MOSES ASAGA

Versus

PHIONAH RIEKERT

And

PRINCE ASAGA

And

UPLAND GAS INTERNATIONAL (PVT) LTD

And

OFFICE FOR THE REGISTRATION OF COMPANIES AND OTHER ENTITIES

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 23 March & 9 September 2023

Application for default judgment

E. Mubaiwa for applicant

CHILIMBE J

BACKGROUND

[1] This is an application for default judgment. Respondent/defendants failed to enter appearance to defend plaintiff`s suit. In considering the default application, I noted a number of issues on the papers and invited comment from applicant council. Counsel duly obliged with written and oral submissions. Hereunder are the reasons for my ruling.

[2] I must, at the outset, tender my apologies to applicant and counsel. This matter has taken unduly long to finalise. It was but a chamber application. It ought to have been earlier disposed of. Regrettably, the matter was improperly cued up with other business on diary. Appropriate arrangements have since been fixed to avert recurrence. I proceed to address the issues at hand.

THE JOINT VENTURE

[3] The applicant, Mr. Moses Asaga (herein “Mr. Asaga”), is of Ghanaian origin. He described himself as such in the affidavit founding this application. Mr. *Mubaiwa* referred to him as an incola. There is a suggestion, from the papers before me, that he is a Ghanaian citizen. Mr. Asaga`s domicile, residence, citizenship and related status of relevant to the issues herein.

[4] Around 2015, Mr. Asaga decided to invest in the jurisdiction. He ventured into the liquid petroleum gas (LPG) sector. First respondent (“Ms Riekert”), a Zimbabwean, was Mr. Asaga`s local partner. The two concluded a shareholder agreement of some sorts. Third respondent company (“Uplands”) was registered with fourth respondent. Second respondent (“Prince”) is described as a Ghanaian resident in Zimbabwe.

[5] Uplands was incorporated on 10 December 2015.Its shareholding was Mr. Asaga-65%; Ms Riekert -20% and Prince -15%. In addition, Uplands was issued with the requisite approvals or certification by regulators ZIMRA (tax/revenue) NSSA (social security and workplace safety) and importantly; -the Zimbabwe Investment Authority (ZIA).

[6] ZIA received, processed and approved of Uplands as a joint venture company. Mr. Asaga was accorded the revered status of an investor. He was assured of attendant privileges. Principal among those was the right to repatriate, to his native Ghana, proceeds of his local investment.

[7] Mr. Asaga claims he thereafter funded the establishment of an LPG business. The exact amount is not stated in the papers. The requisite equipment was purchased and installed. Ms Riekert ran the company. So successful it was that its valuation rose to US$300,000. This according to Mr. Asaga.

[8] What subsequently transpired is not backed by context. But in September 2021, Ms Riekert offered to purchase, not the shares in Uplands, but the LPG equipment. An agreement was drawn up to this effect. The parties thereto were Ms Riekert as “purchaser” and Mr. Asaga as seller. The consideration was fixed at US$300,000. No mention is made in the agreement of any change in the shareholding of Uplands. That aside, it appears common cause that Ms Riekert subsequently took control of the outfit and commenced trading.

[9] Trouble then broke out. Ms Riekert reneged on the agreement so alleges Mr Asaga. She paid Mr. Asaga absolutely nothing. She instead proceeded (and continues) to enjoy the fruits

of the business. In the process, she also apparently turned hostile. Mr. Asaga bitterly alleges that Ms Riekert deploys her incola privileges and advantage to frustrate him. He thus approached this court for relief.

APPLICANT`S CLAIM

[10] Mr. Asaga`s claim was framed in a 7-paragraph draft which I paraphrase below; -

i. An order vesting in him, the remaining shareholding in Uplands currently held by Ms Riekert (20%) and Prince (15%,
ii. Relevant adjustments to fourth respondent`s records,
iii. An order declaring the directorship of Ms Riekert and Prince in Uplands as invalid,
iv. Relevant amendments to fourth respondents` records,
v. An order declaring Mr. Asaga as the “beneficial owner” of Uplands`s plant and equipment,
vi. An interdict barring Ms Riekert and Prince from (a) holding themselves out as directors, or (b) interfering with Uplands`s operations,
vii. Payment of an amount of US$170,000 as “damages for unjust enrichment”.

[11] Mr. Asaga`s claim encompasses 2 declarateurs and their consequential relief. It scopes in an interdict before rounding off with damages. I will return to this claim shortly.

