MARANATHA FERROCHROME (PRIVATE) LIMITED
versus
RIOZIM LIMITED

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 8, 22 & 23 June 2020

Civil trial – absolution from the instance

Date of written judgment: 22 July 2020

Adv F. Girach, for the plaintiff
Adv T. Zhuwarara, for the defendant

MAFUSIRE J

[1] This is a civil trial. The defendant applies for absolution from the instance at the close of the plaintiff's case. The plaintiff's case against the defendant is for payment of a sum of money. The main claim is for USD450 000-00, alleged to be the replacement cost of an immovable property, and the improvements thereon, previously occupied by the plaintiff, but intentionally destroyed by the defendant. The alternative claim is for USD 143 588-22, allegedly for unjust enrichment.

[2] The plaintiff's claim stems from a relationship, or association between the parties that had endured for fourteen years but had eventually dissipated. Ultimately it degenerated into a legal confrontation that is this case. I am told there is one other case. The facts of this case are these. The plaintiff and the defendant are duly registered companies in Zimbabwe. The defendant was formerly known as Rio Tinto Zimbabwe Limited. From the evidence so far, both parties are involved in mining or mining related activities. At all relevant times, the defendant was the owner of certain land in the Eiffel Flats area of Kadoma. On three sites it had put up several buildings for various uses. The one site was 3 856 m^2 in extent. On it the defendant had built a block of offices. They were identified as the Rio Tinto Main Office. The second site was 5 144 m^2 in extent. On it the defendant had put up an engineering block. It was

identified as the Rio Tinto Old Engineering Block. The last site was 2 328 m^2 in extent. On it the defendant had built another block of offices. It was identified as the Rio Tinto Old Accounts Office. The total area covered by these three sites was 11 328 m^2.

[3] By a written agreement dated 3 June 2003 the defendant sold to the plaintiff these three sites as three separate subdivisions. The purchase prices were $42 278 000-00 for the first site; $52 429 000-00 for the second, and $23 174 000-00 for the last. The total purchase price was $117 881 000-00. This was in the then Zimbabwean currency. The plaintiff had paid it all off in accordance with the terms of the agreement.

[4] The defendant says there had been no proper subdivisions done to the land which could legally be sold as separate subdivisions. In the agreement of sale, each of the sites was described as "*A surveyed stand yet to be allocated a number, being a subdivision of Chemukute Township Lot 1 of Railway Farm 11 located on Eiffel Flats Road, Eiffel Flats …*"

[5] Prior to the formal sale agreement aforesaid, the plaintiff was already in occupation on a leasehold basis. The lease terminated upon payment of the full purchase price. In the area, the defendant does open cast mining. Its operations were expanding. In 2014 the parties entered into an agreement in terms of which the defendant leased back from the plaintiff some of the offices for a nominal rent. But the defendant could not pass transfer in terms of the sale agreement. Concomitantly, the plaintiff could not get title. A dispute arose.

[6] Matters came to a head in about 2016. The defendant's open pit mining operations continued to expand. Transfer of the sites could not be passed. The parties engaged. Discussions centred on a number of options. As I have understood the evidence so far, one option was for the defendant to refund the purchase price paid by the plaintiff in an amount that would take into account, *inter alia*, the fact that the country had transformed into a multi-currency economy (following the demise of the local currency in 2009). Another option seemed to be that the defendant could simply buy back the sites. Yet another option seemed to be that the defendant could offer the plaintiff alternative sites on which it would construct similar structures for the plaintiff.

[7] Negotiations seemed protracted. There were several draft agreements produced by both parties with offers and counter-offers. Unfortunately, nothing was concluded. According to the

plaintiff's evidence, relations between the parties were completely shattered in February 2017 when the defendant, without warning, sent in its heavy-duty equipment comprising excavators, front-end loaders, dump trucks and the like, and started demolishing the buildings. The plaintiff's staff on the ground raised an alarm. Its head office personnel in Harare engaged the defendant's personnel. Nothing helped. The demolitions continued. The plaintiff's staff on the ground was instructed to salvage such of the goods and materials as had been stored inside the buildings to avert any possible losses.

