KENNETH CHARLES GREEBE
and
SHEILA GREEBE
versus
FAMAPS INVESTMENTS (PRIVATE) LIMITED
and
WILLIAM ZVINAVASHE

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE 6 MAY 2004 AND 9 JUNE 2004

Opposed Application

Mr *Samkange*, for the applicants
Mr *Gijima*, for the respondents

MAVANGIRA J :

PRELIMINARY ISSUE

In this matter a court application was filed on 18 June 2003. A notice of opposition and the respondents' opposing affidavit were filed on 8 July 2003.

On 29 August 2003 the 2nd respondent filed a supplementary opposing affidavit. No leave was obtained from the court to file the supplementary opposing affidavit.

The explanation proferred for the omission in the opposing affidavit of the averments made in the supplementary opposing affidavit is partly, inadvertence on the deponent's part and partly, "the incompleteness of the founding papers in that certain pages were missing from Annexure "B" to the applicant's founding papers." As it turns out there was one missing page, that is, page 4 of the said annexure "B".

Without any measure of doubt, the contents of the missing page, that is, page 4, have absolutely no bearing or relationship with the issues raised in the supplementary opposing affidavit. There is therefore no good and proper reason for the supplementary opposing affidavit to be admitted. It is for these reasons that at the hearing of this matter, the supplementary opposing

affidavit was ruled inadmissable. This matter will therefore be decided on the basis of the properly filed documents.

THE APPLICATION

The applicants are the registered and beneficial owners of all the shares in Turnpike Service Station (Pvt) Limited; a company which carries on a service station business from Lot 1 of subdivision A of Porta in the district of Salisbury. The 2nd respondent is the Managing Director of the 1st respondent.

During the second half of 2002, the 2nd respondent offered to buy the applicant's shares in the company claiming, *inter alia*, to have external funds in the United Kingdom from trading operations in the D.R.C. and in Mozambique with which to make payment. On 23 September 2002, a written offer was received from the 2nd respondent's legal practitioners to purchase the applicant's shares for R3 000 000.00, such price to cover the business as a going concern including the fixed assets, fixtures, fittings, stock-in-trade, debtors and creditors. The offer was attractive to the applicants who were proposing to retire to South Africa.

The applicants also own a house on stand 42 Sublime Township, Norton. In October 2002, the 2nd respondent requested to purchase the property held under Deed of Transfer 7228/09 dated 7 May 1998, together with its contents and two motor vehicles, an Isuzu 280D Twincab registration number 785-755 F and a Honda registration number 721-856 G for a purchase price of R1 140 000.00 from funds held externally.

Agreements of sale were prepared and signed by the parties. Both agreements incorporate a clause that reads:

> "That this agreement shall be conditional upon the deposit by the purchaser with and in favour of the seller's agent Dykes Van Heerden at Roodepoort of a cheque, drawn by a bank in the Republic of South Africa, acceptable to the sellers, by not later than the 30th September 2002 in the sum of three million rand (and one million one hundred and forty thousand rand respectively), which monies the purchaser warrants are lawfully held by it outside Zimbabwe.
>
> Should the purchaser fail to deposit the cheque as aforesaid, this agreement shall be of no further force or effect."

Prior to 30 November 2002 the 2nd respondent stated that he would make payment to the applicants by means of a cheque drawn by Lloyds Bank in London in favour of Dykes Van Heerden for £600 000.00 which exceeded the amount of the purchase price on the basis that the surplus was to be used to pay for petrol that the 2nd respondent was to import from South Africa. On the strength of the undertaking from the 2nd respondent that payment would be made as promised, he was given possession of the Service Station and all Turnpike's assets together with the house, its contents and the vehicles already referred to above.

On or about 3 December 2002 the 2nd respondent handed to the 2nd applicant a Lloyds Bank cheque in favour of Dykes van Heerden drawn not by Lloyds but on Lloyds Bank unknown signatories for $600 000.00. The cheque was dishonoured.

Various promises were thereafter made by the 2nd respondent for payment to be made but this did not materialise. Subsequently, payment of R24 000.00 has been made towards the purchase price and Z$150 000.00 has been paid towards the applicant's expenses in travelling to and staying in Zimbabwe to try and resolve matters.

On the 2nd applicant's instructions, Messrs Coghlan, Welsh and Guest wrote to the respondents' legal practitioners pointing out that the sale agreement were subject to conditions precedent requiring payment of the full purchase price of R4 140 000.00 by 30 November 2002 and that unless this payment was made by 11 June 2003, the agreements would be treated as being of no further force or effect and that the respondents would be required immediately thereafter to return possession of the service station and its contents and of the house and its contents and of the two motor vehicles. The respondents have failed to pay the purchase price payable under the said agreements.

