FLORENCE NYANDORO
and
LATE ESTATE BENARD NYANDORO
vs
MAX NYANDORO
and
ESTATE LATE NELSON NYANDORO
and
THE MASTER OF THE HIGH COURT
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE 21, 22, 23 and 24 July and 16 October 2008

FAMILY LAW COURT-DECEASED ESTATES ACTION

S. Mugadza, for the plaintiffs
S. Gahadzikwa, for 1st and 2nd respondents

KUDYA J: The first plaintiff is the widow of the late Benard Nyandoro while the first defendant is the son of the late Nelson Nyandoro. Bernard was the elder brother of Nelson. The tussle in the present matter is between the first plaintiff and her nephew, the first defendant, over the ownership of Stand Number 748 – 3rd Street Hatcliffe (748) in Harare. This immovable property was purportedly acquired and developed by Bernard but was registered in the name of Nelson. Nelson never resided at this property. He lived with his wife and children at another house in Hatcliffe that was registered in Benard's name. On completion of the immovable property, Bernard lived at this house with his family and after his death his wives and their children continued to and still reside on this property.

The first plaintiff claims that it was her husband's property while the first defendant maintains that it was his father's property.

In a bid to prove her claim, the first plaintiff gave evidence and in addition called the evidence of four witnesses. She produced five documentary exhibits. The first defendant also testified and called the evidence of one other witness and produced three documentary exhibits.

The first and second defendants raised two preliminary issues on the first day of hearing. These were filed on Friday 18 July 2008 and were only received by plaintiffs' counsel on the day of hearing. In view of the late notification and in a bid to avoid a postponement, I

directed that the preliminary issues be argued at the conclusion of the trial together with oral submissions. The preliminary issues were on the plaintiffs' *locus standi* and prescription. In this judgment I will deal with the evidence first and then proceed to consider the preliminary issues.

The first plaintiff told the court that she married her late husband on 14 April 1978. At that time he worked for Pomona Stone Quarries. He died on 8 July 1998.

He first acquired an undeveloped 300 square meter stand number 632-12th Street (632) in Hatcliffe in Harare and had it registered in his name. She assisted him develop this stand. They moved from the accommodation provided by the employer to the stand in 1986. They stayed at that property with Nelson who paid rentals for the three rooms he utilized to his brother Benard. Benard proceeded to buy stand 748- 3rd Street from Jonathan Maximillian, a soldier based at Pomona Barracks. It was much bigger and able to accommodate his fleet of lorries. He had it registered in Nelson's name to circumvent a policy of the municipal authority which did not permit one person to hold more than one stand in its jurisdiction. The agreement of sale indicated Nelson as the purchaser. She produced the title deeds of the property of 21 August 1992 as exhibit 1, which show Nelson as the owner. Exhibit 2, a letter written by the conveyancers on 1 September 1992 to Benard confirmed that the immovable property had been transferred into Nelson's name.

At the time Nelson was employed as a policeman with the Support Unit. She produced exhibit 3, consisting of five sets of receipts dated 29 January 1990; 25 March 1994; 8 July 1994; 10 April 1995 and 23 October 1996 in a bid to demonstrate that Benard developed the stand. The receipts were for the purchase of steel doorframes, pre-cast walling, plumbing materials, tiles and gypsum used at the immovable property in question. All the receipts were in the name of Mr. Nyandoro. They did not show whether it was Benard or Nelson who purchased the items or even whether they were purchased for Benard. There are two receipts in the name of Benard attached to that of 9 July 1994 the first dated 26 May 1993 issued by the conveyancers and the other dated 5 October 1994 from Zimtile for the payment of tiles. She retrieved these receipts from Micas Mashovedzanwa, a son to Benard's sister, who has been the custodian of his briefcase since his death. This nephew has lived with the family since his Form 1 days. He still operates what remains of Benard's once flourishing transport business.

She stated that the transport business was a partnership between one Robert Mashovedzanwa and her late husband. Nelson was not involved in the partnership.

In 1990 she relocated with her husband to 748 and left Nelson at 632. Nelson died on 22 January 1995. Benard took first respondent under his roof and wing and administered the estate of Nelson. Nelson never laid claim to this house during his lifetime. Nelson's estate received a stove, sewing machine, a Mazda vehicle and the property in dispute.

