He testified that he is a transport operator and a man of straw. He says he first met the defendant in 1989. After his divorce he went to live at a place called Maria Estate Boarding house. The defendant and her brother were also living there. She moved out but kept on visiting her brother and their relationship developed during such visits. Eventually he moved in with her but her flat did not have much by way of furniture. Her salary was at the time very meager and he paid for the rent for the flat, bought the food and also paid for the plaintiff's clothes. They shared this flat for over two years. They were living together as "husband and wife". He concedes that the defendant did bookkeeping for his transport business. He, however, states that she was doing so on account of their relationship and not for financial reward. He also bought tyres for her vehicle. In 1991 he bought her the vehicle that she referred to in her testimony. It was brand new when he bought it. He negotiated with the seller of the disputed property. He wanted to pay the purchase price of $350 000,00 cash. The defendant persuaded him not to pay cash as she was able to finance the purchase through a low interest loan from her employers and the cash would then be used to buy a vehicle. The defendant approached her employers and a loan was granted but the defendant said the loan would be in her name. He says a deposit of $50 000,00 was required. He paid the deposit. He actually deposited

the $50 000,00 into the defendant's account. He also gave her an additional $35 000,00 for insurance for the property and transfer charges. He also paid $12 000,00 capital gains tax for her Bulawayo property that she had just sold. Throughout the co-habitation he regarded the defendant to be in a position akin to a wife. She did not ask for money but he gave her lots of money. He paid for almost everything for a period of approximately fourteen (14) years. His generosity extended to her ex-husband.

On the improvements, he says that when he realised that a lot of money was going to be involved he felt that he needed some form of protection. He felt that he needed to safeguard his interest in the property. He discussed this with the defendant and she shared his concern. He consequently approached his legal practitioner who drew up the notarial deed in question. Although the notarial deed was drafted in 1994 it took a long time before it was signed. The deed was finally signed before a notary public in the presence of witnesses. The defendant signed freely and voluntarily. They employed the services an architect and the defendant and her children worked with him on the nature of the improvements required. She made the suggestions on the improvements. For services rendered the architect charged $35 000,00 which he paid. The improvement plans were in the defendant's name. She signed the plans before they went for approval. He says the improvements were, *inter alia*, extensions of the lounge, bedroom, add-on of three doors, he took up carpets and replaced with tiles. He altered the bathroom carpets with tiles. He did

one hundred and fifty metres of plumbing. He replaced roof tiles in the large area. He built a new kitchen. He built a new entertainment area outside the main house with bathrooms, bars and office. He built a snooker game room. He built a small exercise room. He engaged Costain Construction Company to level the ground at the back. He spent over a million dollars on materials for these improvements and produced an invoice/receipt in support of this averment. He states that most of these improvements were done after they signed the notarial deed. It took between one and half to two years for the improvements to be completed. He states that problems between the parties were caused by, as he termed it, "the defendant's compulsive jealousy". Some quarrels started in 1998 and afterwards in 1999. In 1998 when the situation got unpleasant between them to an extent that he approached his legal practitioner for the purpose of selling the disputed property and sharing the proceeds thereof, equally.

The defendant pleaded with him not to sell the property. She suggested that they try to make up and remain good friends. Thereafter the situation did not improve. It instead got worse as the defendant had become very rude to his children. In October 2000 he went to the house and found defendant's friend Mr Linnel there and things came to a head. As the value of the property at the time was about six million dollars he suggested to the defendant that he was offering her two million dollars for her share and interest in the property. The defendant declined. He moved some of his property to

a friend's house. He then went and told the Police as he intended to go overseas for a while. He went to the house and saw a man in her bedroom. He called the police and they came and took away the man to the Police Station. Two days later he got to the house and found the same man in the defendant's bedroom. The defendant said she allowed him to come and she and her son attempted to beat him up. He once more called the Police but by the time they arrived he had run away. He went overseas and when he returned he discovered that the gate's remote control had been changed and his gate lock could not open the gate. The defendant later came to the property with the police and served him with a court order but he initially refused but later accepted it when he was served by the Police. The order was granted when he was out of the country. He opposed the order and nothing has happened since then.

