

BEN RAYMOND MUNDANGEPFUPFU
and
ALBAN TACHIYIRWEYI MUNDANGEPFUPFU
versus
INNOCENT CHISEPO

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 3 March 2017 & 22 March 2017

Civil trial – special case

P. Kawonde, for the plaintiffs
F.F. Nyamayaro, for the defendant

MUREMBA J: The facts of this matter being common cause the counsels agreed to proceed by way of a special case. Consequently, they filed a statement of agreed facts and heads of argument.

The agreed facts are as follows. On 10 October 2008 the defendant and one Samuel Raymond Manatsa (hereinafter called Manatsa) entered into an agreement of sale in terms of which the defendant sold to Manatsa a Nissan Hardbody 2.7 litres diesel truck. On 8 October 2008 the plaintiffs had agreed to act as guarantors for Manatsa in the event that he failed to meet his obligations towards the defendant. The plaintiffs surrendered their title deed being Deed of Transfer 6291/1998 for a property known as Stand 2846 Highfield Township, Harare, as security. The purchase price of the motor vehicle was US\$22 000-00. At the time Manatsa and the defendant entered into the agreement they had not sought statutory approval authorising payment in foreign currency as required by the provisions of Statutory Instrument 109/1996.

Manatsa failed to perform his obligations in terms of the agreement with the defendant. He failed to pay the purchase price. As a result, the defendant instituted legal proceedings against him and obtained judgment in case number HC 1640/2010 on 17 November 2010. The judgment was obtained in default.

On 15 December 2010, the defendant instituted legal proceedings against the plaintiffs under case number HC 9295/10 seeking the following order:

“(a) The 1st and 2nd respondents are jointly and severally liable with Samuel Raymond Manatsa to pay and shall pay the sum of US\$22 000-00 jointly and severally to the applicant within ten (10) days of service of this order.

(b) The property known as stand 2846 Highfield Township held under Deed of Transfer No. 6291/1998 is specially executable by writ of execution in terms of this order and also in terms of the order in case no. HC 1640/2010.

(c) The respondents shall pay the costs of this application on the legal practitioner and client scale.”

The application was opposed by the plaintiffs. On 18 February 2015, the application was dismissed for want of prosecution under case no. HC 105/2015. On the other hand, another court unaware of the dismissal that had been granted, granted the application under case number HC 9295/10 in June 2015 as a default judgment. The plaintiff made an application for its rescission which was granted in default under case number HC 9174/15. The defendant has since made an application for the rescission of that default judgment under case number HC 2692 B/2016 which application is still pending.

On 4 April 2011 the plaintiffs had instituted the current proceedings against the defendant seeking the following order.

“(a) Delivery of title deed of property No. 2846 Highfield Township, Harare within 7 days of being served a copy of the order.

(b) Costs of suit.”

The defendant opposed the claim and made a counter claim seeking the following order:

“(a) An order that the plaintiff pays the defendant the sum of US\$22 000-00 jointly and severally each paying the other to be absolved.

(b) An order that Stand 2846 Highfield, Harare, to be declared specially executable.

(c) Costs of suit on a legal practitioner and client scale.”

At the pre-trial conference the parties agreed on the issues for trial and the matter was referred to trial, but on the date of the trial counsels agreed to proceed by way of a special case. They agreed on the following issues for determination.

1. Is the agreement between the plaintiffs and defendant null and void for want of requisite statutory clearance and authority to transact in United States dollars?
2. In the event that the court finds it unlawful, can the agreement be saved by the legal exceptions that apply in such cases?
3. Whether or not the defendant's counter claim is *res judicata*?
4. If the counter claim is not *res judicata* whether or not the prayer should be granted?

I will now turn to deal with these issues one by one.

(i) *Is the agreement between the plaintiffs and defendant null and void for want of requisite statutory clearance and authority to transact in United States dollars?*

The plaintiffs' counsel, Mr *Kawonde* submitted as follows. Section 4 of the Exchange Control Regulations S.I 109/1996 outlawed any dealings in foreign currency by Zimbabwean residents without the requisite exchange authority. He went on to cite the provision which reads as follows:

“Dealings in foreign currency

1. Subject to subsection (3), unless permitted to do so by an exchange control authority –
 - (a) No person shall in Zimbabwe
 - (i) Buy any foreign currency from or sell any foreign currency to any person than an authorised dealer or
 - (ii) Borrow any foreign currency from or lend any foreign currency to or exchange any foreign currency with any person other than an authorised dealer.”

