LLOYD GAMBIZA
versus
PIKIRAI TAZIVA

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 30 and 31 July and 3 August 2007 and 27 August 2008

Civil Trial

TG Kasuso, for the plaintiff
RKH Mapondera, for the defendant

GOWORA J: On 1 March 2007, the plaintiff issued summons out of this court for an order as follows:

a) an order declaring the agreement annexure A to the particulars of the claim dated 18 December 2006, to have been validly cancelled and incapable of performance.

b) an order for the return to the plaintiff of motor vehicle Mitsubishi Chariot Reg number AAN 8616, or alternatively

c) Payment of the sum of R17 000-00 being the balance of the purchase price due to the plaintiff

d) Costs of suit

The facts which give rise to the dispute are these. The plaintiff and the defendant were not only friends, they were also business partners. On 18 December 2006, the parties entered into a written agreement of sale in respect of a Mistubishi Chariot owned by the plaintiff. It was agreed between the parties that the vehicle would be sold to the defendant for a price of ZAR25 000-00 or Z$6 million. A deposit of R8 000-00 was recorded as having been paid with the balance of R17 000-00 being paid in two or more installments on or before 20 January 2007.

In his declaration, the plaintiff avers that the defendant has not paid any other amount aside from the initial R 8 000-00. He therefore sues for the return of the vehicle or payment of the outstanding amount.

The defendant admits the existence of the agreement and the terms of the written agreement. He agrees that the balance had to be paid by 20 January 2007, but denies that he had breached the agreement as claimed by the plaintiff. He avers that he tendered payment within the stipulated period but that the plaintiff refused to accept payment because it was not in rand. The defendant states that the offered payment in Zimbabwe dollars as an alternative amount had been stipulated in the agreement. He tendered in his plea, payment of the balance owing to the plaintiff against delivery to him of the registration book in respect of the vehicle. He has also filed a counter-claim where he seeks delivery of the registration book to him against payment by him of the outstanding balance payable in local currency.

I will now deal with the evidence which was common cause between the parties. The agreement concluded was for the defendant to purchase the vehicle for the sum of the R25 000-00. The defendant paid an amount of R8 000-00 on the date that the agreement was signed. The defendant was obliged to have paid the balance by 20 January 2007. However payment was not effected by the stipulated date. The balance was stated as R17 000-00 on the agreement. The Zimbabwe dollar equivalent was not stated in the agreement.

As to the dispute between them, the plaintiff indicated that the defendant had not tendered payment. During cross-examination it was clear however that the defendant had tendered payment of the Zimbabwe dollar component based on official rates of exchange but the plaintiff had refused to accept any payment in local currency. There is no indication as to how much the defendant had tendered. Although in the summons and declaration, the plaintiff had an alternative claim for him to be paid the sum of R17 000-00 when he gave evidence he indicated that he had abandoned that claim as he said that he had been advised that an individual could receive any payment in foreign currency and that he understood that the agreement was illegal to that extent. He said it was not capable of execution and said that it was as a result null and void.

Initially, it was contended on behalf of the plaintiff that the agreement was *per se* illegal and incapable of enforcement due to the same. It was further submitted on his behalf that not only was the purchase price quoted in foreign currency but that the equivalent in the local currency was calculated by the use of the parallel market rate of exchange which in itself is illegal. The plaintiff further contended that the parties were illegally dealing in foreign currency and that the court was, as a result, precluded from giving effect to the agreement.

The defendant, through his counsel also conceded that the agreement was illegal and that both parties participated in the illegality. Counsel prayed that I find that the in *pari delicto* principle applied and that I should let the loss lie where it falls. Effectively this would mean that the defendant would retain a vehicle for which he contracted to pay ZAR25 000-00 and for which he only paid ZAR8 000-00. The defendant would thus be enriched at the expense of the plaintiff.

I was not convinced that both counsel had properly addressed the legal issues before me and I requested that they address me further by way of supplementary submissions. These have now been filed and I am grateful to counsel for acceding to my direction.

The plaintiff now contends that the agreement executed by the parties is legal and valid and that the court can give effect to the same. He relies on the provisions of s 4 (1) of the Exchange Control Regulations SI 109/1996, which he says, prescribe the buying, selling, borrowing, lending or exchange of any foreign currency without permission from the exchange control authority. It is contended on his behalf that although the agreement provided for payment of the purchase price in foreign currency, this was not illegal as it was not an offence to receive foreign currency. The defendant has submitted, contrary to the plaintiff, that the agreement as it provides for payment of the purchase price in foreign currency is illegal, and that this court should not give effect to it as that would encourage parties to such agreements to commit illegal acts.

Section 4(1) of the Exchange Control Regulations ("the Regulations") is in the following terms:

> "Subject to subs (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 other than an authorized dealer or foreign exchange bureau de change; and
>
> (ii) borrow any foreign currency, lend any foreign currency to or exchange any foreign currency with any person other than an authorized dealer".

