

PAUL CHIONISO MAWACHA
and
CECILIA MAWACHA
versus
STERBY NHAMO
and
INNOCENT NHAMO
and
DIRECTOR OF HOUSING AND COMMUNITY
SERVICES –CITY OF HARARE

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE 30 and 31 January and 2 February 2012

J Bakasa, for the plaintiffs
M Hungwe, for the first and second defendants

KUDYA J: The plaintiffs are husband and wife. On 26 February 2008, they issued summons out of this court seeking the declaration of nullity on the agreement executed between them and the second defendant with respect to number 45 Maviyani Street Mbare, Harare; the setting aside of the cession effected over the same property by the third defendant to the second defendant and costs of suit. The first and second defendants contested the action and in addition the second defendant filed a counterclaim seeking the eviction of the plaintiffs and all those claiming right of occupation through them together with costs on the scale of legal practitioner and client.

At the commencement of trial, it was common cause that the first defendant was not a party to the agreement and did not take part in the dispute between the plaintiffs and the second defendant. It was common cause that the second defendant and the plaintiffs concluded a verbal agreement of sale of the first plaintiff's rights, title and interest in the property in dispute on 3 December 2007. Exhibit 1 is the memorial of the agreement and is dated 3 December 2007 even though it was compiled on 12 February 2008. The parties proceeded from Moses Chioniso, the plaintiff's eldest son's residence with Moses to the third defendant's Mbare offices where they confirmed through exh 8, the deed of sale between first plaintiff and the third defendant dated 1 January 1981, that the first plaintiff was the holder of cession in the property in dispute. The first plaintiff with written consent of second plaintiff

applied for the cession of his rights to the second defendant on that date as recorded in exh 9, the application for cession. The third defendant approved cession on the same date as shown in exhibit 2, the agreement of assignment.

The agreement of sale, exh 1 and the application for cession, exh 9, indicate that the rights were sold and purchased for \$5 billion, in local currency. In their oral testimonies both the plaintiffs and the second defendant agreed that at the plaintiffs' request part of the purchase price was paid in South African rands while the remainder was paid in local currency.

After the approval of cession, on 24 January 2008 the third defendant wrote exh 10 to second defendant and his wife confirming the cession and enclosing the agreement of assignment for their attention. The second defendant sued Joel Mawacha, the son of the plaintiffs who remained ensconced in the house for eviction in the magistrates' court. He attached exh(s) 3 and 4 as proof of his entitlement to the property in question. Exhibit 3 is the affidavit deposed to by the first plaintiff on 12 February 2008. He stated that he sold the property for \$5 billion to the second defendant and together with his wife ceded the property to him on the date of the sale, being 3 December 2008. The suit was dismissed, as appears in exh 11, on 8 April 2008 on the basis that the present action was already before this court. He further averred that his son Joel had no authority to stop cession. Exhibit 4 was an affidavit deposed to by Moses Chioniso, the first son of the plaintiffs on 12 February 2008. He averred that the property in dispute was sold to the second defendant with the agreement of the whole family and further stated that his young brother Joel did not have authority to stop the cession.

In his oral testimony, the 73 year old first plaintiff who once worked as a painter for ZESA before his retirement stated that he could neither read nor write. The property consisted of a three roomed aged house with peeling plaster and cracked walls. It was durawalled. He wanted to use the proceeds to construct another house in Harare, and another in his communal home and the balance for his upkeep. He maintained that he sold the property for \$500 000-00 notwithstanding that all documents (exh(s) 1, 3 and 9) indicated the purchase price was \$5 billion. He indicated that the purchaser handed the money to him in the presence of his wife, son and a council official, one Mr Jack. The money consisted of a component in local currency and a component in foreign currency. He averred that Mr Jack took a portion of the local currency purportedly as council and cession fees but did not issue him with a receipt. He could only say he was paid **ten** in foreign currency. At the suggestion

of his counsel he stated that it was US\$10.00-00. He gave the impression in his evidence in chief that due to poor eyesight he was unable to identify his signature in exh 1 or his wife's thumb mark in exh 2. It was at the instigation of Joel that he brought these proceedings seeking cancellation of cession and refund of the amount he received.

