

TAURAI KUFANDIRORI  
**Versus**  
MUNYARADZI GREEN CHIPURIRO  
AND  
TWO OTHERS

HIGH COURT OF ZIMBABWE  
HARARE  
BHUNU J: 23 October 2003 and 28 January 2004

### **Opposed Matter**

Mr *Fitches*, for the applicant  
Mr *Sakutukwa*, for the respondent

BHUNU J: In this opposed application there is no material dispute of facts on most issues relevant to the determination of the dispute at hand. The undisputed facts are that the respondent lent the applicant one million dollars in consequence whereof the applicant pledged his motor vehicle registration number 780-583J, keys and registration book as security for the debt to the respondent.

The terms of the agreement are contained in applicant's affidavit dated 18<sup>th</sup> June 2002 which reads in part:

"The vehicle has been surrendered on term(s) that I pay back money by 31 July 2002 failure (of) which I give Mr H. Chipuriro the express right to effect change of ownership and further changes will be made to the agreement thereafter."

It is common cause that the applicant did not repay the loan by the due date whereupon the respondent proceeded to effect change of ownership in to his own name in terms of the agreement.

There is a material dispute of fact as to whether, or not the respondent frustrated the applicant's bid to repay the loan by due date. There is however no need to resolve that factual dispute because the application can be determined on the basis of the legality or otherwise of the terms of the pledge. That being the case it is not necessary to determine whether or not the doctrine of fictional fulfillment is applicable to this case.

There is also a factual dispute as to whether or not the respondent used and damaged the pledged motor vehicle without the applicant's consent prior to the 31<sup>st</sup> July 2002. The nature of the relief sought makes it unnecessary to resolve that factual dispute at this stage.

The applicant seeks to recover the motor vehicle from the respondent on the basis that the agreement to forfeit the pledged motor vehicle was unlawful and unenforceable in so far as the agreement constitutes a *pactum commissorium*.

The case of *Chimutanda Motor Spares (Pvt) Ltd v Musare and Another*, 1994 (D) ZLR 310 (H) defines a *pactum commissorium* as:

"a pact by which the parties agree that if the debtor does not within a certain time release the thing given in pledge by paying the entire debt, after the lapse of the time fixed, the full property in the thing will irrevocably pass to the creditor in payment of the debt. See *van Rensburg v Weiblen* 1916 O PD 247 at 252."

An examination of Roman Dutch Law authorities particularly *Willies Principles of South African Law, 8<sup>th</sup> Edition* page 345 establishes that a valid pledge merely confers the right to retain possession of the thing pledged as security by the pledgee as long as the debt remains unpaid, it does not confer the right of ownership. The pledgor retains ownership of the pledged property.

The law places a duty of care on the pledgee over the pledged property. In the event of loss or damage while the property is under his custody or possession, there is a presumption of negligence against the pledgee. Thus the pledgee is accountable to the pledgor for such loss or damage to the pledged property.

In addition the pledgee is obliged to render an account to the pledgor of all fruits and profits actually derived from the pledged property. These he must pay over to the pledgee or set off in reduction of the debt.

In the event of default to pay by the date the pledgee has no recourse to self help. He has no right to sell the pledged property without recourse to law.

The procedure which the pledgee must follow for redress is outlined at page 349 of Willie's Principles of South African Law (supra) where he states:

"A judgment for the debt secured may be obtained by the mortgagee (pledgee) if the mortgagor (pledgor) fails to repay the debt at the due date or if he commits a breach of any express clause of the mortgage contract which entitles the mortgagee to foreclose. The judgment of the court declares that the specifically mortgaged property may be executed upon and the property is subsequently sold in execution of the judgment by the officer of the court who pays the mortgagee the amount of his judgment from the proceeds of the sale.

A mortgagee is not entitled to sell the mortgaged property without recourse to law."

That is the legal position save for very limited exceptions which need not detain us here as none have been relied upon.

It is clear that the penalty clause in the agreement at hand amounts to a pactum commissorium. I have already demonstrated above that such an agreement is unlawful and unenforceable due to illegality.

The reasons why our law renders a pactum commissorium illegal are many and varied. The chief reason however was to do with public policy considerations. Our courts will certainly not give effect to agreements which are contrary to public policy, exploitative and oppressive.

