SHEM CHIVHUMBA MLAMBO
versus
ISAAC MUTAMBI PHIRI CHIKATA

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 11 February 2015

Chamber Application for default judgment

ZHOU J: This matter was placed before me as a chamber application for default judgment in terms of r 57 of the High Court Rules, 1971. Ordinarily I would not have written a judgment in such a matter. However, for the reasons which appear below it is necessary for me to give a written judgment on the matters which arise from the chamber application. The brief background to the matter is as follows.

On 11 March 2013 the plaintiff instituted an action against the defendant. The relief claimed as set out in the summons is as follows:

> "(a) Delivery (of) one acre of land in Gweru Town or alternatively payment in the sum of US$52 000 being current market value thereof together with interest thereon at the prescribed rate of interest with effect from date of summons to the date of payment in full.
> (b) Costs of suit."

According to the plaintiff's declaration the claim was founded upon an agreement concluded in March 2000 in terms of which the defendant sold to the plaintiff "five acres of land which was a portion of Gwelo Smallholding 1A". The plaintiff makes the following further averments in his declaration:

> "4. In terms of the agreement the sale was subject to a subdivision permit being granted in terms of the Regional, Town and Country Planning Act.
> 5. There were delays in the subdivision of the property and the plaintiff left for the United States of America for studies.
> 6. In 2011 Defendant delivered to plaintiff a subdivision of four (4) which he represented to be five (5) acres.
> 7. Upon discovering the discrepancy plaintiff demanded delivery of the remaining one (1) acre and defendant agreed to deliver the additional one acre.
> 8. The equivalent (sic) current market value of one acre of land in the area is $52 000.
> 9. Despite demand defendant has failed, neglected and or refused to deliver the remaining one acre of land or to pay the current market value of such land in the City of Gweru in the sum of US$52 000."

The summons and declaration were served upon the defendant on 26 April 2014. The defendant did not enter an appearance to defend and was accordingly barred. Following the automatic barring of the defendant the plaintiff made a chamber application for default judgment. The application was accompanied by an affidavit and a draft order in terms of which the plaintiff asked for the same relief set out in the summons. In paragraph 7 of that affidavit the plaintiff avers that "the figure of US$52 000 is the current monetary equivalence of one acre piece of land in the City of Gweru". He further states the following in paragraph 8 of the same affidavit:

> "To arrive at this figure, I made consultations with the city of Gweru, who advised me that currently they are selling properties in similar areas for US$13 per square metre. I also consulted private estate agents in the City of Gweru who advised me that US$13 per square metre is actually a conservative price. I attach hereto an extract from the Herald dated 11 July 2013 which shows that private estate agents actually sell low density properties like the one I bought for US$15 per square metre as Annexure A."

The plaintiff attached a copy of a page from the classified advertisements section of a newspaper as well as well as a copy of the agreement of sale between him and the defendant. Clause 4 of the agreement of sale states the following:

> "That notwithstanding the signing of here this agreement is subject to the Seller applying for and obtaining a subdivision permit in terms of the Regional, Town and Country Planning Act."

When the matter was placed before me I raised two queries. The first issue related to the validity of the agreement of sale given the express admission in both clause 4 of the memorandum of agreement and paragraph 4 of the plaintiff's declaration that there was no subdivision permit which had been granted by the local authority at the time that the agreement was concluded. The second query was whether the claim for the value of a one acre property made in the alternative was a liquidated claim or a claim for a debt which could be made through the chamber book in terms of r 57. I also pointed out that in any event the affidavit filed did not prove the amount claimed. The plaintiff initially responded to the queries by letter but subsequently filed heads of argument. Nothing turns on whether the claim was for a debt or liquidated demand for the purposes of this judgment.

As there was no subdivision permit in place at the time that the agreement of sale was concluded, the agreement contravened s 39(1) of the Regional, Town and Country Planning Act [*Chapter 29:12*], which provides as follows:

> "Subject to subsection (2), no person shall –
> (a) . . .
> (b) Enter into any agreement –

(i) for the change of ownership of any portion of a property, or
(ii) . . .
(iii) . . . ; or
(c) . . .except in accordance with a permit granted in terms of section forty."

When I raised the issue of the validity of the agreement of sale I drew the attention of the plaintiff's legal practitioner to the case of *X – Trend-a-Home (Pvt) Ltd* v *Hoselaw Investments (Pvt) Ltd* 2000 (2) ZLR 348(S). In that case the court held that a contract made in contravention of the provisions of section 39(1) cited above was illegal and unenforceable. See also *Tsamwa* v *Hondo & Ors* 2008 (1) ZLR 401(H); *Mikesome Investments (Pvt) Ltd* v *Silcocks Investments (Pvt) Ltd* 2003 (2) ZLR 56(H) at 61F-62E.

The plaintiff admits the illegality of the agreement. He, however, submits that this is an appropriate case for the court to enforce an illegal contract in order to prevent unjust enrichment to the defendant. Reliance has been placed on the authority of the court to relax the application of the *in pari delicto potior est conductio possidentis* rule in an appropriate case. That rule means that where the parties to a contract are in equal guilt the party in possession will prevail. The implications of the rule were explained in the following terms by GOWORA J (as she then was) in the case of *Madziyire* v *Makwabarara & Ors* 2011 (1) ZLR 131(H) at p. 138E-G:

> "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 (and) 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'."

The authority of the court to relax the application of the *par delictum* rule in appropriate cases is settled. *Evans* v *Snapper* 2004 (2) ZLR 121(S); *Logan* v *Sibiya* 2002 (1) ZLR 531(H); *Greebe & Anor* v *Famaps Investments (Pvt) Ltd* 2004 (1) ZLR 522(H); *Gambiza v Taziva* 2008 (2) ZLR 107(H)

However, as in the case of *Madziyira* v *Makwabarara & Ors*, *supra*, at 138G-H, the plaintiff *in casu* is not asking for a refund of what he paid for the portion of land which he alleges was not delivered. Instead, he is asking for specific performance, in that he wants an order for the delivery of one acre of land. Plaintiff makes an alternative claim for payment of damages. In other words, the plaintiff is not asking for relaxation of the *par delictum* rule but is seeking enforcement of the agreement. If the court was to grant that relief, which is for specific performance or payment of damages, then it would be lending itself to an illegality.

Dobrock Holdings (Pvt) Ltd v *Turner & Sons (Pvt) Ltd & Ors* 2006 (2) ZLR 353(H). That the court will not do. That is the approach which is consistent with the preponderance of judicial thinking in relation to agreements concluded in contravention of the provisions of s 39(1) of the Regional, Town and Country Planning Act.

As for the question of costs there was no opposition from the defendant. Accordingly, it is appropriate to make no order as to costs.

In the result, IT IS ORDERED THAT:

1. The plaintiff's claim be and is hereby dismissed with no order as to costs.

Mundia & Mudhara, plaintiff's legal practitioners