HARARE SAFARI LODGE (PVT) LTD
and
BRETT ALLAN MCDONALD
versus
BLESSED RUNESU

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE, 28 June & 1 July 2022

Application for summary judgment

Mr.S. *Chigumira* for first and second plaintiffs
Mr.R. *Zhuwarara* for defendant

CHILIMBE J

BACKGROUND

[1] As a general precept, illegality in contract represents an iniquity much frowned upon by the courts, as it ought to be, by commerce. Courts therefore expect, in the very least, demonstrable contrition from those whose conduct has been tainted by allegations of illegality. In the matter before me, both sides to the dispute effectively conceded that the contract central to the matter was discoloured by illegality. That position regardless, not a shred of compunction could be detected in the pleadings, submissions or comportment accompanying this application.
[2] Thus stands the case before me. When this evidently tainted agreement went awry, plaintiffs instituted the present proceedings. The plaintiffs sought, in that suit, cancellation of the agreement and ejectment of defendant from the premises forming subject matter of the dispute. The defendant resisted the action. He duly filed an appearance to defend as well as plea to plaintiffs` claim. The plaintiffs then filed the present application seeking summary judgment. Again, the application was opposed by defendant. And so both sides to the dispute now square up as each seeks the court`s assistance to gain respite from the consequences of their turpitude.

PLAINTIFFS` CLAIM

[3] I will refer to the parties as (first or second) "plaintiffs" and "defendant". The plaintiffs` claim was straightforward. First plaintiff, in its capacity as owner of an immovable property, sought to eject the defendant therefrom. Second plaintiff, who owns first plaintiff company, sought confirmation of the cancellation of an agreement of sale between himself and defendant. That agreement related to an attempt by second plaintiff to dispose of his entire shareholding in first plaintiff company. It was the plaintiffs` case that defendant breached the sale of shares agreement by failing to remit the purchase price as agreed. The plaintiffs thus sued on the basis of that breach. It did not matter at all to plaintiffs that, as alleged by defendant, the contract could be tainted with illegality. What mattered to the plaintiffs was that defendant was in breach. They therefore insisted on exercising their perceived rights as issuing from that self-same contract. The plaintiffs thus claimed the following relief; -

> a. Confirmation of Cancellation of an Agreement of sale of shares entered into by and between 2nd defendant [2nd Plaintiff] and Defendant in respect of hotel premises, outbuildings and grounds known as Harare Safari Lodge, situated on McIlwane 21 of Subdivision A of Glenroy of Oatlands.
> b. Ejectment of the Defendant and all those claiming occupation through him from the premises described in paragraph (a) above.
> c.That the Defendant be allowed to remove only his personal property from the premises named in (a) and (b).
> d.Costs of suit on an Attorney -Client scale.

THE APPLICATION FOR SUMMARY JUDGMENT

[4] The plaintiffs principally sustained the tale borne out in their summons and declaration. Defendant, they argued, has no bona fide defence to their claim. He had breached the terms of the sale of shares agreement by failing to remit the purchase price. He had no right to continue occupying the first plaintiff`s property. In effect, the defendant had practically despoiled first plaintiff of its asset. He was enjoying its fruits with no recompense.

[5] The defendant`s response was equally terse. The parties to the dispute had entered into an illegal agreement. In that regard, the plaintiffs were disentitled from seeking to enforce a tainted agreement through the courts. In any event, first plaintiff had no legal basis to eject defendant him from the premises. First plaintiff was no longer owned the immovable property in question. The property had been acquired by the state and was subject to a "section 8 endorsement".

[6] It is clear therefore that the dispute is largely anchored on the agreement of sale of shares. Defendant, who accused second plaintiff of withholding relevant details from the court, proceeded to spill the beans. Whilst the account related by defendant in this regard does not constitute matters found as common cause, it is indeed relevant for the following reasons.

Firstly, the defendant`s version attempts to shed some light on the source, nature and effect of the illegality. In that regard, it assists in determining, among other issues, whether there is a plausible, triable and potentially successful defence to this application.

[7] Secondly, I take note, in the process, of the fact that the defendant`s version was neither fully accepted, nor severely contested by the plaintiffs. If anything, there was a concession along the lines of "even if the agreement is adjudged as illegal, the defendant ought not be permitted to benefit from it, as he apparently has". The defendant`s version of events also puts the sale of shares agreement is clearer context. Before dealing with the requirements of summary judgment, and whether the plaintiffs have met such, I will examine the sale of shares agreement, as well as the context in which such was negotiated and executed.

