

SANUDI MASUDI
versus
DAVID JERA
and
EPWORTH LOCAL BOARD
and
SECRETARY EPWORTH LOCAL BOARD

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 18-19 May 2016 and 31 August 2016

Civil trial

F Chauke, for the plaintiff
S Mugadza, for the 1st defendant

MUREMBA J: The plaintiff's claim is for:

1. An order declaring that Stand number 1957, Chinamano Extension, Epworth is subdivisible.
2. An order declaring that the contract of sale entered into between plaintiff and Sophia Jera the former lessee in respect of Stand 1957, Chinamano Extension, Epworth is valid.
3. An order directing and compelling 2nd defendant to create one subdivision and cede such subdivision of Stand 1957 to plaintiff.
4. An order directing the 3rd defendant to sign all papers for the purpose of the said subdivision and cession to plaintiff.
5. An order compelling the 1st defendant to allow the 2nd and 3rd defendants to subdivide and cede the resultant subdivision to plaintiff.
6. Alternatively an order directing and compelling the 1st defendant to pay the plaintiff US\$25000.00 being the value of the costs plaintiff incurred in building the house.
7. Costs of suit against the party who opposes the action.

In his declaration the plaintiff stated the following. The first defendant's aunt, one Sophia Jera who is now late, used to be the leaseholder of Stand 1957, Chinamano Extension, Epworth, on a rent to buy basis. On 14 March 1998 the plaintiff entered into an agreement of

sale with Sophia Jera for the purchase and sale of a portion of the stand which was yet to be subdivided. The agreement of sale was reduced into writing and it is the first defendant who actually drafted it in ink and went on to sign the agreement of sale as a witness. The plaintiff paid the purchase price of \$20 000.00 to Sophia Jera. In 1999 the now late Sophia Jera ceded her rights to Stand 1957 to the first defendant. She subsequently passed on. After her death the first defendant instituted eviction proceedings against him notwithstanding that he had bought the portion of land and that he had already erected two structures there with the blessings of the late Sophia Jera. The structures in question are worth US\$ 25 000.00. The first defendant won the case in the Magistrates Court but lost the case on appeal in this court under case number HH66/2007 on the ground that since the stand had been ceded to him by his late aunt all he had acquired were personal rights to the property and not real rights, as such he could not evict the plaintiff. It was held by the appeal court that Epworth Local Board, the second defendant was the owner of the stand.

It is on the basis of the agreement of sale that the plaintiff says he entered into with the late Sophia Jera that he wants the first defendant to be ordered to effect a subdivision of the stand and cede it to him. He says that the second defendant's representative has already written confirming that there is provision for a subdivision on this stand. The plaintiff said that if the subdivision is not done the first defendant will be unjustly enriched. He said that if the court is not able to order a subdivision then it should order the first defendant to pay him US\$25 000.00 being the value of the structures that he erected on the said stand.

In his plea the first defendant averred the following. The purported agreement of sale that was entered into between the plaintiff and the late Sophia Jera was a nullity at law as it is contrary to s 39 of the Regional, Town and Country Planning Act [*Chapter 29:12*] which prohibits any sale of urban land without an approved subdivision by the local authority. A nullity cannot give rise to rights and obligations to the parties. Moreover there is no agreement of sale between the parties. He did not draft the purported agreement of sale, let alone witness it. He does not even know how much the plaintiff paid to the late Sophia Jera as she never told him about it. He admitted that he indeed lost the eviction case but it was on a technical ground, and not on merit. The structures that were erected by the plaintiff are just temporary structures as they were not constructed according to an approved plan by the local authority. Consequently, they are of no value as they do not comply with the local board's by laws. He does not require the structures at all and will seek their demolition as they are far below his standard. The structures will not enrich him in any way.

The first defendant went on to make a claim in reconvention for the eviction of the plaintiff from the said stand. However, in his closing submissions at the end of the trial, the defendant's counsel indicated that having considered some case authorities, the defendant was abandoning the claim in reconvention. I will therefore not deal with the abandoned claim in my judgment.

In his replication the plaintiff made the following averments. It is true that the provision of the Regional, Town and Country Planning Act is correctly cited. However, the Epworth local Board, the second defendant has been allowing people to sell portions of their stands in the absence of its approval as long as the stands accommodate subdivisions. The first defendant is aware of the agreement of sale. The structures erected by the plaintiff are permanent and are of good quality. They are up to standard. The first defendant will be unjustly enriched by them if there is no compensation order against him.