The new house was the better property. It was tile roofed and had ceiling. She could not countenance the house that she contributed in building being awarded to a child who was looked after by Benard. She produced exhibit 4, a letter dated 6 April 1990 written by Benard to the owner of an abutting property requesting his contribution to the construction of a durawall. In the letter he referred to 748 as "my property". She further produced the City of Harare Building Inspection report issued on 2 June 1994 which traced the history of approvals of the various construction stages until 16 November 1994. She attributed these to Benard. While she contributed financially in building 632, she did not pay a cent in the construction of 748. She used to grow and sell vegetables and knit doilies which she sold to buy food at 748.

Under cross examination, she revealed that 632 had been transferred to her from her husband's estate as was the undeveloped stand in Marlborough. The property in Chivhu was repossessed after they failed to develop it in the set time frame. Her husband's second wife Ekenia Gamadze did not receive anything from their husband's estate. She stated that the partnerships' assets were yet to be distributed. She stated that while the company was registered in 1995, the partnership commenced in 1984. Benard bought a non-runner vehicle at that time which he repaired and used for business. She denied that the partnership was formed in the 1970s. She disputed that Nelson was one of the partners. She was adamant that Benard injected $3 000.00 while Robert put in $800.00 to kick start the partnership business. She disputed that Nelson contributed his demobilization funds as a liberation war fighter in the business. She painted him as an irresponsible man who survived on the largesse and goodwill of her husband.

She said the construction of 632 was funded through soft loans from Benard's employer.

On 748, though she maintained that it was sold to Benard, the agreement of sale, exhibit 6 indicated that Nelson executed it with Jonathan Maximillian on 19 September 1989. He denied that the brothers agreed to buy an immovable property for each one of them from the funds generated by the partnership such that Benard received 632 and Nelson 748 while the Marlborough stand was purchased for Robert.

She agreed, as recorded in exhibit 7 that after the death of Nelson and on 13 September 1995 Benard was appointed the guardian of first defendant while the first defendant was made the heir to Nelson's estate by the Harare Community Court. She was not aware that Higson Hamandawana was appointed the executor dative of Nelson' estate and that he on 22 January 1996 submitted to the Master exhibit 8, the First and Final Liquidation and Distribution Account of Nelson's estate which lay for inspection between 9 February and 1 March 1996 and was approved on 21 May 1996. Exhibit 8 indicates that the property in dispute belonged to the late Nelson. It was valued at $250 000.00. Nelson also owned a Mazda B1600 valued at $10 000.00 and cash of $41 465.61 in a POSB account. After paying the expenses of the estate, the executor awarded the immovable property in dispute, the Mazda B1600 and cash of $17 201.83 to the first defendant. His account was approved by the Master at the High Court on 21 May 1996. She stated that to her knowledge, Benard was the one who paid the executor's fees. She accepted that as the guardian of first defendant Benard must have been instrumental in the drawing up of the liquidation and distribution account.

It seemed to me that her assessment of Nelson as an irresponsible drunkard was not borne out by the distribution account.

It emerged from her account that Robert benefited from the partnership through truckloads of fertilizer that were sent to him each farming season.

Emmanuel Makoni was the next witness who testified on behalf of the plaintiffs. He was a close friend of the late Benard who worked for the Harare City Council from 1985 until his retirement in 2007. He met Benard in 1986 in Hatcliffe. He lived with, amongst others, Nelson. Benard bought the stand in question because it was big enough to accommodate his transport business. He put a wall around it and commenced construction. He registered it in Nelson's name because he owned another property and was aware that the Urban Councils Act did not permit him to hold two properties within the jurisdiction of the City of Harare. To the witness' knowledge the property was purchased for Benard's children. He believed that Benard was a sole operator who did not have partners in the transport business.

He was certain that Nelson was not involved in the business as he had a drinking problem. He alleged that Benard used to ask him to counsel Nelson while the first plaintiff used to provide food to Nelson's wife. He stated that he advised Benard to transfer the property into his son's name before and after Nelson died but he never came round to do so. He attributed his lack of urgency to his limited education.

