CITY OF HARARE
versus
BRICKSTONE BUILDERS AND CONTRACTORS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
DEMBURE J
HARARE; 25 & 26 February, 10, 12 & 28 March & 29 May 2025

Civil Trial

C. Kwaramba, for the plaintiff
C. Ushe-Bwititi & *G. Madzoka*, for the defendant

DEMBURE J:

INTRODUCTION

[1] The matter is an action instituted on 2 October 2023 against the defendant, Brickstone Builders and Contractors (Private) Limited, cited as the first defendant and eleven other defendants. The other defendants were Tsungai Mudamburi, Tracy Nyasha Ganiza, Benard Shadaya, Tizirai Chipato, Joshua Chidzoba, Gift Vharisai, Eli Masvingo, Ngonidzashe Gwaziwa, Norman Msipa, Christopher Mpepoimba, and Phinias Rwodzi cited therein as the second to twelfth defendants respectively. The plaintiff's claim is for the following relief:

> "(a) An order ejecting Defendants and all those claiming occupation through them from Stand 19156 Salisbury Township Lands (Municipal Plot) Registered Under Deed of Grant No. 10907 and also known as stands 18991-19042 Belvedere Township Harare.
> (b) An order authorising and directing the Sheriff of Zimbabwe or his lawful Deputy to evict the Defendants and all those claiming occupation through them from Stand 19156 Salisbury Township Lands (Municipal Plot) Registered Under Deed of Grant No. 10907 and also known as stands 18991-19042 Belvedere Township Harare, in the event of the defendants failing or refusing to vacate the premises within 7 days of the granting of the order in paragraph (a) above.
> (c) Costs of suit on a legal practitioner and client scale."

[2] On 12 December 2023, the plaintiff withdrew the claim against the second to the twelfth defendants. Only Brickstone Builders and Contractors (Private) Limited defended the claim and, following the withdrawal, remained the sole defendant before the court.

FACTUAL BACKGROUND

[3] The plaintiff is the City of Harare, a local authority established in terms of the Urban Councils Act [*Chapter 29:15*] (*"the Act"*). The defendant, Brickstone Builders and Contractors (Private) Limited, is a company duly registered in terms of the laws of Zimbabwe.

[4] It is common cause that the plaintiff is the registered owner of Stand 19156 Salisbury Township Lands (Municipal Plot) Registered Under Deed of Grant No. 10907 and also known as stands 18991-19042 Belvedere Township, Harare (*"the property" or "the land"*). This is the property subject to the dispute before me.

[5] It is also not in dispute that the defendant is in possession of the said property.

[6] The plaintiff's action is one for a vindicatory remedy commonly referred to as the *rei vindicatio*. The plaintiff averred that sometime in 2022, the defendant entered and took possession of its property. Further, that since then it had been constructing illegal structures, i.e without the consent, authority or approval of the plaintiff and has remained in possession of the said piece of land. It was also pleaded that the defendant has no lawful right to remain in possession and occupation of the property and that despite demand, it has neglected, refused and/or failed to vacate the property.

[7] The defendant opposed the claim. While it admitted that the plaintiff was the owner of the land, it contended that the plaintiff permitted it to occupy the land and carry out development work thereat. The defendant further admitted being in occupation of the property but denied that such possession is illegal. It further pleaded that it is occupying the property with the plaintiff's permission granted in November 2021. It also denied constructing illegal structures without the authority of the plaintiff. The defendant maintained that its occupation of the property is with the consent of the plaintiff, and accordingly, lawful. The defendant prayed for the dismissal of the claim with costs.

ISSUES FOR TRIAL

[8] The triable issues recorded in the parties' joint pre-trial conference minute are as follows:

> "1.1 Whether plaintiff granted defendant any right to possess, occupy or carry out any developments on Stand 19156 Salisbury Township Lands, Municipal plot Registered under Deed of Grant No. 10907.
>
> 1.2 Whether defendant has lawfully acquired any right in Stand 19156 Salisbury Township Lands, Municipal plot Registered under Deed of Grant No. 10907.
>
> 1.3 Whether defendant and all those claiming occupation through it must be evicted from Stand 19156 Salisbury Township Lands, Municipal Plot Registered under Deed of Grant No. 10907."

While three agreed issues were recorded, it is my view that there is only one issue for determination in this case, namely, whether or not the defendant has any right to occupy or possess and carry out any developments on Stand 19156, Salisbury Township Lands, Municipal plot Registered under Deed of Grant No. 10907.

[9] At the trial, Mr Edgar Dzehonye, the plaintiff's Head Human Shelter Services and Mr Isaiah Zvenyika Chawatama, the Director of Works, testified for the plaintiff. On the other hand, Mr Spencer Mackenzi Mabheka, the defendant's director, testified in the company's defence.

ISSUE FOR DETERMINATION

[10] The sole issue the court must determine is whether or not the defendant has any right to occupy or possess and carry out any developments on Stand 19156 Salisbury Township Lands, Municipal plot Registered under Deed of Grant No. 10907.

THE APPLICABLE LAW

[11] It is common cause that the plaintiff's claim is anchored on *rei vindicatio*. The law on the remedy of *rei vindicatio* is settled. In terms of the law, an owner is entitled to recover his or her property from anyone in possession of it without his or her consent. The principles of law on the *rei vindicatio* were remarkably restated in the case of *Eastlea Hospital (Pvt) Ltd* v *Ndoro & Ors* SC 116/23 at p 7 where MWAYERA JA said:

> "What constitutes *rei vindicatio* has been ably set out in a number of cases in this Court. The case of *Indium Investments (Pvt) Ltd v Kingshaven (Pvt) Ltd & Ors* SC 40/15 at p 10 is apposite. This Court illustrated what constitutes the principle of *rei vindicatio* as follows:
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> > "The nub of the *actio rei vindicatio* is that an owner is entitled to reclaim possession of his property from whosoever is in possession thereof. As was stated in *Chetty* v *Naidoo* 1974 (3) SA 3 at p 13:
> >
> > > 'It may be difficult to define *dominium* comprehensively (cf. *Johannesburg Municipal Council* v *Raid Townships Registrar & Ors* 1910 TS 1314 at 1319), but there can be little doubt that one of its incidents is

> the right to exclusive possession of the res, with the necessary corollary that the owner may claim his property whenever found, from whomsoever holding it. It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some enforceable rights against the owner (e.g. a right of retention or a contractual right)'.

