OLIVER MANDISHONA CHIDAWU

and

DANOCT INVESTMENTS (PTY) LIMITED

and

DANNOV INVESTMENTS (PTY) LIMITED

and

BROADWAY INVESTMENTS (PRIVATE) LIMITED

versus

JAYESH SHAH

and

TN ASSET MANAGEMENT (PRIVATE) LIMITED

and

PELHAMS LIMITED

and

TAGARA MATARUSE

and

CORPSERVE (PRIVATE) LIMITED

and

ZIMBABWE STOCK EXCHANGE

HIGH COURT OF ZIMBABWE

MATHONSI J

HARARE, 27 January 2015 and 11 February 2015

**Opposed Application**

*D Ochieng*, for the applicants

*I Chagonda*, for the 1st respondent

*T Mpofu*, for the 2nd respondent

3rd, 4th, 5th and 6th respondents in default

MATHONSI J: If there is anything to which all the parties in this matter are generally in agreement about, it is that the first applicant is a businessman of repute, of commendable experience who has been conducting business in this country and South Africa for a considerable period and he is good at what he does. The second and third applicants are his companies which he registered in South Africa while the forth applicant is yet another company of his which he controls and is registered in Zimbabwe.

In the normal conduct of his business, the first applicant acquired certain shares in the third respondent registered at the Zimbabwe Stock Exchange, which he held in the names of his companies which he has joined as applicants in this matter. The registered shares total  358 207 502 made up of 100 000 000 held by the second applicant under share certificate number 9945, 8 666 586 held by the third applicant under share certificate number 12 306 and 174 540 961 held by the fourth applicant under 8 different share certificates.

Finding himself in need of money the first applicant entered into a loan agreement with the first respondent, who had the money and was willing to give it out on certain terms and conditions. This was in February 2011 and the amount involved was $3 000 000-00 which the parties agreed would be repaid by 20 February 2011. As security for the loan the first applicant was to surrender as pledge, the Pelhams shares held by him through his companies. The delivery was in the form of the share certificates relating to those shares.

The first respondent must have been a shrewd business man as well who went to great lengths in ensuring that he held proper and negotiable security in the usual and almost predictable event that the debtor defaulted in payment. In addition to getting the first applicant to sign 2 agreements on 9 and 10 February 2011 recording the loan agreement and the terms, including clauses 3 to 5 of the agreement signed on 9 February 2011 and clauses 3 and 5.1 of the one signed the following day on 10 February 2011 which I shall quote shortly, the first respondent caused the first applicant to sign further Securities’ Transfer Forms transferring the pledged shares to him.

Clauses 3 to 5 of the 9 February 2011 agreement read:

“3. The parties agree that such terms and conditions shall include *interalia* the following:

3.1 The repayment of the debt within a period of 10 days from the date of lending or within such time the lender upon receiving satisfactory explanation from Premier Bank may prescribe. It is recorded that the maximum period within which the debt shall be paid is 30 days.

3.2 The borrower has agreed to procure the following securities

3.2.1 ----------

3.2.2 ----------

3.2.3 ----------

3.2.4 Cause the surrender of Pelhams Limited shares totalling to   380 000 000 held by the entities mentioned in 3.2.1, 3.2 (2) and 3.2.3 to the lender in negotiable form.

3.2.5 ---------

4. The borrower acknowledges and accepts that the lender has disbursed the aforesaid amount on understanding and condition that the above named security will be provided.

5. The borrower warrants that he is the beneficial owner of the security mentioned and that no other person has an interest or claim to any of the security mentioned.”

The second agreement signed on 10 February 2011 contains Clause 3 thereof which reads;

“**Acknowledgment**

The borrower acknowledges that he is truly and lawfully indebted to the lender in the total sum of USD 3 000 000-00 (Three Million United States Dollars) (hereinafter referred to as ‘the debt)”

Clause 5 provides;

“5. Security

As security for the prompt repayment of the debt, the borrower undertakes and shall procure to provide the following securities:-

5.1.1 Provide a Deed of Suretyship by Dannov Investments (Pty) Ltd

5.1.2 Provide a Deed of Suretyship by Danoct (Pty) Ltd

5.1.3 Provide a Deed of Suretyship by Broadway Investments (Pvt) Ltd

5.1.4 Cause the surrender of Pelhams Limited shares totalling 380 000 000-00 held by the entities mentioned above to the lender in negotiable form.

