SHELLINGTON DUMBURA
versus
MISHECH MUHWEHWESA
and
SIMBARASHE SIGXOSA

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 11-13 May, 4 June and 3 and 15 July 2009

M.E. Motsi, for the plaintiff
R.M. Mubata, for the defendants

KUDYA J: On 1 September 2008 the plaintiff issued summons out of this court seeking the nullification of a memorandum of agreement of 20 May 2008 and its addendum of 30 May 2008 (the agreement), the return of five motor vehicles and their respective registration books and costs of suit. On 26 September 2008 the defendants entered their plea and filed a counterclaim, based on the agreement, for the cession of rights in house No. 241 Tsvingwe Township Penhalonga, the eviction of the plaintiff therefrom and the payment of US$ 89 000.00.

The agreement of 20 May 2008 and the undated addendum which was executed on 30 May 2008 read as follows:

MEMORANDUM OF AN AGREEMENT OR SETTLEMENT

Made and entered into by and between

SHELLINGTON DUMBURA

1D NOP: 75-155396 P 50

ADDRESS: 241 TSVINGWE TOWNSHIP

PENHALONGA

AND

MISHECK MUHWEHWESA

ID NO: 07- 055049 F 07

AND

SIMBARASHE SIGXOZA

ID 63- 976714 F 24

ADDRESS: C/O GONESE AND NDLOVU
3RD FLOOR FIDELITY LIFE CENTRE
MUTARE

WHEREAS the said Shellington Dumbura by means of false pretences, criminal misrepresentation and fraud stole US$220 000.00 from the said Misheck Muhwehwesa and Simbarashe Sigxoza

AND WHEREAS THE SAID Shellington Dumbura was arrested and is appearing at Mutare Magistrates Court under CRB No. 1726/08 and is currently detained at Mutare Prison.

AND WHEREAS the said Shellington Dumbura is admitting to his civil liability and wants to compensate the said Misheck Muhwehwesa and Simbarashe Sigxoza.

AND WHEREAS the parties have discussed the matter with professional help and assistance of their respective legal counsels and have reached an agreement and understanding.

AND WHEREAS the parties wish to have their agreement recorded and reduced into writing

NOW THESE PRESENT WITNESSTH THAT

1.

Shellington Dumbura pay a deposit of US$21 000.00 to Misheck Muhwehwesa and Simbarashe Sigxoza upon signature of this agreement.

2.

Shellington Dumbura shall surrender, deliver and cede his rights, title, interests and ownership of:-

(A) Stand No. 241 Tsvingwe Township valued at US$30 000.00

(B) Hino ranger ABC Reg. No. ABC 4307 valued at US$20 000.00

(C) Hyundai Santafe Reg. No. AAV 7895 presently registered in Ntambwe Kaninda's name valued at US$15 000.00

(D) Mitsubishi Canter registration No. AAX 8709 presently registered in Charles Muwamba's name valued at US$14 000.00

to Misheck Muhwehwesa and Simbarashe Sigxoza.

3.

Transfer of ownership and legal title shall be effected or ceded upon signature of this agreement. Shellington Dumbura shall vacate the immovable property by 31 /08/08. Provided that ownership and title of these items shall be reversed back to Shellington Dumbura if he pays their value to Misheck Muhwehwesa and Simbarashe Sigxoza by 31 /08/08.

4.

The balance of US$120 000.00 shall be paid off or liquidated by and in monthly instalments of US$10 000.00 or its equivalent at the prevailing interbank rate with the first instalment payable on or before 30 June 2008.

5.

The said Shellington Dumbura renounces all benefits from the legal exceptions " non causa debiti", "non-numerate pecuniae", "de errore culculi", "revision accounts", "no value received".

6.

Misheck Muhwehwesa and Simbarashe Sigxoza undertake to withdraw the criminal charges against Shellington Dumbura upon full settlement of the civil debt or liability.

THUS DONE AND SIGNED AT MUTARE THIS 20 DAY OF MAY 2008 IN THE PRESENCE OF THE UNDERSIGNED WITNESSES

AS WITNESSES

1……

.....