[8] In July 2018 the plaintiff issued a summons against the defendant claiming the sums of money aforesaid. The declaration refers to the 2003 sale agreement; the payment of the purchase price; the defendant's failure to pass transfer; the forceful eviction of the plaintiff from the sites and its acceptance of the cancellation of the agreement. The amount of USD 450 000-00 is said to be the replacement cost of substitute buildings. The alternative claim for USD143 582-22 for unjust enrichment is said to be today's equivalent of the purchase price paid by the plaintiff in 2003, calculated using the official exchange rate prevailing at the time.

[9] In its plea, the defendant has defended the plaintiff's claim on the basis that the 2003 sale agreement was invalid and therefore unenforceable in that it was concluded in contravention of s 39(1) of the Regional, Town and Country Planning Act [*Chapter 29:12*], more particularly in that the three pieces of land in question had purportedly been sold without a subdivision permit. The defendant also defends the plaintiff's claim on the basis that when the parties realised that the 2003 sale agreement was illegal, and could therefore not be consummated, they entered into another agreement whereby the old agreement would stand cancelled; the plaintiff would move off the sites, and the defendant would pay it an amount in the sum of USD 135 000-00 in full and final settlement of the parties' rights and obligations towards each other in terms of the old sale agreement. In the alternative, the defendant pleads that the plaintiff's claims have become prescribed.

[10] In its amended plea, the defendant pleads that the claim by the plaintiff to be put back into the position that it would have been in had the allegedly illegal contract been performed, is not cognisable at law. It also pleads that the plaintiff lays no basis for denominating its claim in United States dollars and that, at any rate, the claim takes no account of the fact that the

plaintiff was in occupation of the sites for well over a decade without paying any consideration or compensation.

[11] The plaintiff closed its case after leading evidence from three witnesses, namely:

- George Tichaona Mushawatu ("***George***"): From 2010 he was the plaintiff's managing director. His evidence deals with the relationship between the parties before, during and after the agreement of sale; the lease agreement; the inconclusive negotiations to salvage some alternative form of relationship between the parties; the demolitions of the buildings without warning, and the quantum of the claims.

- Nikita Masaya: He is a registered estate agent. He was the one who, at the instance of the plaintiff, evaluated the three sites in question and the improvements thereon and prepared a report upon which the plaintiff's claim for USD450 000-00 is predicated. He says he personally inspected the buildings and the sites and came up with three sets of values, namely USD330 000-00, being the estimated market value; USD450 000-00, being the gross replacement value, and USD215 000-00, being the depreciated replacement cost. He concedes he did not measure or survey the land on which the buildings had been situated, or examine the title deed description of the land.

- Tom Usupu: At all material times he was the plaintiff's human resources manager stationed at the Eiffel Flats operations. He, together with the other members of staff for the plaintiff, witnessed the surprise demolitions of the buildings by the defendant. They made arrangements to salvage the plaintiff's goods and materials.

[12] In its application for absolution from the instance, the defendant, in summary, argues that the 2003 sale agreement was *in fraudem legis*. It is unenforceable. No rights derive from it. The plaintiff is claiming the value or cost of a substitute building. In so doing, it is seeking to be placed in the same position that it would have been in had that agreement been performed. This position is in breach of the *ex turpi causa* rule. This rule admits of no exception. An illegal agreement is unenforceable. That is the end of the matter. At any rate, the plaintiff cannot found a claim on the basis of the destruction of the buildings. They belonged to the defendant. The Plaintiff never got title of the land. Thus, the defendant actually destroyed its own property. Nor can the plaintiff's alternative claim for unjust enrichment be sustained. It is prescribed. The plaintiff paid the purchase price for the three sites in 2003. It immediately became entitled to transfer. That the agreement of sale was illegal appeared *ex facie* the document. It is immaterial that the plaintiff might have become aware of the illegality only much later. The *in pari delictum* rule does not apply.