It transpired under cross examination that though he did not go to school, he was literate. He could sign his signature and knew letters of the alphabet and Arabic numerals. He had the sense to appreciate words such as spelling, guess and common. He easily identified his wife and his signatures in exh(s) 1 and 2. He intimated that he was assisted by Moses in the sale of the property but accused Moses of acting in cahoots with the purchaser to undervalue the property. He however indicated that at the time of the sale he believed that \$5 billion was an appropriate price for the property. He was shown exh 12, the Herald Newspaper cutting of 1 December 2007 that indicated that a core house in Chitungwiza was selling for \$2.8 billion; a seven roomed house in Unit N Chitungwiza was selling for \$6.9 billion and another seven roomed house in Unit D was priced at \$7 billion while a four roomed house in Zengeza 1 was pegged at \$3.8 billion. He preferred the prices in exh 5, a copy of the Herald of 27 December 2007 that indicated that a two roomed core house in Unit D was pegged at \$15 billion while a 4 roomed house in the same area, Unit D was selling for \$15 billion. Under cross examination he conceded that the present suit was the brained child of Joel.

His wife the second plaintiff basically confirmed his version. She stated that the decision to sell the property originated from her husband. The amount of sale was set at \$5 billion by the two spouses and their eldest son Moses. They declined to reduce the price to \$3 billion suggested by the second defendant who then paid the requested \$5 billion at the council offices. They received part of the money in rands and the other in local currency. She did not recall the exact amount received as foreign currency. She equated the amount in foreign currency to the height of seven A4 sheets of paper and indicated that she shared the foreign currency in equal amounts with her husband. At first she said they each took ten rands but later corrected herself by stating that each took ten notes of the rands paid. She indicated they left with \$3 billion in local currency after the council official deducted council and cession fees. She indicated they wanted to settle in their communal home and disposed the property to build a better rural home and buy livestock. She confirmed that Joel was the one who advised them of the bad deal they had concluded. She indicated that the second defendant declined to accept the purchase price in exchange for the cancellation of cession.

She was not able to read or write as clearly demonstrated by the X and thump print used as her signature on the agreement of assignment, exh 2 and the application for cession exh 9. In cross examination she revealed that the second defendant negotiated for a reduction of the purchase.

The last witness for the plaintiff's was Joel. He was not aware that his parents were selling the property yet he was the son who lived at the property. He did not have sight of the purchase price. He relied on what his parents and Moses told him. He was the source of the figure of ZAR2 500-00 allegedly paid as part of the purchase price. He was involved in the two attempts to settle the dispute out of court in May 2008 recorded in exh(s) 6 and 7 that were rebuffed by the second defendant who refused to accept US\$1 500-00 or ZAR10 000-00 from the plaintiffs for the cancellation of cession. He stated that the second defendant with the help of Moses and the council official cheated his parents of their property by buying their rights at a ridiculously low price.

The second defendant was the only witnesses who testified for the defendants. He was looking for a house to buy. He was referred to three houses by officials of the third defendant. He was interested in the property in dispute. He came into contact with the second plaintiff and Moses at Moses's residence. They introduced him to the first plaintiff. They were selling the property for \$5 billion. He offered to buy it for \$3.8 billion and left the plaintiffs to consider his offer. Three days later they phoned him whilst he was at a funeral in Chitungwiza. He rushed to Mbare. The plaintiffs and Moses stuck to \$5 billion. They went to council offices at instance of the plaintiffs who were in a hurry to return to their rural home. All the formalities were done at the third defendant's offices. He paid the money to the first plaintiff who handed it to Moses for verification. He was in the business of purchasing fruits from South Africa and was awash with rands. The plaintiffs requested him to pay part of the purchase price in rands to hedge against the free fall of the local currency. He obliged them by paying them \$2.5 billion in local currency and the balance in the sum of ZAR10 000-00 at the black market cross rate of \$250 000-00 to the rand. The cession was granted on that day. It was only when he wanted vacant possession that Joel came onto the scene. He refused to vacate. The second defendant was accompanied by Moses to the plaintiffs' rural home on 11 February 2008. On 12 February 2008, exh 1, 3 and 4 were executed in order to evict Joel from the house. The documents were voluntarily executed by the first plaintiff and Moses. The eviction failed on the basis that the plaintiffs had launched the present proceedings. He disputed that he bought the property for a song and produced exh 12, the Herald of 1

December 2007 to show that he paid a higher price than the prevailing market rate. He denied that he took advantage of the age and unsophistication of the plaintiffs. He regarded the plaintiffs as sophisticated people. He was not aware that the first plaintiff could not read or write. He was not known to either Moses or Mr Jack before he dealt with them over the sale of the property.