Mr *Kawonde* submitted that from the facts of the present matter it is common cause that s 4 of the Exchange Control Regulations was breached and as such the sale agreement that the defendant and Manatsa entered into for the sale of a motor vehicle was illegal. He said that, equally, the agreement that the plaintiffs entered into with the defendant to act as guarantors for Manatsa was illegal. Citing the cases of *Mlambo v Chikata* 2015 (1) ZLR 206, *Mega Park Zimbabwe (Pvt) Ltd v Global Technologies Central Africa (Pvt) Ltd* 2008 (2) ZLR 195 H and *Dube v Khumalo* 1986 (2) ZLR 103 @ 109 D-F, Mr *Kawonde* argued that an illegal contract is unenforceable at law by virtue of operation of the maxim *exturpi causa non-oritur actio* which stipulates that no action arises from an illegal contract. In other words

one cannot seek to enforce an illegal contract. Mr *Kawonde* submitted that, consequently, the loss lies where it falls (the *in pari delicto* rule applies). He further submitted that the *in pari delicto* rule is only relaxed where a rescission of the contract is sought on equitable grounds, otherwise the courts will never enforce an illegal contract.

Mr *Kawonde* argued that upholding the guarantee will be an act of enforcing the 2 illegal contracts that were entered into on 8 and 10 October 2008. He submitted that if the principal contract is illegal, the surety is not bound to the creditor as per the case of *Muchabaiwa v Grab Enterprises (Pvt) Ltd* 1996 (2) ZLR 691 (S) para E of the headnote. He further referred to the case of *Albert v Papenfus* 1964 (2) SA 713 @ p 717 H wherein it was held that:

“It is common cause and trite law that if the main obligation is unenforceable as being tainted with illegality, the guarantor’s obligation is equally unenforceable.”

Mr *Kawonde* submitted that in view of the illegality of the two contracts that were entered into the plaintiffs should be granted the relief that they are seeking for the return of their title deeds by the defendant. He submitted that the defendant is not going to be prejudiced by this order because he has already obtained a default judgment against Manatsa under case number HC 1640/16, so his recourse lies with enforcing that judgment for the recovery of his money. He said that in any case the motor vehicle that was sold was delivered to Manatsa and not to the plaintiffs, so the issue of unjust enrichment to the plaintiffs does not even arise.

In response Mr *Nyamayaro* for the defendant submitted that the argument by Mr *Kawonde* that the agreements were null and void for non-compliance with Statutory Instrument 109/1996, the Exchange Control Regulations is baseless. He said that in 2008 before the adoption of the multi-currency, nothing in the law prohibited the making of an agreement denoted in United States dollar. He said that the issue was dealt with extensively in a string of cases. He said that what was an offence was paying in foreign currency without acquiring the relevant authority, but nothing stopped people from making agreements denoted in foreign currency. He went on to cite a number of cases which include the case of *McCosh v Pioneer Corporation African Limited* HH 164/10 and *Barker v African Homesteads* SC 18/03 which cases specifically dealt with s 4 of the Exchange Control Regulations S.I 109/1996 which prohibited dealings in foreign currency without the permission of the exchange control authority.

The *McCosh v Pioneer Corporation Africa Limited* case involved a labour dispute between a former financial director, Mr McCosh and his former employer, the defendant company. Mr McCosh was seeking payment of arrear salaries and other benefits arising from a contract of employment concluded between the parties in September 2004 and was terminated in March 2007 before the adoption of the multi-currency in February 2009. In July 2007 the defendant's Group Chief Executive Officer had acknowledged liability on behalf of the defendant for the sum of US\$70 000-00. One of the issues that the court dealt with was the interpretation of s 4 (1) (a) (ii) of the Exchange Control Regulations. The question was whether or not it was lawful for a Zimbabwean registered company to pay its employees in foreign currency for work performed in Zimbabwe without exchange control authority. KUDYA J held that payment of an employee's salary in foreign currency before the adoption of the multi-currency would have contravened s 4 (1) (a) (ii) of the Exchange Control Regulations, but the act of entering into an agreement to pay the salary in foreign currency was not prohibited by the Exchange Control Regulations. To quote him *verbatim* he said,

“It seems to me that the payment of an employee's salary in foreign currency, at the time, would have contravened s 4 (1) (a) (ii) of the Exchange Control Regulations. Both CHINENGO J and GOWORA J held in separate cases of *Jumvea Zimbabwe Ltd & Anor v Matsika* 2003 (1) ZLR 71 (H) at 74G and *Gambiza v Tavaziva* HH 109-08 at p 4 of the cyclostyled judgment, respectively, that payment of foreign currency whether inside or outside Zimbabwe would amount to an exchange and thus be in violation of s 4(1) (a) (ii) of the Exchange Control Regulations. In the present case the defendant did not make any payment but entered into an agreement to pay. Mr *Magwaliba* was therefore correct that such an agreement was not prohibited by the exchange control regulations. This is what McNALLY JA had in mind in the *Macape* case, *supra*, when he said at p 321A-B:

“The contract to pay is lawful. Actual payment in pursuance of the contract is unlawful, without permission. There is no reason why the court should not order payment; subject to the condition that authority is obtained. I must make it clear that this judgment in no way inhibits the Reserve bank in the exercise of its discretion. It is entirely for the Reserve bank to decide whether or not to authorise the payment. If it decides not to do so the payment may not be made. The contract remains lawful. Payment will then have to await a change either in the law or in the policy of the Reserve Bank.”