The issues that the parties agreed upon for trial are as follows.

1. Whether or not the agreement between the plaintiff and the late Sophia Jera is enforceable against the first defendant.
2. Whether or not the agreement between the plaintiff and the late Sophia Jera is valid in the eyes of the law.
3. Whether or not the plaintiff is entitled to a transfer of the subdivision of Stand 1957.
4. Whether or not the plaintiff is entitled to compensation for the structures that he erected on the said stand in the event that the transfer is found to be impossible.

From the evidence which was led by the parties during trial it emerged that the following evidence was not disputed. The plaintiff started staying at the stand in dispute in 1998 when Sophia Jera was still alive. In 1999 she indeed ceded the stand to the first defendant who was her nephew. The second defendant's records show that the stand in dispute was registered in the first defendant's names on 15 June 1999. Sophia Jera passed on in 2008 at the age of 78 years. A map and letter provided by UDCORP show and state that there is a possibility of a subdivision on Stand 1957. UDCORP stands for Urban Development Corporation and its duties involve town planning. These documents were availed to the second defendant by UDCORP in 2006 upon request by the second defendant after a dispute had arisen between the plaintiff and the first defendant on the issue of the subdivision. The second defendant wrote to UDCORP asking if it was possible to subdivide the stand. When the purported agreement of sale was entered into by the plaintiff and the late

Sophia Jera no subdivision permit had been obtained by Sophia Jera. She had not made any application for such a permit to the second defendant. In other words, the subdivision had not been approved by the second defendant. There is no contract which was entered into between the plaintiff and the first defendant. The late Sophia Jera's estate or the executor thereof were not cited as co-defendants in these proceedings.

The plaintiff has erected two structures on the stand, a 4 roomed house and a 4 roomed cottage, but these were constructed without approved plans by the second defendant. Both the plaintiff and Dennis Muranduri who is the second defendant's Acting Head of Housing Department who testified as the plaintiff's witness said that at the time the structures were erected no plans were being approved by the second defendant. The plaintiff admitted that if a subdivision order is granted in his favour by this court he will, in the long run, have to erect structures that are approved by the second defendant. He admitted that the structures that he erected are not permanent. Even the first defendant's structures that are on Stand 1957 are not permanent. There is no single permanent structure on this stand.

The first defendant moved in to stay with his now late aunt Sophia Jera at Stand 1957 in November 1998. When he moved in he found the plaintiff already in occupation. The house which the plaintiff was occupying had two rooms only. The plaintiff then extended it to make it 4 rooms in the presence of the first defendant and when Sophia Jera was still alive. Over and above that, the plaintiff went on to build a 4 roomed cottage, but he only finished 2 rooms thereof after Sophia had died. Sophia Jera had erected two structures, a 6 roomed house and another separate 3 roomed house. The first defendant moved out of the premises in 2011 after the death of his aunt in 2008. He now resides in Budiro.

In 2005 when Sophia Jera was still alive the first defendant instituted eviction proceedings against the plaintiff. He wanted to evict the plaintiff from the stand. The first defendant won the case in the Magistrates Court, but lost the case on appeal in this court for the reason that he could not evict the plaintiff on the basis of *rei vindicatio* as he was not the owner of the property.

I will turn to deal with the issues that were referred for trial.

Whether or not the agreement between the plaintiff and the late Sophia Jera is enforceable against the first defendant.

It is clear that the plaintiff's cause of action is based in contract, the contract which he says he entered into with the now late Sophia Jera. At law there is the doctrine of privity of

contract which provides that contractual remedies are enforced only by or against parties to the contract, and not by or against third parties, because contracts only create personal rights¹. Liability is placed on the contracting parties. In *casu* the plaintiff is trying to enforce the contract which he entered into with the now late Sophia Jera on the basis that the late Sophia Jera ceded her rights in the property to the first defendant before she died. Mr. *Chauke* for the plaintiff submitted that the cession of the personal rights in the property that was effected in favour of the first defendant occurred with the burden of the sale on it. On the other hand Mr. *Mugadza* for the first defendant submitted that since there is no privity of contract between the plaintiff and the first defendant the plaintiff ought to have cited the Executor of the estate of the late Sophia Jera as a party to these proceedings. He further submitted that the non-citation thereof is fatal to the plaintiff's claim and as it is there is no defendant in the proceedings.