This Court set forth the remedy of *rei vindicatio* in *Chenga* v *Chikadaya & Ors* SC 7/13 at p.7 when it stated the following:

> "The *rei vindicatio* is a common law remedy that is available to the owner of property for its recovery from the possession of any other person. **In such an action there are two essential elements of the remedy that require to be proved. These are firstly, proof of ownership and secondly, possession of property by another person. Once the two requirements are met, the onus shifts to the respondent to justify his occupation (**my emphasis).
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> See also *Stanbic Finance Zimbabwe Ltd* v *Chivhungwa* 1999 (1) ZLR 262 (H) in which the principle of *rei vindicatio* was clearly propagated, as a principle based on the fact that an owner cannot be deprived of his property against his will and that he is entitled to recover it from any person who retains possession of it without his consent."

[12] The above authorities are clear that the two requirements for a vindicatory action are that the plaintiff must prove ownership and that the property is in possession of the defendant. The onus shifts to the defendant to prove his right of retention or that his possession is lawful once the two requirements are established. This was also what the court in *Jolly* v *Shannon & Anor* 1998 (1) ZLR 78 (HC), at p. 88, reiterated when it said:

> "The principle on which the *actio rei vindicatio* is based is that an owner cannot be deprived of his property against his will and that he is entitled to recover it from any person who retains possession of it without his consent. The plaintiff in such a case must allege and prove that he is the owner of a clearly identifiable movable or immovable asset and that the defendant was in possession of it at the commencement of the action. Once ownership has been proved its continuation is presumed. The onus is on the defendant to prove a right of retention: *Chetty* v *Naidoo*, 1974 (3) SA 13 (A) at 20A-C; *Makumborenga* v *Marini* S-130-95 p 2."

ANALYSIS AND DETERMINATION

[13] Applying the above principles, the two requirements of *rei vindicatio*, namely that of proof of ownership and possession of the property by another person, are resolved from the pleadings. There is no dispute that the plaintiff is the owner of the property in question and that the property is in possession of the defendant. See para(s) 2.1 and 3.1 of the defendant's plea. It was also common cause that the defendant is developing the said land by erecting structures and infrastructure for water and sewer reticulation and roads. The

above agreed facts were further confirmed in the defendant's closing submissions. See para(s) 4 and 6 thereof. Therefore, with the two requirements being common cause, the onus shifts to the defendant to show that it has a right of retention or its occupation or possession of the property is lawful.

[14] I must first restate that pleadings are very important. Parties are bound by what they would have pleaded. It is trite that the purpose of pleadings is to guide the parties as to the nature of their case and help the court identify the issues that separate the two litigants. The purpose of pleadings was fully explained in *Medlog Zimbabwe (Pvt) Ltd* v *Cost Benefit Holdings (Pvt) Ltd* SC 24/18 at pp 10-13, where GARWE JA (as he then was) had this to say:

> *"THE IMPORTANT PURPOSE OF PLEADINGS*
> [25] The manner in which the respondent has handled its case both *a quo* and in this Court brings to the fore the question as to what the purpose of pleadings is. In general the purpose of pleadings is to clarify the issues between the parties that require determination by a court of law. Various decisions of the courts in this country and elsewhere have stressed this important principle…
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> 25.1 In *Durbach* v *Fairway Hotel, Ltd* 1949 (3) SA 1081 (SR) the court remarked:-
>
> > "The whole purpose of pleadings is to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed."
>
> …
> 25.4 In *Courtney–Clarke* v *Bassingthwaighte* 1991 (1) SA 684 (Nm), the court remarked at page 698:-
>
> > "In any case there is no precedent or principle allowing a court to give judgment in favour of a party on a cause of action never pleaded, alternatively there is no authority for ignoring the pleadings … and giving judgment in favour of a plaintiff on a cause of action never pleaded. In such a case the least a party can do if he requires a substitution of or amendment of his cause of action, is to apply for an amendment."
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> 25.5 In *Imprefed (Pty) Ltd* v *National Transport Commission* 1993 (3) SA 94(A), 108, the court cited with approval the case of *Robinson* v *Randfontein Estates GM Co. Ltd* 1925 AD 173 where at page 198 it was stated as follows:-
>
> > "**The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry.** But within those limits the court has a wide discretion. For pleadings are made for the court, not the court for pleadings. And where a party has had every facility to place all the facts before the trial court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been."

25.6 In *Jowell* v *Bramwell-Jones* 1998 (1) SA 836 at 898 the court cited with approval the following remarks by the authors Jacob and Goldrein in their text *Pleadings: Principles and Practice* at p 8-9:

> "As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings **… For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as much bound by the pleadings of the parties as they are themselves.** It is not part of the duty or function of the court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings**. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties. To do so would be to enter the realm of speculation.** … Moreover, in such event, the parties themselves, or at any rate one of them, might well feel aggrieved; for a decision given on a claim or defence not made, or raised by or against a party is equivalent to not hearing him at all and may thus be a denial of justice. The court does not provide its own terms of reference or conduct its own inquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. **In the adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to."**

[26] I associate myself entirely with the above remarks made by eminent jurists both in this jurisdiction and internationally. **The position is therefore settled that pleadings serve the important purpose of clarifying or isolating the triable issues that separate the two litigants. It is on those issues that a defendant prepares for trial and that a court is called upon to make a determination. Therefore a party who pays little regard to its pleadings may well find itself in the difficult position of not being able to prove its stated cause of action against an opponent**." (my emphasis)

[15] The defendant, in its plea, pleaded its defence as follows:

"3.2. First defendant further pleads that **it is occupying the property with the plaintiff's permission granted in November 2021**.

