JEREMY STANDER
versus
NELTRA INVESTMENTS t/a DOUGLAS CAR SALES

COURT OF ZIMBABWE
BERE J
HARARE, 31 August, 2 September, 3 September, 8 September 2009
& 10 March 2010

Civil Trial

T. Manjengwa, for the plaintiff
F.G. Gijima, for the defendant

BERE J: A brief resume of the broadly common facts in this case are as follows:-

The plaintiff is a citizen of Zimbabwe residing in this country and was the registered owner of a toyota hiace bearing registration number AAZ 7054 (the vehicle).

The defendant is a company duly registered in accordance with the company laws of this country and caries out the business of among other things selling motor vehicles at stand 3250, Kenneth Kaunda Avenue, in Harare.

On 10 October 2007 the plaintiff and the defendant entered into a written agreement (exhibit 1) wherein the latter undertook to sell on behalf of the former its motor vehicle and undertook to pay the plaintiff a straight payment of USD 14 000 from the proceeds of the sale.

It is not in dispute that the parties' written agreement was subsequently altered. Therein lies the point of divergence.

Both parties were not in agreement as to the exact nature of the amendments to exh 1.

According to the plaintiff the amendment to exh 1 was merely a reduction of the payment due to him from USD 14 000 to USD 12 000.

The defendant, on the other hand contended that the amendment was to the effect that the plaintiff would pocket the equivalent of USD 12 000 which amount was pegged at Z$96 billion.

Further it is not in dispute that the instant transaction was not a "once off one". The parties had dealt with each other in the past as evidenced by exhibits 2 and 3 which confirm that the defendant had on two separate occasions sold two motor vehicles on behalf of the plaintiff and paid the latter in foreign currency. These transactions were completed without difficulties.

Following disagreement over the payment of the amount due to the plaintiff, the plaintiff issues summons out of this court for an order against the defendant as follows:-

(a) Payment in the sum of USD 12 000 (twelve thousand United States dollars),

(b) Interest on the aforesaid amount at the prevailing United States of America Treasury rate with effect from 21st February 2008 to date of final payment.

(c) Costs of suit

Alternatively

(a) Damages in the sum of USD 12 000 (twelve thousand United States dollars).

(b) Interest on the above sum at the prevailing United States of America Treasury rate with effect from the 21st of February 2008 to the date of final payment.

(c) Costs of suit.

On 13 February 2009 the parties filed a joint pre-trial conference minute which identified basically two issues for determination at the trial of this matter and I have had to be guided by those issues.

FACTUAL ASSESSMENT OF THE EVIDENCE

In this regard, two documents were tabled in these proceedings for consideration.

The plaintiff gave evidence and maintained that the agreement governing the transaction between the parties is as endorsed in exh. 1 and signed by both parties. According to the plaintiff the original agreement which was signed by both parties on 10 October 2007 was to the effect that his motor vehicle would be sold by the defendant and he would be given USD 14 000.

The plaintiff went further to say that the original agreement was subsequently altered on 4 February 2008 by reducing USD 14 000 to USD 12 000 and that when this was done, both parties endorsed their signatories on exh. 1.

Exhibit 1, indeed confirms that both parties to the agreement signed to confirm the amendments. The plaintiff has urged the court to accept exh. 1 as the full text of the parties agreement.

The defendant's representative on the other hand has implored the curt to accept that the transaction between the parties was governed by exh. 4 which made reference to the payment in Zimbabwe dollars of the equivalent of US$ 12 000 which conversion was agreed at Z$96 billion at the time.

The position as put forward by the defendant is fraught with a number of challenges.

Firstly, exh. 4 is a photocopied document and in that regard its evidential value is compromised.

There was no convincing explanation given by the defendant as to why the original document could not be produced. It was only when the defendant's representative, Mr Douglas Tanyanyiwa was giving evidence in chief that he tried desperately to suggest that the plaintiff had taken this exhibit at a time when Mr Tanyanyiwa himself was attending to some labour officers who had visited him at his company.

Surprisingly this suggestion was never put to the plaintiff by way of cross-examination. One could not help but conclude that the suggestion by Mr Tanyanyiwa that he was advised by the labour officers (which incidentally was hearsay evidence) that the plaintiff had snatched the original document of exh. 4 was clearly an afterthought.

