HC 7045/02

WYCLIFF MATSIKA
versus
JUMVEA ZIMBABWE LIMITED
and
SYDNEY MPOFU

HIGH COURT OF ZIMBABWE
CHINHENGO J
HARARE 2 October 2002 and 15 January 2003 hh-09-03

Unopposed Court Application

Mr *Gunye,* for the applicant

CHINHENGO J: This is an unopposed application in which the applicant claimed the delivery of a motor vehicle which he purchased from the respondents. In the alternative he claimed a refund of the purchase price.

The facts of the case are these. On 23 May 2002 the first respondent entered into an agreement of sale with an entity known as Habin Investments. The agreement was for the sale by the first respondent and the purchase by Habin Investments of a motor vehicle, a Toyota Camry, which was to be shipped from Japan by the first respondent. In the agreement of sale, the motor vehicle was identified by its colour, chassis numbers, year of manufacture, gear box numbers and other incidental details of identification.

The purchase price was the sum of US$2 800 payable by making a deposit of US$1 700 with the balance being paid in unspecified instalments at the end of each month. The agreement provided in this regard that –

"The remaining balances to be paid on or before the 30th of each month."

The instalments as I have mentioned were not specified.

The agreement also provided that the ownership of the motor vehicle shall pass to the purchaser after the purchase price was paid in full. The motor vehicle was, however, to be delivered to the purchaser within 121 days from the date on which the deposit was paid.

The applicant paid the deposit on 23 May 2002 and a further amount of US$1 730 on 18 June 2002. The motor vehicle was not delivered within the agreed period nor at any time thereafter despite demand. In the founding affidavit the applicant did not explain why Habin Investments is not the applicant. I will assume for the purposes of this judgment that the applicant was trading in the name Habin Investments and that Habin Investments is not a corporate body. The applicant averred that when the motor vehicle was brought into Zimbabwe, the respondents sold it to another person and that the second respondent then fraudulently represented to him that another vehicle of the same model would be made available to him. This did not happen.

In this application the applicant sought an order compelling the respondents to deliver to him a similar model motor vehicle. In the alternative he sought an order that the respondents refund to him the sum of US$3 430 together with interest thereon at the prescribed rate of interest. No date from which the interest is to be calculated is specified. There was no explanation in the founding affidavit why the applicant was claiming a sum greater than the amount he said he had paid.

The court application was served by a clerk in the employ of the applicant's legal practitioners "by handing a copy of the Court Application to a receptionist, responsible person at the address of service who accepted service on behalf of first and second respondents". The name of the receptionist is not mentioned but the address at which the service was effected is that given in the agreement of sale as the address of the purchaser. I will again assume that the court application was properly served.

At the hearing I raised a number of issues which were of minor concern. Some satisfactory answers and some not so satisfactory answers were given. 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 and not in Zimbabwe 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. I directed that the applicant's legal practitioner should file written submissions on this issue and I reserved my judgment. Those submissions were filed.

The applicant's legal practitioner submitted that the transaction between the parties was illegal because it contravened s 4(1)(a)(ii) of the Exchange Control Regulations, 1996 contained in Statutory Instrument 109 of 1996 (hereinafter called "the Regulations"). He submitted that the *in pari delicto* rule applied, but the court should, in its discretion, relax that rule on the basis that the respondents would be unjustly enriched, that the transaction was not a shameful or immoral one and that the applicant was not aware that the transaction violated the Regulations.