SHELLINTON DUMBURA

2……

THUS DONE AND SIGNED AT MUTARE THIS 20 DAY OF MAY 2008 IN THE PRESENCE OF THE UNDERSIGNED WITNESSES

AS WITNESSES

1……..

……

MISHECK MUHWEHWESA

2…….

AS WITNESSES

1……..

…….....

SIMBARASHE SIGXOZA

2…….

ADDENDUM

WHEREAS the parties entered into, recorded and executed an Agreement on 20 may 2008.

WHEREAS the parties wish to modify, add and incorporate further agreements

Now therefore witnessth that:-

(1) In recognizing accepting and admitting his criminal and civil liability Shellington Dumbura shall deliver, surrender and cede his rights, title, interest and ownership of:-

(a) **Mazda 626 Cronos** Registration No. **AAL 8267** valued at **US$5 000.00** presently registered in **Lizzy Mandikonza's** name.

(b) Toyota Hilux (Virgo) Registration No. **AAU 6184** valued at **US$ 30 000.00** presently registered in **Crosby Mashiri's** name.

(2.) The provisions of paragraph 3, 4, 5 and 6 of the Principal Agreement shall apply mutatis mutandis.

THUS DONE AND SIGNED AT MUTARE THIS …….DAY OF MAY 2008 IN THE PRESENCE OF THE UNDERSIGNED WITNESSES.

THUS DONE AND SIGNED AT MUTARE THIS 20 DAY OF MAY 2008 IN THE PRESENCE OF THE UNDERSIGNED WITNESSES

AS WITNESSES

1……

.....

SHELLINTON DUMBURA

2……

THUS DONE AND SIGNED AT MUTARE THIS 20 DAY OF MAY 2008 IN THE PRESENCE OF THE UNDERSIGNED WITNESSES

AS WITNESSES

1……..

……

MISHECK MUHWEHWESA

2…….

AS WITNESSES

1……..

…….....

SIMBARASHE SIGXOZA

2……."

The facts which gave rise to these claims and counterclaims were hotly disputed. All the parties are businessmen based in Mutare. The plaintiff gave evidence and called his wife Bongani Kusinabadza to support his story while both defendants testified on their own behalf and called the evidence of their friend and legal practitioner of record, Christopher Ndlovu.

The sole issue that was referred to trial at the pre-trial conference held on 25 March 2009 was whether or not the agreements signed between the plaintiff and the defendants are enforceable. In argument, both counsels were agreed that the issue could only be determined after the resolution of the factual disputes that gave birth to the agreement.

A diamond craze hit Mutare in the wake of the discovery of diamonds in the Chiadzwa area of Marange in Manicaland. Taiziri Mahommed, a Lebanese diamond dealer traveling on a Democratic Republic of the Congo passport set base at the Eastgate Hotel in Mutare. It was common cause that he was a business associate of the plaintiff. It was also agreed that before the attempted diamond transaction took place in October 2007, Ndlovu had acted as the legal practitioner of the plaintiff in a murder case that had by then been withdrawn. Thereafter Ndlovu became the legal practitioner of record for Taiziri and the defendants.

The first factual dispute between the parties involves the sum of US$230 000.00, consisting of US$155 000.00 and US$75 000.00 raised by the first and second defendants, respectively, for the purchase of a 100 carat diamond from Taiziri. The issue that I have to resolve first is whether the defendants paid the money to Taiziri or to the plaintiff. It was Ndlovu's testimony, which the parties with the benefit of hindsight agreed with, that the diamond in question did not exist. The defendants averred that on 21 October 2007 the plaintiff persuaded them to contribute towards the purchase of the diamond from Taiziri, who was selling it for US$300 000.00. They were assured by other diamond dealers who may they named as Hlahla, Francis and Lazarus of the existence of the diamond. They handed the sum of US$230 000.00 to the plaintiff on 30 October 2007. The plaintiff intimated to them that he had a ready buyer who was willing to pay US$1 million for the diamond and promised to return their capital and immediately distribute the profits amongst them after the sale. The first defendant stated that he promised each defendant a profit of US$100 000.00 while the

second defendant stated that they did not discuss the profit sharing formula. Ndlovu, however, stated that the two defendants had told him that they would each receive profits of US$50 000.00.

