REPORTABLE ZLR (43)

Judgment No. SC 55/04

Civil Appeal No. 241/03

SHERWIN EVANS v BARBARA SNAPPER

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & ZIYAMBI JA
HARARE, JULY 19 & SEPTEMBER 10, 2004

D S Mehta, for the appellant

E T Matinenga, for the respondent

SANDURA JA: This is an appeal against a judgment of the High Court which dismissed with costs the appellant's claim for payment of the sum of $9 550 000.00, together with interest and costs of suit.

The background facts are as follows.

At the relevant time the appellant ("Evans") and the respondent ("Snapper") had known each other for more than five years. In May 2001 Evans became aware that Snapper could purchase United States dollars through her contacts at the Embassy of the United States of America in Harare ("the Embassy"). As he was in need of the foreign currency he asked her to purchase it for him. She agreed to do so and was to receive a commission.

Thereafter, on three or four occasions Snapper purchased a total of US$86 000 and handed it to Evans. The exchange rate applied was US$1.00 to Z$100.00.

On each occasion the procedure adopted was that Evans took a certain sum in local currency and handed it to Snapper at her residence. Thereafter, Snapper took the money to the Embassy where she handed it to two men, whom she knew as Robin and Brian but whose surnames she did not know. When the foreign currency was ready for collection, Snapper was contacted by Robin or Brian and was so informed. Snapper then went to the Embassy, collected the foreign currency, took it to her residence and informed Evans, who later collected it from the residence.

The first three or four transactions did not cause any problems and a

total of US$86 000.00 was handed to Evans by Snapper. However, two subsequent transactions, which were not successful, led to the present dispute between the parties.

The first of these involved the sum of Z$5 600 000.00, which Evans handed to Snapper in June 2001; and the second involved the sum of Z$3 950 000.00, handed by Evans to Snapper in July 2001. In the circumstances, the total sum in dispute is Z$9 550 000.00. It was common cause that, after handing that sum to Snapper, Evans did not receive any foreign currency from her as anticipated.

According to Snapper, after handing the money to Robin and Brian, with whom she had conducted foreign currency transactions for about two years, she did not hear from them. She got worried and started looking for them but could not find them. She went to the Embassy and was informed that the Embassy did not have anyone called Robin or Brian. She went to Marine House in the suburb of Newlands in Harare, where she believed Robin and Brian lived, but was informed that no-one called Robin or Brian lived there.

Snapper then informed Evans about her predicament, and both of them visited the Embassy, Marine House and a house in Borrowdale looking for Robin and Brian but could not find them.

Subsequently, Evans instituted a civil action in the High Court against Snapper, claiming from her payment of the total sum of Z$9 550 000.00, together with interest and costs of suit.

In her plea Snapper averred that as she was not an authorised foreign currency dealer in terms of the Exchange Control Act and Regulations, a fact which Evans knew, the transactions between her and Evans were not authorised by the Exchange Control Authority and were, therefore, illegal. In addition, she averred that she had lost the money to fraudsters when she attempted to secure foreign currency on behalf of Evans, and that she had not been negligent.

At the civil trial which ensued, both parties gave evidence and were cross-examined. At the end of that trial, the learned judge in the court *a quo* accepted Snapper's version of what had happened, and dismissed Evans' claim with costs. Aggrieved by that decision, Evans appealed to this Court.

The issue which arises in this appeal is whether the learned judge in the court *a quo* ought to have relaxed the maxim *in pari delicto potior est conditio possidentis* and ordered the restitution of the sum of Z$9 550 000.00 to Evans.

In *Dube v Khumalo* 1986 (2) ZLR 103 (S), GUBBAY JA (as he then was) considered the above maxim and said the following at 109 D-G:

> "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'."

And at 110 B-C the learned JUDGE OF APPEAL said:

> "It was again emphasised by GREENBERG JP in *Petersen v Jajbhay* 1940 TPD 182 that in determining where the justice of the matter lay, it was proper to consider that if the relief were refused to the plaintiff the defendant would be unjustly enriched at his expense (see at 191)."

I entirely agree with the learned JUDGE OF APPEAL. However, the first maxim referred to by him, i.e. *ex turpi causa non oritur actio*, is not in issue in the present appeal because Evans did not seek the enforcement of the illegal agreement. Instead, he sought the restitution of money which he had handed to Snapper pursuant to the illegal agreement. It is, therefore, only the second maxim, i.e. *in pari delicto potior est conditio possidentis*, which is in issue, the issue being whether the rule should have been relaxed in favour of Evans.

In determining that issue, the learned judge in the court *a quo* was alive to the fact that it was important to make sure that Snapper was not unjustly enriched at the expense of Evans.

After referring to the case of *Logan v Siviya* HH-88-2002 (not reported), in which HUNGWE J relaxed the *par delictum* rule, the learned trial judge said:

> "In this case, if I were satisfied that the defendant in this case had defrauded the plaintiff and had been enriched by 5.6 million (dollars) and 3.95 million (dollars) that the plaintiff gave her, I would have made the same decision that MR JUSTICE HUNGWE did. I would have relaxed the *par delictum* rule and ordered the defendant to pay the plaintiff.
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> However, having given careful consideration to all the evidence before this court, I am satisfied that on a balance of probabilities the defendant has established that she was not enriched by the money which she received from the plaintiff. I am satisfied that she gave the money to Robin and/or Brian who were employed at the United States Embassy. One or both of them made off with that money."

After a careful scrutiny of the whole of the evidence in this matter, I am satisfied that the learned trial judge correctly determined the matter. In my view, the finding that Snapper was not unjustly enriched at the expense of Evans cannot be faulted.

In any event, that was a finding of fact based on Snapper's credibility as a witness. The learned trial judge, who had an opportunity of seeing, hearing and appraising Snapper, believed her. Being an appellate court, this Court cannot lightly interfere with such a finding.

As HOLMES JA said in *S v Robinson and Ors* 1968 (1) SA 666 (AD) at 675 G-H:

> "A Court of Appeal, not having had the advantage of seeing and hearing the witnesses, is of necessity largely influenced by the trial court's impressions of them. Having regard to the re-hearing aspects of an appeal, this Court can interfere with a trial judge's appraisal of oral testimony, but only in exceptional cases, as aptly summarised in a Privy Council decision quoted in *Parkes v Parkes* 1921 AD 69 at p 77:
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> > 'Of course it may be that in deciding between witnesses, he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact; but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a trial judge based on verbal testimony.'"

Applying that test, I am satisfied that there is no basis on which the finding by the learned trial judge can be interfered with by this Court.

In the circumstances, the appeal is devoid of merit and is, therefore, dismissed with costs.

CHEDA JA: I agree.

ZIYAMBI JA: I agree.

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