CABAT TRADE & FINANCE (PTY) LTD

And

SECURITY MILLS (PTY) LTD

Versus

THE MOVEMENT FOR DEMOCRATIC CHANGE (MDC-T)

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 12 OCTOBER 2010 & 5 JANUARY 2012

R.M. Fitches for plaintiffs
L. Uriri for respondent

1. Defendant's special plea in bar
2. Defendant's exception
3. Plaintiff's exception to defendant's exception
4. Plaintiff's application to strike out

KAMOCHA J: The plaintiffs' claim in this matter was for payment of the sum of ZAR4 627 863,93 being the purchase price of goods sold by the first plaintiff to the defendant at the defendant's special instance and request in or about February/March 2008 which was manufactured and delivered by the 2nd plaintiff to the defendant on or about the 18th March 2008 and which was invoiced on the 18th March 2008 and payable within 30 days of date of invoice.

In the alternative, the claim was for payment of the sum of ZAR 4 627 863,93 being the amount by which defendant had been unjustly enriched at the expense of the 2nd plaintiff as the result of the 2nd plaintiff manufacturing and delivering goods valued at ZAR 4 627 863,93 to the defendant at the defendant's special instance and request on or about the 18th March 2008.

In their amended declaration the plaintiffs had this to say.

Main Claim: *Actio Venditi*

In or around April 2008 at Bulawayo, the defendant, represented by Mr Eddie Cross, duly authorized and Mr Simon Spooner, duly authorized by Mr Cross, entered into an oral agreement with the 2nd plaintiff represented by Mr Laurence Zlattner, in terms whereof, the 2nd

plaintiff undertook, at defendant's behest, to manufacture 200 000 garments, commonly known as "T-shirts" and as many head scarves, commonly known as "doeks or bandanas" as could be manufactured from the material on hand, but at least 30 000 (hereinafter referred to as "the goods") which the 1st plaintiff sold to the defendant for defendant to use in its then forthcoming election campaign, for the agreed sum of ZAR4 965 723 including VAT. Given the size of the order, 2nd plaintiff agreed to manufacture the total order in batches, to accommodate defendant's express stipulation that the total order be ready for defendant to use in its then forth coming election campaign as aforesaid. It was an express, alternatively implied term of the parties' agreement that, given the size of the order, defendant would pay on tender of delivery of each batch of goods supplied. To comply with its contractual obligation, the defendant expressly agreed to effect payment to the 1st plaintiff.

By its agreement aforesaid, defendant became contractually liable to pay the 1st plaintiff the contract price in South Africa, and simultaneously incurred contractual liability to 2nd plaintiff for the manufacture of the goods.

In accordance therewith, 2nd plaintiff duly manufactured the said goods and delivered to the defendant goods in batches to the value of ZAR 4 672 215,37, including VAT comprising 149 887 articles or approximately 74% of the contract goods, payable on tender of delivery and demand, but defendant, in breach of its contractual obligation, notwithstanding having accepted delivery, had allegedly refused to pay, despite demand. Defendant's failure to pay for the goods thus far delivered to it constituted a material breach of an express, alternatively, implied term of agreement, entitling plaintiffs to claim the full contract price *ex vendito*.

At the defendant's request the 2nd plaintiff had withheld delivery of the balance of the manufactured goods, namely 30 000 single jersey T-shirts being finished goods ready for dispatch, to the value of ZAR772 800 and 5 393 single jersey T-shirts, being finished goods ready for dispatch, to the value of ZAR 143 885,24 and 7 368 single jersey T-shirts, being goods comprising "work in progress" to the value of ZAR 196 578,24 pending defendant's advice of readiness to receive such goods, which goods subject to such stipulation, the2nd plaintiff thereby again tendered against payment by defendant of the total balance due of ZAR340 463,48.

Pursuant to plaintiffs' performance of the agreement as aforesaid, 2nd plaintiff rendered to defendant the invoice for the manufacture of the goods, dated 18th March 2008 for ZAR 4 627 863,93, including VAT, being the amount due for the goods (a) manufactured and delivered; and (b) manufactured but in respect of which delivery had been withheld but tendered, for the reasons given.