ADMISSIONS OF PERFIDY

[12] In his summons and declaration, Mr. Asaga made startling disclosures. He admitted to have deliberately fooled “the system”. Unperturbed, he repeated the averments in his founding affidavit. Part of his solemnly sworn statement reads as follows; -

5. “I agreed with the first defendant to make him (sic) the nominal shareholder of 51% of the issued share capital of third defendant to evade the country`s indigenisation laws.
6 It was further subsequently agreed to misrepresent to fourth defendant and other public offices that since 12 April 2016, plaintiff has owned 65%, first

defendant 20% and second defendant 15% of the issued share capital of third defendant.

7 In keeping with these deceptive agreements, the first and second defendants were appointed directors of third defendant.

8 The agreements are illegal and the appointment of first and second defendants as directors are (sic) illegal being acts that gave effect to the illegal agreements."

[13] I was rather startled by these disclosures. I saw it fit to invite counsel`s comment. I drew attention, in doing so, to a number of authorities on illegality. These included the Supreme Court`s decision of *Agson Mafuta Chioza v Smoking Williams Siziba* SC 4-15. Counsel`s written response was prefaced by the following genteel protest; -

> "In reaction to plaintiff's application for the default judgment, His Lordship CHILIMBE J has put to plaintiff the view that the claim seeks to enforce an unlawful agreement. No details are given as to which part of the relief sought His Lordship prima facie considers may be afflicted by illegality or its perceived source. This makes counsel's task difficult to the extent that these submissions may not assist to address His Lordship's exact concern. Be that as it may, these submissions are made. (footnote -The minute from His Lordship refers to two judgments which establish the principle that the court is entitled to raise the issue of illegality of an agreement even without prompting. The minute does not specify the nature and source of the perceived illegality)".

ARGUMENTS BEFORE THE COURT

[14] Before relating the arguments by Mr. Mubaiwa, I must record that counsel abandoned the seventh claim for damages. That concession was well taken. The claim was unsustainable on the papers. I now revert to the other arguments by counsel. He commenced with the question of illegality. In doing so, Mr. *Mubaiwa* acknowledged the established position. A contract in *fraudem legis* could not be enforced. He cited established authority *City of Gweru v Kombayi* 1991 (1) ZLR 333 (SC) and the famous dictum in *Dube v Khumalo* 1986 (2) ZLR 103 at 109D-F where it was held that:

> "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*."

[15] The shareholder agreement was one such. Its fault lay in the deceitful manner in which it allocated shareholding in uplands. It attempted to circumvent the provisions of the Indigenisation and Economic Empowerment Act [Chapter 14:33] and its accompanying regulations." Counsel then proffered a sublime distinction.

[16] The applicant did not seek to enforce the illegal agreement. He sought to unbundle it. He sought to reverse its effect. In doing so, Mr. Asaga was not pursuing specific performance. He merely wished the parties to revert to the original position. In addition, counsel argued that the position in the law had since changed. The indigenous restrictions on peregrine shareholding in local entities had been lifted.

[17] My comments are as follows. There has been a clear and persistent admission that applicant concluded an agreement in *fraudem legis*. Not only that. The agreement was utilised to extract various advantages to Mr. Asaga. He misled the regulatory authorities by false declarations. On the basis of deliberately false representations was issued, as noted above, with permits, approvals and certificates. Such a position is unconscionable. It invokes the wrath reposed in the principle of public policy. On that basis alone, the application ought to fall.

[18] But I proceed further and address counsel`s attempt to distinguish the present matter from the prohibitive *dictum* of *Dube v Khumalo*. The inescapable truth is that Mr. Asaga seeks to draw benefit from an illegal agreement. He needs to retrieve the shares that he unlawfully allocated to his co-shareholders under a sham agreement. One must understand the nature of that agreement. Effectively the parties agreed that the recorded shareholding was inconsequential. Ms Riekert and Prince owned no shares in Uplands. Now Mr. Asaga desires to officially record the true position. And he needs the court`s hand in doing so.

[19] The change in law through the enactment of section 2A of the Indigenisation Act will not save Mr. Asaga from previous illegality. Section 17 of the Interpretation Act [Chapter 1:01] says so.

[20] I also note that herein, Mr. Asaga seeks a declaration of rights. These being rights he acquired through an illegal agreement. His claim cannot succeed. This conclusion defeats claims (i) to (iv). As regards the declarateur sought regarding the assets of Uplands, I comment briefly as follows. The assets concerned vest in the company. The company is a separate persona. Mr. Asaga can only claim a right in the assets through the shares in Uplands. This conclusion sees the collapse of claims (v) and (vi).

DISPOSITION

For the reasons aforegoing, the application for default judgment cannot succeed.

It is hereby ordered; -

That the application for default judgment be and is hereby dismissed.

Mutuso, Taruvinga and Mhiribidi- applicant`s legal practitioners

CHILIMBE___ [8/9/23]