In his opposing affidavit the 2nd respondent avers that upon agreeing and giving him possession, the applicants transferred their rights to him and the first respondent. The applicants therefore do not have any real rights to

the property. They only have personal rights which they can enforce for the value of the purchase price against the respondents.

The 2nd respondent also contends that these were credit sales and not cash sales; that it was agreed that possession of the properties and therefore ownership would pass on to him on the date of signing the agreement. Transfer of the immovable property was however predicated on payment of the full purchase price.

In his heads of argument however, the respondents' legal practitioner appears to have abandoned the argument that the sale was a credit sale.

The arguments raised in the respondents' heads of argument are issues which were raised in the supplementary opposing affidavit which has already been dealt with above. However, the argument raised by the respondents' counsel being a legal point, can be raised at any stage and the court has to consider it. The argument is that the agreements in question are illegal and consequently the relief sought ought not to be granted. Their illegality is said to arise from the fact that contrary to the requirements of section 11 of the Exchange Control Regulations, 1996, no prior authority was obtained by either party for payment to be made outside Zimbabwe or to incur any obligation to make a payment outside Zimbabwe.

Section 11 of the Exchange Control regulations, S.I 109/96 provides as follows:

> "(1) Subject to subsection (2), unless otherwise authorised 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."

Free funds have been defined in the said regulations as follows:

"In these regulations -

'free funds' means money which is lawfully held outside Zimbabwe by a Zimbabwean resident and which was acquired by him otherwise than as the proceeds of any trade, business or other gainful occupation or activity carried on by him in Zimbabwe."

In both agreements of sale the respondents warranted that they could pay the R3 million and the R1,4 million respectively, from monies "lawfully held outside Zimbabwe" (see pages 10 and 14 of the record of proceedings). Furthermore the 2nd respondent did in fact pay R24 000.00 towards the purchase price and claimed that he had been cheated out of R10 million by somebody he had entrusted to convey the money to the applicants. In the opposing affidavit the 2nd respondent insists that he was, and acted, *bona fide*. In my view he cannot now claim to have had no monies lawfully held outside Zimbabwe unless he means that he acted fraudulently in dealing with the applicants.

In his oral submissions to the court, the respondents' counsel submitted that subsection (2) of section 11 of the Exchange Control Regulations cannot save these agreements from illegality as the agreements were entered into with the 1st respondent which is not an individual but a company. He cited *Andrew Duncan Barker* v (1) *African Homesteads Touring and Safaris (Pvt) Limited* (2) *Registrar of Deeds*, S.C. 18/03 in support thereof. At page 5 of the cyclostyled judgement, SANDURA JA said:

"However, payments and agreements to make payment outside Zimbabwe stand on a different footing. That is so because in terms of s. 11(1)(a) and (b) of the Regulations, as read with s. 11(2), both the actual payment and the agreement to make payment outside Zimbabwe require authorization by the exchange control authority, except where the act is done by an individual (as opposed to a company, for example) with free funds available to him at the time of the act concerned."

In *Dube* v *Khumalo*, 1986(2) ZLR 103 (SC) at 109C to 110C GUBBAY JA, as he then was, said :

"I turn then to consider whether the plaintiff's claim for relief, based as it is upon an agreement which involved a conspiracy to defraud the Municipality, should be entertained.

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 Etates 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." As was pointed out by STRATFORD CJ in *Jajbhay* v *Cassim* 1939 AD 537 at 544-545:

> "Courts of law are free to reject or grant a 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 should not disregard the various degrees of turpitude in delictual contracts. And when the delict 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 one 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 a 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 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."

The passage above was cited with approval in *Young* v *Van Rensburg* 1991(2) ZLR 149(SC) and also in *Hattingh & Ors* v *Van Kleek* 1997(2) ZLR 240(s) at 245 E to 256 B. In *Hattingh & Ors* v *Van Kleek (supra)* KORSAH JA then proceeded to state at 246 B:

"The cases clearly show that where a contract is on the face of it legal but, by reason of a circumstance known to one party only, is forbidden by statute, it may not be declared illegal so as to debar the innocent party from relief; for to deprive the innocent person of his rights would be to injure the innocent, benefit the guilty and put a premium on deceit."

In *Zuvaradoka* v *Franck*, 1980 ZLR 402 at 406C to H BARON JA said:

"In the leading case of *Jajbhay* v *Cassim*, 1939 AD 537 STRATFORD, CJ, after discussing the relationship between the two maxim *ex turpi causa non oritur actio* and *in pari delicto potior est conditio defendentis,* said at p.543:

> "...the second maxim *in pari delicto potior conditio defendentis ...* is the only maxim which, in my judgement, concerns us in the present case, for the appellant is not seeking enforcement of the illegal contract but seeks release from its operation."