He was not aware that Nelson paid rent to Benard nor that Benard bought him a car nor that he was in partnership with Robert. He believed that the transport operation belonged to Benard. He was not aware that Benard instructed a law firm to draw up the agreement of sale and title deeds of the property in favour of Nelson. He was not aware that Benard was appointed guardian to first defendant and that first defendant was made heir to Nelson's estate in which the house belonged. His lack of knowledge on all these things undermined his attempt to paint himself as a close family and ritual friend of Benard.

The next witness Rosemary Mujuru was positive that Benard purchased 748 for his minor children and to accommodate his fleet of lorries. She was his secretary at the time that he was a district chairman of ZANU PF in the Hatcliffe area. She came to rent 632 in 1991 and came to know Nelson as a good for nothing unemployed drunkard who survived on his brother's largesse. Nelson also lived at the house and paid rent to Benard. She used to help out Nelson's wife with mealie-meal. She believed that 748 belonged to Benard and not to Nelson. She lacked detail on the arrangements between Nelson and Benard. She was uneasy in the witness box and behaved as if she had been told what to say. This was apparent as she gave her evidence in chief. She was assisted by the leading questions that were put to her. Under cross examination she exhibited scanty knowledge of the transactions that Benard entered into.

The next witness Christina Christmas Gonorenda was an aunt to both Nelson and Benard by virtue of the fact that she shared the same totem with Benard's mother and hailed from the same communal land with them. Nelson and Benard were half brothers who shared one father but had different mothers. Her direct nephews were Benard, John and Robert. She only came to know Benard when he started staying at 632 because she and her husband had also bought a property in the area. Benard then purchased 748 to park his fleet of lorries. She knew Nelson as a lazy policeman who disliked work. Benard bought the property in Nelson's name to circumvent council policy against acquisition of rights in two or more properties in its local area. He knew that the partners in the transport business were Benard and Robert.

She was not aware of the manner in which Benard handled the estate of Nelson. She believed that he was the owner of 748. She was not aware of the agreement between the brothers to use the proceeds of the partnership to buy undeveloped stands for themselves. She was not aware that Benard was appointed the guardian of the first defendant after the death of Nelson.

The last witness for the first plaintiff was Agnes Price. Her husband worked with Benard at Pomona Stone Quarries from the time that both were bachelors. She knew how

Benard came to own 632, build a transport business and purchase and develop 748. He registered it in Nelson's name but had beneficial use of the property. Nelson never stayed at this residence. She stated that she used to overhear Benard talk with her husband about his business affairs.

Under cross examination she revealed that her husband was still alive but was indisposed due to a stroke. She could not answer as to why after the death of Nelson Benard never attempted to rectify the title of the property in issue. She alleged that he borrowed building materials from his chief executive officer at Pomona Quarries to develop both stands, contrary to the testimony of all the other witnesses. She said Florence used to collect rent from Nelson, an averment that was never made by Florence herself.

The Benard who emerges from the evidence is a man who was at peace with his brother and who did not separate his proprietary interests from those of his brother. He looked after his brother and his family. He became the guardian of the first defendant and thus became the "father" of the first defendant. He had the power to claim the property from Nelson's estate but did not do so. It seems to me that he recognized the property as Nelson's. The basis appears to be found in the partnership. The evidence deposed on behalf of the plaintiffs does not show that the property belonged to Benard. Rather it paints Nelson as the owner.

For his part the first defendant gave evidence and called the evidence of his uncle John Nyandoro. He was born on 9 June 1985. His father died when he was in grade 4. In a family meeting held in 2006 to discuss the property of the partnership with the first plaintiff, John and Robert, it was revealed to him that some property which was purchased with partnership funds was registered in the names of the three partners, that is, Robert, Benard and Nelson. The property in Robert's name was given to his children while that in Benard's name went to the first plaintiff. Nelson's children received nothing. He sought an explanation from his aunt and uncles present. Robert then narrated the history of the partnership from its formation up to 2006. It was to the effect that Benard received 632, Nelson 748 while Robert rejected the Marlborough stand and opted to live in the rural area. Micas reluctantly handed to him exhibit 1. He also obtained the liquidation and distribution account and the certificate of heir from the Master, which is exhibit 7 and 8 which confirmed the property that belonged to Nelson on his death. He simply wanted his father's property registered in his name. He abandoned his claims for rentals and eviction of Florence. He accepted that his father was a drunkard but denied that he was irresponsible by citing his impeccable credentials as a liberation war hero who helped

liberate our country from the yoke of racist minority rule. It was clear to me that his father may have had his faults but he left a sizeable estate which showed him in good light and painted him as a prudent and industrious man.

