MARICK TRADING PRIVATE LIMITED
versus
DOUBLE T SERVICES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 4- 5 November 2016, 27 January 2017

Civil Trial

P. C. Paul, for plaintiff
Ms *J. B. Wood*, for defendant

CHIGUMBA J: Parties who enter into an unsanctioned lease agreement ought not to seek judicial assistance to enforce their rights and obligations towards each other. As a matter of public policy, the courts should not and will not provide assistance to parties to an illegal agreement. This is so because such an agreement is *void an initio.* There is nothing on which, at law, either party to such an agreement can base a claim against the other. The plaintiff issued summons against the defendant, on 16 June 2014, claiming payment of USD$46 982-71, being defendant's 50% contribution towards a partnership debt owed to Old Mutual, as well as costs of suit. The defendant entered notice of appearance to defend on 25 July 2014. According to the plaintiff's declaration, the parties entered into an oil extracting business in January 2009, from the basement of 29 Coventry Road, Harare.

The parties had entered into a contract three years previously in terms of which defendant would share the total rent payable by plaintiff to Old Mutual in respect of the top floor, the ground floor, and the basement of the aforementioned premises. The defendant's half share of the rent was deducted from the profits of the oil extracting business. During the course of the partnership a rent dispute arose between the plaintiff and Old Mutual, due to the dollarization of the Zimbabwean economy. The plaintiff and defendant agreed to dispute the rental claimed by Old Mutual and to put down the cost of funding the dispute as a partnership expense. The partnership was dissolved in March 2010. The defendant continued to contribute its share of the

rent from the oil extracting business. Monthly accounts were prepared during the partnership. The rent dispute was eventually decided in favor of Old Mutual. Plaintiff was ordered to pay USD$83 965-43. This is a claim for payment of defendant's contribution, USD$48 965-43.

The plaintiff's further particulars included an admission that the lease agreement was between it and Old Mutual. Clause 7 provided that the plaintiff was to continue to pay rent in the event of a cancellation dispute. Clause 25 of the lease agreement prohibited sub-letting. Clause 32 provided that disputes be referred to arbitration. Mr *Jess Nathan Watson* bound himself as surety for the due performance of the plaintiff's obligations in terms of the lease agreement. Defendant filed a plea on 8 January 2015, in terms of which it admitted having entered into a partnership agreement in respect of an oil extracting business which operated from a small section of the basement. It denied entering into an agreement to pay 50% of the rent due to Old Mutual from the plaintiff. It averred that the plaintiff unilaterally and without agreement deducted 50% of the rent from the oil extracting business. It averred that it constantly protested against this practice, and that its protests were ignored. The defendant averred that it occupied a quarter of the building as plaintiff's sub-tenant.

The defendant denied that it agreed to participate in the costs of the rent dispute between the plaintiff and Old Mutual. It averred that the only partnership agreement between the parties was dissolved in March 2010 when the parties vacated the premises. It denied ever approving the monthly account statements which were produced by the plaintiff. It denied being made aware of, let alone participating in any arbitration proceedings between plaintiff and Old Mutual. The defendant denies that plaintiff is entitled to be indemnified by it for 50% of the legal costs of the arbitration proceedings. On 22 January 2016 the defendant filed a notice to amend its plea, in terms of which it reiterated that there was never any agreement that it would indemnify the plaintiff if the rent dispute was decided in Old Mutual's favor. Further, it averred that the plaintiff was negligent in the manner in which it conducted the dispute resolution process with Old Mutual by failing to take reasonable steps to mitigate its damages and legal costs.

The matter was referred to trial on four issues. Whether the parties agreed that the rentals due to Old Mutual would be a partnership expense, whether the parties agreed to jointly participate in the rent dispute with Old Mutual, whether the plaintiff incurred any extra costs , by way of rentals, interest, as a result of the arbitral award(this issue was admitted by the defendant

in the notice of amendment to the plea), whether the plaintiff was negligent in the manner in which it conducted the arbitral proceedings, and if so, how much should it be made to pay in recognition of this negligence.