The issues to be determined are whether (a) the transaction is illegal i.e. whether Zimbabweans can buy and sell to each other or trade within Zimbabwe in a currency other than Zimbabwean dollars and cents; and (b) if it is illegal, can the court relax the *in pari delicto* rule in favour of the

applicant.
The Decimal Currency Act [*Chapter 22:04*] was enacted to provide for the introduction of a decimal currency in Zimbabwe. In s 3, the Decimal Currency Act provides that the currency units of Zimbabwe shall, from 17 February, 1970, be the Zimbabwe dollar and the Zimbabwe cent. Though this Act was concerned with the decimalisation of the currency units, it declared as a given that that is the currency of Zimbabwe. The currency of Zimbabwe is issued by the Reserve Bank of Zimbabwe in terms of ss 12 and 15 of the Reserve Bank of Zimbabwe Act [*Chapter 22:10*]. In terms of ss 13 and 16 of that Act, a tender of notes and coins issued by the Reserve Bank and which have not been demonetized shall be legal tender in Zimbabwe. The Reserve Bank of Zimbabwe Act does not positively provide that persons in Zimbabwe may not transact business in foreign money in the way that the applicant and the respondents did. This would appear to be permissible if there was no regime of foreign exchange controls. And if it were permissible, a conflict of laws of a very limited nature will arise because an obligation governed by Zimbabwean law results in a duty to pay a sum in foreign money. Sections 13 and 16 of the Reserve Bank of Zimbabwe Act recognise the distinction between money which is legal tender and money which is not legal tender in Zimbabwe, following the principle that all legal tender is money but not all money is legal tender. Thus, outside the exchange control regime, the transaction between the parties to this application would not be illegal even though it would not have been done in money which is legal tender. Generally transactions in money which is not legal tender is of little concern in Zimbabwe because no money circulates here which is not legal tender.
The President of Zimbabwe is empowered by s 2 of the Exchange Control Act [*Chapter 22:05*] to make regulations which may prohibit or restrict dealings in any currency. The Exchange Control Regulations, 1996 were made for that purpose.
In section 4(1)(a)(ii) the Regulations provide that no person in Zimbabwe shall exchange foreign currency with any person other than an authorised dealer without the permission of the exchange control authority.
Subsection (2) of s 4 provides that if any person obtains any foreign currency in Zimbabwe, he shall comply with any condition that an exchange control authority may give him in regard to the use to which the foreign currency may be put or the period for which it may be retained.
Section 11 of the Regulations prohibits a Zimbabwean resident from making any payment outside Zimbabwe or incurring any obligation to make a payment outside Zimbabwe unless he has been authorised by an exchange authority to do so.
The applicant's legal practitioner submitted and conceded that the transaction in this case was conducted in contravention of s 4(1)(a)(ii) of the Regulations. I agree that this provision of the Regulations was contravened when the applicant and the respondents exchanged the sums of US$1 700 and US$1 730 without the permission of an exchange authority. Their transaction was therefore tainted with illegality.

Zimbabwe currently suffers from a severe shortage of foreign currency. It was suffering the same shortage when the parties to this application entered into the agreement of sale. It is absolutely necessary that, in the current situation of shortage of foreign currency, all available foreign currency should be properly accounted for and that every citizen or resident should comply with the controls imposed by the Regulations. To enter into transactions in foreign currency, as did the parties to this application, can only compound the difficulties which the country faces in regard to the availability and optimum utilisation of the scarce foreign currency available.

It is trite that this court has the discretion to relax the effect of the maxim *in pari delicto potior est conditio possidentis* and not deny judicial assistance to a person who parts with money in furtherance of an illegal transaction. The situations were the court may relax the rule are where they must prevent injustice between man and man. This principle was recognised and applied in *Dube v Khumalo* 1986 (2) ZLR 103 (SC) and *Young v Van Rensburg* 1991 (2) ZLR 149 (SC). Having regard to the foreign currency situation in Zimbabwe and to the need to discourage persons from engaging in illegal transactions involving foreign currency, I have to decide whether the public policy imperative of doing justice between man and man should take precedence over the need, also dictated by public policy, to discourage transactions of the nature involved in this case. I think that the need to discourage transactions of the nature involved in this case, in the current situation in Zimbabwe, should generally take precedence. This consideration would present a point of distinction between this case and *Dube* and *Young, supra.*