Under cross-examination he admits that he is a rich man but said he is not wealthy. He admits owning a Mercedes Benz 260E, a Mitsubishi Pajero, Nissan Sunny, Toyota Hilux, four trucks with trailers, owning premises where he operates a factory from another house with title deeds in his name. The house is paid up and has no incumbents. He stated that since the interdict he stopped his contributions towards the bond repayments. He felt that as the defendant was staying in the property she should pay the bond. He stated that he did not know whether the notarial deed was registered against the title deeds of the disputed property. In the event that the property is sold he is willing to pay the half share of the Capital Gains

Tax. He stated that the current value of the property is thirty-five million dollars.

Jonathan Mpandanyama

He is an employee of the City of Harare who is an architect. He drew the plans for the improvements. He first met the plaintiff who later introduced him to the defendant. Both parties showed him around and told him what they had in mind. He went to the property several times. On some occasions he was attended to by the plaintiff. On other occasions he was attended to by the defendant. There were also instances where he found both parties. Under cross-examination he concedes that he is not a registered architect but hat he is an architectural technician. He did the work for the parties in his spare time as he was employed by the City of Harare at the time. He, however, stated that he was contracted by the plaintiff to carry out the work of drawing the improvement plan.

Assessment of evidence

In my view the credible evidence is that the defendant signed the notarial deed in order to achieve peace in the parties relationships. She did not tell the plaintiff about her objective in signing the deed. On the other hand the plaintiff wanted the notarial deed as a form of security as the parties were not legally married and he was injecting quite a fortune in the improvement of the property.

The defendant's evidence is that she signed the deed under circumstances of duress because the plaintiff was badgering and embarrasing her. She knew at the time that performance on the deed

was not possible on account of the fact that the deed was not executed or attested by the Registrar of Deeds. This is a requirement in terms of the Deeds Registries Act Chapter 20:05. In terms of this Act, registration is normally required for the derivative acquisition of ownership of or limited real rights to land. The Act also imposed, *inter alia,* a duty on the registrar to keep such registers containing such particulars as are necessary for the purpose of maintaining an efficient system of registration. There is no question of passivity of the registrar. In principle a registered owner can only transfer his right of ownership to another person by means of registration. Land is a scarce and important resource. Acquisition of its ownership requires stringent regulation. In the circumstances, I support the unqualified application of the registration principle despite apparent contrary views evinced from common law authorities - **Grotius** 2.32. 2 and **Van der Keesel Praelectiones** ad Cr 2.32.3 - see also "The Law of Property" by H Silberberg and J Schoeman (2nd Ed) page 206.

I agree that our law does not have any explicit or active form of guarantee of title. Our law does not seem to provide an implied warranty of indefensibility either. The requirement of registration in the Deed Registries serves to reduce the likelihood of fraud or error and as a result enhances the operating efficacy of the system and the security of registration "The Acquisition and Protection of Ownership" by Carey Miller pages 173/4 and *Standard Bank van SA* v *Breitenbach* 1977(1) SA 151 (T) and *Breytenbach* v *Frankel & Anor* 1913 AD at 401. The Supreme Court has stated that the registration of rights in

immovable property in terms of the Deeds Registries Act is not a mere matter of form. It is a matter of substance - it conveys real rights upon those in whose name the property is registered - *Takafuma* v *Takafuma* 1994(2) ZLR 103(S).