On 3 November 2016, the plaintiff filed an application to amend its claim to USD$42 619-55 after chronicling how the entire sum due to Old Mutual is calculated. The issue for determination, according to the defendant's closing submissions is that of whether the defendant agreed to pay a 50 % share of the rent payable by the plaintiff to old Mutual in respect of premises known as 29 Coventry Road, Harare. With all due respect I disagree with this assertion. It is my considered view that the main issue to be determined in this matter was and always will be whether the plaintiff was entitled to sub-let the premises known as 29 Coventry Road, Harare to the defendant or to anyone else for that matter. If the plaintiff was not authorized by Old Mutual to sub-let the premises to the defendant, on what legal basis can it then approach the court seeking to enforce an unsanctioned under the table agreement between it and the defendant. As usual in all matters of Landlord –Tenant rights and obligations we are guided by the lease agreement, the one between the plaintiff and Old Mutual is attached at Rp11-32. The first thing to note is that the leased premises are described as the property, in the interpretation section, which is to be interpreted to mean stand number 4491 Salisbury Township, Harare. This is not the lease agreement for 29 Coventry Road, Harare, but it was attached to the further particulars requested by defendant as part of the pleadings.

The second thing to note is that this lease agreement was signed on 8 September 2008, and that one of the plaintiff's directors agreed to act as surety to guarantee the performance of the plaintiff's obligations to Old Mutual. That lease was valid for a year, up to August 2009. Clause 25 of this lease states that the lessee shall not be permitted to cede, assign or pledge the lease or any of its rights hereunder, nor to, sublet the whole or any portion of the premises, nor to permit any other party to occupy any part of the premises or to conduct business therein or therefrom (the underlining is mine for emphasis).Clause 25.3 states that the lessee accepts that breach of this clause shall be fundamental breach entitling the lessor to cancel the lease agreement without notice. The plaintiff did not attach any other lease agreement to the pleadings. It made a bare averment during the evidence of its director that there was an agreement between it and the defendant. The court must decide if the plaintiff showed, on a balance of probabilities,

that Old Mutual allowed it to sublet 29 Coventry Road Harare to the Defendant, otherwise the legal basis on which plaintiff is relying on to pursue defendant, will not have been established.

The law that governs the standard and burden of proof in civil cases is trite. It is trite that;- "…in a civil case, the standard of proof is never anything other than proof on a balance of probabilities. The reason for the difference in onus in civil and criminal cases is that, in civil cases the dispute is between individuals, where both sides are equally interested parties. The primary concern is to do justice to each party, and the test for that justice is to balance their competing claims. See *City of Gweru* v *Mbaluka*[1]. In the case of *Zimbabwe Electricity Supply Authority* v *Dera*[2]the court said the following, on the issue of proof in civil cases;-

> "The degree of proof required by the civil standard is easier to express in words than the criminal standard, because it involves a comparative rather than a quantitative test. The civil standard has been formulated by Lord Denning as follows;-
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> "It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not', the burden is discharged, but if the probabilities are equal it is not".

It is clear that what is being weighed in the balance is not the quantum of the evidence or its weight, but the probabilities which arise from the circumstances of the case. See *Selamalele* v *Makhado*[3]. It has also been said that;- 'It is not a mere conjecture or slight probability that will suffice. The probability must be of sufficient force to raise a reasonable presumption in favor of the party who relies on it. It must be of sufficient weight to show the onus on the other side to rebut it". See *West Road Estates Ltd* v *New Zealand Insurance Company Ltd* [4]. Put differently, 'he who alleges must prove'. See *Pillay* v *Krishna* [5]. It is equally trite that;-

> "…the true onus never shifts. However in some cases the impression of shifting may be derived from the fact that there are different issues in the pleadings. The onus on the different issues is fixed initially by the pleadings and does not change". See *Klaasen* v *Benjamin*[6].

The onus rested on the plaintiff to prove that Old Mutual had consented to the sub-letting of 29 Coventry Road Harare to the defendant. Not only has the plaintiff failed to discharge this

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[1] HH 93-14 (one of my own judgments)
[2] 1998 (1) ZLR 500 (S), Miller v Minister of pensions [1947 2 All ER 372 @ 374
[3] 1988 (2) SA 372 @ 375D-E The preponderance of probability in favor of the party bearing the onus must be strong.
[4] 1925 AD 245 @ 263
[5] 1946 AD 946
[6] 1941 TPD 80

onus in my view, plaintiff has gone further to fail to prove what it alleged. The lease agreement attached to the pleadings relates to different premises from those identified in the summons and declaration. That lease agreement expressly prohibits sub-letting, labelling it fundamental breach which goes to the root of the lease agreement entitling the lessor to cancel the lease agreement. There is no evidence in the pleadings, or which was alluded to during the course of the trial, on which the court can find, on a balance of probabilities, that the plaintiff had been authorized to sub-let the premises known as 29 Coventry Road, to the defendant, by Old Mutual..