What is critical in this matter is that in obtaining personal rights in Stand 1957 the first defendant did not purchase or buy the property from the late Sophia Jera, instead the property was ceded to him. Therefore what determines whether or not the contract which was entered into by and between the plaintiff and Sophia Jera is enforceable against the first defendant is the law with regards to cession. Cession entails the transfer of personal rights from one person to another as opposed to real rights². In simplified terms cession is the transfer from one creditor to another of an obligation from a debtor. The principle parties to any cession agreement are the cedent (the original owner of the right or claim) and the cessionary (the new owner of the right or claim). The debtor is not a party to the cession agreement. The debtor merely performs his obligations to the new owner of the right or claim upon notification. Put differently, cession involves the substitution of a new creditor (the cessionary) for the original creditor (the cedent). The effect of a cession is that it divests the cedent of all the rights ceded and vests them in the cessionary so that thereafter only the cessionary and not the cedent is entitled to sue for the enforcement of those rights³. It is pertinent to note that the cessionary cannot get rights that are stronger than the cedent had⁴ (the *nemo plus iuris rule*).

In the present case the late Sophia Jera transferred her rights in Stand 1957 by having the rights registered in the name of the first defendant in the second respondent's records on

¹ Innocent Maja *The Law of Contract in Zimbabwe* p 27.

² Innocent Maja *The Law of Contract in Zimbabwe* p 141.

³ RH Christie *Law of Contract in South Africa* 3rd ed. P 521.

⁴ Innocent Maja *The Law of Contract in Zimbabwe* p 143.

15 June 1999 after she had already allegedly sold a portion of her rights to the plaintiff. If it is true that she had indeed sold a portion of her rights to the plaintiff the first defendant cannot therefore be entitled to the full rights to the property because that means that he will be getting rights that are stronger than the late Sophia Jera had. Applying the law to the present facts, what it means is that, by virtue of the cession that was effected in favour of the first defendant, if the plaintiff owed Sophia Jera anything in respect of Stand 1957, the first defendant was now entitled to sue the plaintiff for the claim. This explains why the first defendant, in 2005, sued the plaintiff for his eviction from the property. Since the cessionary cannot get rights that are stronger than the cedent had, it therefore means that when the cession occurred it occurred with the burden of the sale on it. The first defendant cannot therefore seek to run away from the obligations of the sale agreement which was entered into by his cedent, the late Sophia Jera and the plaintiff. He cannot give the defence that he was not a party to the contract and argue that he is not privy to its terms and conditions. Mr. *Chauke* correctly submitted that the late Sophia Jera had transferred her rights during her lifetime, as such those rights cannot be part of her estate. To hold this would be to defeat the whole purpose of donating things whilst one is still alive. It was therefore not necessary for the plaintiff to cite the estate of the late Sophia Jera in the present proceedings. In suing the first defendant the plaintiff sued the right or the correct defendant.

Whether or not the agreement between the plaintiff and the late Sophia Jera is valid in the eyes of the law.

Ordinarily it would be logical to first determine if there was indeed a contract which was entered into by and between the plaintiff and the late Sophia Jera. This was a heavily contested issue by the parties during trial. Whilst the plaintiff was saying that there was a contract, the first defendant vehemently denied it. He pointed out to a number of flaws in the written agreement of sale that the plaintiff produced as an exhibit. In view of the decision that I will reach after determining whether or not the agreement between the plaintiff and the late Sophia Jera is valid in the eyes of the law, it is not necessary at this stage that I make a finding on whether or not a contract existed between the plaintiff and the late Sophia Jera.

The issue that calls for determination is, assuming that there was indeed an agreement of sale between the plaintiff and the late Sophia Jera, is such an agreement valid in the eyes of the law. Generally speaking legal persons are free to enter into contracts in line with the doctrine of freedom of contract. However, there are certain limitations to this freedom. One

of the limitations is that all contracts should be legal. What this means is that any contract which is entered into freely and voluntarily, but which contravenes some legal rule in statute or in common law cannot be enforced at law⁵. Such a contract is illegal and unenforceable.

Subdivisions of land are governed by s 39 of the Regional, Town and Country Planning Act [*Chapter 29:12*] which reads as follows.

“No subdivision or consolidation without permit

(1) Subject to subsection (2), no person shall—

(a) subdivide any property; or

(b) enter into any agreement—

(i) for the change of ownership of any portion of a property; or

(ii) for the lease of any portion of a property for a period of ten years or more or for the lifetime of the lessee; or

(iii) conferring on any person a right to occupy any portion of a property for a period of ten years or more or for his lifetime; or

(iv) for the renewal of the lease of, or right to occupy, any portion of a property where the aggregate period of such lease or right to occupy, including the period of the renewal, is ten years or more; consolidate two or more properties into one property;

except in accordance with a permit granted in terms of section forty”(my emphasis).