A *dictum* of HOEXTER JA in *Frye's (Pty) Ltd* v *Ries* 1957(3) SA 575(A) at 582A, is instructive -

> "As far as the effect of registration is concerned, there is no doubt that the ownership of a real right is adequately protected by its registration in the Deeds Office. Indeed the system of land registration was entered for the very purpose of ensuring that there should not be any doubt as to the ownership of the person in whose names real rights are registered. Theoretically no doubt the act of registration is regarded as notice to all the world of the ownership of the real right which is registered. That merely means that the person in whose name a real right is registered can prove his ownership by producing the registered deed. Generally speaking no person can successfully attack the right of ownership duly and properly registered in the Deeds Office. If the registered owner asserts his right of ownership against a particular person he is entitled to do so, not because that person is deemed to know that he is the owner but because he is in fact the owner by virtue of the registration of his right of ownership".

Further in *Milne N O* v *Singh NO & Ors* 1960(3) SA 441 (D) at 449 F CANEY J stated -

> "---our system of registration is, in general, a guarantee to a transferee that all is well".

From the foregoing it is clear that the notarial deed did not comply with formalities required by the Deeds Registries Act. The notarial deed was not validly contracted on account of non-compliance with the Deeds Registries Act. It is trite that for creation or formation of a valid contract certain absolute requirements must be complied with : there must be agreement or consensus between the parties, the

parties must have the capacity to contract, the performance on which they agree must be possible and lawful and prescribed formalities, if any, must be complies with.

The Deeds Registries Act lays down that registration is required for the derivative acquisition of ownership of a limited real rights to land. *In casu*, there is no registration of joint ownership of the land in line with the contents of the notarial deed. In the final analysis the inescapable conclusion is that according to the Deeds Registries the property is the sole and absolute ownership of the defendant. No extrinsic evidence may be adduced by the plaintiff to contradict, vary or add to terms of the registration in the circumstances of this case. Even without making a finding whether there was undue influence by the plaintiff on the defendant I therefore find that the notarial deed was not validly contracted.

There is no marriage between the parties and as such this finding alone impacts greatly against the plaintiff's claim. His claim is not sustainable *ex contractio*, based either on a marriage relationship or the notarial deed. It does not seem that his claim is *ex delicto*. Damages are usually associated with contractual and delictual liability. Delictual liability may also be interpreted to include liability without fault or liability based on risk. It is, however, trite that liability for unjust or enrichment is allowed in competition of patrimonial loss if certain requirements are met - *BK & Tooline (Edms) Bpk* v *Scope Precision Engineering (Edms) Bpk* 1979(1) SA 391(A) at 436 and "Law of Damages" by P J Visser and J M Potgieter at page 5.

Unjust enrichment at the expense of another is a generic conception of the composite event which gives rise to a claim for restitution. There is a Roman root for the claim of undue enrichment. The "Digest" preserves two versions in fragments excepted from Pomponius. In one he says -

> "*cumalterius detrimento* - i.e. this is indeed by nature fair, that nobody should be made richer through loss to another".

In another, he says:-

> "*cum alterius detrimento et injuria* i.e. it is fair by the law of nature that nobody should be made richer through loss and wrong to another".

There are three mechanisms against unjust enrichment, *viz*, deterrence, anticipation and reversal. Reversal is the only one relevant to the facts *in casu*.

The doctrine of unjustified enrichment applies when a person is enriched through the acquisition (in a legal rather than factual sense) of an asset without adequate justification, for example the existence of a valid contact. In certain strictly delineated circumstances the law requires the person so enriched to disgorge the benefit. The doctrine of unjust enrichment, like *negotirum gestio*, reveals that the courts are disinclined to intervene where liability has neither been voluntarily assumed nor incurred by the commission of a wrongful act. In limiting liability and, in particular, in discouraging unsolicited assistance to others, the individualistic values of the classical law of contract which purports to emphasize freedom and equality are

asserted - "Farlam and Hathaway : Contract Cases, Materials and Comment" (3rd Ed) by G F Lubbe and C M Murray at pages 1 - 2.