THE SALE OF SHARES AGREEMENT

[8] The second plaintiff, being 100% shareholder in first plaintiff (referred to hereinafter as "the company", or "Harare Safari Lodge"), disposed of his entire shareholding to defendant. The parties executed an "Agreement of Sale of Shares" dated 14 December 2020.The purchase price of USD$1,500,000,00 was payable, according to clause 4 of the agreement, within 14 days of the date of signature. No such payment was made.

[9] I may state that the agreement sets out, on the face of it, the terms and conditions quite elegantly. It evidences an agreement drawn by commercially alert parties who fully applied their minds to the transaction before them. The other principal terms of the agreement can be paraphrased as follows; -

i. Under paragraph B of the recitals, second plaintiff as the seller confirmed that the company was the <u>owner and registered holder of a certain piece of land</u> situate in the district of Salisbury called McIlwaine 21 of Subdivision A of Glenroy of Oatlands, measuring 8,3720 hectares. This averment was incorrect. The land in question had been acquired by the state as far back as 2005. It had in that regard, been long divested from Harare Safari Lodge company`s balance sheet.
ii. In the same vein, the seller warrantied that the assets of the company comprised of "properties", buildings, equipment, fixtures and fittings. The term "Properties" was defined in the recitals to mean two pieces of land known as "McIlwane 21 of Subdivision A of Glenroy of Oatlands" and "Oatlands". Again, this stipulation was false. Oatlands had, as noted above, been acquired by the state. It did not form part of first plaintiff`s assets.

iii. Clause 6 of the agreement placed an obligation on the purchaser-defendant to eject any persons, present on the Properties. No undertaking of vacant possession was extended to defendant as purchaser. This clause seems to confirm defendant`s contention (as seen below), that plaintiffs were troubled by invaders on the property and sought defendant`s assistance to chase them off.

iv. A number of disclosures were also made by the second plaintiff/seller. Paragraph B of the recitals confirmed that "*Oatlands was served with a section 8 acquisition order*". Under clause 2 of the agreement the defendant, as purchaser confirmed that he "*acknowledged and accepted*" that; -

v. "*2.1…. that this Agreement is for the sale/purchase of the Shares in the Company, and will not be reduced or vary (sic) to any extent Irrespective of the ownership status of Oatlands.*" This clause implicitly recognised that title to Oatlands had shifted. The question is why then did the parties proceed to include Oatlands as the underlying asset of the company, in the sale of shares agreement?

vi. "2.2 *Where reference is made to the Properties, such reference does not imply that the Seller is the lawful owner of "Oatlands*"." This clause clearly contradicts those sections of the contract which affirm that the farm or immovable property forms part of the company`s balance sheet.

vii. "*2.3 The Purchaser is aware that a Section 8 acquisition has been endorsed.*" This was an unequivocal admission that Oatlands, the main asset of first plaintiff had been acquired by the state. I say unequivocal based on the presumption that both parties were well aware of the consequences of acquisition of land by the state under section 72 of the Constitution and as operationalised by the various land reform legislation including the Land Acquisition Act [Chapter 20:10] as well as the Gazetted Lands (Consequential Provisions) Act [Chapter 20:28]. I am also fortified on this point by the fact first plaintiff did not contest this issue nor did they insist that it had title to the property. The status of the immovable property in question had been endorsed by the Registrar of Deeds on 1 January 2005 in terms of section 10(3) of the Land Acquisition Act [Chapter 20:10]. This fact was not in dispute between the parties.

[10] Additional to these disclosures, or "explanation", the seller bound himself to a lengthy list of warranties and indemnities. The following are noteworthy; -

i. *"10.6.9 The Company has complied with all legal and procedural requirements and other formalities.*"

ii. 10.6.11 *There exists no mortgage, charge, pledge, lien, encumbrance or security interest of whatsoever nature against the whole or any part of the assets of the Company*;" This assurance could not have been accurate given the fact that the land had in fact been acquired by the state. The plaintiffs did not proffer any suggestion that they had secured some reprieve, concession or arrangement from the state regarding the exercise of any rights over the immovable property.

