VALUE CHAIN TRADING (PRIVATE) LIMITED
versus
PENTECOSTAL ASSEMBLIES OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 9 & 24 February 2016

Civil Trial

R F Mushoriwa, for the plaintiff
B Mahuni, for the defendant

CHAREWA J: The plaintiff issued summons against the defendant for a refund of monies paid towards goodwill and security deposit, interest thereon at the prescribed rate and costs on the higher scale, arising from a lease agreement.

The matter eventually came before me as a stated case by consent. The issue I had to resolve was:

Whether or not upon cancellation of the lease agreement between the parties, the plaintiff was entitled to a refund of the goodwill paid to the defendant.

The agreed facts were that the parties entered into a lease agreement on 24 July 2014 which terms were as follows:

a. The lease was supposed to run from 1 August 2012 to 31 July 2016.
b. The plaintiff was required to pay (and did pay)
    i. USD30 000-00 for goodwill
    ii. USD7 500-00 for security deposit
    iii. USD7 500-00 per month as rental
c. The plaintiff cancelled the lease four months into the contract and gave vacant possession to defendant.

At the commencement of the hearing, the parties advised the court that they had come to a partial agreement whereby the defendant consented to judgment in the amount of USD6 457-21 being refund of security deposit.

STATED CASE

At the hearing of the matter, and in amplification of its heads of argument filed of record, the plaintiff premised its claim for a refund of the goodwill on three heads as follows:

1. The matter fell within the precinct of the Commercial Premises (Rent) Regulations S.I.676/83, s19 of which proscribes extra payments apart from rent and security deposits. Where any extra payments are made, they must be refunded in full as they are illegal.
2. The present matter is on all fours with the case of *Goodliving Real Estate (Pvt) Ltd & Anor* v *Lin Zhongmin SC 61/13* which has effectively interpreted s19 to include goodwill among the illegal payments that may not be demanded by landlords and is binding upon this court.
3. Finally, the forfeiture of the amount paid as goodwill in circumstances where the defendant will have both the property and the money amounts to a tacit contractual penalty contrary to the Contractual Penalties Act [*Chapter 8:04*], leading to the defendant's unjust enrichment.

For its part, the defendant argued that s19 f the Commercial Premises (Rent) Regulations did not apply, or if it did, the interpretation made by the Supreme Court should not be the guiding principle in resolving the issue. Rather the Court should simply be guided by what s 19 says.

Secondly, the defendant argued that the plaintiff had not properly pleaded unjust enrichment and could not therefore rely on that to obtain relief from the court.

Finally, the defendant argued that the payment of goodwill was not illegal, and did not render the lease agreement illegal. It advanced that the agreement to pay goodwill could be excised from the lease agreement as a separate agreement merely contained in the lease agreement for convenience. In any event, the defendant further argued, in terms of the *in pari delicto* rule, the loss lay where it fell. For this assertion, the defendant cited the case of *Jajby* v *Cassim* 1939 AD 537. It went on to argue that the case was also authority for the averment that, if it was illegal to charge goodwill, since plaintiff had participated in the contract and

paid the illegal sums, it was before the court with dirty hands and should not be allowed to extricate itself from the illegal contract.

DOES s19 OF THE COMMERCIAL PREMISES (RENT) REGULATIONS S.I. 676/1983 APPLY TO THE PARTIES' TRANSACTION, AND IF SO, IS THE INTERPRETATION RENDERED BY THE SUPREME COURT IN *GOODLIVING REAL ESTATE (PVT) LTD & ANOR (supra)* RELEVANT?

Section 19 of the Commercial Premises (Rent) Regulations applies to leases of commercial properties, and makes it illegal to levy any extra sums other than rent and security deposit on lease agreements. The Supreme Court has, in the case of *Goodliving Real Estate (Pvt) Ltd (supra)* per Garwe JA, at p4 of the cyclostyled judgment, categorically interpreted s 19 to include the payment of goodwill as impermissible under the law when he stated:

> "The clear intention of the Legislature was to prohibit the tendency on the part of some landlords to take advantage of desperate tenants seeking to rent accommodation by demanding, over and above the amounts that a landlord may lawfully demand from a lessee, such as rent and a security deposit, other amounts that are not permissible in terms of the Regulations. Put differently, it is impermissible and a breach of the law, for a landlord to demand payment of "a commitment fee", or "goodwill", or "a lease consideration fee" or any other fee, by whatever name, which amounts to a bonus or premium or a consideration for negotiating the lease".