In any event, and as already stated the evidential value of exh. 4 is severely compromised in the light of the Civil Evidence Act[1] which spells out circumstances when the court may accept copies of documents.

The other challenge which the court could not overlook is the fact that the endorsements on exh. 4 were unilaterally done by the defendant's representative. There is nowhere on that documents where the plaintiff signed to acknowledge his alleged agreement to receive $96 000 000 000 (then) as the equivalent of US$12 000.

It must be understood that the main reason why parties prefer written and signed agreements like exh. 1 is that the parties desire that they be bound by such agreements particularly in the event of a dispute like what has happened in this case. Reference to such documents is easier as opposed to relying on verbal agreements.

It is highly unlikely that the plaintiff, having earlier on signed exh. 1 would have subsequently consented to the amendments as they appear in exh. 4 and proceeded not to sign for such amendments.

Exhibits 2 and 3 show a consistent pattern in the manner the plaintiff and the defendant were conducting their business. Exh. 1 is equally consistent with those two exhibits.

The evidence of Noah Silvester Gomera was unable to add value to the defendant case as he admitted that he had no independent knowledge as regards how the transaction with the plaintiff was conducted.

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[1] Section 11 Chapter 8:11

The court had no difficulties in accepting the version of the plaintiff as representing the true position in this matter. Exhibit 1 must be conclusive in so far as it deals with the undertaking of the parties to each other.

THE LEGALITY OR OTHERWISE OF THE AGREEMENT

Flowing from the findings of the court, the inevitable question that cannot avoid scrutiny is whether or not the agreement entered into by the plaintiff and the defendant was legal. This issue assumes dominant consideration because of the conflicting positions adopted by the respective legal counsels for both the plaintiff and the defendant.

The plaintiff's counsel was of the firm view that the agreement between the parties as captured in exh. 1 was perfectly legal and this court should enforce it.

The defendant's counsel was of a different view. Counsel's contention was that the transaction by the two parties was premised on dealing in foreign currency and that to indulge in such a transaction at the time the parties needed to have obtained exchange control authority.

THE LEGAL POSITION

The issue before me is not a novel one as this court has had the occasion to deal with similar situations in the past. See the following cases for guidance; Wycliff Matsika[2] and Lloyd Gambiza[3] .

In the Matsika case the issue which the court had to determine was crisply put by the learned judge in the following;

> "I became concerned that one issue had not been dealt with to my satisfaction – the issue being whether the parties were entitled under our law to transact business in foreign money i.e. in United States dollars. In other words the question which vexed me was whether two Zimbabweans both resident in the country, were entitled to buy and sell in United States dollars"[4].

After a thorough analysis of the case before him the learned judge concluded that the transaction was in fact in violation of s 4(1)(a)(ii) of the Exchange Control Regulations[5].

Following on the decision in Matsika case (*supra*) the learned judge who dealt with the Gambiza case concluded the transaction therein was a violation of the same exchange control regulations.

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[2] Wycliff Matsika v Jumvea Zimbabwe Limited and Sydney Mpofu HH 9-2003
[3] Lloyd Gambiza v Pikirai Taziva HH 109-2008
[4] SI 109/1996
[5] HH 9/2003 at p. 2

There is a slight distinction though from the above referred cases from the instant case. Whereas in the two cases (*supra*) there was evidence that foreign currency had actually changed hands in the instant case the parties had only made an undertaking to exchange the foreign currency once the transaction had been concluded.

However, this distinction must not cloud issues in this matter. The agreement between the parties cannot be looked at in a vacuum. There is need to consider the history of the two parties as captured by exh(s) 2 and 3 which were tendered by the plaintiff himself in a bid to strengthen his case. In my view, those two confirmed transactions clearly demonstrate a stout effort by both parties to flout the exchange control regulations with their eyes wide open. The record of proceedings in this case will show that even when the two parties engaged in this transaction they both knew that they were flouting the regulations in question. To that extent it cannot escape one's mind that this particular transaction was tainted with illegality.

During submissions counsel for the plaintiff referred me to the case of Barker [6] as authority for the support of the plaintiff's position. With respect, that case was referred to out of context in that in that case the Supreme Court was called upon to deal with violations of s 11, of the Exchange Control Regulations which section was designed to control payments by Zimbabwean residents outside Zimbabwe or to incur an obligation to make a payment outside Zimbabwe subject to certain conditions being fulfilled.