[13] The plaintiff has opposed the claim for absolution from the instance. In summary, it says none of its witnesses, (evidently and primarily George), has admitted that the 2003 sale agreement was illegal. Even in its pleadings, the plaintiff challenges this assertion. It is the defendant which alleges an illegality on the basis of an alleged contravention of s 39 of the Regional Town and Country Planning Act. The onus to prove this purported illegality is on the defendant. It must call evidence. Furthermore, the defendant's case in the plea is not that by reason of this alleged illegality the plaintiff is entitled to nothing. Rather, it is that the 2003 sale agreement was superseded by another agreement, an exit agreement, in terms of which the defendant would pay US$135 000-00 in full and final settlement of any of its obligations towards the plaintiff and in consideration of the plaintiff moving out of the premises to pave way for the defendant's occupation. The *in pari delicto* rule applies. This is an appropriate case to call for its relaxation in order to do justice between the parties by ordering restitution of the purchase price paid by the plaintiff. On prescription, the defendant has not taken account of the exceptions in the Prescription Act [Chapter 8:11]. Section 16 sets out when prescription begins to run. A creditor must be aware of all the facts from which the debt arises. In this case both parties at all times proceeded on the basis that the plaintiff had become the owner of the property. In this regard, in 2014 the defendant even went on to lease a portion of the property from the plaintiff.

[14] Here now is my ruling. An application for absolution from the instance made by one party, for instance, the defendant, at the close of the case for the other party, i.e. the plaintiff, is a procedure designed to bring a speedy end to the proceedings where there is no evidence warranting the defendant going into its own case. To succeed, the defendant must show that the plaintiff has not established such facts as are supportive of his cause: see *Corbridge v Welch* (1892) 9 SC 277, or adduced such evidence as to warrant him taking the witness' stand so as to rebut the plaintiff's case, or to put across his own case. At this stage the plaintiff's evidence must be assumed to be true unless very special circumstances exist, such as the inherent improbability of the evidence.

[15] Granting absolution from the instance is not the same thing as granting judgment for the defendant. The court is simply absolving or relieving the defendant of the burden of the plaintiff's case so that he or she does not have to deal with his or her own. Absolution does not

decide the matter finally. The plaintiff can go away and still bring back the same case next time but with better evidence.

[16] In considering an application for absolution from the instance at the close of the plaintiff's case, the onus on the defendant to persuade the court, manifestly to make short work of the plaintiff's case, is much heavier. At this stage, the application is being made when only half the case has been heard. But comparatively, the onus is lighter if the application is made after all the evidence has been led, i.e. at the end of the entire case. The court uses different legal calipers or scales to measure or weigh the cogency of the evidence at these different stages. At the close of the plaintiff's case, the enquiry is: what judgment ***might*** the court give? But at the end of the whole case the enquiry is: what judgment ***ought*** the court give? This implies that with "***might***" the judgment could well be mistaken, and therefore incorrect. But with "***ought***" the judgment could not be mistaken. It is the correct one: see *Supreme Service Station [1969] (Pvt) Ltd* v *Fox and Goodridge (Pvt) Ltd* 1971 (1) RLR 1.

[17] The difference between ***might*** and ***ought*** is the difference between a *prima facie* case and a case on a balance of probabilities. In other words, at the close of the plaintiff's case, all that the court looks at is whether the plaintiff's evidence makes out such a *prima facie* case as to warrant the defendant taking the witness' stand. But at the close of the whole case, the court looks at whether the plaintiff has made out such a case on a balance of probabilities as to warrant judgment in its favour. There is a glut of cases on the point. The following are just a sample: *Gascoyne* v *Paul and Hunter* 1917 TPD 170; *Claude Neon Lights (SA) Ltd* v *Daniel* 1976 (4) SA 403 (A); *Gordon Lloyd Page & Associates* v *Rivera* 2001 (1) SA 88 (SCA); *Supreme Service Station [1969] (Pvt) Ltd, supra,* and *Standard Chartered Finance Zimbabwe Ltd* v *Georgias & Anor* 1998 (2) ZLR 547 (H) and *Bailey NO* v *Trinity Engineering (Pvt) Ltd & Ors* 2002 (2) ZLR 484 (H).

[18] Courts are chary of granting absolution at the close of the plaintiff's case. They are loath to decide upon questions of fact without hearing all the evidence. As was pointed out in the *Supreme Service Station [1969]* case above, the practice in South Africa and in this jurisdiction has always been that, in case of doubt as to what a reasonable court ***might*** do, a judicial officer should always lean on the side of allowing the case to proceed. A defendant

who might be afraid to go into the witness box should not be permitted to shelter behind the procedure of absolution from the instance.