Under cross examination he accepted that he was not yet born when 632 was acquired and developed. He was a toddler when the partnership became operational. He only knew what he was told by Robert and John in the presence of the first plaintiff and other family members. The story was confirmed by the documents that were at hand. He could not explain why Nelson chose to lived at 632 with lodgers while Benard lived at the more luxurious property. He attributed it to the filial love that existed between the two brothers. Benard had two wives and many children while his father had one wife and three children. Benard also ran the transport business and the brothers may have agreed that he stay at the bigger property where the lorries were kept.

The first defendant's story was confirmed to the hilt by his uncle John Madimura Nyandoro. He is the eldest brother in Robert and Benard's family and is a half brother to Nelson. He stated that his three younger brothers Robert, Benard and Nelson formed a partnership. The witness was called from Gweru where he operates from to witness the arrangement. The three partners at first bought one vehicle and proceeded to buy a second one during that month. They also through a hire purchase scheme with UDC purchased another. As their business prospered they purchased more vehicles. They also used the proceeds to buy 632 for Benard and 748 for Nelson. Benard occupied 748 in agreement with Nelson because he had two wives and a large brood of children. That is how he moved to the bigger house.

He emphasized that Nelson was a war liberation hero who joined the police force from where he retired on medical grounds before he passed on. On Nelson's death Benard registered Nelson's estate through a legal practitioner Higson Hamandawana. Benard also fell ill and died in 1998. The witness stated that Nelson's house should go to his heir, the first defendant.

He stated that the Marlborough stand was purchased for Robert but he declined it in favour of a farm. The farm found for him in Guruve was not purchased because it had no title deeds. He stumbled across the Chivhu stand after the death of Benard.

He denied that 748 was put in Nelson's name to circumvent council policy.

He confirmed the first defendant's evidence that a family gathering was held to discuss the distribution plan of Benard's estate at the request of Patya, the executor in Benard's estate. They also took that opportunity to discuss the property in question. The only dissenting voice

about transferring it to first defendant came from first plaintiff. He denied that Nelson ever paid rent to Benard. He insisted that the Mazda vehicle was bought by Nelson who received a top up from the partnership. He denied that it was bought for him by Benard.

The witness was cross examined. He maintained his evidence in chief. It became clear that attempts to portray him as an enemy of first plaintiff were futile. He was close to his young brothers who confided in him about the formation and operations of their partnership. His failure to recall the minute details about the partnership did not detract from his general knowledge about its existence and operations. He painted both his brothers as selfless and loving persons who had the greater good of the family at heart. He was adamant that Benard was aware that 748 belonged to Nelson.

In my view, the evidence led by both parties demonstrated that the house belonged to Nelson. The actions of Benard after the death of Nelson confirmed this fact. Benard was instrumental in having the house registered in Nelson's estate. He took no measures to have it transferred to him. At the time the estate was registered, he could have been appointed an heir and transferred the property to himself. He dealt with legal practitioners who could have advised him to this effect. The fact that he was content to be appointed guardian only demonstrated that he was not a greedy man. I found myself convinced that John told the truth unlike the witnesses called by the first plaintiff who for reasons of friendship gilded the lily in a bid to appease her.

On the evidence led, I find that first plaintiff has not demonstrated that the property belonged to Benard. Rather the evidence shows that it belonged to Nelson. Registration of title is not a mere formality but confers real rights to the holder. See *Takafuma v Takafuma* 1994 (2) ZLR 103 (SC) at 105H-106A.

Mr. *Gahadzikwa*, for the first defendant and second defendant, raised two preliminary issues at the commencement of the trial. He submitted that the 2nd plaintiff was improperly before the Court and that in the absence of letters of administration could not be represented by 1st plaintiff. The second was that even if one or both had *locus standi*; the claims for transfer were prescribed.