5.1.5 ------------”

Clearly therefore the first respondent was not content with a mere surrender of the shares. He wanted them in “negotiable form.” Writing about negotiable instruments, the learned author R.H Christe, *Business Law in Zimbabwe*, ed 2, Juta & Co Ltd stated at p 190:

“In outline, this concept is simply that provided a written instrument complies with the prescribed formalities, the legal rights which are written on the instrument may be transferred from person to person either by mere delivery or by the transferor’s signing his name on the back of the instrument (endorsement) followed by delivery. A person who takes transfer of the instrument in good faith and for value then receives title to those rights free from any defences which might have been available against previous holders (‘free from equities.’) (The underlining is mine)

The first applicant duly signed on behalf of the other applicants in whose names the shares were held, transfer forms in which they transferred all the shares that had been given as security. There can be no doubt therefore that in that form and with the transfer certificates signed by the first applicant, the shares given to the first respondent were in negotiable form. He could negotiate them further to other parties.

As happens so often in this country, the first applicant failed to pay the debt only succeeding in repaying a small fraction of it, the sum of $300 000-00 paid on 21 March 2011. Indeed up to now, the applicants have not paid anything further towards liquidating the debt and only hold on to a vague statement that the amount claimed is disputed. They have not even begun to explain how a claim based on all the unequivocal acknowledgments of indebtedness could be disputed.

Be that as it may, when the first applicant defaulted, the first respondent negotiated the share instruments, promptly selling all of them to the second respondent who accepted the shares for value. The applicants would have none of that. They have brought several applications, initially trying to prevent the sale and transfer of the shares and now trying to reverse the transfer. They have been to the Supreme Court and back still pursuing the same issue.

In the present application the applicants seek a declaratur that the sale of the shares by the first respondent to the second respondent “constituted unlawful *parate executie*”, that the securities transfer form executed by the forth applicant in respect of shares held by it was invalid by reason that the certificate was defective and that ownership of the shares did not lawfully pass to the second respondent. The applicants also seek the return of the shares to them among other relief.

In his founding affidavit the first applicant insists that he did not authorise the first defendant to transfer the shares and that he had given the documents I have referred to as “a security interest in the shares” and that he did not pass ownership. For that reason the first respondent had no right to sell the shares without instituting legal proceedings against him. Selling the shares as the first respondent did is a case of *parate executie* which is unlawful self help. According to the applicants *parate executie* is unlawful and this should entitle them to the order that they seek.

The application has been strongly opposed by the first and second respondents. The former insists that he acted lawfully and within his rights conferred upon him by the agreements of the parties. When he was approached by the first applicant for the loan he had insisted on negotiable security being tendered as he did not want security which would be difficult to dispose of in the event of a default. He wanted the shares to be in negotiable form to enable him to sell them without resort to the applicants. This explains the documents the first applicant had to sign in order to get the loan.

On its part the second respondent’s position is that considering that the issues raised by this application have already been subject of earlier judicial pronouncements particularly by the Supreme Court, the present application is an abuse of process. The second respondent maintained that when it purchased the shares it had been shown the agreements entered into between the first respondent and the applicants including the share transfer forms executed by them authorising the first respondent to transfer the shares to third parties. It therefore acted on those and purchased the shares in good faith and for value meaning that the applicants are estopped from denying the existence of authority for the first respondent to sell. Mr *O’chieng* for the applicants had a difficult time indeed in moving the application mainly because the application was predicated on a wrong principle that *parate executie* is unlawful. When he could not sustain that line of argument he was forced to swing round, almost full circle, to argue that by contending, in the absence of any contractual provision to that effect, that the first applicant authorised the sale, the respondents were effectively saying that *parate executie* was a tacit term of the agreement. It is a remedy that cannot be inferred.

