

SIPHATHISIWE MOYO

VERSUS

ABRAHAM K. NDLVOU

AND

CITY OF BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 24 JULY 2008 AND 9 OCTOBER 2008

Mr Tsvangirai for the plaintiff

Judgment

Illegal contract

CHEDA J: This is an application for a default judgment.

This salient facts of this matter are common cause.

On the 28th April 2008 plaintiff and defendant entered into an agreement of sale of an immovable property, being stand number 435/2 Old Magwegwe, Bulawayo. The purchase price was agreed at R35000-00 payable upon signature on the agreement. This was indeed done by the parties and plaintiff was duly represented by one Ndumiso Nkomo who was duly authorised by a Power of Attorney granted by the said plaintiff.

Plaintiff has since discovered two problems in this transaction, one that the said agreement is incapable of performance as defendant has no right, title and interest in the said property and that the purchase price is expressed in foreign currency, which no doubt is illegal in this country.

It is now trite law that the court will deny its assistance to a party to a contract which is clearly illegal or where the party participates in an illegal performance by his failure to take reasonable steps to prevent such performance.

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This, however, is the general rule. There are, however, certain instances where the court may sympathise with the offended party.

Mr Tsvangirai has urged me to condone the issue of illegality thereby relaxing the in pari delicto rule in order to render justice between man and man. On that score he has referred me to the case of *Matsika v Jumvea Zimbabwe Limited and another* HH 9/03.

In the said case the issue which fell for determination was whether or not a sale agreement, the purchase price of which was sounding in foreign currency was enforceable at law. In exercise of his discretion the learned Judge ordered restitution in Zimbabwean dollars with an option of payment in United States dollars.

Transactions in foreign currency are regulated by the Exchange Control Regulations number 109/1996. The said transaction is prohibited by S (4)(1)(a)(ii) which provides that no person in Zimbabwe shall exchange foreign currency with any person other than an authorized dealer without the permission of the Exchange Control Authority.

As pointed out supra plaintiff has urged me not to apply the in pari delicto est conditio possidentis rule so that I can do justice to this case. The principle was indeed relaxed in *Dube v Khumalo* 1986(2) ZLR 103(SC) and *Young v Van Rensburg* 1991(2) ZLR 149(SC).

The above maxim is indeed part of our law. However, my view is that it should not be applied in a blanket form but rather certain factors such as public policy and unjust enrichment should be considered in the suitability or otherwise of its application. The object of the rule is to discourage the engagement and/or participation in illegal transactions. In *Dube v Khumalo supra* at 109 E GUBBAY JA (as he then was) stated:

“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.”

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The departure from this rule was spelt out in *Jafbhay v Cassin* 1939 AD 537 at 544-545 where STRATFORD CJ stated:

“.....courts of law are free to reject or grant 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 could not disregard the various degrees of turpitude in delictual contracts. And when the delicate falls within the category of crimes, a civil court can reasonably suppose that the criminal law has 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 not 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 my view that this is one of the cases where the court should in its duty to apply the par delictum rule, relax it, in order to do justice between man and man as public policy dictates that it should be so. The relaxation of this principle should not be easily resorted to, but, should only be applied after strict and serious considerations in order to avoid the mistaken belief that courts passively bless such illegalities.

As the objective of the above rule is to discourage illegality, plaintiff should not reap the benefit of restitution in foreign currency as this will trivialize the illegality.

The following order is accordingly made:-

- (1) The purported agreement of sale of stand 435/2 Old Magwegwe, Bulawayo entered into between plaintiff and first defendant on the 28th April 2008 be and is hereby declared null and void.
- (2) That first defendant pays the plaintiff the equivalent of R35000-00 (thirty five thousand rands) at the reserve Bank of Zimbabwe exchange rate prevailing on the 28th April 2008.
- (3) First defendant to pay the costs of suit.

Danziger and partners, plaintiff's legal practitioners

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