3.3. The first defendant denies that it has been constructing illegal structures without the authority of the plaintiff and further pleads that,

3.3.1. **In November 2021, the first defendant applied to plaintiff for the allocation of a piece of land called Stand 19156, Salisbury, Township Lands.**

3.3.2. **In response to the application, the plaintiff allowed the first defendant and first defendant's members to occupy the land, and to carry out development work on the property**.

3.3.3. Part of the work done by the first defendant on the property includes but is not limited to, obtaining approved general plan, title survey, dispensation certificates, ground work, and payment for sewer and water reticulation.

3.3.4. Having allowed first defendant to occupy the property and develop the property, and having received payments in respect of such developments, the plaintiff cannot

> plead that the first defendant's occupation was without its consent, or illegal." (my emphasis)

[16] There is no doubt that the defendant pleaded that it was granted authority or permission to occupy the property in November 2021. This, it alleged, followed its application in the same month for allocation of the said piece of land, and the plaintiff allowed it to occupy the land and carry out development work on the property. In his evidence in chief, Mr Mabheka, the defendant's director, did not produce any copy of such application, nor did he show the court any proof of the allocation of the land and the alleged authority granted in November 2021 by the plaintiff. He did not deny that the plaintiff is an institution of record. The plaintiff is a council established in terms of the Urban Council Act (*"the Act"*) and not an individual. There was no proof that the defendant was allocated the land or was granted permission to be on the land in November 2021.

[17] The plaintiff's witnesses, Mr Dzehonye and Mr Chawatama, very senior officials of the plaintiff, spoke very well on the methods of acquiring land from the council and the processes involved. Their evidence of the basic methods, which include an allocation letter, lease and memorandum of partnership agreement, was not challenged under cross-examination. From their testimony, it was clear that for one to claim to have authority from council or permission to occupy any land, there must be a written council resolution and that the mandatory procedure outlined in s 152(2) of the Act is complied with. The defendant did not challenge the evidence on the proper procedure for acquiring authority to occupy or to be allocated any land by the plaintiff or council in cross-examination. I associate myself with the remarks in *President of the Republic of South Africa & Ors* v *South African Rugby Football Union & Ors* 2000 (1) SA 1, where the Constitutional Court of South Africa highlighted the purpose and importance of cross-examination as follows:

> "[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. **If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct**. This rule was enunciated by the House of Lords in *Browne* v *Dunn* [[1893] 6 R 67 (HL)] and has been adopted and consistently followed by our courts." (my emphasis)

[18] Further, in *Small* v *Smith* 1954 (3) SA 434 (SWA) at 438, CLAASSEN J also said:

> "It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness, and if need be, to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. **It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved.**" (my emphasis)

[19] The above remarks apply with full force in this case. The court has no reason to disbelieve the evidence of Mr Dzehonye, which was well corroborated by Mr Chawatama on the methods and processes involved in acquiring land or for one to be granted permission or authority to occupy and develop council land. They were also unchallenged in their evidence that the authority must be in writing and backed by a full Council resolution. Such authority cannot be verbally granted. The position is also in sync with the law. Mr Mabheka accepted under cross-examination that the defendant did not have an allocation letter or offer letter, a lease or partnership agreement with the council for the said property. He also admitted that there was no agreement of sale of the land with the plaintiff. He further conceded under cross-examination that he did not have any minutes, records or correspondence from the Council officials he claimed gave them the greenlight to occupy the land pending finalisation of their papers. He simply threw in names such as Mr Bare, Mr Sithole and Mr Nhekairo, among others, as having allowed them to occupy and develop the land, but did not produce even a single document from these officials to confirm his evidence. All he could say was that the communication was verbal. The alleged verbal communication was never substantiated by any other documentary evidence or otherwise. His evidence accordingly remained just bald assertions or unsubstantiated allegations. The law is clear that bald assertions cannot prove one's case. In *Sibanda* v *Yambukai Holdings (Pvt) Ltd & Anor* HH 84/17, the court said:

> "The celebrated rule of evidence that he who alleges must prove should always guide practitioners and parties when drafting court pleadings and preparing for court unless the matter at play is one in which an exception to the rule has been provided for as in the case of presumptions…
>
> It follows therefore that where a party makes bald assertions not backed by evidence and the same are denied by the party against whom they are made, such bald allegations cannot pass as having been proved on a balance of probabilities. A party averring a fact should

present evidence of that fact which has a probative value. See generally *Zimbank Ltd* v *Ndlovu* SC 61/2004."

[20] Further, in *Tedcor Zimbabwe (Pvt) Ltd* v *Marecha* HH 558/22, the court emphasised the need to always place before the court primary evidence instead of making bald and unsubstantiated allegations.

[21] The defendant failed to prove that it was granted any authority or permission to occupy the property in November 2021 as pleaded. In his evidence in chief, Mr Mabheka alleged that the defendant in fact applied for this land in 2002. He did not place such an application before the court, and the response thereto, which he said was given. He, in fact, conceded under cross-examination that he did not place before the court the response from the plaintiff. While it was pleaded that the application for allocation of the land was made in November 2021 and granted in that month, his evidence in chief completely took a different turn. He alluded to the application being made in 2002 and that when he became a director in 2021 with the other new directors, he decided to pursue the application. This is when he said he went and saw Mr Sithole, the then Acting Director of Housing and Community Services. He did not talk of any new application being submitted and granted in November 2021. There is no written record of any communication from the plaintiff granting the application for the land in question, whether it was made in 2002 or in November 2021, as pleaded. It is, therefore, difficult to understand how it can then be said that permission or authority to occupy the land was given by the plaintiff in the circumstances.

