HB 326/17
HCA 103/16

UPENYU LEONARD

Versus

HARRIS SHOKO

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & MOYO JJ
BULAWAYO 23 & 26 OCTOBER 2017

Civil Appeal

H. Ndlovu, for the appellant
T. Midzi, for the respondent

MAKONESE J: This is an appeal against the decision of the magistrate sitting at Zvishavane on the 26th October 2016. The respondent made a claim in the court *a quo*, for the ejectment of the appellant from house number 2007, Mandava Township, Zvishavane, and holding over damages pegged at US$15 per day. Appellant filed an appearance to defend against the claims. Respondent then made an application for summary judgment. The claim was opposed. The magistrate in the court *a quo* granted summary judgment. This appeal is against the order for summary judgment.

Factual background

The respondent filed particulars of claim alleging that the parties had entered into an agreement of sale in respect of house number 2007, Mandava Township, Zvishavane ("the property"). It was alleged that the respondent had paid the full purchase price for the property and that the defendant was to vacate the premises on or before 31st August 2016. The respondent further alleged that appellant had remained in a lawful occupation of the property to the prejudice of the respondent. The appellant contends that the parties did not enter into an agreement of sale in respect of the property. The respondent argued that the parties had entered into a loan agreement in terms of which the respondent had loaned him the sum of US$8 400. In support of his assertions the appellant filed a document headed "deed of sale agreement". Under clause 1 of the agreement, it is provided that the first party (appellant) wishes to borrow the sum

of US$8 400 from the second party (the respondent). It is further provided that the respondent had agreed to "lend" the appellant the sum of US$8 400 on signature of the agreement. A further term of the agreement was that the appellant would surrender his title deeds in respect of the property at Mandava as security against the debt. It was recorded in the written agreement that the borrowed money was being advanced to the appellant from a business know as Shoko Investments and therefore an interest of 100% would be levied on the capital debt. It was recorded that the appellant would repay a total sum of $16 800. The agreement was entered into on the 1st of August 2016. The whole amount was to be paid by the 11th August 2016. It was a term of the agreement that the title deeds to the property would be released to the respondent only after full payment of the sum of US$16 800. In the event that the appellant failed to repay the full amount by the stipulated date ownership in the property was to be passed to the respondent. In the event of the default appellant was required to pay an additional sum of US$5 600. The agreement does not specify what this further punitive payment represented. I suspect though, that from a wording of the agreement, and the fact that the money was specifically to be paid to respondent's legal practitioners, that this amount related to legal costs. The agreement purports to provide that the agreement constitutes the entire agreement between the parties and that any variations would be of no force or effect unless reduced to writing and signed for by both parties. On the 11th day of August 2016 the parties executed another agreement. I observe here, that this is the date the amount in terms of the first agreement was to be paid. In the second agreement, the agreement is titled "Acknowledgment of Receipt of Purchase Price". The agreement provides as follows:

> *"I, UPENYU LEONARD (I.D. NO. 12-063032 Q 12) of 2007 Makwasha Township, Zvishavane do hereby acknowledge that I received the sum of US$5 200 from Haris Shoko (I.D. No. 29-183232 D 03) of 725 Romix Street, Zvishavane being:-*
>
> *The balance of the purchase price of the immovable property called house number 2007 Mandava Township Zvishavane which I sold to Haris Shoko on 1st August 2016.*
>
> *I further confirm that this is the final payment of the purchase price in terms of the agreement signed by me.*
>
> *Dated at Zvishavane this 1st day of August 2016."*

It is also noted that this second document is a sworn statement signed and executed before a commissioner of oaths. What can be concluded without any doubt is that the two documents presented before the court *a quo* are not mutually compatible. The two documents are different both in form and content. The first document is clearly a loan agreement. The second sworn statement is an acknowledgment of receipt. This court can clearly read through these two documents and establish the real intention of the parties. In other words, this is not a simple agreement of sale between the parties. The respondent lent the appellant money on condition title deeds to the property belonging to the appellant were surrendered as security for the loan. In his opposing affidavit to the application for summary judgment the appellant states as follows in paragraph 4 and 5:

> "4. *On the 11th of August 2016, I paid the applicant the capital sum of US$8 600 and advised him that he was supposed to revise the interest rate as I could not pay the 100% for money which I borrowed for only 10 days. I also pointed out to him that the 100% interest he had charged me was unlawful and outrageous.*
>
> *5. He refused to revise the interest and insisted on 100% rate and threatened to fix me by holding on to my title deeds for the property which I had surrendered to him. He also indicated that he would proceed and take over the ownership of the property."*

