BLESSMOE CHANAKIRA
and
AUXILIA DANAYI MYNYEZA
and
MAI KAI REAL ESTATE DEVELOPMENT TRUST
BERNARD MAHARI MUTANGA

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 16 March and 20 March 2009

F. Mutamangira, for plaintiffs
T.H. Chitapi, for defendants

Application I.T.O. Order 29 of High Court Rules, 1971

BERE J:
The Background

The agreed facts of this matter as given by the parties are as follows:-

On 9 November 2004 the plaintiffs entered into an agreement of sale with the first defendant represented by the second defendant in respect of the extend of subdivision "A" of subdivision "C" of Kingsmead extension of Borrowdale Estates. In terms of that agreement the plaintiffs purchased from the defendant the above mentioned property for the sum of $700 million (old currency).

The plaintiffs duly paid in full the purchase price in terms of the agreement.

Subsequent to payment of the purchase price the plaintiffs could not get transfer of the property because a Mr Geoffrey Andrew Harrel the previous owner of the property from whom the first defendant had purchased it, was refusing to pass transfer to the first defendant claiming that he was still owed the sum of $460 million (old currency) by the first defendant with the later disputing it.

Acting on that understanding and in the interest of protecting their rights arising from their agreement with the first and second defendants the plaintiff duly paid the $460 million to Mr Geoffrey Harrel.

The first and second defendants do not deny that they are liable to the plaintiff, what is however in issue is the quantum of such liability.

The plaintiffs's claim is for unjust enrichment as set out in the summons. The defendants deny the plaintiffs are entitled to claim for unjust enrichment and aver that the defendant's are entitled to the sum of $460 million plus interest calculated at the prescribed rate only. The plaintiffs deny the defendants' computation of its liability to the plaintiffs.

ISSUE BEFORE THE COURT

The issue which the court has been called upon to determine is a question of law, viz whether in the light of the agreed facts the plaintiffs' claim for unjust enrichment is sustainable or whether the plaintiffs are entitled to the tendered amount of four hundred and sixty million dollars together with interest at the prescribed rate calculated from the date of liability to the date of payment.

Counsel for the plaintiffs put up a very strong and persuasive argument in favour of the plaintiffs' claim for unjust enrichment.

It was his contention, guided by precedent from this court[1] and outside our own jurisdiction[2] that the remedy of unjust enrichment would entitle the plaintiffs to get damages in order to achieve equity.

Counsel also reasoned that if the court were to proceed with this claim under unjust enrichment, the court would be able to award damages at current values which would take into account inflation for purposes of computing the amount of compensation.

Counsel for the defendants vehemently opposed the position adopted by the plaintiffs by arguing *inter alia* that the amount paid by the plaintiffs to a Mr Harrel was a simple debt which should be repaid with interest at the prescribed rate hence the tender by the defendants.

It was also argued by counsel that the issues to do with inflation are really to do with the legislature which prescribes what it deems to be an appropriate rate of interest from time to time.

Having acquainted myself with the authorities cited there can be no denial that a claim of unjust enrichment is recognised as part of our law. In an appropriate case, such a claim can be sustainable. I think the issue which must remain impeded in my mind to avoid clouding my focus is whether or not the circumstances under which the debt of four hundred and sixty million dollars arose would justify the claim as crafted by the plaintiffs.

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[1] Industrial Equity vs Walker 1996(1) ZLR 269
Mtunda vs Ndudzo 2000(1) ZLR 71 (H) 718
Jengwa vs Jengwa 1999(2) ZLR H 121

[2] Nortje En'nAnder vs Pool, NO 1966(111) SALR 96

In doing so I remain cognisant of the fact that not every claim made under unjust enrichment will pass the test under this heading.

In determining this matter I remain conscious that it is not the function of the court to re-write the contract for the parties but that the court must endeavour to ascertain what was in the minds of the parties at the time the issue of four hundred and sixty million dollars arose.

What is clear from the pleadings and agreed upon by the parties is that the sole reason why the plaintiffs paid Mr Harrel the four hundred and sixty million dollars was that they wanted to protect their rights in the sold property or to ensure the smooth transfer of the purchased property.

It is also clear that the first defendant had never accepted this liability to Mr Harrel and that the plaintiffs were themselves not privy to the circumstances surrounding the liability as between the first defendant and Mr Harrel.

It is important to note that the main contract between the plaintiffs and the first defendant remained intact and that the property was transferred with the purchase figure still remaining pegged at the original agreed price of seven hundred million dollars.

It is a time honoured principle of our law of contract that it is founded upon true *consensus ad idem* of the parties involved.[3]

In the words of Wessels[4] and approved by ROBERTS AJ in the case of *Jordaan v Trollip*[5]

> "Although the minds of the parties must come together, courts of law can only judge from external facts whether this has or has not occurred. In practice, therefore, it is the manifestation of their wills and not the unexpressed will which is of importance."

Can it be seriously contended in this matter that at the time the plaintiffs paid the four hundred and sixty million dollars to Mr Harrel on behalf of the defendant (who was disputing liability at the time) the plaintiffs had in mind the recovery of their money from the defendant based on the principles of unjust enrichment?

In the same vein can it be said that at the time the issue of four hundred and sixty million dollars arose the first defendant had in his mind the concept of unjust enrichment at the time of repayment or both parties viewed the transaction as a simple ascertainable debt which would be repaid as such?