The unfortunate part of life is that due to the unequal distribution of wealth, grinding poverty and greed, the world will always have its fair share of "Shylocks" who are prepared to pounce and make capital out of other people's misfortunes. They will demand their pound of flesh regardless of the cost and effect to the victim.

Both common and statutory law have developed safeguards which endeavour to protect gullible members of the public from oppressive and exploitative agreements which they may enter into.

Section 4 (1) of the Contractual Penalties Act [Chapter 8:04] is relevant. It provides that:

- "(1) Subject to this act a penalty stipulation shall be enforceable in any competent court.
- 2) If it appears to a court that the penalty is out of proportion to and prejudice suffered by the creditor as a result of an act, omission or withdrawal giving rise to liability under a penalty stipulation the court may:
- a) reduce the penalty to such (an) extent as the court considers equitable under the circumstances and
  - b) grant such other relief as the court considers fair and just to the parties.
  - c) without derogation from its powers in terms of subsection (2) a court may -
    - a) order the creditor to refund to the debtor the whole or any part of any instalment, deposit or other money that the debtor has paid; or
    - b) order the creditor to reimburse the debtor for the whole or part of any expenditure incurred by the debtor in connection with the contract concerned.
- 3) In determining the extent of any prejudice for the purpose of subsection (2) a court shall take into consideration not only the creditor's proprietary interest but every other rightful interest which may be affected by the act, omission or withdrawal in question."

It is pertinent to note that what is being brought to question here

is the penalty, clause of the agreement and not the contract itself. The contract itself is perfectly valid. As can be seen from the provisions of the above section the court has very wide powers in granting equitable relief where it deems the penalty clause is out of proportion to the prejudice suffered by the creditor.

In this case the respondent lent the applicant one million dollars. Upon breach he exacted a penalty by appropriating the applicant's motor vehicle to himself. He openly admitted that he used the applicant's pledged motor vehicle prior to the due date. He has however not accounted to the applicant for the value of such use. The value of the motor vehicle he appropriated to himself has not been ascertained but the probabilities are that its much more than the money lent plus interest. This is the only reasonable explanation as to why he rushed to activate the penalty clause without notice or

demand. Thus the respondent has been unjustly enriched to the extent of the difference between the money borrowed plus interest and the actual value of the pledged motor vehicle to the loss and prejudice of the applicant.

Such unwarranted prejudice entitles the court to intervene and provide equitable relief in terms of section 4 of the Contractual Penalties Act [*Chapter 8:04*].

At the commencement of argument counsel for the applicant submitted that the respondent was barred for failure to file heads of argument timeously. Counsel for the applicant gave what appeared to be plausible explanation and made a verbal application for condonation. I granted the application preferring to determine the application on the merits rather than on a technicality. Despite that initial success the respondent has no leg to stand on, on the merits.

The applicant has asked for costs on an attorney client scale. There is no justification for punitive costs because the respondent had an arguable case based on an agreement which is apparently valid on the face of it but could not bear close scrutiny.

In the result it is ordered"

- 1) that the application be and is hereby granted with costs to be borne by the 2nd respondent on the ordinary scale.
- 2) (a) that 1<sup>st</sup> and 2<sup>nd</sup> respondent shall forthwith release to applicant the Toyota motor vehicle registration number 780-582 J together with keys and registration book for the motor vehicle upon repayment of the loan of \$1 000 000,00 together with interest at the prescribed rate.  
  
(b) that 1<sup>st</sup> and 2<sup>nd</sup> respondent shall upon payment of the debt due together with interest sign all necessary papers to register the motor vehicle in the name of the applicant, failing which the Deputy Sheriff shall sign any such papers necessary to give

effect to this order.

3. (a) Alternatively;

That in the event that for any reason the motor vehicle cannot be returned to the applicant within 3 weeks from the date of this order, the first respondent is ordered to pay the applicant the agreed value of the motor vehicle as at March 2003 as determined by any registered valuer on the Master of the High Court's panel of evaluators.

c) That in the event that the applicant fails to repay the loan together with interest the motor vehicle shall be sold in execution, the proceeds used to repay the loan together with interest and the residue paid to the applicant.

4) That this order shall remain in operation notwithstanding the noting of an appeal against it.

*Wickwar and Chitiyo*, applicant's legal practitioners

*Mantsebo and Partners*, 1<sup>st</sup> respondent's legal practitioners.