The said invoice constituted plaintiffs' demand and expressly stipulated that interest accrues at 8% per annum within 30 days of the date of the invoice. Accordingly, defendant was allegedly liable for interest on the total sum due, *mora ex re*, from 17 April 2008 to the date of final payment.

In the result plaintiffs prayed for judgment and costs against defendant in the sum of ZAR4 627 863,93, together with interest at 8% per annum from 17 April 2008 to the date of payment.

ALTERNATIVE CLAIM: UNJUST ENRICHMENT

It was alleged that alternatively and in any event, that by reason thereof, defendant had been unjustly enriched at 2nd plaintiff's expense in that:

Pursuant to the contract entered into as averred, in performing its obligations thereunder, 2nd plaintiff allegedly used its resources and incurred the following liabilities in producing the contract goods; inter alia, manufacturing costs, wages, the cost of engaging a sub contractor in Harare, namely, Kataura Enterprises (Pvt) Ltd to assist in fulfilling the contract order, deferring its normal customers and rescheduling other deliveries, to give priority to defendant, and the costs of purchasing raw materials as well as machinery which had to be secured through deposits and the expectation of payment by defendant.

By taking delivery, without payment of approximately 92% of the contract goods, and using them for its intended election campaign purposes, and by assuming the contractual obligation, defendant had been enriched at plaintiff's expense.

The plaintiffs had been allegedly impoverished by the enrichment of the defendant, the casual connection being the contractual obligation referred to above in particular the costs and liability incurred by plaintiffs in expectation of payment by defendant. The said enrichment was unjustified.

The 2nd plaintiff rendered to defendant its invoice dated 18th March 2008 for ZAR4 627 863,93 including VAT, being the amount due for the goods manufactured and delivered and manufactured, but in respect of which delivery had been withheld but tendered, for the reasons given. The said invoice constituted plaintiffs' demand and expressly stipulated that interest accrues at 8% per annum within 30 days of the date of the invoice. Accordingly, defendant was allegedly liable for interest on the total sum due, *ex mora re* from 17 April 2008 to the date of final payment.

Having regard to the terms of the founding contract, defendant had accordingly, been allegedly unjustly enriched at plaintiffs expense in the sum of ZAR4 627 863,93 together with interest at 8% per annum from 17 April 2008 to the date of final payment, and costs of suit.

Wherefore, in the alternative, 2nd plaintiff prayed for judgment and costs against defendant on the basis of unjust enrichment in the sum of ZAR4 627 863,93 together with interest at 8% per annum from 17 April 2008 at the date of final payment.

DEFENDANT'S PLEA

The defendant denied that it had authorized Mr Eddie Cross or Mr Spooner to enter into the alleged contract. It averred that neither Mr Cross nor Mr Spooner had authority to enter into contracts on its behalf. It denied that it had purchased anything from the first plaintiff and denied liability to pay VAT in South Africa.

It averred that any valid order would have been written not oral and would have been authorized by the defendant's Director General.

It denied being party to the agreement between the plaintiffs and Mr Cross and Mr Spooner and further denied that it had expressly agreed to effect payment to the 1st plaintiff the contractual price in South Africa as such agreement would have been illegal.

It pleaded that it had not received the goods and averred that a goods received voucher would have been issued to second plaintiff had the goods been received.

It went on to state that annexures "A" to the further particulars supplied by plaintiff alleged that some deliveries were made on 25 June 2008, and on 13 August 2008 when in fact it had very publicily resiled from the Presidential run-off election on 20 June 2008. Therefore, if the plaintiff continued to manufacture after 20 June 2008 then it voluntarily assumed the risk that it would receive no payment.

In the event of there being a valid contract for the plaintiffs to supply the defendant with election campaign materials a material term of the contract would have been that the plaintiffs had to deliver well before the election and any delivery after the election would have been a material breach.

Defendant denied that it had contracted to pay for goods and further denied that it had requested second plaintiff to withhold delivery of further items nor that it had received any delivery from the plaintiff and insisted that there had been no contract between the parties. It denied having agreed to any interest rates and averred that the interest claimed was usurious and illegal.

It was finally averred that plaintiffs should have made the demand to Mr Cross and Mr Spooner since they were the parties to the contract and prayed for the dismissal of the plaintiffs' claims with costs.