[22] In the absence of an allocation letter or any document clearly allocating or alienating the said piece of land to the defendant from the plaintiff, there can be no legal basis for the court to accept the defendant's assertion that it has a right of retention or that its possession of the land is lawful. The quotations and the alleged receipts are not proof of the allocation or alienation of land. It is now settled that the mandatory requirements of s 152(2) of the Act must be complied with or followed in any allocation or alienation of council land. It is important to note that the elaborate process under s 152(2) must also be followed even where council is to grant permission for the use of any land owned by it. It is trite that failure to comply with the mandatory provisions of the statute renders any alleged allocation or alienation a nullity. Mr Mabheka did not deny that the purported

permission to possess the land or the purported allocation was not done in terms of the law. He maintained that it was verbal, and that cannot be said to be a valid process undertaken in terms of s 152(2) of the Act.

[23] In *City of Harare* v *Munzara & Ors* SC 1/23 at p 11, the court had this to say:

> "In addition to the above legislative provisions, s 152 (2) of the Urban Councils Act [*Chapter 29:15*] applies to the sale or alienation of municipal land. It provides:
>
> "(2) **Before** selling, exchanging, leasing, donating or **otherwise disposing of or permitting the use of any land owned by it the council shall**, by notice published in two issues of a newspaper and posted at the office of the council, give notice-
>
> (a) of its intention to do so, describing the land concerned and stating the object, terms and conditions of the proposed sale, exchange, lease, donation, disposition or grant of permission of use; and
>
> (b) that a copy of the proposal is open for inspection during office hours at the office of the council for a period of twenty-one days from the date of the last publication of the notice in a newspaper; and
>
> (c) that any person who objects to the proposal may lodge his objection with the town clerk within the period of twenty-one days referred to in paragraph (b)." (The underlining is for emphasis)
>
> **There is therefore an elaborate process that has to be undertaken by a municipal authority before it may lawfully dispose of its land. It is a process provided for by statute.**" (my emphasis)

At pp 13-14, the court concluded:

> "The question whether or not the appellant's Town Clerk and Director of Housing and Community Services had authority to allocate the stands to the respondents pales to insignificance regard being had to the non-compliance with both s 49 (2) and (3) and s 39 of the Regional Town and Country Planning Act and s 152 (2) of the Urban Councils Act [*Chapter 29:15*]. Whatever it is that those officials agreed with the respondents was of no legal consequence. It is a nullity and does not bind anyone."

[24] The same legal position was outlined in *Chinhoyi Municipality* v *Musonza* SC110-23 at p7, where the court said;

> "The appellant's position is unassailable. **It did not sell the property to the respondent- there are no records to that effect. The respondent's argument is that the plot was allocated to him verbally by the appellant's director of housing. It is trite that immovable property of a municipal authority cannot be disposed of verbally without any documents.** The appellant further contended that if indeed it had sold this plot to the respondent, it would have been required to comply with the mandatory provisions of s 152 (1) and (2) of the Urban Councils Act [*Chapter 29:15*] (the Act). The court *a quo* ruled that the above section did not apply because it had not been pleaded and as such the appellant was raising it as an afterthought! Firstly, litigants are generally not required to plead the law. Secondly, the contention is not an afterthought. It is the Law! In any event, it is trite

> that a point of law can be raised at any stage of the proceedings. **The appellant is a creature of the Urban Councils Act. Its land sales are strictly controlled by that Act**…
>
> Section 152 of the Act sets out the procedure to be followed by the appellant when disposing of land belonging to council. **These provisions are mandatory**. **As long as same are not complied with no valid sale or transfer of council land can occur**. Thus, even assuming that the respondent had a valid agreement of sale, such would not prevail in the absence of proof that the provisions of s 152 were complied with. **Failure to comply with the mandatory provisions of s 152 renders the agreement null and void**. In *casu* the court *a quo* sanctioned a nullity. Its order cannot stand. See *Mcfoy* v *United Africa Co* 1961 (3) ALL ER 1169 (PC) at 1172". (my emphasis)

[25] The law is clear that the defendant could not acquire any right in respect of the land without the process set out in s 152(1) and (2) of the Act being complied with. No quotation or receipt can constitute valid proof of allocation or alienation of council land in terms of the law. Any permission to occupy or use the council land must also be validly acquired upon compliance with s 152(2) of the Act and cannot be verbal. The quotations are not proof of authority or permission to develop council land. In any case, the said quotations were clearly not issued in the name of the defendant. While Mr Mabheka claimed they were directed to their agent, there is no indication of the name of that agent on those quotations. The quotations also related to approval fees, yet no such approved designs were ever produced or shown to exist. Even the building plans, which the defendant claimed were approved for the structures, were never produced. Clearly, the defendant could not lawfully occupy the land without an allocation letter, lease or memorandum of partnership or any written proof of such authority or permission to do so from council.

[26] The defendant could also not lawfully erect structures without approved building plans, as well as carry out development work for roads, water and sewer reticulation infrastructure without approved engineering designs and proof of allocation in the first place from the plaintiff. Mr Mabheka showed the court nothing in that regard to establish that the defendant's presence on the land was with the plaintiff's permission or consent, or authority. Further, while the receipts are not proof of alienation or permission at law to occupy council land in terms of the law, they were, in any case, illegible and Mr Mabheka conceded to this. Mr *Madzoka* undertook to place legible copies before the court, but the legible copies were never placed before me. Again, the receipts were not printed with the defendant's name on them. While Mr Mabheka said the handwritten inscription of the

defendant's name was inserted and signed for by a council clerk, there was no evidence confirming this position.

[27] Even the alleged application for a job number and the said location advance do not establish that the defendant was allocated the land or granted permission to possess it in terms of the law. The alleged application for a job number at p 182 of the record is not signed by anyone and does not even mention the defendant's name. Mr Mabheka admitted that he did not even know the parameters of Mr Chivindidze's (whose name is written thereon) authority. Nothing can arise from these documents. They all even read together cannot create any lawful allocation or right to occupy and use the land in accordance with the law, in particular considering the provisions of s 152(2) of the Act.