The difficulty with that argument lies in the fact that it does not arise from the applicant’s case as contained in the founding affidavit and supporting documents where they insisted that *parate executie* was unlawful self-help. In addition *parate executie* cannot possibly be said to be implied when the first applicant did sign securities transfer forms clearly authorising the first respondent to sell. It was a specific term of the agreement.

For what it is worth, I must state that *parate executie* is now accepted as lawful in our law. Let me restate the passage in *Farmers World Holdings (Pvt) Ltd* v *Manica Zimbabwe Limited* HH 297/12 at pp 4-5;

“The fallacy of that argument is self evident. The respondent relies on a consent by the applicant, firstly in the original agreement signed in May 2009 and secondly in the Acknowledgment of Debt penned in March 2010, to *parate execution*. That our law recognises *parate execution,* subject to qualifications, cannot be doubled. As stated by BECK JA in *Changa* v *Standard Finance Ltd* 1990 (2) ZLR 412 (S) 414 A-C:

‘It was settled in *Osry* v *Hirch, Loubser & CoLtd* 1922 CPP 531 that as far as movables are concerned an agreement for their delivery to the creditor and sale by him be means of *parate execution* is valid and binding. That decision was approved and followed by BEABLE J (as he then was) in *Aitken* v *Miller* 1957 (1) SA 153 (SR); 1950 SR 227, The recognition extended under the civil law to such agreement is subject, however, to the qualifications expressed at p 547 of *Osry* case (*supra*), in these terms:

‘It is however, open to the debtor to seek the protection of the court if, upon any just ground he can show that, in carrying out the agreement and effecting a sale, the creditor has acted in a manner which has prejudiced him in his rights.”

To the extent that the applicants have based their application on a mistaken view that *parate executie* is unlawful, the application is sitting on sinking ground. It simply cannot succeed. Even the attempt by Mr *O’chieng* to resuscitate it by trying to argue that even if the first respondent had the power to transfer the shares, such power did not mean authority, he still needed authority of the first applicant before he could transfer, while it is the typical spirit of advocacy, it cannot save this application. It is an unnecessary splitting of hairs. There is no doubt in my mind that the first respondent acted lawfully and in accordance with the agreement of the parties.

Mr *Mpofu* for the second respondent made the additional point that the issue has long been settled by the Supreme Court and that the applicant is asking me to make a decision on matters already decided by the Apex Court. I agree. We are covering ground that has already been traversed merely because the applicants think they can try their luck. CHIDYAUSIKU CJ made findings adverse to the applicants in *Chidawu & Ors* v *Shah & Ors* SC 13/12 when he said:

“The first applicant delivered the Pelhams Limited shares to the first respondent in negotiable form as security for the loan he received. The inescapable inference to be drawn from this is that the first applicant freely consented to the shares being sold or negotiated in the event of his failure to repay the loan. He failed to repay the loan and the shares were sold by the first respondent. The applicant wants the transfer interdicted. The sale, as stated above, had already been concluded. What remained was transfer of the shares by the stock broker to the purchaser. The papers in this matter show that the loan agreement between the parties, voluntarily signed by the first applicant and the first respondent was transparent. The parties were *ad idem* in respect of all the terms and conditions of the loan agreement. The loan agreement correctly reflects the contractual intentions of the parties. There is no allegation or suggestion of any form of coercion or underhand dealings. The loan agreement appears to be a normal business transaction between businessmen of substance. For the first applicant to now seek the assistance of the law to renege on a contract he openly and willingly entered into, smacks of duplicity and deceit. Is sounds crooked.”

See also *Chidawu & Ors* v *Shah & Ors* SC 12/13.

It ought to have been apparent to the applicants that this court is bound by the pronouncements of the Supreme Court. When they prosecuted this application knowing what the Supreme Court had already determined without even putting forward any new facts upon which a different conclusion could be made, they were abusing process. It is the kind of conduct which should be frowned upon with a good measure of punitive costs.

In the result the application is hereby dismissed with costs on the scale of legal practitioner and client.

*Messrs Honey & Blanckenberg*, applicant’s legal practitioners

*Messrs Atherstone & Cook*, first respondent’s legal practitioners

*Messrs Mtetwa & Nyambirai*, second respondent’s legal practitioners