In relation to the alternative claim defendant maintained that it had not taken delivery of any goods pursuant to any contract of sale and averred that it had not been unjustly enriched in the alleged amount or at all. It reiterated that the interest claimed was illegal and prayed for the dismissal of the alternative claim with costs.

PLAINTIFFS' REPLICATION TO DEFENDANT'S PLEA ON THE MERITS

The plaintiffs maintained that Mr Cross and Mr Spooner had the authority of the defendant to enter into a contract on its behalf. In the event that it was found that they had no authority to represent the defendant it was averred that they had ostensible authority to do so by reason of the following facts:-

1. On or about November 2007, in anticipation of the 28th March 2008 Zimbabwe Presidential Elections, Mr Cross, who at the material time was a member of the Defendant's National Executive Committee, and, by widely disseminated public knowledge, was a senior member of defendant's hierarchy, acting on behalf of defendant, allegedly entered into a similar contract with second plaintiff for the manufacture and supply of garments that second plaintiff manufactures within its normal business. The order was for 60000 T-shirts, 60 000 bandanas and 40 000 wraps, known colloquially as "Zambians".

That the contract/order was performed by second plaintiff and paid for by defendant without demur or deviation. Such payment was allegedly effected through defendant's hierarchical process. At no time did defendant deny Mr Cross's authority to represent it in that transaction. In upholding the said earlier contractual obligation entered into by Mr Cross, and by making such payment, defendant thereby represented to second plaintiff by its conduct, that Mr Cross was duly authorized to enter into such agreements on behalf of defendant.

It was alleged that the second plaintiff was induced, to its prejudice, by the said representation to believe that Mr Cross was duly authorized to enter into subsequent agreement on behalf of defendant, concluded in April 2008, which pertained to the re-run of the said Presidential Election, and, acting on the strength of that belief, second plaintiff, to its detriment and prejudice, entered into the agreement concluded in April 2008, and the said transaction was confirmed and ratified by Mr Cross. Second plaintiff transacted the April 2008 contract, to its detriment, on the basis of the aforesaid representation, inducement and belief.

In the result, defendant was estopped from denying that Mr Cross and Mr Spooner had the authority to represent it, more particularly, as the payment for the March Election and April re-run were matters not only of enormous public interest and debate, but the payment for the contract transacted by Mr Cross had been obviously released as a result of processing through defendant's payment process. Moreover, it was alleged that Mr Cross and Mr Spooner had in fact admitted that they had been duly authorized.

The plaintiffs alleged that an arrangement had been made whereby the goods were collected by the defendant as and when they were manufactured and required by defendant. The second plaintiff would advise defendant when goods were ready for delivery and defendant would in turn collect them as it wished to. As and when significant volumes had been manufactured, second plaintiff would advise defendant, thereby tendering delivery, whereafter defendant would determine when to collect in whole or in part.

Plaintiffs averred that they had documentary evidence of the goods collected and such documents had been repeatedly made available to defendant. In addition, contemporaneous electronic mail correspondence between Mr Cross, Mr Spooner and Chris Mbanga, affirmed that there had been complete verification of the numbers and that distribution was complete.

In respect of goods for which delivery thereof had been tendered, but collection by defendant had not been effected, such goods still awaited collection.

It was plaintiffs' averments that the goods had been manufactured and delivery thereof tendered to defendant in terms of the contract long before defendant decided on 20 June 2008 to withdraw from the Presidential run-off Election. The fact that defendant effected ten collections after that date was wholly in defendant's hands and did not mean that manufacture was after that date, in fact, manufacture had been effected long before that date and delivery tendered in accordance with the on-going interactions with defendant's representatives.

It was contended that the fact that defendants collected goods on 25 June 2008 and 13 August 2008 constituted their acknowledgement that they were bound by the terms of the contract which they were still implementing. The plaintiffs denied any voluntary assumption of risk as inferred by defendant.

Finally, it was alleged that Mr Spooner had requested second plaintiff to diminish the original order, which plaintiff did, and to hold certain manufactured stocks of which delivery had been tendered pending later collection. It was, accordingly, submitted that the parties had indeed entered into a contract through their duly authorized representative.

DEFENDANT' S SPECIAL PLEA IN BAR

After receiving the plaintiffs' claims the defendant filed its special plea in bar of the claim. It denied that it was obliged to the plaintiffs either in contract or in delict.

