

TARSISIO MALUNGA
and
BERTHA MALUNGA
versus
ALEX ELIAS WEDE

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 8 February 2016 & 15 June 2016

Civil Trial

L Uriri, for the plaintiff
Ms *O T Sanyika*, for the defendant

FOROMA J: The plaintiffs in this matter who are husband and wife sued the defendant for refund of the sum of £40 000.00 and interest thereon at the rate applicable to the British Pound in the United Kingdom and costs of suit. The plaintiffs' claim arises from the nullification of an agreement of sale of the defendant's property known as Stand 413 Hatfield Township of Lot 223 A Block C Hatfield Estate. The agreement of sale was declared to be null and void for illegality by the High Court on the 17th April 2008 under case number 5429/07. The plaintiffs claimed that in ordering their eviction on the basis that the agreement was null and void the court failed to order restitution of the purchase price to them.

The defendant defended the plaintiffs claim pleading among other things (i) that the defendant did not owe the plaintiffs the sum of \$40 000.00 as the matter was *res judicata* and (ii) disputed at any rate that the sum of Z\$5 000 000 000.00 forming part of the plaintiff's claims converted to £15 000 as it was never agreed that it would be converted to pound sterling and (iii) that there were no rights that the plaintiff could exercise as arising from an agreement ruled void *ab initio*. Before the commencement of trial the parties agreed and requested that the court deal with the dispute as a stated case which the court acceded to. A statement of agreed facts was filed by the parties. The agreed facts are outlined as follows:

"1. That on the 5th of June 2006 the parties herein entered into an agreement of sale by which the 1st and 2nd plaintiffs purchased and the defendant sold certain immovable property namely STAND 413 HATFIELD TOWNSHIP OF LOT 223A BLOCK C HATFIELD ESTATE.

2. That in terms of that agreement the purchase price of the property was 37 000 pounds sterling.
3. That the plaintiffs paid the defendant the following sums towards the purchase price;
 - (a) 17 000 pounds sterling on the 19/05/2006
 - (b) 1000 pounds sterling on the 15/05/2006
 - (c) five billion Zimbabwe dollars ZW\$5 000 000 000.00 on 10/07/2006
 - (d) 1000 pounds sterling on the 4/08/2006
 - (e) 1 000 pounds sterling on the 30th October 2006
4. That the payments in pounds sterling were made by the plaintiffs from funds earned in their employment in the United Kingdom and were remitted through the Reserve Bank of Zimbabwe Homelink facility.
5. That a dispute arose between the parties wherein the defendant alleged breach of the agreement of sale by the plaintiffs in that they had failed to pay a balance of 4200 pounds sterling on the purchase price on the one hand and the plaintiffs alleged they had paid the full purchase price of the property on the other.
6. That the defendant, in circumstances that remain the subject of dispute, obtained a default judgement against the plaintiffs cancelling the agreement of sale which judgement is still extant.
7. That after a multiplicity of litigation between the parties consequent upon the default judgment, the defendant made a tender of payment of US\$30 000 .00 to the plaintiff in full and the final settlement of the offer.

That the tender was accepted on condition that the value to be ascribed to the sum of ZW\$5 000 000 000.00 in pounds sterling remain a live issue before the Court for trial.”

The following were the agreed issues for determination by the court as agreed upon by the parties

- “i. Whether or not the plaintiffs are entitled to restitution of the sums paid to the defendant towards the purchase price of STAND 413 HATFIELD TOWNSHIP OF LOT 223A BLOCK C HATFIELD ESTATE in light of the Order of Court for cancellation of the agreement.
- ii) What value in pounds sterling, if any, is to be ascribed to the sum of ZW\$5 000 000 000.00 paid by the plaintiffs to the defendant as part of the purchase price for STAND 413 HATFIELD TOWNSHIP OF LOT 223A BLOCK C HATFIELD ESTATE.
- iii) Whether or not the defendant is entitled to set off any sums claimed as rentals and as damages for breach of the agreement (for occupation of the property by the plaintiffs), from the sums paid by the plaintiffs to the defendant as the purchase price for STAND 413 HATFIELD TOWNSHIP OF LOT 223A BLCK HATFIELD ESTATE.
- iv) The appropriate remedy.”