The plaintiff on the other hand averred that the two defendants, in the knowledge that he was a close business associate of Taiziri, requested him to facilitate a meeting with Taiziri. They wanted to purchase the diamond, which they would sell for US$1.5million to an unidentified Lebanese national whom he saw who lived in Morningside in Mutare. He was motivated by the promise of a commission of US$100 000.00. He accompanied the defendants to Taiziri who refused to part with the diamond before payment. He was aware that the defendants had, in his absence, eventually paid US$230 000.00 to Taiziri for the purchase of the diamond. At the time all of them were aware that dealing in diamonds without a licence was illegal.

Mr *Motsi*, for the plaintiff, on the one hand urged me to find that the defendants handed the money directly to Taiziri. Mr. *Mubata*, for the defendants, on the other urged me to find that the defendants gave the money to the plaintiff for his own account. Taiziri was deported from Zimbabwe over his dealings at the Chiadzwa diamond fields soon after the plaintiff was released on bail. He did not testify in the present trial.

In his testimony the plaintiff stated that in October 2007 he acted as a conduit pipe between Taiziri and the second defendant in the exchange between them of 31 pieces of diamonds paid in lieu of the US$230 000.00. He also stated that he guaranteed a US$10 000.00 loan that Taiziri advanced to the second defendant when the second defendant returned the 31 pieces to Taiziri. He also testified that in early November 2007 the defendants unleashed some mobsters on him at Wise Owl Hotel who robbed him of US$500.00. The money was repaid by the first defendant after the intervention of one Binale, a fellow businessman based in Mutare. Thereafter he withdrew from the dealings that went on between the defendants and Taiziri and concentrated his energies in campaigning for the Mutare South constituency parliamentary elections. He only saw the defendants after the harmonized elections. On 6 May 2008 he was arrested for defrauding the defendants of US$230 000.00.

The two defendants gave similar evidence on what transpired soon after they gave the plaintiff the money on 30 October 2007. He did not return with the diamond as he had promised. They failed to reach him on his cellphone. They alleged that he had gone to Mozambique purportedly to meet the courier in whose custody the 100 carat diamond was and

who was coming from Maputo. On the following day they caught up with the plaintiff at Chimoio police station where he alleged that the money and some diamonds that were in his possession had been stolen when his vehicle, a Hyundai Santafe station wagon was broken into at the Manica Executive Hotel in Chimoio. The quarter window of the vehicle was damaged but the boot was full of groceries and toys. He was enjoying himself with a Mutare based woman whom they named. While he told them that US$250 000.00 had been stolen, he reported to the Chimoio police that US$50 000.00 had actually been stolen.

On arrival in Mutare, he agreed to refund them their money and repaid US$10 000.00. Two days later he brought diamonds he alleged were worth US$100 000.00. They declined to accept them and requested him to sell them and bring the money to them. He did not pay up. Two weeks later he bought six cars. They approached Ndlovu who referred them to the police who refused to entertain their complaint. They came to the Attorney-General's office in Harare five times in the company of Ndlovu to explain what had happened. They saw the Director of Public Prosecutions and the Deputy Attorney-General in charge of crime who in February 2008 directed the Serious Fraud Squad in Harare to investigate the matter. The police indicated that they would arrest the plaintiff after the harmonized presidential, parliamentary and local government elections so that they would not derail his campaign.

The onus to show, on a balance of probabilities, that the plaintiff received the money lies on the defendants. In order to prove fraud, they would need to discharge the onus beyond a reasonable doubt. That the bar on the onus is raised where criminal connotations arise was set out in *Pitluk v The Law Society of Rhodesia* 1975 (2) SA 21 (RAD*)*; *Mugabe and Mutezo v Law Society of Zimbabwe* 1994 (2) ZLR 356(S) at 363-365B and *Hove v Gumbo* SC143/04 at pages 6 and 16 of the cyclostyled judgment.

Mr *Mubata*, in argument, properly conceded that I should disregard the testimony adduced by the defendants on the events that they alleged happened from the time they gave the money to the plaintiff until their return from Mozambique because he had not cross examined him on it.