iii. *10.6.19 The Seller has disclosed to the Purchaser all facts and circumstances material to this transaction and which would be material or would be reasonably likely to be material to a Purchaser of the Shares and the purchase price payable in respect thereof".* If indeed all the material disclosures had been made, then there was no basis for the parties to enter into an agreement involving the sale of state assets. The contract was potentially in violation of section 72 (6) of the Constitution as read with section 5 (2) (c) of the Land Acquisition Act, as well as section 3 of the Gazetted Lands (Consequential Provisions) Act. This clause, read together with the rest of the agreement, comprise of an admission which binds both sides of the dispute to the illegality. I maintain that view. This is so despite defendant`s attempt to plead compulsion as the reason why he executed this agreement, and plaintiffs` marked prevarication over the issue of illegality.

THE DEFENDANT`S VERSION OF EVENTS

[11] It was submitted on defendant`s behalf that the sale of shares agreement was a sham. It sought to disguise the sale of the immovable property stated in the document. Yet that land had been acquired by the state as far back as 2005. (How the parties thought they could transact over an asset vested in the state and get away with it is beyond comprehension). The defendant also averred that second plaintiff had, through force and violence, been chased off the Harare Safari Lodge premises by some unnamed politicians sometime in 2016. Having failed to obtain instant relief from the courts, second plaintiff then enlisted defendant`s help to eject the invaders. Defendant contends that he successfully "outmuscled" these invaders and cleared them from the property.

[12] Defendant alleges that second plaintiff (a) consented to defendant`s occupation of the hotel premises in order to secure them from further invasions, and (b) undertook to sell the shareholding in the company to defendant as a reward for defendant`s assistance. (c)The terms of such transaction were to be finalised at a future date. (d) Defendant alleged that second plaintiff then reneged on that agreement and turned hostile. Defendant stated that this hostility culminated, (e) in threats by second plaintiff to eject defendant from the hotel premises. As a

result of those threats, defendant says he assented to the sale of shares agreement in December 2020. The Significant irony issues from the last point (e).

[13] How did it turn out that one who had defended a helpless property owner by resisting forceful and violent invaders, suddenly succumbed to threats from the very same owner, and executed a clearly unenforceable agreement? What caused second plaintiff`s change of heart? Never mind the exact nature of the threats! The more probable conclusion is that defendant was complicit to the illegal agreement. Defendant's other explanation that, (f) he later resiled from the sale of shares agreement after realising that the land in question had been acquired by the state males even less sense. The agreement explicitly referred to this fact.

[14] Finally, as (g) defendant argued that he has, since 2016, been minding the premises and expending personal resources in that regard. As stated above, all these allegations were not specifically contested blow by blow by plaintiffs, apart from some considerable scoffing in the founding affidavit and heads of argument. What compounds the position for plaintiffs is that they tendered no explanation at all as in rebuttal of the allegations that the agreement was tainted with an illegality.

[15] Had it not been replete with incongruencies, the sale of shares agreement would stand as an elaborate document. On one hand the agreement acknowledges, in several parts, that the principal assets on first defendant`s balance sheet were the Harare Safari Lodge`s land and buildings. Those assets formed the holdings or balance sheet of the entity that was being sold through the exchange of shareholding. But in the same breath, the agreement turned around and made several disclaimers stipulating that Oatlands, the immovable property had been acquired by the state.

[16] I did not consider it necessary, as a court seized only with a summary judgment application, to delve to the bottom of the issue of illegality. I made my conclusions on the existent of that defect in passing based on (a) the contract at the base of this dispute, (b) a preliminary reading of the land acquision provisions in the Constitution, the Land Acquision Act and the Gazetted Lands (Consequential Provisions) Act [Chapter 20:28]. As (b) I also considered the parties` admissions and position regarding illegality as it affected them and finally, I had as (c) regard to the general guidance regarding land reform issued in decisions such as *Commercial Farmers Union and Others* v *Minister of Lands and Others 2010 (2) ZLR 576; Bonias Yoramu and 45 Others* v *The Prosecutor General CCZ 2-16; Rangarirai Mago* v *George Rusere and Another HMA 54-21,* among many others.