In *A M Bennett (Private) Limited* v *H O Wilsenach & Co (Pvt) Ltd* 1972(2) RLR 175 (GD) at 177 E-G MACAULAY J aptly stated the operation of the doctrine as follows -

> "---There is no general action based on enrichment. *Nortje & Another* v *Peel N.O.* 1966(3) SA 96. To succeed, the plaintiff must bring its claim within one or other of the recognized *condictiones*. This, in my view, it is unable to do. In *Govins* v *Jester Pools (Pty) Ltd* 1968(3) SA 563 at 573 JANSEN J, considered various authorities on unjust enrichment and referred with approval at F to H to a passage in Professor Lee's 'Introduction to Roman-Dutch Law' (5th ed) pp 347 to 348. It is clear from that passage that enrichment is not without just cause, if it is, permitted by law. Nor is it unjust if it is the consequence of a contract".

The Court will, however, assist parties to an "invalid" contract where justified by considerations of equity and justice - *Wakefield* v *A S A Seeds (Pvt) Ltd* 1976(2) RLR 63' *Ntini* v *Masuba*, HB 69-03 and *Muringaniza* v *Munyikwa* HB 102-03. In *Wakefield* v *S.S.A. Seeds (Pvt) Ltd* GOLDIN J aptly captured the doctrine at page 70 D-H as follows -

> "----Moreover, members can become entitled to claim payment on the basis of the doctrine of unjust enrichment. The Court will come to the aid of a party to an invalid contract where considerations of justice and equity justify the prevention or avoidance of enrichment by one party at the expense of the other. In *Havman* v *Nortje* 1914 AD 293, INNES, JA, said at 302-2:
>
> > 'Turning now to our own law, we find the doctrine well established that no man may enrich himself at the expense or to the detriment of another'.
>
> Its general operation lies outside the realm of contract, and its most frequent application relates to cases where improvements have been made by a possessor of land. But it was used in *Rubin* v *Botha* (1911 AD 568) to prevent enrichment which had its origin not in possession but in an agreement which the parties believed to be binding, but which turned out to be invalid. And there is no reason in principle why it should not be

> similarly employed where the enrichment would follow in consequence of a contract but would not be covered or contemplated by it."

It has been held that money lent by a company in terms of a void transaction could be recovered from the borrower to the extent of the unjustified enrichment (*Crispette and Candy Co Ltd* v *Michaelis N O & Anor* 1948(1) SA 404 (W) at 408) YOUNG J, analysed the authority in great detail and concluded in the case *cf Lodce* v *Modern Motors* 1957(4) SA 103 that

> "the enrichment principle applied where a provision in the Hire Purchase Act rendered the contract between the parties a nullity. (See also *Amalgamated Society of Woodworkers of S A* v *Die* 1963 *Ambagsaalvereninging,* 1967(1) SA 587(T) at 596; *Noorjie en 'n Ander* v Pool N.O 1966(3) 96".

In *Industrial Equity* v *Walker* 1996(1) ZLR 269 (H) BARTLETT J admirably dealt with the issue of unjust enrichment and stated at pages 296H-297D -

> "I am satisfied that, echoing the words of VAN ZYL J in *Blesbok Elendomsagentskap* v *Cantamessa supra* (1991(2) SA 712 (T)), the time has indeed arrived for recognising the general enrichment action as it existed in our common law. I am of the view that the detailed research and analysis of the Roman Dutch writers, particularly as encapsulated by SCHOLTENS in 'The General Enrichment Action That Was' (1966) SALJ *supra*, and VAN ZYL "The General Enrichment Action is Alive and Well'. *Acta Judicata* 1992 *supra*, establishes that the general enrichment action had developed in the Roman-Dutch Law by the 18th Century. (See also Lotz Lawsa Vol 5 p 46; Weeramantry 'The Law of Contract Vol 2 1025 and van Zyl '*Negotiorum Gestio* in the SA Law 85)'
>
> It is accordingly my most respectful view that the majority decision in *Noortje* v *Pool supra* was incorrect in stating that our law does not regard the rule against unjust enrichment as creating a legal obligation independently of one or other recognized enrichment action and regardless of particular circumstances. I am of the view that if the full research as particularised in the articles to which I have referred had been before the Court in *Noortje's* case that a contrary decision would