There is however a criminal sanction to the contravention of the Regulations. In this regard I am much persuaded to adopt the statement of STRATFORD CJ in *Jajbhay v Cassim* 1939 AD 537 at 544-545 which was quoted with approval in *Dube* and *Young supra.* The learned JUDGE OF APPEAL stated as follows:

> "…. Courts of law are free to reject or grant a prayer for restoration of something given under an illegal contract, being guided in each case by the principle which underlies and inspires the maxim (*in pari delicto*). And in this last connection I think a court could disregard the various degrees of turpitude in delictual contracts. And when the delict falls within the category of crimes, a civil court can reasonably suppose that the criminal law has provided an adequate deterring punishment and therefore, ordinarily speaking, should not by its order increase the punishment of the one delinquent and lessen it of the other by enriching one to the detriment of the other. And it follows from what I have said above, in cases where public policy is not foreseeably affected by a grant or refusal of the relief claimed, that a court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment."
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> I must say that in this case public policy is probably "foreseeably

affected by a grant or refusal of the relief claimed" in the sense that a grant of the relief claimed would appear to encourage, rather than discourage, persons from engaging in illegal transactions which impact negatively on the foreign currency situation of this country at a time of dire foreign currency need.

In this case, however, the full nature of the transaction has not been disclosed because the respondents did not oppose the application. The background facts given by the applicant are scanty. What those facts do clearly establish, however, is that respondents have no legal or moral claim to the money nor other equitable right. The respondents have given absolutely no value for the money they received. They stand to gain for no reason at all. The agreement of sale was weighted against the applicant, in that in terms of clause (e) thereof if the applicant cancelled the agreement for any reason he was to suffer a cancellation penalty of twenty *per centum* of the purchase price. It should be held against them that it is the respondents who breached the agreement. I am satisfied that in these circumstances the *in pari delicto* rule should be relaxed in favour of the applicant.

In the written submissions filed by the applicant's legal practitioner, it was explained that the amount appearing in the prayer as being the total amount claimed in the sum of US$3 430 is made up of the actual purchase of US$2 800 and import duty charges paid by the applicant to the respondents. I am satisfied that the respondents have had notice of the total amount claimed as it appears in the draft order attached to the court application. The interest claimed on a debt sounding in foreign money cannot be at the prescribed rate of interest see *Mawere v Mukuna* 1997 (2) ZLR 361 (H). In the absence of a date from which interest is to be calculated I will order that it be calculated from 2 September 2002, being the date on which the court application was served on the respondents. As for the basis of the liability of the second respondent, I can only say that if he did not think that he was jointly liable with the first respondent he should have opposed the application.

The agreement of sale in clause (f) thereof provided that any dispute would be resolved in the magistrates court. The parties consented to that court's jurisdiction. The applicant brought this matter to the High Court in defiance of a clear term of the agreement of sale. My order of costs will reflect my disapproval of the institution of these proceedings in this court. I do not think that it would be proper for me to order that the respondents should deliver a similar model car as that would be to assist the parties to complete an otherwise illegal transaction. My order will only be for restitution to be made. Due to the shortage of currency in the country I will order that the applicant receive payment in Zimbabwe dollars at his option.

Accordingly it is ordered that –

(a) the respondents shall pay to the applicant, jointly and severally

the one paying the other to be absolved, the sum of US$3 430 together with interest thereon from 2 September 2002 at the rate applicable to any foreign currency denominated account in United States Dollars held by any Commercial Bank in Zimbabwe or at the rate applied by any court in the United States of America of jurisdiction equivalent to or greater than that of this Court.

or

At the option of the applicant, the respondents shall pay, jointly and severally, the one paying the other to be absolved, the equivalent in Zimbabwe dollar of the sum of US$3 430 together with interest thereon at the prescribed rate of interest calculated from 2 September 2002 to the date of payment in full.

(b) the respondents shall pay jointly and severally the one paying the other to be absolved, the costs on the scale applicable to the magistrates court.

Chinyoka & Gunje, applicant's legal practitioners