SMARTSTART ADVANCED TECHNOLOGIES (PVT) LTD
versus
AUSTIN MUSHANGWE
and
ELVIS MUSHANGWE

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE 7 January and 18 February 2004

Unopposed Application

Ms *Magoge,* for the applicant

This is an unopposed application in which the applicant seeks payment of $1 474 861,37. The claim arises from a memorandum of agreement signed between the applicant and one Tichaona Charakupa who is not a party to these proceedings.

The memorandum of agreement Annexure "B" shows that Tichaona Charakupa purchased goods worth $350 000 from the applicant on the 1st day of September 2003. The amount was payable upon delivery of the purchased goods.

The applicant now claims that despite delivery being effected no payment was made.

The non-payment of the purchase price prompted the applicant to enter into a contract of pledge with the two respondents on the 25th July 2003. The two respondents Austin Mushangwe and Elvis Mushangwe were not party to the written agreement. In its affidavit the applicant has not explained why the two are being sued on a written contract to which they were not a party.

In paragraph 4 of its affidavit the applicant claims that the written agreement was concluded in July 2003 and yet the written agreement is dated 1st September 2003.

It is therefore clear to me that the contractual document upon which the claim is founded is not a contractual document which binds the two respondents. In its affidavit the applicant did not explain the link between the respondents and the contractual document Annexure "B" when the applicant alleges that the written agreement was concluded in July 2003.

This should really be the end of the matter justifying the dismissal of this application. But for completeness' sake I proceed to deal with the legality of

the claim.

The facts are that when there was no payment by the due date the applicant entered into an agreement of pledge with the two respondents on the 25th July 2003. Clause 4.1 of the written agreement upon which the applicant bases its claim reads:

> "4.1 The Pledger undertakes to pay to the creditor the sum of $700 000 on or before the 6th day of August 2003 at the Creditor's offices wherever they may be found from time to time and that the Pledgor further undertakes to pay the balance owing to the Creditor on or before the 30th Day of August 2003, failure of which shall entitle the creditor to sell the property attached as security and any additional property to liquidate the Pledgor's indebtedness to the Creditor including any interest charged at the rate stated in the definitions sections above." (**my emphasis**)

Upon default the applicant sold the respodnents' pledged property without notice for the exact amount of the purchased goods thereby recovering the purchase price of $350 000,00. Despite having recovered the purchase price the applicant is now claiming an additional payment of $1 474 861,37. He claims that the amount comprises interest and storage charges. He has not bothered to give a breakdown of how he has arrived at that incredible figure. The total amount he claims is roughly five times the original debt. The claim therefore offends against the *in deplume* rule which stipulates that interest cannot exceed the capital amount owing. See *Georgias and Another v Standard Chartered Finance Zimbabwe Ltd* 1998 ZLR 488.

Our law treats a *pactum commissorium* as an illegal and unenforceable contract.

A *pactum commisorium,* was defined in the case of *Chimutanda Motor Spares (Pvt) Ltd v Mutare and Another* 1994 (1) ZLR 310 (H) 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 Rensberg v Weiblem* 1916 OPD 247 at 252."

The above definition fits squarely the contract of pledge which the parties concluded. I therefore hold that the contract was unlawful and unenforceable on account of it being a *pactum commissorium.* Section 4(1) of the Contractual Penalties Act [*Chapter 8:04*] seeks to protect gullible members of the public from unfair terms of a contract. The section gives the court very wide powers to intervene where it deems that the penalty stipulated in a contract is out of proportion to any prejudice suffered by the creditor as a

result of the omission or withdrawal giving rise to liability, under that section the court may:

> "(2) ....
>
> (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.
>
> (3) Without derogation from its powers in terms of subsection (2), a court may -
>
> (a) order the creditor to refund to the creditor the whole or any part of any installment, deposits or other moneys 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.
>
> (4) 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."

In this case, I am satisfied that claiming an additional $1 474 861, 37 after recovering the purchase price within a very short space of time is grossly unjust, exploitative and oppressive.

The applicant exercised self help and sold the goods without notice. Given the applicant's avaricious greedy there is no knowing the exact value of the goods and the actual amount for which they were sold. The probabilities are therefore that they may very well have been sold for more than what the applicant is prepared to disclose.

In the recent case of *T Kufandirori v M.G. Chipuriro & Two Others* HH 13-04 I had occasion to remark on the reasons why our law seeks to protect gullible members of the public from unjust and unfair contractual penalties. In that case I observed that:

> "The unfortunate part of life is that due to the unequal distribution of wealth, grinding poverty and greedy, 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."

Owing to financial desperation some people may be forced to enter into exploitative and oppressive contractual terms. It is the duty of the courts to

protect such persons from the harmful effects of the unfair contractual penalties brought about by their penury and financial need.

In this case I am satisfied that applicant has not satisfactorily accounted for the proceeds of the pledged goods. It illegally exercised self help. It now wants the assistance of this court to complete the unlawful process which it started. Granting the application will undoubtedly amount to an endorsement and approval of an unlawful and unfair contract terms. This the court cannot do.

It is accordingly ordered that the application be and is hereby dismissed with no order as to costs since the application was unopposed.

Magoge Legal practitioners, applicant's legal practitioners.