[28] The defendant further argued that it cannot be punished for the plaintiff's failure to comply with the law. This is a court of law. The court cannot condone an illegality. In any case, anything that is void or a nullity is incurably bad, and nothing can flow from it. No enforceable rights can flow from a nullity. There is also no requirement for the court to even set aside a nullity. Thus, Lord DENNING in *Macfoy* v *United Africa Co.* 1961 [3] ALL ER 1169 at 1172, had this to say;

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, although it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

[29] The defendant also submitted in its closing submissions that the principle of quasi-mutual assent was applicable. However, the facts pleaded do not sustain the application of that doctrine. A case is not made in the closing submissions. As held in the *Medlog Zimbabwe* case *supra,* a party is bound by what he or she has pleaded unless amended in terms of the rules. The defendant's plea did not set out a case for the application of the principle of quasi-mutual assent. There is no legal basis, therefore, for the doctrine to be invoked in this case. In any case, the principle cannot operate to sanction an illegality given the mandatory provisions of s 152(2) of the Act.

[30] The defendant also pleaded in its plea the principle of estoppel. The said para 3.3.4 reads:

> "Having allowed first defendant to occupy the property and develop the property, and having received payments in respect of such developments, the plaintiff cannot plead that the first defendant's occupation was without its consent, or illegal."

In *Econet Wireless (Pvt)* v *ZIMRA* SC 17/2019, the court remarked that:

> "For the appellant to succeed in proving estoppel, it has to prove, and the authority for this proposition is the case of Andrew *Phillips (Pvt)* Ltd v *GDR Pneumatics (Pvt) Ltd* 1986 (2) ZLR 65(SC) 67, that the respondents or their officers made a representation in word or deed which might have reasonably misled the appellant; that the appellant was misled and that the representation induced the appellant to act as it did"

[31] In *casu,* the defendant failed to prove that the plaintiff or its officials made any representation that the defendant could occupy the land, and that it reasonably acted on that representation. The defendant's evidence was not consistent with what it had pleaded. It was not clear at the end when it was given permission to occupy and develop the land. The defendant's evidence was confusing as to when the application for the land itself was lodged. In its plea, it had said the permission was applied for in November 2021, but Mr Mabheka's evidence was that the said application was made in 2002. He stated that no application was made in 2021. The letter from the office of the President and Cabinet issued on 22 February 2022 again shows that there was no allocation or permission to possess the land made in November 2021. The issue of estoppel cannot be sustainable in the circumstances.

[32] In any case, one cannot rely on estoppel to sustain an illegality. The court cannot enforce a claim that arises from an illegal act. Estoppel cannot be used to validate an illegal act. The leading case on estoppel and illegality is *Trust Bank van Afrika Bkp* v *Eksteen* 1964 (3) SA 402 (A) where the court reiterated the general principle that an act which is contrary to a legal rule is void and cannot be made valid through indirect means if doing so would undermine the purpose of the prohibition. A similar position prevails in English law. As Wilken & Ghaly write: "A party cannot be estopped from denying that which it could not lawfully have agreed", See S Wilken & K Ghaly, *The Law of Waiver, Variation and Estoppel* 3 ed (2012) 9. 132. It appears to have been largely settled in the wake of the *Eksteen* case that estoppel may not be raised if it would have the effect of rendering an illegal contract enforceable. See *Provincial Government of the Eastern Cape* v

Contractprops 25 (Pty) Ltd 2001 (4) SA 142 (SCA) para 11; *Mgoqi* v *City of Cape Town: In Re: City of Cape Town* v *Mgoqi* 2006 (4) SA 355 (CC) para 145.

[33] The above legal position is applicable in *casu* as it represents the position of our law on the doctrine of estoppel, which was developed from English common law. The court has no discretion not to invalidate an illegal contract or act, or transaction. This principle was also confirmed in *Chioza* v *Siziba* SC 4/15 at p10 where the court said:

> "… [T]he Court cannot aid a party to defeat the clear intention of an ordinance or statute; that Courts of justice cannot recognize and give validity to that which the legislature has declared shall be illegal and void; and that the courts will not permit to be done indirectly and obliquely what has expressly and directly been forbidden by the legislature."

Estoppel cannot, therefore, be invoked where there can be no lawful alienation of land, given that the mandatory requirements of s 152(2) of the Act have not been complied with. The law does not recognise any sale, alienation or allocation or permission for the use of Council land outside the peremptory provisions of s 152(2). That allocation or permission, or authority to occupy and develop the land cannot be said to have been done verbally. An illegality does not create any valid and enforceable right.

[34] There was also insufficient evidence provided for the court to even invoke the principle that no one should benefit from their own wrong. This principle that a party cannot derive a benefit from its own wrongdoing was enunciated in *Standard Chartered Bank Zimbabwe Ltd* v *Matsika* 1997 (2) ZLR 389 (SC), where the court said:

> "A cardinal principle of the common law is expressed in the aphorism: "*nemo ex proprio dolo consequitur actionem*", which translates: no one maintains an action arising out of his own wrong. Complementary to this principle is another which stipulates: "*nemo ex suo delicto meliorem suam conditionem facere potest*", which means: no one can make his better by his own misdeed."

[35] The principle is inapplicable as it was not shown that the plaintiff allocated the land to the defendant or granted any permission for its use in violation of s 152(2). The evidence is clear that the plaintiff did not allocate the land or alienate it to the defendant or grant permission to the defendant to use it even without following the statutory process. Mr Mabheka did not dispute the evidence from the two witnesses that the council is an institution of record and that the defendant was not issued with any authority to occupy the land arising from a lease, allocation letter, a sale or memorandum of partnership agreement.

He conceded that he did not have any record to establish such allocation. He also did not deny that there was no Council resolution on the purported allocation. In these circumstances, it was clear that the plaintiff committed no breach of the mandatory statutory requirements on alienation of land. The clear evidence on record shows that the land was never allocated to the defendant in any way, even unlawfully. There can be no basis to invoke the said principle set out in the *Standard Chartered Bank Zimbabwe* case.