The law

The issue for determination in this appeal is whether the magistrate in the court *a quo* was correct in his decision to grant summary judgment. The notice of appeal filed in this matter is couched in the following terms:

> "1. The court *a quo* erred on a point of law by granting the application for summary judgment in a matter which had triable issues.
> 2. The court *a quo* erred by determining the matter by way of summary judgment when the respondent had exhibited that the matter was triable through the pleadings.
> 3. The court *a quo* erred on a point of law and that granting an order in favour of the respondent which respondent had not properly discharged his onus of proof on a balance of probabilities entitling him to the judgment."

The learned trial magistrate reasoned that the respondent had an unanswerable claim and states as follows:

> *"The respondent has a deed of sale agreement with the applicant and he signed it. The deed is clear as a crystal it does not need any interpretation in any manner whatsoever. Further to that he signed an acknowledgment of receipt of purchase price. This document is a follow up document on the deed of sale. This is also crystal clear. It must be remembered that the signor should be aware of the documents he or she signs. There are no triable issues here. The respondent has nothing which looks like a defence. Application granted with costs at attorney and client scale."*

It is clear that the contract which respondent sought to enforce in the court *a quo* is not *per se* an agreement of sale for the sale of a house. The agreement is framed as a loan agreement with clauses providing surety for the non-payment of the loan. The agreement provides that the loan should be paid in 10 days. The appellant surrendered his title deeds as surety. In the event of default the property would be sold to the respondent in terms of the agreement. Further the interest on the capital debt was 100%. Such interest is usuorous and way above the bank minimum lending rate. The rate of interest violates the provisions of the Money Lending Rates of Interest Act (Chapter 8:10) which provides under section 8 as follows:

> "(1) No lender shall stipulate for, demand or receive from the borrower interest at a rate greater than the prescribed rate of interest.
> (2) Any lender who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding level seven to imprisonment for a period not exceeding one year or both to such fine and imprisonment."

It follows that the purported loan agreement was unlawful as it sought to levy an interest above the prescribed rate of interest. The contract is *prima facie* unlawful. It is trite law that the court will not give effect to an illegal contract. The court is guided by the basic principle that a litigant cannot found a claim based on an illegality.

Further, this court cannot be seen to condone an illegal act, let alone assist and perpetuate an illegal act.

See *Madinda Ndlovu* v *Highlanders Football Club* HB-95-11.

The court, in general will not be used in this furtherance of illegal or immoral acts. A claim for interest at the rate of 100% is way beyond the prescribed maximum or the prime lending rate is clearly unlawful and unenforceable. The court should be seen to discourage such contracts.

In any event, as I have indicated the two agreements executed by the parties are not mutually compatible. One is an agreement for a loan. The other purports to be an agreement of sale. There is a clear dispute of facts which could not be resolved on the papers without leading *viva voce* evidence. Summary judgment could never have been entered where there were patent triable issues. Just how the trial magistrate arrived at the conclusion that the matter was "clear as a crystal" is a matter I have failed to comprehend.

See also *Heyns* v *Heyns* 1978 RLR 324 (A)

As regards the requirements in an application for summary judgment, it is settled law that the applicant in such application must establish that his claim is unanswerable. If there is an arguable defence to the claims, summary judgment will not be granted. See *Jena* v *Nechipote* 1986 (1) ZLR 29 (S) and *Pitchford Investments (Pvt) Ltd* v *Muzari* 2005 (1) ZLR (1) (H)

In the circumstances, I am utterly surprised that the respondent has filed extensive heads of argument numbering up to 11 pages to support the contention that summary judgment was correctly entered. This is, in my view a matter where the respondent ought to have conceded that the learned trial magistrate erred in granting summary judgment in view of the disputes of fact which could never be resolved on the papers. The matter ought to have been referred to trial.

In the circumstances it is ordered that the appeal be and is hereby allowed. The order of the court *a quo* is hereby set aside and substituted with the following:

" The application for summary judgment is dismissed with costs".

Moyo J ……. I agree

Chidawanyika, Chitere & Partners c/o T. J. Mabhikwa & Partners appellant's legal practitioners
H. Tafa & Associates, respondent's legal practitioners