When the defendants were cross examined, they indicated that the plaintiff was not a diamond dealer. This was at variance with their opposing affidavit in Case No. HC 3902/08, the urgent application brought by the plaintiff for the vehicles to be retained in the Deputy Sheriff's custody, in which they described the plaintiff as "a well known and well celebrated diamond dealer". In addition, while they expressed surprise in their evidence in chief that the

plaintiff had not brought the diamond within half an hour after they gave him the money, in their opposing affidavit referred to above they stated that the plaintiff had gone to Mozambique to purchase the diamond. The two defendants differed between themselves and with Ndlovu on the profits that would accrue to them from the US$230 000.00 investments. These examples show that the defendants did not give credible evidence. They fabricated some of their evidence and were evasive under cross examination. They did not call Taiziri to dispute the plaintiff's story that he was the recipient of the money and explain why he paid US$31 000.00 to Ndlovu in reduction of the US$230 000.00. They neither disputed the Wise Owl Motel incident nor denied refunding the plaintiff the US$500.00 that was forcibly taken from him during that incident. It seemed to me that they used the criminal justice system to force the plaintiff to admit to liability because they realized that they did not have adequate evidence to prove their allegation against him.

I am satisfied that they failed to show on a balance of probabilities that they paid US$230 000.00 to the plaintiff. Further, the evidence that they gave also failed to show beyond a reasonable doubt that the plaintiff defrauded them of this amount.

The second factual dispute arises from the manner in which the agreement was made. The plaintiff alleged that he did not enter into the agreement freely and voluntarily but was unduly influenced by his arrest, incarceration in prison while on remand and the subsequent failure of his bail application both in the magistrates Court in Mutare and on appeal to this court. The defendants averred that at the time the agreement was initiated, negotiated and executed the plaintiff was ably represented by a legal practitioner of his choice and the agreement was therefore voluntarily and freely made.

Most of the facts of how the plaintiff was arrested and arraigned before a magistrate for fraud were common cause. He was represented by a legal practitioner, Mr Mugadza. On 7 May 2008 he was denied bail notwithstanding that the prosecutor was initially amenable to the grant of bail. It transpired that Ndlovu actively influenced the prosecution against consenting to bail. He supplied the State with the police profile of the plaintiff and influenced the Director of Public Prosecutions to direct the local public prosecutor to oppose bail. The appeal against the refusal of bail was dismissed by this court on 15 May 2008. He was subsequently remanded in custody to 21 May and thereafter to 18 June 2008.

Mugadza and Ndlovu visited the plaintiff in remand prison and conferred with him in the officer in charge's office. The first defendant and Taiziri attended one of the meetings. The

outcome of the meetings was the drawing up of the agreement. Taiziri paid US$21 000.00 to Ndlovu which went towards the reduction of the indebtedness of US$220 000.00. Ndlovu stood as creditor to the plaintiff in a bid to disguise Taiziri as the source of the money. Five motor vehicles, that is a Hino Range, a Hyundai Santafe, a Mitsubishi Canter, a Mazda Cronos and a Toyota Hilux; valued at US$84 000.00 were surrendered to the defendants. On 31 May 2008, with the encouragement of Ndlovu, the State acceded to the application for bail that was made by Mugadza who used the agreement as demonstrative of changed circumstances warranting the admission of the plaintiff to bail.

The plaintiff averred that the defendants pressurized him to surrender assets in exchange of or as a guarantee for the indebtedness. He signed the agreements when he was in remand prison. Mr Ndlovu assisted the State to oppose bail and after the agreement had been executed assisted the plaintiff obtain bail. Mr *Motsi* submitted that Ndlovu acted in an overbearing and intimidating manner against both the plaintiff and his wife which resulted in the execution of the oppressive agreement. Mr Mugadza was not called by the plaintiff. In the absence of his testimony, it is difficult to accept the plaintiff and his wife's testimony on the accusations that they made against Ndlovu on the intimidatory tactics that he allegedly made against both of them including the robbery of US$300.00 from the wife for the bribery of Court officials. I am satisfied that the wording of the agreement in its first preamble amounts to a confession of fraud, false misrepresentation, which had it been obtained freely and voluntarily one would thereafter have expected the plaintiff to plead guilty to the charge he was facing. Indeed that he was forced to sign is apparent from the last promise therein to the effect that the defendants would withdraw charges once full settlement was made. Further, the fact that he agreed to cede the Tsvingwe property valued at US$30 000.00, which did not belong to him, confirms the absence of free consent in the execution of the agreement. As soon as he obtained his liberty he, on 25 July 2008, brought an urgent chamber application, which was dismissed, to retain the vehicles that had been surrendered in the custody of the Deputy Sheriff. Notwithstanding the defendants' awareness that the plaintiff was challenging the validity of the agreement, they alleged that they sold four of the vehicles and surrendered the Hyundai Santafe to Ndlovu in lieu of his fees. Ndlovu confirmed the fate of the Hyundai Santafe. The defendants were not able to supply the names of the purchasers or the dates of the alleged sales. If indeed they sold the vehicles, their conduct was perverse as on 29 July 2008 they averred in their opposing affidavit in case No. 3902/08 that they had the vehicles in their