Defendant stated that it was a political association with its headquarters in Zimbabwe and was accordingly a Zimbabwean based association.

It stated that the contract alleged by the plaintiffs would have been tainted with illegality for want of compliance with Exchange Control Act [Chapter 22:05] as read with the Exchange Control Regulations, 1966 contained in Statutory Instrument 109 of 1996 as the alleged contract would have required payment to be made by defendant to first plaintiff outside Zimbabwe.

The defendant did not have any free funds nor did it then hold any money in a foreign currency account.

It was contended that the alleged contract was void for illegality and the plaintiff's claims *ex contracti* should be dismissed.

DEFENDANT'S AMENDED EXCEPTION

Further, the defendant excepted to the second plaintiff's declaration pertaining to the alternative claim on the ground that it disclosed no cause of action or alternatively on the ground that it was vague and embarrassing and bad in law in particular.

It was alleged in the amended exception that the plaintiff had not stated in its declaration on which specific ground of enrichment it sought to sue. It claimed that the cause of action had not been properly identified. In the result the claim was vague and embarrassing.

In the alternative to the above it was alleged that to the extent that plaintiff claims in its response to the initial exception that it sought to found its claim on a general action for unjust enrichment, plaintiff had failed to make the allegations necessary to found its claim on such an action. To found its claim on a general action for unjust enrichment, second plaintiff must have alleged that:

(a) The defendant was enriched;
(b) The plaintiff was impoverished by the enrichment of the defendant;
(c) The enrichment was unjustified;
(d) The enrichment does not come within the scope of one of the classical enrichment actions.

In casu, the 2nd plaintiff had averred that it had delivered goods worth ZAR3 762 215,37 to defendant yet it sought to recover the sum of ZAR4 965 723,00 together with interest thereon at 8% per annum.

Paragraph B7 of the plaintiff's declaration averred that the plaintiffs were claiming the full contract price *ex vendito*. By claiming the same amount in unjustified enrichment as it claims *ex vendito*, 2nd plaintiff was attempting to claim a profit. That was unacceptable and rendered the plaintiff's claim bad in law as well as vague and embarrassing.

It alleged that plaintiff had not given any admissible quantifiable figure of money that it sought to claim in unjustifiable enrichment. The amount sought was based on evidence from a contract in violation of sections 4, 10 and 11 of the Exchange Control Regulations and thus the court had no evidence on which it could be requested to find for the plaintiffs. The claim was therefore allegedly vague and embarrassing and bad in law.

It was alleged that plaintiff sought to enforce a contract under the law of unjustified enrichment when it performed under a contract. Its declaration in paragraph C1 incorporated averments made in contract and at paragraph C7 it couched its enrichment action "having regard to the founding contract aforesaid". The plaintiff insisted on the founding contract's validity it be enforced by way of unjustified enrichment. That was approbation and reprobation, vague and embarrassing and incurably bad in law.

It was submitted that the plaintiff's declaration in its alternative claim was bad in law and lacking in averments necessary to sustain the identified cause of action as stated above in that plaintiff did not unequivocally allege that there had been unjustified enrichment. In fact, plaintiff insisted that there was a contract in force. Meaning that the enrichment would therefore be justified. The approbation and reprobation rendered the claim vague and embarrassing and bad in law.

In paragraph B1 and B2 of its declaration plaintiff specifically stated that goods allegedly delivered were for use in the Presidential Election campaign for the election due on 29 June 2008. As such delivery of any goods after 29 June 2008 would mean that such goods would not have enriched the defendant's estate as they could no longer be used and therefore could not be claimed in an action based on unjustified enrichment. Plaintiff's averments to that extent, therefore, failed to sustain the cause of action in that they do not support any averment that defendant was enriched.

The plaintiff had not alleged that the enrichment did not come within the scope of one the classical enrichment actions. That allegation was necessary before any purported reliance on the general unjustified enrichment action, consequently, the averments in the plaintiff's

declaration failed to sustain the cause of action by failing to make that allegation. Failure in that regard rendered the claim vague and embarrassing.

Finally, defendant stated that in paragraph 4 of the amended declaration it was alleged that the defendant had used the goods "for its intended election campaign purposes." That was an admission that the goods had been consumed. Accordingly, it was submitted, that that was bad in law and embarrassing to allege in the same breath that the defendant had been enriched.