I hold that the contract to pay the plaintiff in foreign currency did not contravene any Exchange Control Regulations.” (My emphasis)

Mr *Nyamayaro* also made reference to the case of *Macape (Pty) Ltd v Executrix Estate Forretser* 1991 (1) ZLR 315 (S) which was also referred to in the *McCosh v Pioneer Corporation Africa Limited* case.

What comes out in the cases that Mr *Nyamayaro* referred to is that under the Exchange Control Regulations the entering into agreements to pay in foreign currency was

lawful. What was unlawful was making the actual payment in pursuance of the agreements without first obtaining permission from the exchange control authority. So even if authority was subsequently declined or refused, that did not nullify the agreement itself. In *Macape (Pty) Ltd v Executrix Estate Forretser*, MCNALLY JA said that if authority was not granted, payment would then have to await a change either in law or in the policy of the Reserve Bank.

In casu, the plaintiffs' cause of action is the alleged contravention of s 4 (1) (a) (ii) of the Exchange Control Regulations which prohibited dealing in foreign currency with an unauthorised dealer without first obtaining permission. Looking at the section, it clearly did not prohibit the entering into agreements or contracts denoted in foreign currency. All it did was prohibit persons in Zimbabwe from dealing in foreign currency with unauthorised dealers without first obtaining authority from the exchange control authority. So dealing in or exchanging foreign currency with a person who was not an authorised dealer was not prohibited *per se*. All that was needed was to obtain permission before exchanging the foreign currency. With this analysis, I fully associate myself with the case authorities that Mr *Nyamayaro* referred to above. I am therefore in agreement with the arguments and submissions made by Mr *Nyamayaro* that the agreement that the defendant and Manatsa entered into in 2009 for the sale of a motor vehicle in foreign currency was not illegal. What would have been illegal was for the payment of the money to have been made without the parties or the defendant having first obtained permission to receive such payment from the Exchange Control Authority. Clearly, that would have contravened s 4 (1) (a) (ii) of the Exchange Control Regulations.

The principal agreement that the defendant and Manatsa entered into being legal, it follows therefore that the guarantee agreement that the plaintiffs entered into with the defendant is also legal and enforceable. So the plaintiffs are bound by it. They cannot therefore claim for the return of their title deed from the defendant on the basis that the guarantee agreement was unlawful for want of statutory clearance to transact in foreign currency. I will therefore dismiss their claim.

Since I have made a finding that the agreements were lawful it means that the issue with regards to legal exceptions that are applicable in cases of illegal contracts falls away. Consequently, I will not determine it.

(ii) *Whether or not the defendant's counter claim is res judicata?*

It is common cause that the defendant's counter claim in the present matter is similar to the claim that he made under HC 9295/10. In both matters the defendant wants the plaintiffs to be ordered to pay him US\$22 000-00 being the purchase price of the motor vehicle that he sold to Manatsa for which the plaintiffs acted as guarantors. He also wants the plaintiffs' stand for which he holds title deeds to be declared specially executable. He further wants them to pay costs of suit on a legal practitioner and client scale.

It is not in dispute that at the moment HC 9295/2010 is still pending. The plaintiffs obtained a default judgment dismissing it for want of prosecution and the defendant has since made an application for its rescission under case number HC 2692B/2016.

Mr *Kawonde* for the plaintiffs citing the case of *Kawondera v Mandebvu* 2006 (1) ZLR 1105 submitted that the requisites for a successful plea of *res judicata* are that the prior action:

- (i) must have been between the same parties or their privies;
- (ii) must have concerned the same subject matter;
- (iii) must have been founded on the same cause of action.

Mr *Kawonde* also cited the case of *Towers v Chitapa* 1996 (2) ZL 261 submitting that in that case it was held that a default judgment previously handed down could pose as an insuperable obstacle to a claim in the future based on the application of the principle of *res judicata*. Mr *Kawonde* argued that in light of the authorities he had cited the defendant's claim is *res judicata* and should therefore be dismissed.