[36] Further, I found no evidence to support the defendant's claim that it was the one which applied for the consolidation of the two stands, carried out the survey and obtained the dispensation certificates. The documents produced do not establish this special case. Ordinarily, as the owner of the land, the plaintiff would be the central figure in an application for the consolidation of the two stands and the survey. The survey diagrams and dispensation certificates also issued do not *per se* show that it was the defendant who applied for these or carried out the works thereof. No paper trail was produced to show that it was the defendant and not the usual authority, the plaintiff as the owner, which did so. I accept the plaintiff's evidence as being reasonably probable that it carried out the survey of its land through its former employee A. M. Derembwe. It was not in dispute that the said surveyor was once an employee of the plaintiff. The letter from the Surveyor General at p 169 of the record shows that it was directed to him and copied to the plaintiff's Director of Works and the Registrar of Deeds. There is no mention of the defendant.

[37] I also find the letter from the Office of the President and Cabinet to further betray the defendant's assertions. It completely destroys its defence as pleaded that it applied for the land and was granted permission or allocated the land in November 2021. The said letter dated 25 February 2022 was directed to the Acting Director of Housing within the plaintiff and reads:

> "SUPPORTING LETTER FOR BRICK STONE (PVT) LTD STAND ALLOCATION
>
> Our office would like to inform you that Brick Stone Builders & Contractors (Pvt) Ltd has applied for a piece of land in Belvedere (Stand 18991-19042) Stand 19156 Harare. Please be advised that the company belongs to our staff, the company has 52 beneficiaries **may you kindly consider the company when you do your allocations…"**

The letter clearly shows that on the date it was written, 25 February 2022, the defendant had not been allocated the land in question. The letter sought to support that application.

The writer urged the plaintiff to consider the company when allocating the land. The defendant's defence, therefore, that it was granted permission to occupy the said land in November 2021 was a lie. If at all, it had already been granted permission to occupy the land, that letter from the President's office would not have been sought or written. The defendant's claim of a right of retention is founded on falsehoods and is untenable.

[38] Another aspect worth mentioning is that the defendant may also not have acquired any right to possess and develop the land for residential purposes. The reason is that it was not seriously challenged that the reserved land use for the property is that of a public open space. The letter from the Environmental Management Authority dated 20 January 2020 at p 146 of the record, proved that the request for a change of use to residential was rejected because the land is a wetland.

[39] It was not in dispute that the Ministry of Local Government had not yet approved any change of land use for this land. Mr Chawatama's evidence that there has not been any change of land use was not seriously challenged. While Mr Mabheka alleged that they had an approved layout plan for the development of residential stands, that document was never placed before the court. In any case, its validity would be questionable given the official position that the land is reserved for an open public space. Without the change of land use for the property, it could not be validly allocated and developed for residential purposes. It would also render any purported allocation and developments thereat null and void. Anything done on the land for residential purposes cannot be valid and enforceable. No rights can flow from a nullity. See *City of Harare* v *Munzara & Ors* where the court, from p 12, had this to say:

> "The evidence before the court-a-quo, which it completely overlooked was that the remainder of stand 210 Mount Pleasant remained an open space for recreational as opposed to residential purposes. The processes preceding change of use set out in s49 of the Regional Town and Country Planning Act [*Chapter 29:12*] for such change of use were never set in motion.
>
> Stands 1051 and 1052 claimed by the respondents could not have been lawfully created out of the remainder of stand 210 Mount Pleasant Township, Harare. It follows that the alleged agreements sought to be relied upon by the respondents were ultra vires the provisions of s49(2) and (3) of the Act as such stands could not have been created outside the remit of the law.

> To the extent that the said agreements did not satisfy the requirements of s49(2) and (3) which are mandatory, they were invalid and unenforceable at law. In respect of the said stands 1051 and 1052, were they to be lawfully created, it was mandatory that the approval of the Minister be sought and obtained prior to any change of use of the open space reserved for recreational purposes to residential stands…
>
> It is trite that illegal agreements are *void ab initio*. They are invalid and they do not create any obligations"

It follows that the defendant cannot have any recognisable right in respect of the property reserved for public open space in terms of the law. The defendant cannot sustain a claim for lawful possession of the land in question, even assuming its defence that it was given permission was to be accepted.

[40] I must admit that the defendant's case has been turning and shifting. The defendant was exposed as a dishonest litigant. As stated in *Mhungu* v *Mtindi* 1986 (2) ZLR 171 (SC) courts can make reference to their own records and proceedings. In terms of s 24(1)(a) of the Civil Evidence Act [*Chapter 8:01*], the court must take judicial notice of decisions of the High Court or Supreme Court, if reported or recorded in citable form. It is common cause that the defendant filed an urgent chamber application for a spoliation order against the plaintiff under Case No. HC 3774/23 on 8 June 2023. The court, before MANGOTA J, issued a judgment (reference *Brickstone Builders & Contractors (Pvt) Ltd* v *City of Harare* HH 392/23) on 28 June 2023 in favour of the defendant.

[41] The said urgent application was filed before the present proceedings were lodged. In that application, the defendant relied on the alleged allocation of the property purportedly done by the Ministry of Local Government through the Department of Spatial Planning & Development through a letter dated 22 April 2021. The court accepted this position as the truth, and said:

> "The respondent made serious insinuations on the fact that the Ministry allocated the property to the applicant. It challenged the applicant to produce evidence of the allocation of the property to it. Paragraphs 22 and 23 of its opposing papers contain the challenge. They each read in turn, as follows:
>
> > "22…..The alleged application to the Ministry of Local Government and Public Works for allocation of Stand No 19156 Belvedere residential stands on the disputed piece of land. The purported application is not attached and is therefore denied and the applicant is put to strict proof of its existence.
> > 23. It is disputed that any permission was granted to the applicant to develop the disputed piece of land. The Ministry of Local Government and Public Works does

> not grant verbal permissions in matters involving land allocations. If such permission existed I am certain the applicant would have attached it."