In the premises, defendant prayed that the alternative claim be dismissed with costs on the Law Society Tariff.

PLAINTIFFS' REPLICATION TO DEFENDANT'S SPECIAL PLEA IN BAR

The plaintiffs alleged that the defendant's denial of an obligation "in delict" was vague and embarrassing, superfluous, disclosed no offence (sic) and was itself excipiable by reason of the fact that plaintiffs had not claimed in delict. In any event, defendant's denial of a contracted obligation was vague and embarrassing to plaintiffs given that such denial avoids traversal of the alternative claim based on the general action against unjust enrichment. The said vague traversal allegedly militated against Rule 104 (4) of the rules of this court which stipulated that a party denying an allegation shall not do so evasively, but shall answer the point of substance.

The plaintiffs claim that as a political party the defendant had access to external donor funds at the material time.

They went on to allege that the illegality was not a matter to be raised by special plea and denied that the contract was illegal for want of compliance with Exchange Control Regulations of 1996, published in Statutory Instrument 109 of 1996, more particularly, inter alia, by reason of section 45 thereof, and more particularized by plaintiffs, defendant had allegedly agreed that first plaintiff would be an ad stipulator, hence defendant could not raise a contrary stance.

As the payment was at defendant's express request and behest, as particularized in the declaration and further particulars, defendant was estopped from asserting to the contrary. It was averred that the legality or otherwise of the contract was a matter of law. It was further denied that the contract was void for illegality and was averred that the defendant could not approbate and reprobate the existence of the contract, by denying its existence, and, simultaneously purporting a challenge its legality.

In the result it was prayed that at the hearing of evidence on the special plea, it be dismissed with costs on the Law Society Tariff.

PLAINTIFFS' RESPONSE TO DEFENDANT'S EXCEPTION

The plaintiffs' in their response to the defendant's exception, alleged that the exception was an abuse of court process, by reason of the fact that Zimbabwe law recognized a general action for unjust enrichment, and by reason of the fact that the alternative claim was based on the general action for unjust enrichment. Hence, second plaintiff denied that the alternative claim was vague and embarrassing or bad in law.

In response to paragraph B2 (a) (b) and (c) the plaintiff repeated that the averments in those paragraphs were bad in law and constituted an abuse of court process in that defendant had failed to identify a straight forward cause of action in that the plaintiffs' allegations were necessary to found a *conductio indebiti*, which is an entirely separate cause of action, and ignored their alternative cause of action, as pleaded, namely, the general action for unjust enrichment, accepted as being part of Zimbabwe law since 1996.

Plaintiff averred that goods to the value of ZAR3 672 215,37 were manufactured and delivered to defendant, which goods comprised approximately 74% of the defendant's contractually stipulated order. The difference between the figure of ZAR 3 672 215,37 and the total amount claimed related to the balance owing as had been averred in paragraph B3 of the main claim, and was due.

In answer to paragraph B3.2 the plaintiffs averred that the paragraph repeated and compounded the alleged misunderstanding of the law and their claim for the general action for unjust enrichment, rather than a *conditio indebiti*. It was contended that rather, it was defendant's exception that was bad in law. The reference to specific performance was vexatious in that it ignored the cause of action, as expressly stated as being the *actio venditi*. Further, the reference to the purported "guise" was equally vexatious in that it misidentified the cause of action, being the general action for unjust enrichment.

Their explanation for not averring that delivery was in error was that their alternative claim did not sound in the *conductio indebiti*, as no question of error arose, neither did it sound in *conditio sine causa*, hence there was no necessity to allege that the delivery was not due. The averments for the main claim for the full contract price *ex vendito* had been incorporated by reference in the alternative claim for the general action for unjust enrichment.

In answer to the suggestion that the defendant had used the goods for its intended election campaign purposes the plaintiffs were admitting the goods had been consumed accordingly. It was bad in law and embarrassing to allege in the same breath that defendant had been enriched. The plaintiffs averred that accepting delivery and consuming the goods constituted an admission of unjust enrichment, as there was no denial of the averment that the goods were used. In addition, it constituted unjust enrichment for the purposes of the general action or unjust enrichment, as those facts pertained to the element of the said cause, that the defendant had been enriched by such impoverishment, and that the enrichment was unjustified.