> have been reached---. I am satisfied that the correct view of the law is as stated by RUMPFF JA in the minority decision in *Noorjie's* case.
> I am also accordingly with the utmost defence respectfully of the view that the upholding of the majority decision to *Noortje* v *Pool* by this court in *Polwarth & Company (Pvt) Ltd* v *Zanombair & Ors* 1972(1) RLR 112 (G); *Skywalk (Pvt) Ltd* v *Peter Scales (Pvt) Ltd* 1978 RLR 416 (G) and *Guthrie Overseas Investment* v *GMHL Holdings (Pvt) Ltd* HH 554-87, was incorrect".

The learned judge held that the recognition of the existence of a general action of unjust enrichment in our law will not open floodgates for judicial intervention whenever the distribution of property does not seem to be consonant with equity. The requirements for liability for this action would have to be present and the courts can further control the ambit of this action by exercising a discretion to circumscribe liability according to the general sense of the justice of the community and the legal convictions of society. The requisites for liability for this action are:

(a) the defendant must be enriched;

(b) the plaintiff must have been impoverished by the enrichment of the defendant;

(c) the enrichment must be unjustified;

(d) the enrichment must not come within the scope of one of the classical enrichment actions; and.

(e) There must be no positive rule of law which refused an action to the impoverished person - see also *Kommissaris van Bimelandse Inkomste en 'n Ander* v *Willers en Andere* 1994(3) SA 283(A), I agree with BARTLETT J with an addition that this principle can be traced even in Roman Law as shown in the

excerpts by *Pomponius supra*. This view received further support in *Jongwe* v *Jongwe* 1999(2) ZLR 121 (H). At page 130F-G GILLESPIE J stated:

> "BARTLETT J in *Industrial Equity* v *Walker* 1966(1) ZLR 269(H) has given the law precisely that general action for which jurists in Southern Africa have been pressing --- The elements of that action, as the learned judge defined thereon, seem to be apposite to the case of the wife at customary law, to whose property rights the general law applied. Where she has made a contribution that impoverishes her and will leave the husband enriched at her expense under the existing law, this I would suggest then there be extended to her an action based upon that unjust enrichment."

From the credible evidence in this case I am satisfied that all the requirements for an action of unjust enrichment are satisfied. The defendant was enriched by the vast improvements on the disputed property with the plaintiff being correspondingly impoverished. There is no justification for the enrichment. The other two requisites are also satisfied.

The plaintiff seeks an order that the property be sold and the nett proceeds be shared equally between the parties. Is there any justification for this type of prayer? I think so. Authority is found in *Rubin* v *Bellina supra* where the action was used in an agreement which the parties believed to be binding, but which turned out to be invalid. I will do so because consideration of justice and equity justify the prevention or avoidance of enrichment of the defendant by the plaintiff. There is no justification for such enrichment from the evidence before me. The plaintiff's claim must therefore succeed and the defendant's claim in reconvention fail.

It is accordingly ordered:-

1. That the defendant shall pay to the plaintiff an amount equivalent to fifty *per centum* of the present nature of the immovable property known as Stand 91 of Kensington Estate , Salisbury District, also known as Number 19 McLoughlin Road, Avondale, Harare within three months of this order;
2. That should the defendant fail to comply with the provisions of paragraph 1 *supra*, it is ordered that the same property be sold to the best advantage and the nett proceeds divided equally between the parties;
3. That defendant's claim in reconvention be and is hereby dismissed;
4. The defendant shall pay the plaintiff's costs of suit.

***Byron Venturas & Partners*, legal practitioners for plaintiff**
***Lofty & Fraser*, legal practitioners for defendant**