possession. Even though the initial application for the return of the vehicles was withdrawn on 29 August and the summons in this trial served on 11 September, by 2 October 2008 they were aware that the plaintiff desired his vehicles back. Their failure to supply the dates on which they sold the vehicles and the names of the purchasers and the fact that when trial commenced the defendants came to court in the Toyota Vigo cast doubt on their version that they disposed of the vehicles. The defendants averred that they assumed ownership of the vehicles, by virtue of the agreement, on 31 August 2008.

Ndlovu stated that the plaintiff was desperate to gain his liberty. The plaintiff denied that he paid US$10 000.00 in person after his release on bail as stated by Ndlovu and believed it was paid by Taiziri. Ndlovu assisted his clients and friends to the best of his ability. He used his professional skills to their advantage. At the time he acted for the defendants he did not have a legal practitioner and client relationship with the plaintiff. He did not use any privileged information that he gained while representing the plaintiff to the latter's disadvantage. The only blight on his conduct was in allowing the false information that the plaintiff was facing a charge of murder to stand when he very well knew that it had been withdrawn before plea. He, it seems to me, acted improperly in accepting a motor vehicle and for that matter one he knew to be the subject of dispute as payment for his fees. Notwithstanding the duty he had to his clients and the court, it was clear that he deliberately initiated the arrest and the opposition to the grant of bail of the plaintiff in a calculated bid designed to draw him to the negotiating table. After he had partially succeeded he influenced the plaintiff's lawyer to seek bail. The State took a cue from the defendants to agree to the consensual admission to bail of the plaintiff.

While the plaintiff did not call Mugadza to testify, I am satisfied that the probabilities favour his version that he signed the agreement against the advice of his legal practitioner in order to gain his liberty. I accept his averment that he would have sold his soul to escape from the terrible condition of Mutare Remand Prison. As I take judicial notice that at the time Mutare Prison was in a parlous and dire state. His version is supported by his continued denial of the criminal allegations notwithstanding that the agreement represented a confession to that very charge. I am therefore satisfied that the plaintiff has discharged the onus on him to show on a balance of probabilities he did not freely and voluntarily enter into the agreement in question.

It seems to me that the conduct of Ndlovu in this case requires investigation by the Law Society. I will direct the Registrar in terms of s 25 (a) of the Legal Practitioners Act *[Cap 27:07]* to refer this judgment to the Secretary of the Law Society for him to investigate whether or not the conduct of Ndlovu amounted to unprofessional, dishonourable and unworthy conduct.

The finding that the agreement was not freely executed would ordinarily result in the conclusion of both the claim and counter claim. Mr *Motsi*, however, argued in the alternative that the illegality of the agreement was based on extortion.

Extortion is defined in s 134 (1) the Criminal Law (Codification and Reform) Act *[Cap 9:23]* as follows:

> **134 Extortion**
> (1) Any person who-
> (*a*) intentionally exerts illegitimate pressure on another person with the purpose of extracting an advantage, whether for himself or herself or for some other person, and whether or not it is due to him or her, from that other person, or causing that other person loss; and
> (*b*) by means of the illegitimate pressure, obtains the advantage, or causes the loss; shall be guilty of extortion.