The plaintiffs concluded by praying that the defendant's exception be dismissed with costs on the Law Society Tariff.

PLAINTIFFS' EXCEPTION TO DEFENDANT'S EXCEPTION

Plaintiffs excepted to the defendant's exception (to the plaintiffs' alternative claim of unjust enrichment) as being bad in law, vague and embarrassing, disclosing no defendant to plaintiffs' alternative claim thus:-

It was alleged that paragraph 2 thereof incorrectly stated the requirements for a *conductio indebiti* as being the requirements for the general action for unjust enrichment. As a proposition of law, that was incurably bad, at variance with established superior court authority.

The requirements stated in paragraph 2 (a), (b) and (c) seriatim were the requirements for the *conductio indebiti*, which pertained to when enrichment arose from a payment in error. The general action for unjust enrichment was not available if one of the classical enrichment actions such as the *conductio indebiti*, was available. Since plaintiffs did not aver performance to be in error, they did not rely on the *conductio indebiti.*

It was alleged that paragraph 3.1 was argumentative in that it obfuscated the value of the goods delivered and ignored the pleaded facts pertaining to the balance of the claim.

Paragraph 3.2 allegedly ignored the cause of action, as was expressly stated as being the *actio venditi* and not specific performance. In addition, the reference to the purported guise, "misidentified" the cause of action being the general action for unjust enrichment, established in Zimbabwe law since 1996.

It was averred that it was bad in law to allege that a party was claiming under a cause of action not even pleaded, as the defendant had allegedly by the assertion that "the plaintiffs'

claim that it had performed under a contract and now seeks to recover the full contract price under the *conditio indebiti*". The plaintiffs had not claimed under the *conditio indebiti* at all.

It was further alleged that paragraph 4 compounded defendant's misunderstanding of the alternative claim in that the paragraph alleged that there was no averment that delivery had not been done in error nor that it had been due, the reason for that being that plaintiffs were not claiming delivery in error, nor were they claiming a *conditio sine causa or causa data non secuta,* which would be appropriate for performance which was not due.

In alleging in paragraph 4 that: "Confusingly paragraph C 7 of those that the defendant had been unjustly enriched in the same amount as the contract price *ex vendito"* defendant had confused the import of plaintiffs; alternative claim.

In as far as paragraph 5 was concerned it was alleged that its meaning was obscure. To the extent that the meaning could be understood, it was bad in law, contradictory, vague and embarrassing, and disclosed no defence to the claim, by reason of the fact that per contra, the averment of accepting goods without paying for them, and consuming them, constituted an admission of unjust enrichment, as there was no denial of the averment that the goods were used. In addition it was alleged that it constituted unjust enrichment for the purposes of the general action for unjust enrichment, as those facts pertained to the elements of the said cause namely that the plaintiff had been impoverished, that the defendant had been enriched by such impoverishment, and that the enrichment was unjustified.

In the result the plaintiffs prayed that the exception to defendant's exception be upheld and defendant's exception be held to be bad in law, vague and embarrassing, disclosing no defence to the plaintiffs' alternative claim. Plaintiffs prayed for costs on the Law Society Tariff.

PLAINTIFFS' APPLICATION TO STRIKE OUT

The plaintiffs applied to strike out paragraph 5.2 of the defendant's plea and paragraph 1 of the defendant's special plea in bar, filed of record on 30 November 2009 as being bad in law, vague and embarrassing, disclosing no defence to plaintiffs' claim for the following reasons:-

Ex facie paragraph 5.2 of the plea, defendant having denied the existence of the contract in paragraphs 3, 4.2, 5.4 and 6.1, yet approbates and reprobates by relying on the merits, and resorting to argumentative and irrelevant conjecture. As the averments in that paragraph allegedly disclose no defence, are irrelevant, and constituted approbation and reprobation, paragraph 5.2 of the plea ought to be struck out as it is conjectural argumentative and irrelevant.

Further, it was alleged that *ex facie* paragraph 1 of the special plea, the defendant's denial of an obligation "in delict" was vague and embarrassing, superfluous, disclosed no offence, and was in itself excipiable by reason of the fact that plaintiffs had not claimed in delict. Accordingly the alleged offending averment ought to be struck out.