THE REQUIREMENTS FOR SUMMARY JUDGMENT

[17] The requirements for summary judgment have, so to speak, traipsed a well-trodden path in our jurisdiction. In *E.G Construction v Farai Matsika Motors HH 356-20*, CHAREHWA J summarised the applicable principles as follows at page 3; -

> "It is trite that summary judgment is an extraordinary remedy against an unscrupulous litigant seeking to frustrate a claim. In that regard, the claim must be clear and unanswerable and the defences inadequate in fact and in law. It is further trite that not every defence will defeat an application for summary judgment. In order to succeed the defences must be clear and complete, disclosing facts upon which they are based as at the time of the claim. Further such defences must be sufficient to enable one to succeed on the merits or at least, place a prima facie case before the court to enable it to assess their bona fides. Thus the role of the court is to assess whether a bona fide defence which is plausible and could possibly succeed has been raised."

[18] In *Kingstons Limited* v *Ineson (Pvt) Ltd 2006 (1) ZLR 456* at page 458 F-G, the Supreme Court gave the following guidance; -

> "Not every defence raised by a defendant will succeed in defeating a plaintiff's claim for summary judgment. Thus what the defendant must do is to raise a *bona fide* defence — a "plausible case" — with "sufficient clarity and completeness to enable the court to determine whether the affidavit discloses a *bona fide* defence". He must allege facts which, if established, "would entitle him to succeed". See *Jena* v *Nechipote* 1986 (1) ZLR 29 (S); *Mbayiwa* v *Eastern Highlands Motel (Pvt) Ltd* S-139-86; *Rex* v *Rhodian Investments Trust (Pvt) Ltd* 1957 R & N 723 (SR)."

[19] These requirements will be applied to the present facts where illegality features centrally to the defence. Have the plaintiffs established an unassailable claim? Are they, in the circumstances, entitled to a speedy remedy and relief? Do the facts support the court granting plaintiffs the "drastic remedy" which summary judgment represents? On the other hand, has defendant tendered a plausible defence? Are there triable issues arising from such defence and are they, if successfully proven at trial, deliver defendant from the plaintiffs` claim? The defence tendered, as noted is illegality. Before answering these questions, I need to consider the issues necessarily arising from a defence of illegality.

THE "*SMOKING WILLIAMS*" CASE

[20] ZIYAMBI JA dealt with illegality in contracts in the Supreme Court decision of *Agson Mafuta Chioza v Smoking Williams Siziba SC 4-15* ("*the Smoking Williams case*"). In that decision, the court made an observation which must remain a constant guideline in matters involving illegality in contracts. It was stated as follows at page 10 of the unreported version of the judgment; -

> "It is now established that an illegal agreement which has not yet been performed either in whole or in part will never be enforced by the Court…. This rule is absolute and admits of no exception."

[21] Having laid down this position in indisputably emphatic terms, the court then proceeded to deal with the consequences of illegality. The *Smoking Williams* case, is in that regard, quite insightful. It articulated, under one roof, the three concepts central to illegality. These being (a) the *in pari delicto potior est conditio defendentis,* maxim(b) the *ex turpi causa* rule and (c) the principle of unjust enrichment.

ILLEGALITY AS A DEFENCE IN AN APPLICATION FOR SUMMARY JUDGMENT

[22] In the instant application, the issue of illegality in the sale of shares agreement has been effectively conceded. It is also a matter that arises on the very face of the document itself. This position somewhat paints the picture with different colours when it comes to examining the application before me. There will be need for a court to examine the defective contract to establish the existence or extent of the respective parties` blame, guilt or innocence. The nature of illegality, its effect, the culpability of the respective parties or prejudice incurred are all matters relevant to this dispute. One may note that any inquiry into illegality will inevitably consider unjust enrichment. At the end of it all, the court will then be able to prescribe appropriate remedies, be it injunction, disgorgement, chastisement or other sanction meeting the justice of the case. Whilst one may not state that a "good" defence has been raised, the facts amply demonstrate the existence of illegality which itself stands as a significantly triable issue.

[23] In addition, defendant raised another defence which confronts plaintiffs` case at the very centre of its attack. The defendant has argued that first plaintiff cannot seek to evict him from the premises owned not by it but by the state. It stands as another triable issue for first plaintiff to disprove this averment as well as demonstrate its superior rights and justification to seek defendant`s ejectment. The defence of illegality must be ventilated, as was held in *Smoking Williams.*

DISPOSITION

Accordingly, it is ordered that;

The application for summary judgment be and hereby dismissed with costs.

Whatman & Stewart Lawfirm- the plaintiffs'legal practitioners
Chimwamurombe Legal Practitioners- defendant's legal practitioners