I found the second defendant generally more truthful than the plaintiffs and their witness Joel. The onus to establish that he was known to Mr Jack and Moses lay with the plaintiffs. They failed to discharge that onus. It was incorrect to suggest as did Mr *Bakasa*, for the plaintiffs, that merely because they could not read and write they were unsophisticated. The prices of houses in exh 12, the Herald of 1 December 2007 demonstrate that they sold the property above the prevailing market prices. That they were alive to prices of property was demonstrated by the wife's evidence that they declined the offer of \$3.8 billion. They were also alive to the ravages of hyperinflation on the local currency and demanded part payment in foreign currency. They benefited from the foreign currency. They also had the services of their trusted son Moses. I agree with Mr *Hungwe*, for the first and second defendants, that the plaintiffs sold their property freely and voluntarily without any undue influence. The evidence led does not reveal that they were deceived, defrauded or acted on any misrepresentation. Rather they were the ones who firmly drove the deal.

At the end of the trial, neither party gave satisfactory evidence on the amount paid in rands. The plaintiff's did not state the actual figure. The second defendant did so for the first time in his evidence in chief. What the actual amount was is of no consequences, as all the parties were agreed that part of the purchase price equivalent to \$2.5 billion was paid in foreign currency.

The first issue for determination is whether the parties concluded a valid contract of sale. Both counsel agreed with the three essential elements of a contract of sale set out in *Kovi v Ashanti Goldfields Zimbabwe Limited & Anor* 2007 (2) ZLR 354 at 359F. These are a meeting of minds, the merx and the pretium. Mr *Bakasa* contended that the pretium was not agreed. He was wrong. Both plaintiffs stated in their evidence in chief that they sold the property for \$5 billion. The amount is captured in exh(s) 1, 3 and 9. The existence of an agreement of sale is not dependent on delivery or payment. I find that a valid agreement was contracted between the sellers and the purchaser. The absence of the second plaintiff's signature did not vitiate the agreement. She testified that she consented to the cession. She signed the assignment as a holder of cession. In reality, however, only the first plaintiff held

rights and interest in the property as shown by exh 8. In any event, the position in our law is that property registered in the husband's name belongs only to him. See *Nyandoro & Anor v Nyandoro & Ors* 2008 (2) ZLR 219 (H) at 223E-F and the cases cited thereat.

The next issue to determine is whether the contract is vitiated by what the plaintiff termed a ridiculously low price. The basis by the plaintiff for setting aside was that the price was too low. I have found that it was actually higher than the prevailing market prices for similar properties at the time. It was improper for the plaintiffs to rely on figures in exh 5, the Herald of 27 December 2007 when they were fully aware that at the time hyperinflation was taking its toll on values. Rather the values in the Herald of 1 December 2007 provide a useful comparison of the prevailing market prices.

The third issue was whether the part payment in foreign currency was an illegality that nullified the contract. Mr *Bakasa* submitted that payment of the purchase price contravened s 5 of the Exchange Control Act [*Cap 22:05*]. He had in mind the contravention of s 5 (1) (a) (ii) of the Act as read with s 4 (1)(a) (ii) of the Exchange Control Regulations SI 109/96 that penalizes exchange of any foreign currency with any person other than an authorised dealer.