Mr *Motsi* contended that Ndlovu applied illegitimate pressure on the plaintiff by influencing the decision to arrest, oppose bail and when bail was denied; demanding compensation and declaring that the plaintiff would rot in prison unless he surrendered property and agreed to repayment terms that were to the satisfaction of the defendants. Ndlovu stated that the plaintiff was desperate to obtain his liberty from remand prison. The plaintiff stated that he would have sold his soul to gain his liberty. He went against his legal practitioner's advice and signed the agreement on 20 May 2008. The defendants exerted more pressure on him to include two other vehicles and he signed the addendum to the agreement on 30 May 2008. His wife testified that when she refused to release the motor vehicles, she was warned by Ndlovu that her husband would rot in prison.

Mr *Mubata* submitted that Ndlovu worked in liaison and agreement with the plaintiff's legal practitioner, who protected the interests of the plaintiff. The preamble to the agreement is worded in strong language which is inconsistent with a denial of the criminal charges that the plaintiff still faces. A legal practitioner worth his salt would not advise his client to sign such an agreement when such client was denying criminal liability. I am satisfied from the language therein that the plaintiff signed the agreement under pressure. The defendants were not able to

show how the values attached to each motor vehicle and the immovable property were calculated.

Thus while the plaintiff was legitimately in remand prison, the pressure exerted by the defendants' legal practitioner on the plaintiff was untoward and unwarranted. That he illegitimately influenced the process of bail is demonstrated by his admission that when the last two motor vehicles were delivered, he advised the prosecutor handling the case that he was agreeable to the grant of bail. Ndlovu appeared to have worn the prosecutorial robe in this matter, which he used to extract an advantage not only on behalf of the defendants but in his own behalf. After all he ended up driving and owning one of the motor vehicles that had been extracted from the plaintiff. It seems to me that his conduct in taking a motor vehicle the subject of litigation was designed to intimidate the plaintiff by painting a veneer of legality to the agreement and his conduct. It is not surprising that he could boldly state in evidence that he had a direct and substantial interest in the case. One would have thought that legal practitioners act as agents and not as co-principals of their clients.

I am satisfied that the agreement was based on extortion. Further and in any event both counsel submitted on the authority of *Gensberg v Weiblen* 1916 OPD 247 at 252; *Mapenduka v Ashington* 1919 AD 343; *Chimutanda Motor Spares (Pvt) Ltd v Musare & Anor* 1994 (1) ZLR 310 (H) and *Oceaner (Pvt) Ltd & Anor v Upper Class Enterprises (Pvt) Ltd & Anor* 2001 (2) ZLR 130 (H) and its sequel on appeal *Upper Class Enterprises (Pvt) Ltd v Oceaner (Pvt) Ltd* 2002 (2) ZLR 603 (S) that the agreement is *pactum commissorium.* It is "a pact by which the parties agree that if the debtor does not within a certain time release the thing given in pledge by paying the entire debt, after the lapse of the time fixed, the full property in the thing will irrevocably pass to the creditor in payment of the debt". In *Chimutanda's* case, *supra*, it was held that the portion that is *pactum commissorium* is the only one which is unenforceable. This view finds support in *Bock v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA) ([2003] 4 All SA 103) para [7] where HARMS JA stated that:

> "A clause in a mortgage bond permitting the bond holder to execute without recourse to the mortgagor or the court by taking possession of the property and selling it is void. It does not matter whether the goods are immovable or movable: in the latter instance, to perfect the security, the court's imprimatur is required."

Thus were the plaintiff truly indebted to the defendants and had the other portions of the agreement in the present case been found to have been freely and voluntarily made, I would have enforced them.

Clearly, the agreement, being grounded on extortion lacks severable clauses and additionally being *pactum commissorium*, is void and unenforceable.

An attempt to deal in diamonds by persons who are not licensed to do so is a criminal offence in terms of s 3(1) (a) of the Precious Stones Trade Act [*Cap 21:06*] as read with s. 189 (1) of the Criminal Law (Codification and Reform) Act *[Cap 9:23]*. It is illegal.

The plaintiff and the defendants in both the claim in convention and reconvention correctly admitted that they attempted to deal in diamonds in the full knowledge that it was illegal. They were aware that it was prohibited and penalized by the law.