The first issue for determination has been couched in the following terms- Whether or not the plaintiffs are entitled to restitution of the sums paid to the defendant towards the purchase price of Stand 413 Hatfield Township Lot 223 A block C Hatfield Estate in light of the Order of Court for cancellation of the agreement (the underlying is mine). The words underlined suggest that the agreement was cancelled by Order of the High Court which is not

correct. The High Court declared that the agreement was null and void. Issue No. 1 should therefore be reworded by substituting the words underlined above with the words nullifying the agreement. This is important as the consequences of cancellation of an agreement. For the avoidance of doubt a cancelled agreement retains the rights accruing up to the date of cancellation whereas an agreement that is null and void does not give rise to any rights at all and the court cannot enforce any in respect thereto.

The defendant argues that because the High Court has already found the contract of sale upon which the plaintiff's claim is premised to be null and void due to illegality which order still stands plaintiff cannot seek any recourse from an agreement which is tainted with illegality. The case of *Dube v Khumalo* 1986 2 ZLR 103 SC @ 109 was cited by the defendant as authority for the proposition that the court cannot aid a party to defeat the clear intention of an ordinance or statute. Tsanga J is also quoted as having supported this proposition in the case of *Musingarambwi v Dewa* HH 43/15 where the learned judge quoted with approval the case of *York Estates Ltd v Wareham* 1949 SR 197 cited in the SA law reports as 1950 (1) SA 125 at 128 where it was stated-“the court has no jurisdiction to grant relief to the plaintiff seeking enforcement of a prohibited contract” Counsel went further to quote Tsanga J as having added “the court has no equitable jurisdiction to grant relief to a plaintiff seeking to enforce a contract prohibited by law. In fact the court is bound to refuse to enforce a contract which is illegal even though no objection to the legality of the contract is raised by the parties”.

The soundness of the legal validity of the principles enunciated in the cases cited by the defendant above is beyond reproach. However the issue for determination *in casu* is not whether the court should assist or countenance any attempt by any of the parties to enforce an agreement ruled to be null and void on grounds of illegality. Correctly understood the issue should be stated as follows-D What are the respective obligations (if any) of the parties to a void agreement to each other at the time the court declares the agreement null and void? Firstly as indicated herein above a void agreement does not create rights as between the respective parties. Where an agreement is nullified as *in casu* the position is that the parties revert to the *status quo ante* and the court can only assist the parties revert to the *status quo ante* (i.e. before the entering into the void contract). Where a merx had been delivered the one receiving the merx has an obligation to restore possession of the merx to its lawful possessor or owner of same and if any price or part thereof had been paid the one who received payment of the price has an obligation to refund it (restitution) as not to do so would result in

one of the parties being unjustly enriched. A party to a void agreement who approaches the court to enforce its right to restitution does not seek to enforce the void agreement but seeks the doing of justice between man and man.

To allow a situation where one of the parties benefits at the expense of the other in such circumstances in my view would be grossly inequitable and clearly against public policy. A strict application of the *par delictum* rule as is being urged by the defendant *in casu* would result in the defendant retaining both the property and the amount the plaintiffs had paid towards the purchase price. This infact was not the ratio of the case of *Dube v Khumalo* 1986 2 ZLR 103. Quite clearly defendant has misunderstood the judgment of Gubbay J as he then was as he said(after stating the general import of the *in pari delictum* rule) “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 justice between man and man”.

Gubbay J in the case of *Dube v Khumalo* aslo quoted with approval Greenberg JP in the case of *Petersen v Jajbhay* 1940 TPD 182 where the Judge President had the following to say “..... that in determining where the justice of the matter lay it was proper to consider that if the relief were refused to the plaintiffs the defendant would be unjustly enriched at his (plaintiff’s) expense”.

There is therefore merit in the plaintiff’s argument that the plaintiffs are entitled to restitution on the basis of unjust enrichment. Although restitution is competent in a case where an agreement is nullified on grounds of illegality pursuant to the court exercising its power to do justice between man and man as indicated in the *Dube v Khumalo* case I do not believe that the restitution is claimable as of right by either party to an agreement that is void for illegality.