On the other hand, Mr *Nyamayaro* submitted that the defendant's counter claim is not *res judicata*. He submitted that the requirements for a successful plea of *res judicata* have been laid out in a number of cases such as *Tobacco sales (Pvt) Ltd v Eternity Start Investments* 2006 (2) ZLR 293 (H); *Flowerdale Investments (Pvt) Ltd and Another v Bernard Construction (Pvt) Ltd and Others* 2009 (1) ZLR 110 (S); and *Banda & Ors v Zisco* 1999 (1) ZLR 340 (SC). Mr *Nyamayaro* went on to submit that the essential elements of *res judicata* are

- (i) The action in respect of which judgment has been given must concern the same parties.
- (ii) The action or judgment must involve the same subject matter.
- (iii) The action in which judgment is given must be founded in the same cause of action or complaint.

- (iv) With respect to requirement of the judgment, it must be a final and definitive judgment.

It was Mr *Nyamayaro's* argument that *in casu* whilst the parties are the same, the action involves the same subject matter, and the cause of action is the same, the two judgments that were granted in HC 9295/2010 are not final and definitive. He said that the plaintiffs obtained judgment by way of an application for dismissal for want of prosecution which is not a definitive and final judgment. He also said that the defendant also obtained judgment in default of appearance by the plaintiff. Mr *Nyamayaro* submitted that as a result the requirements for *res judicata* have not been met.

The special plea of *res judicata* means that the same matter has been decided in another court of competent jurisdiction and may not be pursued further by parties. The matter would have been judged on the merits and as such it may not be relitigated. This plea is a declinatory plea meaning that it is meant to quash or put an end to the proceedings. I am in agreement with the essential elements of *res judicata* as enumerated or outlined by Mr *Nyamayaro* because he made mention that there should be judgment in the matter and the judgment must be a final and definitive judgment. The doctrine of *res judicata* is meant to bar or preclude continued litigation of a case on the same issues between the same parties. It means that the matter cannot be revised again either in the same court or in a different court. Put differently, the doctrine means that the same matter cannot be reconsidered by the same court or by a different court. It is a legal concept that is meant to prevent

- (i) injustice to the parties of a case supposedly finished.
- (ii) unnecessary wasting of resources in the courts.
- (iii) future judgments from contradicting earlier ones.

In *casu*, it has been stated in the statement of agreed facts that pursuant to a default judgment that the plaintiffs obtained, the defendant applied for its rescission and that application is still pending. To begin with, a default judgment is a court judgment that is granted in favour of either party when the opposing party fails to respond. It can spell the end of a lawsuit and become a final judgment if the opposing party does not seek to reverse it. However, if the opposing party seeks to reverse it by making an application for its rescission, it does not become a final judgment. In HC 9295/10, the defendant has since made an application to have the default judgment which was obtained by the plaintiffs dismissing his claim rescinded. This means that the default judgment that the plaintiffs obtained is not yet a

final judgment. It will only become a final judgment if the defendant's application for rescission fails or if the defendant withdraws the application for rescission. Therefore, at this juncture the counter-claim cannot be said to be *res judicata*. One of the requirements or elements of *res judicata* being the need for there to be a final judgment has not yet been met.

(iii) *If the counter-claim is not res judicata whether or not the prayer should be granted?*

Although counsels put this as an issue for determination, none of them addressed it in their heads of argument. I would not know if the omission was an oversight or deliberate. Be that as it may, I realised that it was an issue that I could determine without recalling counsels to address me on. After a research I came to the conclusion that although the counter-claim is not *res judicata*, I cannot grant it for the reason that it is pending in this court under case no. HC 9295/10 as I have already discussed above. The matter is therefore *lis alibi pendens*. Since it is already pending under a different case number, I cannot determine it in the present matter. The risk or danger is that I might reach an inconsistent decision from the one that will be reached in HC 9295/10. With *lis alibi pendens* the factors to be considered are as follows.

- i) litigation is pending elsewhere;
- ii) between the same parties or their privies;
- iii) based on the same cause of action;
- iv) in respect of the same subject matter. See *Eravin Construction CC v Twin Oaks Estate Developments (Pty) Ltd* (1573/10) [2012] ZANWHC 27.

Lis alibi pendens just like *res judicata* is also a special plea that can be pleaded by the opposing party. Whilst *res judicata* is a plea in bar, *lis alibi pendens* is a plea in abatement. The difference in the two special pleas is that with *res judicata*, the matter would have been decided and there would be a final and definitive judgment, whereas with *lis alibi pendens*, the matter would still be pending, awaiting determination. In other words, there would not be a final and definitive judgment in existence yet.

(iv) *Costs*

Since both parties have lost in their claims, I will order that each party pays their own costs.

Therefore, it be and is hereby ordered that:

1. The plaintiffs' claim is dismissed.

2. The defendant's counter claim is dismissed.
3. Each party is to bear its own costs.

Kawonde Legal Services, plaintiffs' legal practitioners
Nyamayo, Makanza & Bakasa, defendant's legal practitioners