In the instant case the issue involved two Zimbabweans, one being the plaintiff and the other being a representative of his duly registered Zimbabwean company. The transaction involved providing services to each other and paying each other in this country in foreign currency. To that extent therefore the distinction between these two cases is quite clear.

Different considerations apply to these two sets of transactions. See the case of Barker (*supra*) and Macafe (Pty) Ltd[7].

Having determined that the agreement entered into by the parties was an illegal one, I turn now to consider whether the plaintiff case is sustainable or not given the fact that the plaintiff's suit was in essence meant to enforce this contract.

In dealing with this issue I find the views by GUBBAY JA in the case of Dube to be quite instructive. The then learned judge of appeal put the position succinctly in the following:-

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[6] Barker v African Homestead Touring and Safaris (Pvt) Ltd & Anor 2003(2) ZLR 6(5)
[7] Macafe (Pty) Ltd v Executrix, Estate Forester 1991(1) ZLR 315(S) at 320 B-D

> "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 Robinowitz* 1948(2) SA 876 (W) at 878; *York Estates Ltd v Warcheam* 1950(1) SA 125 SR at 128. It is expressed in the maxim *ex turpi causa non oritur action*. The second is expressed in another maxim *in pari delicto potior est condition possidentis*, which may be translated as meaning 'where the parties are equally in the wrong, he who is in possession will prevail'. The effect of this rule is that where something has been delivered pursuant to an illegal agreement the loss lies where it 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 to be made. They will do so in order to prevent injustice, on the basis that public policy 'should properly take into account the doing of simple justice between man and man' As was pointed out by STRATFORD CJ in *Jaybay v Cassim* 1939 AD 537 at 544-545……."[8]

In the case before him the learned judge, with the concurrence of the other judges of appeal went on to relax the *par delictum rule* and granted relief to the plaintiff.

I consider that the overriding factor in the majority of the cases where the *par delictum rule* is relaxed is that the party seeking relief will not be seeking to enforce an illegal agreement.

I also make a further observation that almost invariably where parties enter into illegal agreements there is an element of unjust enrichment particularly where courts have declined to relax the *par delictum rule*. In other words one of the parties to the illegal transaction comes out of it with burnt fingers whilst the other stands to benefit. Such is the hazardous nature of entering into an illegal transaction.

In the case before me it is clear that the plaintiff, in both the main and the alternative claim has sought to enforce the illegal contract. In this regard one needs to go no further than a rudimentary perusal of the summons commencing action.

From the evidence given and accepted by the court the conduct of the parties in this case is quite reprehensible. They have a very clear history of transgressing the Exchange Control Regulations as in force then as confirmed by exhibits 2 and 3. The conduct of the parties disable the plaintiff from the benefit of a 'once off' transaction. They had systematically connived to act in the way they did fully aware of the existence of the prohibitive Exchange Control Regulations. In my view courts must frown at such conduct and must not be seen to

[8] Dube v Khumalo 1986(2) ZLR 103 SC at 109

aid and abet such unacceptable conduct. In my view this is a clear case where loss should lie where it falls".

The issue of costs

I accept the position that the issue of costs is largely at the discretion of the court provided of course that such discretion is judiciously exercised. In this regard I find the views of YOUNG J quite apposite when he stated as follows:

> "In ordinary litigation the rule is of course that in the absence of special circumstances costs should follow the event, and judicial discretion is geared to that principle".[9] See also the case of Kruger Brothers and Wasserman.[10]

In the case before me, I consider that there are special circumstances warranting a departure from the general rule as regards the question of costs.

The plaintiff has lost the motor vehicle which he delivered to the defendant in pursuance of an illegal transaction. The defendant has benefited from such a transaction in that he has not paid anything to the plaintiff.

It is an elusive concept to try and do justice between man and man but I believe an attempt should be made to disgorge the defendant of the benefit it has obtained through this illegal transaction by denying it costs in this litigation.

It was for these reasons that at the conclusion of this trial I made the following order:-

(a) That the plaintiff's claim be and is hereby dismissed.

(b) That there will be no order as to costs.

Wintertons. plaintiff's legal practitioners
F.G. Gijima and Associates, defendant's legal practitioners

[9] Greenspan Bros (Pvt) Ltd v Commissioner of Taxes 1960(1) SA 454
[10] Kruger Bros and Wasserman v Rusk 1918 AD 63 at 68