I find the plaintiff’s counsel’s reasoning unassailable i.e that the defendants having been restituted of the property through the ejection of the plaintiff from the property the defendant is enjoined to restitute the purchase price to the plaintiffs as that is the invariable consequence of his election to seek a nullification of the contract. I therefore find in the plaintiff’s favour in respect of issue number (1). Regarding issue number 11 the parties require the court to determine the value in pound sterling of Z\$5000 000 000.00 paid to the defendant by the plaintiffs as part payment of the £37 000.00 for purposes of restitution. This is a fairly straightforward matter where perhaps it can be said the parties arrive at the same result using different routes. A more direct route to arrive at the value to be placed on the

Z\$5,0 billion is to consider that in terms of the statement of agreed facts the defendant received the sum of £20 000.00 plus Z\$5 000 000 000,00. The defendant claims that after the above payments the plaintiffs' owed a balance of £4 200.00 to clear the full purchase price. A simple mathematical equation would lead to a quick solution. The equation presupposes Z\$500 000 000,00 is equal to £X . The equation on the basis of the parties' statement of agreed facts would translate to this $-\text{£}20\,000 + \text{£}X + \text{£}4\,200 = \text{£}37\,000$.

$$\begin{aligned}\text{Therefore } x &= 37\,000 - \text{£}24\,200,00 \\ x &= \text{£}12\,800,00\end{aligned}$$

This formula produces an equitable result of what the parties ought to have agreed upon in order for the plaintiff's to pay the full purchase price of £37 000.00. Quite clearly the value of Z\$5,0 billion is not one which can be determined by using a rate of exchange given the fluid nature of the value of the Zimbabwe dollar on account of hyperinflation (at the time which the court must take judicial notice of) and also the fact that the Zimbabwe dollar as a currency has since been demonetised.

This value as it happens accords with what the defendant claims to be what the parties agreed upon at the meeting held at Musunga and Associates when the balance outstanding in respect of the purchase price was confirmed to be £4 200,00. It is a value which one arrives at without the need to decide as to who between the parties should be believed on what exactly was agreed upon at Musunga and Associates as regards the balance of the purchase price.

The next issue for determination is issue number (iii) which reads:

“Whether or not the defendant is entitled to set off any sums claimed as rentals and as damages for breach of agreement (for occupation of the property by the plaintiffs) from the sums paid by the plaintiff's to the defendant as the purchase price for Stand 413 Hatfield Township of Lot 223A Block C Hatfield Estate.

The starting point in the resolution of this issue is to remind oneself that this court ruled in HC 5429/07 that the agreement of sale was null and void for illegality and that the said judgment is extant. The defendant's attempt to claim damages for breach of contract presupposes that the agreement was either valid at the time of its cancellation or at the very least voidable which it was not. An agreement that is illegal is void *ab initio*. This proposition is too notorious in our jurisdiction to require the support of case authority. The defendant correctly cited the authority of Tsanga J in the matter of *Musingarambuwi v Dewa* HH 413/15 where the learned judge had the following to say:

“The court has no equitable jurisdiction to grant relief to a plaintiff (party) seeking to enforce a contract prohibited by law... In fact the court is bound to refuse to enforce a contract which is illegal even though no objection to the legality of the contract is raised by the parties”.

The defendant correctly understood this rule to be absolute and not an exception.

Quite how the defendant then perceives this issue to arise in the circumstances of this case is not easy to comprehend. The defendant cannot approbate and reprobate. Quite apart from the obvious fact that the court cannot entertain any claim for damages for breach of agreement *in casu* such claim was neither pleaded nor is it sufficiently liquidated to enable the court to order a set off. See *African Banking Corporation Ltd v Rainsford* 1912 SR 157.

In the circumstances I make the following order.

It is ordered that:

1. The defendant pay the plaintiff the sum of £32 800.00
2. The defendant pay interest at the legally prescribed rate with effect from the date of service of summons to date of payment.
3. The defendant pay the costs of suit.

Nyika Kanengoni and Partners, plaintiff's legal practitioners
Matipano & Matimba, defendants' legal practitioners