Section 4 (1) (a) (ii) and (3) of the regulations states:

- (1) Subject to subs (3), unless permitted to do so by an exchange control authority—
 - (a) no person shall, in Zimbabwe—
 - (i) ... not relevant
 - (ii) borrow any foreign currency from, lend any foreign currency to or exchange any foreign currency with any person other than an authorised dealer;
 - (b) ... not relevant
- (2) ... not relevant
- (3) Subsections (1) and (2) shall not apply to—
 - (a) the acquisitions of foreign currency outside Zimbabwe by an individual who is a Zimbabwean resident, where the foreign currency is acquired with free funds which were available to him at the time of the acquisition; or
 - (b) the sale or loan of free funds by an individual who is a Zimbabwean resident to a foreign resident, where the free funds were available to the individual at the time of the sale or loan; or
 - (c) ... not relevant
 - (d) ... not relevant

I agree that the section delegitimises the payment of the purchase price in foreign currency by a local resident to another local resident without exchange control approval

provided the funds are not free funds. See *Matsika v Jumvea Zimbabwe Ltd & Anor* 2003 (1) ZLR 71 (H) at 74G.

In the present matter the second defendant did not disclose his source of the rands. All he stated was that he was in the business of buying fruits from South Africa for sale in Zimbabwe. He did not demonstrate that the rands paid were free funds. By exchanging those rands with the plaintiffs for the property in question he contravened s 4(1) (a) (ii) of the Exchange Control Regulations. Accordingly I agree with Mr *Bakasa's* submission that the payment of part of the purchase price in local currency was illegal.

Mr *Bakasa* submitted that the contract of sale was void for illegality. Mr *Hungwe* correctly submitted that the contract was not illegal as it was concluded with a pretium in local currency. In my view what was unlawful was the payment in foreign currency. I found that payment in foreign currency was at the special instance of the plaintiffs.

It seems to me that the approach of our courts in such circumstances is provided in *Dube v Khumalo* 1986 (2) ZLR 103 (S) at 109D-F where GUBBAY CJ 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 the maxim *ex turpi causa non oritur actio*. The second is expressed in another maxim *in pari delicto potior est conditio 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."”

In the present matter, the illegal agreement has been performed. The plaintiffs delivered the property to the second defendant by authorising third defendant to pass cession to him and this was done on 3 December 2007. The *ex turpi causa* maxim does not apply in the present matter. Rather the *in pari delicto* rule applies in the present matter. The property was delivered in pursuant to an illegal payment agreement. The parties are equally in the wrong. The loss must lie where it fell.

The plaintiffs did not suffer loss as they received a sum equivalent to \$5 billion that they sold their rights for. The second defendant received transfer of the property. The property is in his name and he is saddled with rates and municipal charges amounting to US\$1 317-15. The plaintiffs have failed to establish the need to relax the *in pari delicto* rule. Cancelling the cession would not be equitable. The plaintiffs do not recall the amount in rands that they received. Paying back \$2.5 billion in local currency would not be fair to the second defendant as local currency has been demonetised. The rate of exchange to be used to repay the local currency in USD would be the official exchange rate prevailing on that day and not the parallel rate. On 3 December 2007 the official cross rate of the local currency to the United States dollar was \$30 000-00: \$1. \$2.5 billion was equivalent at the official exchange rate to US\$83 333-33. It would be ridiculous to request the plaintiffs to pay the second defendant US\$83 333-33.

In the premises, the plaintiff's claims for a declaration of nullity of the agreement of sale and cancellation of the cession cannot succeed.

The second defendant counterclaimed for the eviction of the plaintiffs and those who are in occupation through them. The factual position shown in exh 3 and 4 is that the plaintiffs consented to the eviction of Joel who remains ensconced in the property. The effect of my finding on the *in pari delicto* maxim is that the property fell into the lap of the second defendant. If the plaintiffs or Joel were to remain on the property, they would be unjustly enriched. It is equitable to relax the *in par delicto* maxim for the second defendant and grant him the order of eviction that he seeks.

It is also appropriate to grant the second defendant the costs he prayed for as it is apparent to me that the plaintiffs were motivated by greed rather than principle in bringing the main claim and contesting the counter claim.

Accordingly it is ordered that:

1. The plaintiffs' claims be and are hereby dismissed.
2. The plaintiffs, together with all those who claim the right of occupation through them, be and are hereby evicted from Stand No. 6380 Mbare, otherwise known as 45 Maviyani Street Mbare.
3. The plaintiffs shall jointly and severally one paying the other to be absolved pay the first and second defendants' costs of suit for both the main claim and counter claim on the scale of legal practitioner and client.

Muza & Nyapadi, plaintiffs' legal practitioners

Hungwe & Partners, first and second defendants' legal practitioners