Further, *ex facie* paragraph 3 of the special plea, defendant relied on illegality. That was a matter of substantive law which ought to be raised in a plea on the merits rather than by way of special plea, as the averment of illegality was neither a plea in bar nor in abatement. Hence the paragraph ought to be struck out.

It was prayed that the above mentioned paragraph be struck off on the Law Society Tariff.

I now turn to deal with the defendant's special plea in bar as provided for in Order 21 Rule 137 (1)(a) of the High Court Rules and recites as follows:-

"137 Alternatives to pleading to merits:

1) A party may –
   (a) Take a plea in bar or in abatement where the matter is one of substance which does not involve going into the merits of the case and which if allowed, will dispose of the case."

What comes out from the above is that the requirements of a special plea are that:-

(a) The matter must be one of substance;
(b) Which does not involve going into the merits of the case; and
(c) If allowed, disposes of the case.

In the case of *Brown* v *Vlok* 1925 AD 56 which was quoted in *George* v *Lewe and another* 1936 CPD 402 at 406 INNES CJ had this to say:-

"Now a plea in bar is one which, apart from the merits, raises some special defence not apparent from the declaration – for in that case it would be taken by way of exception – which either destroys or postpones the operation of the cause of action."

The plea in bar is not predicated on a denial of any facts set out in the declaration as that would involve going into the merits of the case made by the plaintiffs in their declaration. The plea proceeds on the basis that the allegations in the plaintiffs' declaration are correct but should nevertheless be disposed of for one reason or another that does not appear *ex facie* the pleadings. In *Scuddingh* v *Vitenhage Municipality* 1937 CPD 113 the court had this to say in respect of a plea in bar at 119:-

"It (a special plea) is the type of plea the object of which is to avoid the necessity of going into the merits of the plaintiff's claim because of the existence of certain circumstances not apparent from the declaration which either bar or postpone the claim made."

The courts have stated repeatedly that the purpose of a special plea is to permit the defendant to achieve a prompt resolution of a factual issue which founds a legal argument which disposes of the plaintiffs' claim as called for by rule 137 (1) (a) above. See for instance *Doelcam (Pvt) Ltd* v *Pitchamick and Others* 1999 (1) ZLR 390

The issue that the defendant raised in this matter is that of illegality. In that the plaintiffs were attempting to enforce a contract tainted with illegality for want of compliance with the Exchange Control Act [Chapter 22:05] as read with the Exchange Control Regulations, 1996 contained in Statutory Instrument 109 of 1996 as the contract would have required payment to be made by defendant to first plaintiff outside Zimbabwe.

Ideally a plea of illegality should be raised before the trial and not *in limine* as stated in *Abreu* v *Campos* 1975 (1) RLR 198 at page 204H – 205A. In *Adler* v *Elliot* 1988 (2) ZLR 283 (S) illegality was raised as an exception as it appeared on the papers. Illegality was also raised as an exception that the summons disclosed no cause of action in the case of *York Estate Ltd* v *Wareham* 1950 (1) 3A 125 (SR) where the summons had set out the factual basis that was then used to argue the point of illegality. In *Barker* v *African Homesteads Touring and Safaris (Pvt) Ltd and Anor* 2003 (2) ZLR 6 (S) illegality for contravening section 8 (now section 11) of the Exchange Control Regulations raised *in limine* was upheld both by the High Court and an appeal in the Supreme Court resulting in the plaintiffs' claim being dismissed. Consequently, the submission by the plaintiffs that illegality should not have been raised as a special plea and can only be raised on the merits is clearly untenable.

The relevant provisions of the Exchange Control Regulations of 1996 recite thus:

"10 (1) Unless otherwise authorized by an exchange control authority, no person shall, in Zimbabwe –

(a) Make any payment to or for the credit of a foreign resident; or
(b) …; or
(c) Place any money to the credit of a foreign resident; or
(d) …"

Section 11 of the said regulations provides as follows:-

"11 (1) Subject to subsection (2) unless otherwise authorized by an exchange control authority, no Zimbabwean resident shall:-

(a) Make any payment outside Zimbabwe; or
(b) Incur any obligation to make a payment outside Zimbabwe

(2) Subsection (1) shall not apply to –

(a) any act done by an individual with free funds which were available to him at the time of the act concerned; or

(b) any lawful transaction with money in a foreign currency account."