Later at p.543 he said:

> "...the right of recovery of something delivered under an illegal contract (a *restitutio in intergrum)* has never been denied in all cases. In other words the maxim has not, in modern systems of law, been rigidly and universally invoked to defeat every claim by one of two delinquents to recover what he has delivered under such a contract."

The test applied by STRATFORD, CJ was whether public policy was best served by granting or refusing the plaintiff's claim, and he stressed that public policy should properly take into account the doing of simple justice between man and man.

The present case seems to me to fall squarely within the foregoing principle. The plaintiff is not seeking to enforce the illegal contract; indeed he does not even seek release from its operation. The defendant repudiated the contract for reasons which, had the contract been a legal one, would clearly have been in breach thereof; the plaintiff is simply seeking to recover what he had paid thereunder."

He further stated at pages 407E to 408C:

"It remains therefore to deal with Mr *Hill's* submission that the court is not entitled to look at the agreement for any purpose and that consequently it has not been established that Weinman was the defendant's agent. This point also arose in *Jajbhay v Cassim (supra)* and in *Petersen v Jajbhay*, 1940 T.P.D 182. In the former case STRATFORD, CJ, said at p. 545:

> "I think I should add that in my view, if either party had terminated the contract and the tenant refused to vacate, the court would probably assist the appellant to recover his property."

GREENBERG, JP in *Petersen v Jajbhay (supra)*, having referred to this

passage, said at p. 189:

> "...it is clear that (STRATFORD, CJ) was referring to a termination that would have been valid by the terms of the contract, had it been legal and binding."

Quite obviously it was assumed by STRATFORD, CJ that the court could look at the agreement and GREENBERG JP made the point in terms in *Petersen's* case (*supra)* when he said at p.191:

> "In order that the court may decide whether or not to grant relief, it may clearly look at the agreement. If all the terms of a current lease are being complied with and there are no considerations of public policy present, the court will not assist the lessor; but if the lessee is not performing his obligations, the rule may in a proper case be relaxed."

Finally, the short judgment of CENTLIVRES, J.A. *Jajbhay v Cassin (supra)* is worthy of note. He referred to an old case in the Scotch Appeal Court, *Cuthbertson v Lowes*, (1870) 7 Sc. L.R. 706 and cited the following from the judgement in that case:

> "It is true enough that in *turpiu causa* the maxim held true *melior est conditio possidentis;* but this was a pact not so illicit that the court could not look at it. What the court could not do was, it could not enforce the contract. But to refrain from taking any notice of it, so as to let the defenders retain the potatoes without paying for them, would amount to a gross injustice. The court could, therefore, entertain the alternative plea of the pursuer and decern against the pursuer (sic)? _ defenders) for the market value of the potatoes.""

In *casu*, the 1st respondent, represented by the 2nd respondent, gave out in both agreements, that it had monies that it lawfully held outside Zimbabwe. The respondents having taken possession of the applicants' property, for which they have not paid the agreed price, seek to benefit by having the applicants;' application dismissed on the basis that the agreements contravene a provision of the Exchange Control Regulations. In my view, even if it is accepted, as I think it must, that the agreements contravene section 11 of the Exchange Control Regulations, 1996, the case on the facts before the court, calls for a relaxation of the *par delictum* rule. A refusal to grant the application would unjustly enrich the respondents. See *Hattingh & Ors v Van Kleek, supra* and *Young* v *Van Rensburg, (supra)*. It would, in my view almost be akin to the situation, as expressed by KORSAH JA in *Hattingh & Ors v Van Kleek,* where a premium is put on deceit.

It appears that public policy may not be foreseeably affected by the grant or refusal of the relief claimed and that this matter calls out for the reasons already discussed above, for the court to do justice between the

individuals concerned. See also *Murphy v Tengende* 1983(2) ZLR 292(HC)

At the hearing of this matter I expressed my misgivings about paragraph 4 of the applicants draft order. The applicants' counsel indicated that he was not persisting in seeking it. I shall not deal with that aspect of the matter any longer. In my view however, as the agreements were tainted with illegality each party should bear its own costs.

In the result and for the above reasons it is ordered as follows:

1. That the agreements of sale dated 22nd November 2002 between applicants and first respondent for the sale by applicants to first respondent of their shares in Turnpike Service Station (Private Limited and between second applicant and first respondent for the sale of stand 42, Sublime Township, Norton, are declared to be of no force or effect.

2. That the respondents are ordered to return to applicants within seven days hereof upon 24 hours notice possession of Turnpike Service Station and its contents, stand 42 and its contents, schedules of which respective contents are attached to applicants' application and the Honda motor vehicle registration number 721-856 G and Isuzu 280 D Twincab registration number 785-755 F failing which the Deputy Sheriff is hereby authorized to evict them from both properties and to recover the contents and motor vehicles and return them to the applicants.

3. Each party is to bear its own costs.