What I understand the defendant to argue is that s 19 does not prohibit the payment of goodwill because goodwill is not a bonus or premium or other like sum as envisioned in the regulations. For that reason, s19 is not applicable to the parties' transaction. Therefore, according to the defendant, the cases that have been decided which have classified goodwill within the genus of "bonus, premium or other like payment" are not correct.

Firstly, I find the defendant's argument to be disingenuous. This is because there is no dispute, on the record, that the parties entered into a lease agreement for commercial premises, to wit, a supermarket. It cannot, therefore, nor is it disputed that the Commercial Premises (Rent) Regulations in general are applicable to the case. As a result, unless the statute specifically so provides I cannot accept that a commercial transaction of this nature should be subject to the relevant statutory framework to the exclusion of a particular provision therein.

Secondly, my reading of para(s) 1.1. to 1.3 of the defendant's heads of argument suggests that this court is required to interpret s 19 so as to exclude goodwill from the class of payments prohibited under the section. The difficulty with this argument is that this court is bound by the interpretation of s 19 which has been rendered by the Supreme Court.

Consequently, I am unable to agree with the defendant that the case of *Goodliving Real Estate (Pvt) Ltd (supra)* is inapplicable as it also involved a lease agreement whereby goodwill was required to be paid over and above rental and security deposit for the lease of commercial property.

On the contrary I agree with the plaintiff that what the defendant is asking this court to do is to overrule the Supreme Court. I therefore find the defendant's argument untenable and am of the view that s 19 is directly applicable.

As a result, I find that the lease agreement to pay goodwill is contrary to statutory provisions, illegal and therefore null and void. See also *Ndlovu* v *Highlanders Football Club HB 95/11, Heyns* v *Heyns 1978 RLR 324(A) and York Estates Ltd* v *Wareham 1950 (!) SA 125 (SR).*

I will not concern myself with the defendant's argument that the agreement to pay goodwill is a separate agreement which is excisable from the lease agreement as it is irrelevant: the lease agreement has since been terminated. In any event, even if the agreement to pay goodwill was separate, it would still be an illegality in terms of the law as such agreement can only flow from the landlord/tenant relationship.

DOES THE CONTRACTUAL PENALTIES ACT APPLY?

The plaintiff argued that forfeiture of goodwill to the defendant amounted to a penalty contrary to the Contractual Penalties Act. Save to state that plaintiff contradicts itself by claiming that the lease agreement was illegal on one hand, and on the other claiming protection under the Contractual Penalties Act, the defendant made no meaningful submissions on this point.

In terms of s 2 of the Act, a penalty is any sum which a party is liable to forfeit on a contract. Section 4 (2) provides that such forfeiture must not be disproportionate.

In *casu,* were the Court minded to regard the lease agreement as valid, the forfeiture of $30 000-00 paid as goodwill against an occupancy of some 4 months followed by the return of the vacant possession to the defendant would definitely amount to a disproportionate penalty contrary to the Act. This is because the defendant would have both

the premises and the goodwill to the detriment of the plaintiff. At best, were such goodwill validly due to the defendant, it would be appropriate to order a refund of a proportionate amount commensurate with the period that the plaintiff was in tenancy.

However, since I have found that the lease agreement was null and void for breaching statutory provisions I do not find it necessary to calculate such proportion of goodwill due to defendant.

WHAT IS THE EFFECT OF THE *IN PARI DELICTO* RULE?

The defendant raised the more valid defence that in terms of the *in pari delicto* rule the loss ought to lie where it fell, particularly since

1. the plaintiff was voluntarily party to the illegal agreement;
2. had its hands steeped in the dirt of such illegality; and
3. should therefore not obtain relief from the consequences of its illegal act.

Ordinarily, the rule presupposes that both parties are equally morally guilty and hence the loss should lie where it falls. However, the courts have also chosen not to adopt an overly technical approach, choosing instead to examine the results of the illegal agreement to determine where the equities lie. The approach is normally to examine whether public policy would be best served by upholding or rejecting the plaintiff's claim. If public policy considerations do not favour either party, then the rule will operate against the plaintiff who seeks to extricate himself from the consequences of the illegal agreement. In every case, the court will not enforce an illegal agreement, but will seek to do justice between the parties. See *Dube* v *Khumalo 1986 (2) ZLR 103 (SC), Young* v *Van Rensburg 1991 (2) ZLR 149 (SC), Hitler Adolf Klokow* v *Michael Boyton Sullivan SCASA 410/04* and *Jajby* v *Cassim 1939 AD 537.*

According to Amler's *Precedents of Pleadings 6 ed.p.88*, this approach means that:

> "Once defendant has alleged and proved that plaintiff is also *in delicto*, it is for the plaintiff to allege and prove facts, (in his replication or in the declaration) that will enable the Court to come to his assistance because justice and public policy so require."