In *Dube v Khumalo* 1986(2) ZLR 103 (S) at 109D-F GUBBAY JA, as he then was, stated that:

> "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. This rule is absolute and admits of 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 condition 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 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 simple justice between man and man."

In *Hattingh & Ors v Van Kleek* 1997 (2) ZLR 240(S) KORSAH JA cited the above statement with approval at 245F-G. At p 245H-246B he proceeded to say:

> "The learned JUDGE OF APPEAL then cited a passage from the judgment of STRATFORD CJ in *Jajbhay v Cassim* 1939 AD 537 at 544-545 to underscore the point that "in cases where public policy is not foreseeably affected by a grant or refusal of the relief claimed a court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment".
>
> The cases clearly show that were a contract is on the face of it legal but, by reason of a circumstance known to one party only, is forbidden by statute, it may not be declared illegal so as to bar the innocent party from relief; for to deprive the innocent person of his rights would be to injure the innocent, benefit the guilty and put a premium on deceit."

In *Jajbhay v Cassim, supra,* STRATFORD CJ at p. 542 did not define the maxim *ex turpi causa non oritur actio'* but was content to hold that it was self explanatory and required no elucidation. In the same case, at p. 548 WATERMEYER JA stated that it "referred to an illegal or immoral purpose not yet carried out.' In Director of Public Prosecutions: *Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C) at paragraph [89] VAN ZYL J translated the maxim as "no action arises from an immoral cause**".**

Both counsel submitted that the *ex turpi causa* maxim had no application in the present case. They argued that the court should apply the *par delictum* maxim. I agree that neither the plaintiff nor the defendant is seeking the enforcement of the alleged diamond deal. In fact the plaintiff denied being either an agent or principal in the diamond deal. The defendants averred that he was the principal with whom they contracted and that they performed their obligations under the illegal contract. They are not seeking the supply of the diamond or their profits. Rather they desire that they be refunded the money that they paid out to the plaintiff. In the circumstances outlined by the defendants, it is clear that the *par delictum* rule would have applied had the circumstances outlined by the defendants been vindicated by the evidence. It deigns that where the parties to an illegal or immoral contract are equally in the wrong, the loss should lie where it falls; however, the Court will intervene and do justice between the wrongdoers where one of them has been unjustly enriched.

The *par delictum* rule has been discussed and applied in many cases in this jurisdiction. I refer to *Zuvaradoka v Franck* 1980 ZLR 402 (S); *Dube v Khumalo, supra; Rootes (Central Africa) (Pvt) Ltd v Mundawarara & Anor* 1973 (1) RLR 57 (G); *Hattingh & Ors v Van Kleek, supra; Logan v Sibiya* 2002 (1) ZLR 531 (H) and *Evans v Snapper* SC 55/2004. The plaintiff did not obtain any money from the defendants. He did not benefit from any of the defendants' money. In these circumstances the *par delictum* rule has no application. The agreement was not voluntarily made. It was based on extortion and was illegal. There was no cause for the alleged indebtedness. The confiscation of the motor vehicles clause was *pactum commissorium.* All these findings favour the plaintiff's claim and militate against the defendants' counterclaim.

Accordingly, it is ordered that:

1. The memorandum of agreement dated 20 May 2008 and the undated addendum thereto is declared null and void.

2. The defendants and all those claiming through them surrender the following vehicles and registration books to the plaintiff:

    a. Hino Ranger Registration No. ABC 4307,
    b. Hyundai Santafe Registration No. AAV 7895
    c. Mitsubishi Canter Registration No. AAX 8709
    d. Mazda 626 Cronos Registration No. AAL 8267
    e. Toyota Hilux Vigo Registration No. AAU 6184.

3. The defendants' counter claim is dismissed.

4. The defendants shall pay the plaintiff's costs of suit jointly and severally, the one paying the other to be absolved.

5. The Registrar shall transmit a copy of this judgment to the Secretary of the Law Society for him to investigate whether or not the conduct of Mr. Christopher Ndlovu of Gonese and Ndlovu Legal Practitioners in this matter amounted to unprofessional, dishonourable and unworthy conduct.

Mabulala & Motsi, plaintiff's legal practitioners
Gonese & Ndlovu, defendants' legal practitioners.