Mr. *Mugadza*, for the plaintiffs, conceded that the 2nd plaintiff was not before the Court, as no executor had been appointed for the Estate Late Benard Nyandoro. He however contended that the 1st plaintiff had *locus standi* to represent her interests in the matter. On

prescription he submitted that as the issue concerned the transfer of land and not a debt, it could not be prescribed in the time frame contended by the first and second defendants.

I agree with both counsel that the second plaintiff is not before this Court. In our law, in terms of section 25 of the Administration of Estates Act, a deceased estate is represented by an executor or executrix duly appointed and issued with letters of administration by the Master. In *Mhlanga v Ndlovu* HB 54/2004, NDOU J stated as follows:

> "The executor of an estate has certain rights and powers in connection with the liquidation and administration of the estate and also certain duties to perform. What they consist of is to be found both in common law and the Administration of Estates Act, *supra* – and *The Law and Practice of Administration of Estates* (5th Ed) by D Meyerowitz at page 107 and *Fischer* v *Liquidators of Union Bank* 8 SC 46. What must be noted is that the applicant, as executor, is legally vested with the administration of the estate. He is not a mere procurator or agent for the heirs. In *The Law and Practice of Administration of Estates, supra* the learned author correctly observed on page 123 – "A deceased estate is an aggregate of assets and liabilities and the totality of the rights, obligations and powers of dealing therewith, vests in the executor, so that he alone can deal with them. He has no principal and represents neither the heirs nor the creditors of the estate …" – *Malcomess NO* v *Kuhn* 1915 CPD, *In re Brown* 7 SC 237; *CIR* v *Emary NO* 1961 (2) SA 621 AD and *Goosen* v *Bosch and The Master* 1917 CPD 189."

In *Clarke v Barnacle NO & Two Ors* 1958 R&N 358 (SR) at 349B -350A MORTON J stated the legal position that still obtains to this day in Zimbabwe. It is that "whether testate or intestate, an executor, either testamentary or dative, must be appointed…..so that the executor and he alone is looked upon as the person to represent the estate of the deceased person." He left no doubt that towards the rest of the world the executor occupies the position of legal representative of the deceased with all the rights and obligations attaching to that position and that because a deceased's estate is vested in the executor, he is the only person who has *locus standi* to bring a vindicatory action relative to property alleged to form part of the estate.

Arising from the nature of a deceased estate as described in *Clarke v Barnacle, supra,* and *Mhlanga v Ndlovu, supra,* it must follow that the citation of a deceased estate as a party to litigation is wrong. The correct part to cite in lieu of the deceased estate is the executor by name. The citation of the second plaintiff and second defendant *in casu* was therefore improper and incurable. It makes there presence before me a nullity.

In the absence of letters of administration the first plaintiff could not represent her husband's estate as she purported to do in the present matter. I am satisfied that the second plaintiff is not part of these proceedings.

The next issue that presents itself is whether she, as the widow, has the legal interest to sue for the immovable property in question on the basis that she was a part owner of the property. She stated in her pleadings and her evidence that had the house been registered in her late husband's name, she would have been a part owner by virtue of her contributions to its acquisition and construction. In her testimony she averred that she did not directly contribute to either the purchase or development of the house but only made indirect contributions.

The position in our law is that property that is registered solely in the husband's name belongs only to him. See *Muswere v Makanza* HH16-2005, *Cattle Breeders Farm (Pvt) Ltd v Veldman (2)* 1973 (2) RLR 261 (AD), *Muzanenhamo & Anor v Katanga* 1991 (1) ZLR 182 (SC) and *Muganga v Sakupwanya* 1996 (1) ZLR 217 (S). We are here dealing with estate property and not the distribution of matrimonial property arising from divorce which would be governed by section 7 of the Matrimonial Causes Act *[Cap 5:13]*. It must follow that she would not have had *locus standi* to sue for such property in her own right.

The above findings would make it unnecessary for me to deal with the other issues that were raised. I however deal with these other issues on the basis that I might be wrong in the findings I have come to above.