[19] In this case, the defendant says the illegality of the 2003 sale agreement appears *ex facie* the document itself, i.e. the document identified in evidence as the "Broker's Note". But I do no think so. All that there is on that document, in relation to the three sites, is, as I have already highlighted above, a reference to "… *a surveyed stand yet to be allocated a number* …" This cannot be sufficient information to anyone that there was no sub-division permit.

[20] In its replication, the plaintiff denies that transfer could not be registered by reason of the fact that the property had not been subdivided. It avers that both parties believed at the time that the defendant was capable of passing transfer. George says much the same thing in his evidence. It is common cause that as late as 2014, the parties agreed to a lease. The defendant was the lessee or tenant. The plaintiff was the lessor or owner. Only on 4 March 2016, through a letter to George, penned by one Noah Matimba as Chief Executive, does the defendant, quite obliquely for that matter, broach the subject of the absence of a proper subdivision in relation to the three sites. In part the letter reads:

> "The above mentioned properties were subject to an Agreement of Sale entered into between Rio Tinto Zimbabwe Limited (now RioZim Limited) and Maranatha Ferrochrome (Private) Limited on 3 June 2003. It is common cause however that the properties were never assigned stand numbers of separate title and therefore despite the sale of the properties, transfer of the properties to Maranatha has not occurred."

[21] That letter was in the context of an attempt to find common ground on the way forward, given the defendant's expansion programme and its desire for more land. In his reply, George expresses dismay at the absence of a meaningful offer. On the question of a non-existent subdivision permit, he says:

> "The issues regarding the delayed transfer have been subject of previous discussions between the Legal Counsel of Gurta AG / Maranatha Ferrochrome (Private) Limited and your good offices. I would therefore prefer to leave issues on the legal implications of the delayed transfer to the legal teams."

[22] Thus, that the 2003 sale agreement might have been a legal nullity does not appear either *ex facie* the documents, or from the plaintiff's evidence. I agree with the plaintiff's position that it is up to the defendant to lead evidence on these aspects. It is only after all the evidence has been led that the court can assess and consider the applicability or otherwise of

the principles *ex turpi causa* and *in pari delicto* in relation to s 39(1) of the Regional, Town and Country Planning Act.

[23] The relevant portions of s 39(1) of the Regional, Town and Country Planning Act read:

> "**39 No subdivision or consolidation without permit**
>
> (1) "… …[N]o person shall –
>
> (a) subdivide any property; or
>
> (b) … … … … … … … … …
>
> except in accordance with a permit granted in terms of section forty … …"

[24] In *X-Trend – A – Home* v *Hoselaw Investments* 2000 (2) ZLR 348 (S) the Supreme Court interpreted s 39 above to mean that what is prohibited is the agreement itself that may lead to a change of ownership of any portion of a property, irrespective of the time of signing that agreement. So, if parties enter into an agreement to buy and sell a portion of land which is part of a whole but without a subdivision permit, that agreement will be patently illegal. It is unenforceable. No rights or obligations derive from it. A court of law will not associate itself with, or relate to such an agreement. It is tough luck if one of the parties suffers loss by reason of anything done, or not done, in terms of that agreement, e.g. if the seller has already parted with possession of the property before the purchase price has been paid and now wants the property back, or conversely, if the purchaser has already paid the purchase price before taking transfer and now wants his or her money back. It is such an agreement as will be affected by the *ex turpi causa* and *in pari delicto* principles.

[25] The maxim *ex turpi causa non oritur actio* means "**no action arises from an immoral cause**": see *Dube* v *Khumalo* 1982 (2) ZLR 103 (S), at 109D – F, and *Mega Pak Zimbabwe (Pvt)* v *Global Technologies Central Africa (Pvt) Ltd* 2008 (2) ZLR 195. It is a rule absolute. It admits of no exception. Explaining the rationale for this rule, MAKARAU JP, as she then was, in the *Mega Pak Zimbabwe* case above, said[1]:

> "In my view, the general principle expressed in the maxim does not permit litigants to bring their 'dirty' transactions into the clean halls of justice. Justice will not soil its hands by touching

[1] At p 197G – 198A

> such transactions. 'Dirty' in this regard not only refers to immoral transactions, contracts specifically prohibited by law but also includes transactions that seek to defeat the law."