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[3] The Law of contract in South Africa, (Butterworths), by R H Christie p 183
[4] Para 62
[5] 1960 1 PH A25 (T)

I detect some revealing indication from the plaintiff's heads of argument where counsel on behalf of the plaintiffs states as follows:-

> "An equitable remedy is one that seeks to do justice between the parties and in the circumstances of this matter an order for the payment of 460 million dollars (old currency) plus interest will not do justice to the plaintiff's claim. This amount has become so insignificant as a result of inflation and the removal of zeros on our currency in June 2006 and July 2008 such that in today's terms the said amount is now the equivalent of 0,00046 cents. When the said 460 million dollars was paid in October of 2005 it was about the equivalent of 66% of the value of the property that the plaintiff's were purchasing, now the said amount cannot buy a single brick"[6] (my emphasis).

I have not the slightest doubt in my mind that at the time the plaintiffs and the first defendant discussed the issue of four hundred and sixty million dollars paid to Mr Harrel they all looked at it as a simple debt that would be repaid as it was. The issue of unjust enrichment could not possibly have occupied their minds at the time this money was paid out.

As is clearly apparent from the above quotations, it does seem to me that the plaintiffs claim as now crafted is not as a result of the arrangement as they perceived it with the first defendant at the time the four hundred and fifty million dollars was paid out to Mr Harrel but an afterthought, a direct response to the impact of galloping inflation coupled with the axing of zeros from our currency which has rendered the advanced amount completely valueless.

There has been no suggestion by the plaintiffs that the first defendant was responsible for triggering inflation, let alone the removal of zeros from our currency.

It is quite significant to note that at the time the plaintiffs paid the four hundred and sixty million dollars to Mr Harrel they were fully aware that the first defendant had a dispute with Mr Harrel over the amount in question. The plaintiffs, for convenience's sake decided to pay the disputed amount because they did not want the transfer of the purchased property compromised. In such a scenario, there can be no question of non-disclosure on the part of the, first defendant and this probably explains why even in the declaration filed there was no reference to such non-disclosure as the basis for the claim. Even if this court were to make a specific finding that there was a material non-disclosure on the part of the first defendant, in my view such a finding would not advance the plaintiffs claim under unjust enrichment for as long as it is agreed that the plaintiff's claim is a simple debt sounding in money the principle of currency nominalism would come into play.

[6] Paragraph 8 of the plaintiff's heads of argument

The principle of currency nominalism which no doubt is part of our law forbids the approach adopted by the plaintiffs in this matter.

I am fortified in this view by the position adopted by E.M. GROSSKOPF JA when he eloquently elaborated on the principle of currency nominalism in the following terms:-

> ["This result seems to me to be in conflict with the principle of nominalism of currency which underlies all aspects of South African law, including the law of obligations. Its essence, in the field of obligations, is that a debt sounding in money has to be paid in terms of its nominal value irrespective of any fluctuation in the purchasing power of currency".
>
> This places the risk of a depreciation of the currency on the creditor and saddles the debtor with the risk of an appreciation, …… .
> Nominalism is the norm in the common law of Western States with similar systems to our own. Thus in *Deutsche Bank Filiale Nurnberg v Humphrey* (1926) 272 US S17 at 519 the United States Supreme Court said:
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> "An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change the law takes no account of it, … Obviously, in fact a dollar or a mark may have different values at different times, but to the law that established it is always the same. If the debt had been due here and the value of dollars had dropped before suit was brought the plaintiff could recover no more dollars on that account"

The same applies in England. In *Treseder – Griffin and Another v Co-operative Insurance Society Ltd* (1956) 2 QB 127 (CA) at 144 DENNING LJ said the following:

> "…….. (I)n England we have always looked upon a pound as a pound, whatever its international value ……. In all our dealings we have disregarded alike the debasement of the currency by kings and rulers or the depreciation of it by the march of time or events,……. A man who stipulates for a pound must take a pound when payment is made, whatever the pound is worth at that time.[7]"] (my emphasis).

After commenting on nominalism of currency in the Netehrlands and German legal systems the learned judge of appeal went on to consider the reasons commonly given for currency nominalism. The judge commented as follows:

> "It is not necessary to consider them in detail, except to point out that it would represent a revolutionary transformation of our legal system if courts were to be called upon to determine the true economic value (in terms of purchasing power) of all obligations sounding in money. I need not, however, labour the point; currency nominalism, for whatever reason, is firmly entrenched in our law".[8] (my emphasis)

[7] SA Eagle Insurance Co. Ltd v Hartley 1990 4 SA 833 at 839-840
[8] SA Eagle, Insurance (supra) p 840

Clearly, the attempt by the plaintiffs to lodge their claim under unjust enrichment in this case is an attempt to circumvent the principles of nominalism of currency given the effect of the rapid depreciation or debasement of the Zimbabwean dollar ever since the debt of four hundred and sixty million dollars was paid by the plaintiffs.

I am in total agreement with the views expressed by my brother judge KUDYA J in the recent case of *Constantinos Bakari v George Kattarenos*[9] where he stated that:

"Courts have adopted a conservative approach to the question of determining the true economic value of money" by leaving it up to the legislature which is empowered to review and set from time to time the prescribed rate of interest.

Everything considered, I do not see how the plaintiff's claim under unjust enrichment can be sustained in this case. I am of a very strong conviction that the plaintiffs are entitled to no more than the sum of four hundred and sixty million dollars (revalued) together with interest at the prescribed rate of 30% as tendered by the defendants.

COSTS

I think in all fairness the stated case is of great legal significance. This probably explains why neither of the parties have asked for costs.

Each of the parties must bear their own costs.

Mutamangira & Associates, plaintiffs' legal practitioners
T.H. Chitapi & Associates, defendants' legal practitioners

[9] HH 1/2009