It is not in dispute that when the agreement between the plaintiff and the defendant was concluded the defendant had paid an amount of ZAR8 000-00 as deposit on part of the purchase price. In terms of the agreement between the parties, the equivalent of the ZAR8 000-

00 in local currency was $6 million. The rate of exchange was not given but it is accepted by both parties that the conversion rate was not the authorized one. The balance outstanding was stated to be ZAR17 000-00. The equivalent in local currency was not stated.

Mr *Kasuso* is correct when he says that the law does not proscribe the conclusion by parties of agreements where prices are quoted in foreign currency. A careful scrutiny of s 4 (a) (ii) leads me to the conclusion that his submission is correct. The regulations do not forbid parties from transacting in foreign currency in general terms but they detail specific conduct that involves foreign currency which is then prohibited. What is pertinent is to determine whether the manner in which the parties herein conducted their agreement falls under the species of proscribed conduct within the ambit of the regulations. The only word that would apply to the present is "exchange" and what meaning can be ascribed to it.

The Shorter Oxford Dictionary defines exchange, as a noun variously as follows:

> "the action, or an act, of reciprocal giving and receiving; a mutual grant of equal interest, the one in consideration of the other.
>
> In respect of the verb the dictionary ascribes the following meanings to exchange-
>
> to change away; to dispose of by exchange; to give or part with (something) for something in return; to give and receive reciprocally; to interchange".

In *Matsika* v *Jumvea & Anor*[1] CHINHENGO J had to consider whether or not an agreement for the purchase of a motor vehicle within Zimbabwe in currency other than the local currency was legal. It is not my intention to traverse the path taken by the learned judge in his examination of the matter for to do so would be repetitive and disrespectful. He concluded that in accordance with the Decimal Currency Act [*Cap 22:04*] the legal tender in this country is the Zimbabwe dollar. He also concluded that according to the provisions of Reserve Bank Act [*Cap 22:10*], a tender of notes and coins issued by the Reserve Bank, which has not been demonetized shall be legal tender in Zimbabwe. He also found that the Reserve Bank Act does not prohibit the transaction by Zimbabweans of business in foreign currency. With regard to the application before him, on the facts as presented the learned judge had no hesitation in finding that when the applicant paid US$1 700-00 and US $ 1730-00 to the respondent for the purchase price of a vehicle without first having obtained the permission of an exchange authority the parties had contravened the regulations.

[1] HH 9 /03

In the context in which exchange is used by the legislature in the regulations the meaning that can therefore be ascribed to it is "to pay" and "to receive". The defendant paid ZAR8 000-00 without the permission of an exchange control authority and in the circumstances there can be no doubt that this is prohibited by the regulations. Thus the agreement is tainted with illegality and cannot be enforced. It is trite that there must be no illegality in a contract. An agreement is illegal if the making of the agreement, the performance agreed upon or the ultimate purpose of both parties in contracting is prohibited by common or statute law, that is, if it is contrary to public policy or is *contra bonos mores.* See *Sasfin (Pty) Ltd* v *Beukes*[2]. A contract will be contrary to public policy if its performance, even though not illegal or immoral, is one which the courts will not enforce because performance would be detrimental to the interests of the community.

From the evidence given by the parties it emerged that one of the parties, if not both, was aware that their transaction might not have been exactly above board. The defendant gives as his reason for refusing to pay the balance in rand the knowledge that the payment in foreign currency was illegal. This, he averred, was the reason why he did not pay, as he was afraid of committing an offence. He does not say when he became aware of the illegality attached to the payment in foreign currency in view of his initial payment of the deposit in foreign currency.

In his declaration, the plaintiff makes the averment that the contract was illegal as it contravened the exchange control regulations and thus it was incapable of being enforced. Whilst the agreement itself is not *per se* illegal, it has nevertheless been tainted by illegality in that the parties breached the regulations when they were giving effect to its terms and conditions. Instead of exchanging rand the parties could have calculated the official rate of the local currency and payment made accordingly and thus there would have been legal performance of the agreement.

Whilst the plaintiff has prayed that the agreement be cancelled and for the return of the motor vehicle, the defendant has counter-claimed for the delivery to him of the registration book of the motor against a tender of payment by the defendant of an amount of $3 840 000-00 which he states is the outstanding balance on the purchase price.

[2] 1989 (1) SA 1 (A)

The question that now confronts me is whether or not the contract can be cancelled or whether it is capable of being enforced thus entitling the defendant to an order in terms of the counter-claim. I would on this point respectfully refer to the comments of GUBBAY CJ in *Dube* v *Khumalo*[3] where he stated:

> '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 *Rabinowitz* 1948 (2) SA 876(W) *at* 878. *York Estates Ltd* v *Wareham* 1950 (1) SA 125 (SR) at 128. It is expressed in another maxim *ex turpi causa non oritur actio.* The second is expressed in another maxim *in pari delicto est potior conditio possidentis*, which may be translated as meaning "where 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".