In `*Jajbhay* v *Cassim* 1939 AD 537, at p 551, and quoting from *Collins* v *Blantern* [2 Wilson, 347] [1767], reference was made to "… *no polluted hand shall touch the pure fountains of justice.*"

[26] On the other hand, the *in pari delicto* principle ["*in pari delicto est conditio possidentis*"], in its classical form, says that in case of equal guilt, the loss stays where it falls; he who is in possession prevails: see *Schierhout* v *Minister of Justice* 1926 AD 99: *Dube* v *Khumalo*, *supra*; *Matsika* v *Jumvea Zimbabwe (Pvt) Ltd* 2003 (1) ZLR 71 (H) and *Gambiza* v *Taziva* 2008 (2) ZLR 107 (H). The rationale is to discourage illegality by denying judicial assistance to persons who part with money, goods or incorporeal rights in furtherance of an illegal transaction: *Schierhout v Minister of Justice, supra*. But this principle is not as inflexible as the *ex turpi causa* doctrine.

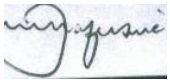
[27] In *Honeycomb Hill (Pvt) Ltd* v *Herentals College (Pvt) Ltd* HH 265-16 (*unreported*) I said the *ex turpi causa* and *in pari delicto* doctrines seem to be cognates but that they are distinct. Whilst *ex turpi causa* is inflexible and admits of no exception, *in pari delictum* is flexible and is subject to exceptions, especially those grounded in public policy. In a nutshell, *ex turpi causa* prohibits the enforcement of immoral or illegal contracts. *In pari delictum* curtails the rights of the delinquents or offenders to avoid the consequences of their performance, or part performance of such contracts (per STRATFORD CJ in *Jajbhay* v *Cassim*, *supra*, at p 540 – 541). In *Dube's* case above, GUBBAY JA, as he then was, confirming the position that in suitable cases the courts will relax the *in pari delictum* rule, said that this is done "*…[to do] simple justice between man and man*" (also *Jajbhay*, *supra*, at p 544).

[28] *In casu*, I have already concluded that neither do the plaintiff's pleadings nor its evidence show or admit that the 2003 sale agreement was a legal nullity, let alone that this was the view of either or both of the parties at any stage prior to the trial. As the plaintiff argues, the defendant does not, in its plea, take the view that the plaintiff is entitled to nothing. Its defence is essentially a confession and an avoidance. It relies on some exit agreement. It is the defendant saying the 2003 sale agreement is a legal nullity. Therefore, it is upon it to lead evidence. Absolution from the instance is not available to it at this stage. The plaintiff has laid out such a *prima facie* case as to warrant the defendant taking the witness' stand.

[29] Furthermore, in view of the fact that the plaintiff had performed its side of the bargain by paying the full purchase price in terms of the agreement, but has not got the property, it would seem so unjust, on the face of it, to send it away empty-handed. Even if the defendant eventually succeeds in showing an illegality, it seems to me to be obliged to go further and show why the plaintiff cannot invoke the *in pari delictum* principle to recover the purchase price, despite the invalidity or unenforceability of their original agreement. It is the defendant, which, according to the evidence so far, unilaterally cancelled the 2003 sale agreement and, without any prior warning, went on to demolish the buildings that the plaintiff had occupied for fourteen years. The question of prescription upon which the defendant relies to defeat the plaintiff's alternative claim for unjust enrichment, is not clear cut on the papers, or from the evidence so far. It seems that up until the defendant's actions above, both parties were treating the 2003 agreement as being valid, with all the attendant rights and obligations.

[30] In all the circumstances therefore, the defendant's application for absolution from the instance at the close of the plaintiff's case is hereby dismissed. The costs shall be in the cause. The trial shall resume on a date, or dates, to be agreed upon by the parties in consultation with the Registrar.

22 July 2020



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