It is common cause that the first plaintiff Cabat Trade & Finance (Pvt) Ltd is a foreign resident. The transaction which entailed making a payment to it contravened the provisions of section 10(1)(a) and (c) *supra*. The transaction does not end there in its contravention of the regulations but further violates section 11 (1)(a)and (b) supra in that the defendant is not an individual but a political association with *locus standi* and power to sue and to be sued with its headquarters in Zimbabwe and is therefore a Zimbabwean resident. Similarly the first plaintiff is not an individual but a company incorporated with limited liability according to the laws of the Republic of South Africa. It is therefore a South African resident – a foreign resident.

The contract entailed making payment by the respondent or placing any money to the credit of the foreign resident – the first plaintiff in violation of section 10(1)(a) and (c).

The first plaintiff cannot have recourse to the provisions of section 11(2)(a) as those provisions are only available to individuals with free funds which were available at the time of the act concerned not companies and political associations. In *Barker* v *African Homesteads Touring and Safaris (Pvt) Ltd and Anor* 2003 (2) ZLR (s) the Supreme Court held that violation of section 11(1)(a) and (b) of the regulations as read with section 11(2) barred both actual payment and an agreement to make payment outside Zimbabwe without authorization by the Exchange Control Authority, except where that was done by an individual with free funds available to him or her at the time of the act concerned. In the absence of such authorization, the court held the contract illegal and unenforceable. Hence, both the making of the contract and the performance undertaken were unlawful. SANDURA JA at page 10D-E had this to say:-

"In the present case, as the alleged agreement to pay the sum of $32 500 to Barker in Australia had not been authorized by the Exchange Control Authority, *cadit questio*. That is the end of the matter. The agreement is illegal and unenforceable."

The above applies with equal force *in casu* as the agreement to pay the sum of ZAR 4 965 723 together with interest at 8% per annum from 17 April 2008 to the date of final

payment to Cabat Trade & Finance (Pvt) Ltd in South Africa had not been authorized by the Exchange Control Authority it is illegal and unenforceable.

The plaintiffs are seeking to enforce an illegal agreement which is prohibited by law by the *maxim ex turpi causa non oritur actio*. This maxim, admits of no exception. In *Dube* v *Khumalo* 1986(2) ZLR 103 (S) the Supreme Court held at 109D-G that:-

> "The first rule 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 of no exception."

The plaintiffs seek to enforce an illegal agreement which the courts have repeatedly stated can never be enforced.

The plaintiffs sought to rely on the provisions of section 45 of the regulations but that section only relates to debts lawfully incurred or contracts lawfully entered into. Those provisions do not avail the agreement under consideration which was illegal and unenforceable.

The plaintiffs had claimed the amount of ZAR4 965 723 together with interest at the rate of 8% per annum from 17 April 2008 to the date of final payment in the alternative on the basis of the doctrine of unjust enrichment. In my view, that also cannot avail the plaintiff as unjust enrichment cannot be used to enforce an illegal agreement or achieve anything of that nature.

The plaintiffs also submitted that estoppel operated against the respondent in this matter. The submission is also devoid of any merit as the plaintiffs are seeking to enforce a contract prohibited by law. See *York Estates Ltd* v *Wareham* 1950 (1) SA 125 (SR) at 128 where the court stated that it was bound to refuse to enforce a contract even though no objection to illegality of the contract is raised by the parties. It went on to state that it would not enforce such a contract even though the plaintiff is innocent and the defendant is settling up illegality.

Moreover, defendant cannot be prevented from relying on the illegality or unenforceability as a defence, no matter how unfair that may be to the plaintiff.

In the light of the foregoing I would allow the plea in bar which disposes of the case. The need to deal with defendant's exception, the plaintiffs' exception to the defendant's exception and plaintiffs' application to strike out does not arise.

In the result it is ordered that the plaintiff's main and alternative claims be and are hereby dismissed with costs on the ordinary scale.

Messrs Joel Pincus, Konson & Wolhuter plaintiffs' legal practitioners
Messrs Honey, Blanckenberg defendant's legal practitioners