It is this challenge of a fact which the respondent knew about which prompted the applicant to attach the letter which the Ministry wrote to the respondent to its answering affidavit. That the respondent knew of the existence of this letter is evident from the contents of the letter itself. The letter reads, in its last paragraph, that:

> "Three copies of the allocation letter are endorsed herein for your use, records and onward transmission to the relevant stakeholders. We have forwarded one copy to Brickstone Builders and Contractors (Pvt) Ltd and retained one copy for our records."

The respondent was being economic with the truth when it challenged the applicant to produce the letter. The letter was, in fact, addressed to its Director of Works. One therefore wonders what the respondent meant to prove when it challenged the existence of the letter as it did. The applicant was, in the circumstances of this case, within its rights to produce the letter following the challenge which had been made to it about the letter.

The court takes a very serious view of a litigant who comes to court with a prepared mind to tell a lie about a fact which, as *in casu*, is not only known to him but is also common cause as between the other party and him. It is trite that if a litigant gives false evidence, his story will be discarded and the same adverse inferences may be drawn as if he had not given any evidence at all: *Leather Trade Zimbabwe (Pvt) Ltd* v *Smith*, HH 131/ 03. It is fundamental to court procedures in this country and in all civilized countries that standards of faithfulness and honesty be observed by parties who seek relief. If this court were not to enforce that standard, it would be washing its hands of its responsibility: *Underbay* v *Underbay*, 1977 (4) SA 23 (W) at 24 E-F. People are not allowed to come to court seeking the court's assistance if they are guilty of a lack of probity or honesty in respect of the circumstances which cause them to seek relief from the court: *Deputy Sheriff, Harare* v *Mahleza & Anor*, 1997 (2) ZLR 425.

The above-cited case authorities show the disdain to which the court is prepared to go when it discovers that it is dealing with a dishonest litigant. It quite rightly draws adverse inferences against such. It does so because it cannot tell the moment that such a litigant is telling the truth and not a lie. The respondent told a lie about a matter which is known to it. It challenges the applicant to prove that the property which is the subject of this application was allocated to the latter."

[42] It is very clear that the court relied on the purported allocation letter from the Ministry as establishing that the defendant (the applicant therein) was allocated the property in question. When these eviction proceedings were instituted, the defendant completely abandoned that position and what it had pleaded under oath. In its plea, the new position now taken was that the defendant got the authority or permission to occupy the land from the plaintiff in November 2021. In his evidence in chief, Mr Mabheka did not testify of any application being made in November 2021 as alluded to in para 3.1 of the defendant's plea. He started to say that the application was made in 2002. Again, a letter

from the Office of the President and Cabinet shows that on 25 February 2022, when the letter was written, no allocation of the land had been done by the plaintiff by that date. This level of flip-flopping is astounding, to say the least.

[43] It is a settled principle of the law that a litigant cannot be allowed to change positions at every turn. See *S* v *Marutsi* 1990 (2) ZLR 370 at p 374B and *Zimbabwe Revenue Authority* v *Stanbic Bank Zimbabwe Limited* SC 13/19. In other words, one cannot approbate and reprobate. Thus, in *The Trustees for the Time Being of Cornerstone Trust & Ors* v *NMB Bank Ltd* SC 97/21 at p 8, the court said:

> "The position was well articulated in the case of *S v Marutsi* 1990 (2) ZLR 370 at page 374B wherein it was stated that:
>
> > "It is trite that a litigant cannot be allowed to approbate and reprobate a step taken in the proceedings. He can only do one or the other, not both."
>
> Moreover in the case of *Alliance Insurance v Imperial Plastics (Pvt) Ltd. & Another* SC 30/2017, the court took the view that such conduct amounts to a classic display of *mala fides*."

The defendant's conduct is, indeed, a display of *mala fides*. It cannot have its cake and still eat it. Its assertions in the circumstances must be discarded as untrue.

[44] Litigants must always be honest or candid with the court. See MANGOTA J's sentiments in the *Brickstone Builders & Contractors* case above. The defendant had initially told the court under oath in Case No. HC 3774/23 that it had been allocated the land by the Ministry. However, under cross-examination, Mr Mabheka accepted that the Ministry had no land, and in the plea, it was also accepted that the plaintiff owns the land in question.

[45] Mr Chawatama's evidence established that the said allocation letter was fake. He was not seriously challenged under cross-examination on his evidence that the letter was fraudulent and that the purported allocation of the land was never made. He testified that the letter was directed to his office, but he never saw it. He produced a copy of the letter he wrote and sent to the Director of Spatial Planning and Development dated 27 July 2023. In his letter dated 17 August 2023, Mr Magadzire, the Director in that Department at the Ministry, who is purported to have allocated the land to the defendant, stated that there was no such letter in their files, that the Department does not allocate any land and that the

signature on the letter was forged. He denied that he ever signed the said letter. See p 147 of the record. This evidence was not challenged when Mr Chawatama was cross-examined.

[46] The complete shift in the defendant's position in the plea, where the allegation was that the plaintiff granted the company permission to occupy and develop the land, was an admission that there was never any allocation by the Ministry in the first place. It also showed that the defendant had lied to the court. Mr Chawatama's testimony raised serious allegations of fraud against the defendant. However, the defendant failed to dispel these serious allegations. The defendant's lack of probity or honesty was exposed. The defendant's story cannot be believed in the circumstances.

[47] Given the evidence before me and for the reasons outlined above, I am satisfied that the defendant failed to discharge the onus to prove on a preponderance of probabilities that it has any recognisable right to occupy or possess the property and to develop it. Its defence cannot succeed.