The second preliminary point raised by Mr. *Gahadzikwa* was that even if the wife had *locus standi* her action was prescribed. He contended that the date of prescription ran, at the earliest, from the date of death of Nelson in 1995 and at the latest in March 1996 when the Master approved the distribution account for the transfer of the property to the first defendant. Her claims against Nelson's estate and the first defendant expired three years later, respectively. Mr. *Mugadza's* response was threefold. Firstly, he contented that a plea of prescription must be pleaded, secondly that it should be raised by way of a special plea and lastly that the first plaintiff's claim was not a debt but a claim for land for which prescription runs for 30 years.

Section 20 of the Prescription Act [*Cap 8:11*] states the manner in which prescription may be raised in legal proceedings. It reads:

20 Prescription to be raised in pleadings

(1) No court shall of its own motion take notice of prescription.

(2) A party to litigation who invokes prescription shall do so in the relevant documents filed of record in the proceedings:

Provided that a court may allow prescription to be raised at any stage of the proceedings.

In paragraph 6 of their plea, the defendants pleaded prescription. The first objection raised by Mr. *Mugadza* falls away. The second objection was that it had to be raised by way of a special plea. He relied on *Angelique Enterprises (Pvt) Ltd v Albco (Pvt) Ltd* 1990 (1) ZLR 6 at 9G where SMITH J quoted BAKER J in *Cordier v Cordier* 1984 (4) SA 524 (C) that " on the other hand it has been held that the issue of prescription should be raised by special plea and not by way of an objection to an amendment, as Mr. *Louw* has done here……Section 17 (2) provides that a party to litigation who invokes prescription shall do so in the relevant document filed of record in the proceedings. What is 'the relevant document filed of record in the proceedings?' The 1943 Act provided that a party who raised prescription had to do so in the pleadings (s 14 of Act 18 of 1943) and this has always been taken to mean in a special plea". At page 11B SMITH J agreed with these views.

Mr. *Gahadzikwa* on the other hand relied on *Hwaire v Mbare Development (Pvt) Ltd & Others* HH 105/2005 at page 4 wherein MAKARAU J, as she then was, held that the right to claim for transfer in terms of the agreement of sale is a debt in terms of section 14 of the Prescription Act [*Chapter 8.11*] and that the right prescribes three years after the cause of action arose. She relied on *Hodgson v Granger and Another* 1991(2) ZLR 10 (HC) where GREENLAND J, as he then was, reviewed the jurisdictional philosophy behind statutes of limitations, represented herein by the Prescription Act to come to the conclusion that prescription starts to run from that date when the creditor becomes aware of all the facts necessary to create the need to approach a court for relief. Hwaire issued summons in July 2004 when she became aware that her claim to transfer was under threat in June 2001. The second purchasers in that case pleaded prescription. The matter proceeded to trial and the issue was argued at the closure of trial. It did not proceed by way of special plea.

It does not appear to me that the failure to raise a special plea debars a litigant who has pleaded prescription from having its case resolved. Having pleaded it *in casu*, it seems to me that the defendant was within his rights to seek to curtail the trial on the basis of prescription.

The last point revolves on whether the plaintiff's claim is a debt as defined in section 14 of the Prescription Act. Section 2 of the Prescription Act defines debt in these terms:

" "debt", without limiting the meaning of the term, includes anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise."

Her claim for transfer of the immovable property whether based on a purported trust for her children or her contributions began to run at the latest when the distribution plan of Nelson's Estate was approved by the Master.

I accept Mr. *Gahadzikwa's* submission that her claim was prescribed.

I proceed to deal with the merits for completeness' sake since I allowed the adduction of evidence at the trial.

The onus lay on the first plaintiff to show that she acquired Stand 748. In her testimony, which was supported by four witnesses she testified that it was her late husband who purchased the stand. While she said she made no direct contributions to the purchase and development, Agnes Price stated that she used monies eked from her informal trade activities to help her husband in developing the property. It was clear that she did not contribute to the purchase and development of the stand in issue. Her allegations that it was registered, to her knowledge at the time, in Nelson's name to evade the municipal policy undermines her case as it runs foul of the clean hands policy raised *mero motu* by the Court in *Chikadaya v Chikadaya* 2000 (1) ZLR 343 (H). The principle is ingrained in our law that a court will not assist a litigant who has demonstrated a lack of probity or honesty in his or her dealings.