It is more probable than not, that the plaintiff sub-let a small portion of those premises to the defendant without the knowledge or consent of Old Mutual. If such consent had been obtained, then it is more probable than not, that the plaintiff would have attached it to the pleadings as part of the further particulars which had been requested by the defendant. Is an agreement which is illegal enforceable? GUBBAY JA (as he then was) followed this dicta with approval in *Dube* v *Khumalo* 1986 (2) ZLR 103 at 109D-F:

> "There are two rules which are of general application. The first is that an illegal agreement which has not yet been performed, either in whole or in part, will never be enforced (by the courts). This rule is absolute and admits no exception. *See Mathews* v *Rabinowitz* 1948 (2) SA 876 (W) at 878*; York Estates Ltd* v *Wareham* 1950 (1) SA 125 (SR) at 128. It is expressed in the maxim ex turpi causa non oritur actio. The second is expressed in another maxim in pari delicto potior est conditio possidentis, which may be translated as meaning 'where the parties are equally in the wrong, he who is in possession will prevail'. 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, goods or incorporeal rights, in furtherance of an illegal transaction. But in suitable cases the courts will relax the par delictum rule and order restituion 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". See *Independence Mining (Pvt) Ltd v Fawcett Security Operations (Pvt) Ltd* 1991 (1) ZLR 268 (H).

STRATFORD CJ *in Jajbhay* v *Cassim* 1939 AD 537 at 544-545, said :

> ". . .Courts of law are free to reject or grant a prayer for restoration of something given under an illegal contract, being guided in each case by the principle which underlies and inspired the maxim. And in this last connection I think a court could not disregard the various degrees of turpitude in delictual contracts. And when the delict falls within the category of crimes, a civil court can reasonably suppose that the criminal law has provided an adequate deterring punishment and therefore, ordinarily speaking, should not by its order increase the punishment of the one delinquent and lessen it of the other by enriching one to the detriment of the other. And it follows from what I have said above, in cases where public policy is not foreseeably affected by a grant or refusal of the relief claimed, that a court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment."

An agreement which is not legal is not enforceable because it is *void ab initio.* LORD DENNING put it succinctly as follows;-

McFoy v *United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172 I, "every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse." It is this court's considered view that there is nothing for the plaintiff to base its claim on. The claim is based on an illegal agreement between the parties to sublet 29 Coventry Road without the prior written consent of Old Mutual. The evidence does not support, on a balance of probabilities, the assertion made on behalf of the plaintiff that 'Old Mutual was aware' of the sub-letting. There is no doubt in my mind that the parties connived to sub-let the premises to the defendant illegally, or put differently, contrary to the terms and conditions of the written lease agreement between the plaintiff and Old Mutual. There is no doubt in my mind that the plaintiff is aware that there is no privity of contract between Old Mutual and the defendant. If there was, then it is more probable than not that Old Mutual would have sued both plaintiff and defendant in the rent dispute and cited them jointly as parties to the arbitration proceedings.

These parties are equally in the wrong. The loss should lie where it fell, into the plaintiff's literal lap. Judicial assistance should be denied to the plaintiff for sub-letting the premises without the consent of Old Mutual. This will discourage similar conduct in future. Plaintiff has no legal basis on which to found a claim to be indemnified by the defendant for costs incurred in a dispute with its landlord, Old Mutual. Plaintiff cannot, at law seek to share its obligations to Old Mutual with the defendant, in respect of a lease agreement that the defendant was never formally, or lawfully made a part of, based on the evidence which is before the court. It cannot be said that the defendant has been unjustly enriched, or that the court should be persuaded to exercise its discretion and do justice between man and man. For these reasons, the plaintiffs' claim cannot and should not, be allowed to succeed. Further, the plaintiff should pay costs on a punitive scale for seeking to enforce a verbal lease agreement in circumstances where there is no evidence placed before the court that the plaintiff itself was authorized to sub-let the premises. In the result, it be and is hereby ordered that;-

1. The plaintiff's claim be and is hereby dismissed.
2. The plaintiff shall pay costs on a Legal Practitioner-Client scale.

Messrs Wintertons, plaintiff's legal practitioners
Messrs Venturas & Samkange, defendant's legal practitioners