COSTS

[48] The general rule is that costs shall follow the cause. There is no reason for me to depart from this general rule in this case. The plaintiff, however, sought costs to be awarded against the defendant on a legal practitioner and client scale. It is a settled principle of the law that the issue of costs is within the discretion of the court. See Hebstein & Van Winsen in *The Civil Practice of the High Court and the Supreme Court of Appeal of South Africa*, 5 ed: Vol 2 p 954, where it was stated as follows:

> "The award of costs in a matter is wholly within the discretion of the Court, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at. The law contemplated that he should take into consideration the circumstances of each case, carefully weighing the various issued in the case, the conduct of the parties and any other circumstances which may have a bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties..."

[49] Further, costs on a legal practitioner and client scale are awarded only in special circumstances where the conduct of the other party or the circumstances of the matter would warrant an order for such punitive costs. MUSHORE J in *Crief Investments (Pvt) Ltd & Anor* v *Grand Home Centre & Ors* HH 12/18, had this to say:

> "**In essence, the cases establish a position that courts should award costs at a higher scale in exceptional cases where the degree of irregularities, bad behaviour and vexatious proceedings necessitates the granting of such costs, and not merely because the winning party requested for them.** Costs should not be a deterrent factor to access to justice where future litigants with genuine matters which deserve judicial alteration. In awarding costs at a higher scale the courts should therefore exercise greater vigilance." (my emphasis)

See also *Mehembe* v *Matambo* 2003 (1) ZLR 148 (H).

[50] In this case, I agree that the defendant has been dishonest. It failed to challenge that it had originally used a fake or fraudulent allocation letter from the Ministry. When confronted with the said letter under cross-examination, Mr Mabheka conceded that the Ministry did not own the land. As if that was not enough, the defendant pleaded that it had applied and obtained permission from the plaintiff in November 2021, a position the defendant's witness failed to substantiate. Mr Mabheka again said the application was made in 2002. The ever-changing positions of the defendant also established its *mala fides*. A litigant who conducts himself in that way deserves censure with an award of punitive costs.

[51] I also find the defendant's defence to be utterly groundless. It was frivolous and vexatious. Clearly the defendant had no defence at all but simply wasted the court's time. Mr Mabheka conceded under cross-examination that he had no allocation letter, lease or memorandum of partnership with the plaintiff. He also admitted he had no agreement of sale with the plaintiff. There was no council resolution in place. He could only talk of what he alleged was a verbal authority. The law is very clear on the mandatory processes for any allocation or permission to use council land. He placed before me absolutely nothing of substance to establish a right of retention or a recognisable right to possess and develop the land.

[52] It is clear that the defendant brazenly defied the law and unlawfully invaded Council land without any authority. The defendant did not stop there, it proceeded to develop infrastructure, such as roads, and for water and sewer reticulation, without any approved designs or authority from the plaintiff. It also erected illegal structures without any enforceable rights over the land. Mr Mabheka admitted under cross-examination that the defendant even parcelled stands number 19009, 19011 and 19012 to their developer,

Lightone Construction (Private) Limited, as payment for its services. The defendant confirmed they did not buy the land and never paid even a cent to the owner of the property. Such deplorable and unlawful actions cannot be condoned. The defendant's conduct must be condemned in the strongest of terms. The court must register its displeasure with the defendant's conduct. In these circumstances, I find costs on a legal practitioner and client scale to be warranted.

DISPOSITION

[53] The requirements for *rei vindicatio* have been satisfied. It was not in dispute that the plaintiff is the owner of the property and that the defendant is in possession of it. The defendant failed to discharge the onus to show any right of retention or that its possession was lawful. It took occupation and is in possession of the plaintiff's property without the plaintiff's consent or authority as required in terms of the law. It is, therefore, an illegal occupier and any development work it is undertaking on the land is consequently unlawful. The law jealously protects the right of ownership. MAKARAU JP (as she then was) made this clear in *Alspite Investments (Pvt) Ltd* v *Westerhoff* 2009 (2) ZLR 236, where she said:

> "**There are no equities in the application of the *rei vindicatio***. Thus in applying the principle, the court may not accept and grant pleas of mercy or for extension of possession of the property by the defendant against an owner for the convenience or comfort of the possessor once it is accepted that the plaintiff is the owner of the property and does not consent to the defendant holding it. It is a rule or principle of law that admits no discretion on the part of the court. **It is a legal principle heavily weighted in favour of property owners against the world at large and is used to ruthlessly protect ownership.** The application of the principle conjures up in my mind the most uncomfortable image of a stern mother standing over two children fighting over a lollipop. If the child holding and licking the lollipop is not the rightful owner of the prized possession and the rightful owner cries to the mother for intervention, the mother must pluck the lollipop from the holder and restore it forthwith to the other child notwithstanding the age and size of the owner-child or the number of lollipops that the owner child may be clutching at the time. **It matters not that the possessor child may not have had a lollipop in a long time or is unlikely to have one in the foreseeable future. If the lollipop is not his or hers, he or she cannot have it**." (my emphasis)

See also *Nzara & Ors* v *Kashumba & Ors* SC 18/18.

[54] The defendant, being in unlawful possession of the plaintiff's property, ought to be ejected therefrom. The plaintiff's claim ought to succeed.

[55] In the result, it is ordered as follows:

1. The defendant and all those claiming occupation through it shall vacate Stand 19156 Salisbury Township Lands (Municipal Plot) Registered Under Deed of Grant No. 10907 and also known as stands 18991-19042 Belvedere Township, Harare, within seven (7) days of the date of this order.
2. In the event that the defendant fails to comply with paragraph (1) above, the Sheriff of Zimbabwe or his lawful Deputy is hereby directed and authorised to evict the defendant and all those claiming occupation through it from Stand 19156 Salisbury Township Lands (Municipal Plot) Registered Under Deed of Grant No. 10907 and also known as stands 18991-19042 Belvedere Township, Harare.
3. The defendant shall pay the costs of suit on a legal practitioner and client scale.

DEMBURE J: …….

Mbidzo, Muchadahama & Makoni, plaintiff's legal practitioners
Zvavanoda Law Chambers, defendant's legal practitioners.