Mr. *Mugadza,* however, contended that this was a proper case for the application of the *pari in delicto* rule. He relied on the case of *Dube v Khumalo* 1986 (2) ZLR 103 (S). GUBBAY JA, as he then was, stated at 109D as follows:

> "There are two rules which are of general application: The first is that an illegal agreement which has not yet been performed, either in whole or in part, will never be enforced. This rule is absolute and admits no exception. See *Mathews v Rabinowitz* 1948 (2) SA 876 (W) at 878; *York Estates Ltd v Wareham* 1950 (1) SA 125 (SR) at 128. It is expressed in the maxim *ex turpi causa non oritur actio.* The second is expressed in another maxim *in pari delicto potior est condition possidentis,* which may be translated as meaning "where parties are equally in the wrong, he who has possession will prevail". The effect of this rule is that that where something has been delivered pursuant to an illegal agreement the loss lies where if falls. The objective of the rule is to discourage illegality by denying judicial assistance to persons who part with money, goods or incorporeal rights, in furtherance of an illegal transaction. But in suitable cases the courts will relax the *par delictum* rule and order restitution be made.

They will do so to prevent injustice, on the basis that public policy "should take into account the doing of simple justice between man and man".

GUBBAY JA relaxed the *par delictum* rule at p.110D on the basis that the plaintiff was not seeking to enforce an illegal agreement, that had been performed with the result that the municipality had been defrauded as the defendant girl friend had acquired rights in the stand without giving value for it while the man continued to pay for it. He agreed that the girlfriend acted as a nominee of the man with the result that he could recover his rights from her otherwise refusing him relief would result in her unjust enrichment at his expense. He entered judgment for him.

The first plaintiff does not appear to have been privy to her husband's partnership agreement with Nelson. Her assumption that there existed an agreement to defraud the municipality was based on her belief that Stand 748 was acquired, developed and occupied by her husband and the fact that Nelson never resided nor laid claim to it during his lifetime. The onus lay on her to show on a balance of probabilities that Nelson was a nominee.

I am not satisfied that she has discharged that onus in the face of the primary role made by her husband in registering the house in the estate of Nelson and passing it on to Nelson's heir. The actions of her husband and his failure to claim the property as his own demonstrated that the property did not belong to him. His actions rather confirm the version of his elder brother that the transport business was a partnership of the three brothers, that is, Robert, Benard and Nelson which they used to purchase and develop properties for their respective benefit. She has, therefore, failed to demonstrate that her husband acted to defeat a municipal policy or that even if he did so; he acted in connivance with Nelson. The case of *Young v van Rensburg* 1991 (2) ZLR 149 (SC), which Mr. *Mugadza* relied on is distinguishable from the present matter. Firstly, while Young was found to have been a nominee of van Rensburg, it was not proved that Nelson was a nominee of Benard. Secondly, while Young did not pay value for the farm, Nelson purchased the property and developed it from his share of the proceeds generated by the transport partnership. The first plaintiff has not shown that Nelson was unjustly enriched at the expense of Benard in the light of the existence of the partnership. The question of damages against Nelson's estate does not arise for determination, but even if it did these were neither quantified nor proved.

Clearly, the plaintiff's claim would also fail on the merits.

In his evidence, the first defendant abandoned his claim for eviction and rentals and thus his counterclaim in its entirety. There does not appear to be any legal impediment in his quest to have the property in issue transferred to him from his father's estate. He would have to put that process in motion. I will dismiss his counterclaim on the basis that he abandoned it in his evidence.

The first defendant has won. Cost must follow the cause.

Accordingly, it is ordered that:

1. The first plaintiff's claim be and is hereby dismissed
2. The first defendant's counterclaim be and is hereby dismissed.
3. The first plaintiff shall bear the first defendant's costs for both the claim in convention and the counterclaim.

Madanhi, Mugadza & Co. Attorneys, plaintiff's legal practitioners
Gahadzikwa & Mupunga, 1st and 2nd defendants' legal practitioners.