In *Jajby* (*supra)*, the equities favoured the defendant (the tenant) against whom the plaintiff (landlord) sought to enforce the illegal contract. In *Klokow (supra),* the equities

favoured the plaintiff against a defendant who retained both the business and the money paid towards the purchase price under an illegal agreement.

In this case, the parties entered into a lease agreement for the payment of goodwill contrary to the Commercial Premises(Rent) Regulations. Both were thus *in delicto.*

However, the plaintiff has gone further to allege inequity and injustice, in that the defendant has both the goodwill and the premises. The plaintiff has argued that, in the interests of the public, there is need to protect other prospective tenants from being charged goodwill illegally for the same premises. The equities therefore favour the plaintiff, as it would be unconscionable for the defendant to have both the property and the goodwill. Public policy requires that the defendant should not be allowed to profit from the illegality.

I am therefore not inclined to enforce the agreement and order retention of the goodwill by the defendants as courts do not exist to endorse or promote illegality. In any case, I find that the *in pari delicto* rule is in the plaintiff's favour.

WAS IT NECESSARY TO PLEAD UNJUST ENRICHMENT?

The defendant advanced the argument that the plaintiff did not specifically plead unjust enrichment and should therefore not be entitled to a refund of the goodwill.

I agree with the law as stated in *Klokow (supra)* at para(s) 25-26 (p(p) 15-16) of the judgment where Cachalia AJA had this to say:

> "[25] …… The parties entered into a written agreement for the purchase of a business, which contemplated a contravention of the Act. *Prima facie* they were therefore *in pari delicto.* The plaintiff paid to the defendant an amount of R250 000 towards the purchase price. Six weeks later the business was returned to the defendant. The defendant, however, refused to refund the purchase price. The result was that the defendant retained both the business and the money.
>
> [26] Faced with these facts it is difficult to understand what 'further facts' the plaintiff was required to plead to persuade the full court that the *par delictum* rule should be relaxed. The defendant was left with both the business and R250 000. The equities clearly supported a return to the status quo. There was no need, in these circumstances, for the plaintiff specifically to plead the relaxation of the *par delictum* rule on grounds of public policy, or that the defendant had been unjustly enriched. Once it had been alleged that the defendant was in possession of the business as well as the money (which at exception stage must be accepted as true), it was he, not the plaintiff, who needed to show that he had not been enriched".

The facts of this case are similar: the parties entered into a lease agreement which contravened s 19 of the Commercial Premises (Rent) Regulations. *Prima facie*, both parties were *in pari delicto*. The plaintiff paid to the defendant $30 000-00 towards goodwill. Four months

later the lease was cancelled and vacant possession was given back to defendant. The defendant refused to refund the goodwill. The result was that defendant retained both the premises and the money. In the circumstances I do not find it necessary that plaintiff ought to have specifically pleaded for the relaxation of the *in pari delicto* rule or that defendant was unjustly enriched. Once it was shown that defendant retained both the premises and the goodwill the *onus* shifted onto it to show that it had not been unjustly enriched. See also *First National Bank of Southern Africa Ltd* v *Perry NO and Others* 2001 (3) SA 960 (SCA) para 31.

I therefore find that the plaintiff has proved its claim for a refund, in full, of the good will it paid to the defendant.

With regards to costs, both parties had asked for costs on a legal practitioner and client scale. However, in view of the fact that I am of the opinion that parties should not profit from their illegal acts, I am not persuaded that this is a case where either party would have merited the higher costs which are an exception in any event.

DISPOSITION

Consequently, it is ordered that judgment is granted to the plaintiff as follows:

1. By consent, the defendant shall refund to the plaintiff the balance of the security deposit in the amount of $6 457-21
2. The defendant shall refund to the plaintiff $30 000-00, being payment of goodwill levied contrary to the law
3. The defendant shall pay the plaintiff's costs of suit on the ordinary scale.

Messrs Mawere & Sibanda, plaintiff's legal practitioners
Scanlen & Holderness, defendant's legal practitioners