The agreement before me has only been partially performed by either of the parties. Whilst the defendant had paid less than half of the purchase price the plaintiff had not really effected delivery in that the registration book had not been given to the defendant and thus he cannot assume ownership of the vehicle. Although the agreement itself is not illegal, the manner in which the parties performed part of the agreement has rendered it illegal and any order on my part that would lead to the performance of the remaining part of the same would have the effect of giving sanction to the actions of the parties in violating the regulations. As a court I am precluded from encouraging, through orders of court, the commission of acts that are proscribed by the law or the further perpetuation of such acts in clear violation of statutory provisions. I am therefore of the view that this is not an agreement that can be given effect to and this in my view disposes of the counter-claim of the defendant. The question remaining on this issue is whether I should then declare the agreement duly cancelled. When something is illegal it is in fact null and void. Thus a declaration that it has been duly cancelled would clothe the agreement with legality. The only logical manner to treat the agreement is therefore to declare that it is of no force and effect.

[3] 1986 (2) ZLR 103 (SC) at 109 D-F

What remains now is what is to be done with the vehicle. The defendant having acknowledged the unlawful nature of the agreement has submitted that the court has several options on how to dispose of the matter. The first is to dismiss the plaintiff's claim in its entirety. The second option is strike out the quotation of the price in rand is not appropriate in view of the illegality of the agreement. The defendant has also suggested that the defendant be made to pay the equivalent of ZAR17 000-00 calculated in accordance with the prevailing rates exchange and that consequentially the plaintiff be ordered to surrender the registration book to the defendant. The last three options suggested by the defendant would result in the court giving effect to an illegal agreement. This would run counter to the two maxims that were pronounced by GUBBAY CJ in *Dube* v *Khumalo* (*supra*). The usual manner of treating illegal agreements, where the parties to the same are equally to blame, is to let the loss lie where it fell. However, the courts have a discretion in suitable cases to relax the *par delicto* rule in order to do justice between man and man. The rationale for this discretion is to prevent injustice where one party is enriched at the expense of another. In *Jajbhay* v *Cassim*[4] STRATFORD CJ stated the following:

> "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 inspired the maxim. And in this last connection I think a court should not 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 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".

It is trite therefore, that where an agreement is illegal, a court has the discretion to relax the *par delicto* rule in order to do justice between man and man where the relief granted would be contrary to public policy. I was not addressed by either counsel on the question whether granting the relief sought would be contrary to public policy and as a consequence I find that I am not constrained from relaxing the *par delicto* rule. Considering the circumstances of the case, it is only proper that I do so in order to do justice between man

[4] 1939 AD 537 at 544-545

and man. The plaintiff parted with a valuable item against payment of an amount which was less than half the purchase price. The defendant thereafter did not pay the outstanding amount within the stipulated period. The agreement provided that the full purchase price have been paid before 20 January 2007. The defendant readily admitted having failed to pay as stipulated therein. In his evidence he alluded to an agreement between himself and the plaintiff concluded in South Africa where the plaintiff agreed to extend the period by which payment could be made. The defendant however was unable to state the date by when he was supposed to have made payment under the alleged verbal contract. It is highly improbable, in my view, that the plaintiff having in the agreement of sale stipulated a time period for payment of the purchase price, would be so accommodating as to allow the defendant an unlimited extension of time by which to pay the balance. The defendant was already in *mora* and it would only be sensible and reasonable if the plaintiff was to allow more time, to put the defendant on terms about payment. In his evidence which was not seriously challenged by the defendant the plaintiff said he wanted to use the money for a business venture hence his stipulation for a time period on when balance was to have been paid in full. The plaintiff denied that he had extended the time to the defendant for payment of the balance or that he had given an impression to that effect. Under cross-examination the plaintiff had admitted that the defendant had tendered payment of the balance of the purchase price in local currency at the official rate and at that stage the plaintiff had refused to accept the tender. The plaintiff said the offer to pay in local currency came after he had issued summons against the defendant. My assessment of the evidence as a whole leads me to conclude that the plaintiff's version is to be preferred to that of the defendant. Neither he nor his brother impressed me as a witness. I find the plaintiff's version more probable given the prevailing circumstances. In the premises I find for the plaintiff.

I therefore make an order in the following terms:

1. The plaintiff's claim is granted to the extent that the defendant be and is ordered to restore possession to the plaintiff of a Mistubishi Chariot motor vehicle registration number AAN 8616 within ten (10) days of the date of service of this order failing which the Deputy Sheriff is hereby authorized

to seize and recover the same from wherever it is situate and from whomsoever is in possession of the same.

2. The defendant be and is hereby ordered to pay the costs of suit.

Mantsebo and Company, legal practitioners for the plaintiff
Mapondera & Company, legal practitioners for the defendant