The provision means that parties cannot enter into an agreement of sale in respect of an unsubdivided portion of land without first obtaining a permit entitling its subdivision. The provision uses the peremptory word ‘shall’ as well as the negative phrase ‘No person shall’. This means that the legislature intended the contract that is entered into in the absence of a permit to be void. Therefore such a contract is illegal and unenforceable.

In *X-Trend-A-House v Hoselaw Investments (Pvt) Ltd*,⁶ McNally JA amplified the provision. In that case, “the appellant tendered to buy a portion of a stand from the respondent. Both parties were aware that the stand would have to be subdivided. The respondent accepted the offer, but a few months later repudiated the arrangement, stating that there was no valid agreement. The appellant sought the transfer of the piece of the stand. The question for decision was whether, when an agreement for the sale of a portion of property was made conditional on the obtaining of a permit for subdivision, the agreement was valid. In the High Court, the judge had ruled, on the facts, that the transaction fell foul of s 39 of the Town and Country Planning Act [*Chapter 29:12*].”

On appeal McNally JA held that,

⁵ Innocent Maja *The Law of Contract in Zimbabwe* p 23.

⁶ 2000 (2) ZLR 348 (SC).

“S 39 forbids an agreement for the change of ownership of any portion of a property except in accordance with a permit granted under s 40 allowing for a subdivision. The agreement under consideration was clearly an agreement for the change of ownership of the unsubdivided portion of a stand. It was irrelevant whether the change of ownership was to take place on signing, or on an agreed date, or when a suspensive condition was fulfilled. The agreement itself was prohibited.”(My emphasis)

In *casu*, in his submissions Mr *Chauke* implored me to use my discretion and give an order directing the second defendant to subdivide Stand 1957. This plea was premised on what Dennis Muranduri, the representative of the second defendant said when he gave his evidence. He said that the second defendant only does the subdivision of a stand either upon application by the holder of the rights to the property or on direction by a court of law. The *exturpi causa* rule stipulates that no action arises from an illegal contract. In *Mega Pak Zimbabwe (Pvt) Ltd v Global Technologies Central Africa (Pvt) Ltd*⁷ it was held that the *exturpi causa* rule is absolute and admits no exception. In light of this, Innocent Maja in his book *The Law of Contract in Zimbabwe* at p 71 went on to say that courts do not have, therefore, any discretion to relax this rule. He went on to cite the case of *Tsamwa v Hondo & Others*⁸ wherein the court established that a court is bound to refuse to enforce an illegal contract. He summed up by saying that the court cannot be an accomplice to an illegality by enforcing such a contract. In view of this I cannot sanction the performance of an illegal contract in the present matter, and besides, if a contract is prohibited by legislation and the wording of the legislation is very clear that such a contract is void like in the present matter where the provision uses peremptory words that ‘No person shall’ instead of discretionary words like ‘may’, I do not believe that I can exercise any discretion and order the performance of the illegal contract. There is no discretion to exercise in the first place.

I therefore make a finding that there was no contract in existence between the plaintiff and the late Sophia Jera as the purported contract is in contravention of s 39 of the Regional, Town and Country Planning Act. This finding automatically disposes of the third issue for trial, the issue of whether or not the plaintiff is entitled to a transfer of the subdivision of Stand 1957. Since I cannot order the performance of an illegal contract, under the circumstances the plaintiff is not and cannot be entitled to a transfer of the subdivision of Stand 1957.

Whether or not the plaintiff is entitled to compensation for the structures that he erected on the said stand in the event that the transfer is found to be impossible.

⁷ 2008 (2) ZLR 195 (H)

⁸ 2008 (1) ZLR 401 (H)

The plaintiff submitted that in the event that subdivision is impossible the court should order that he be compensated by the first defendant for the structures he erected on the property to avoid unjustly enriching the first defendant. The plaintiff is claiming US\$25 000.00. The first defendant objected to paying this compensation on the grounds that (i) the structures were built on the basis of an illegal contract, as such no rights accrue to him. In any case he has enjoyed staying on the property for free over the years and that is enough compensation; (ii) the structures are temporary and are supposed to be replaced by permanent ones whose plans should be approved by the second defendant as the local authority. The first defendant said that he is not going to be unjustly enriched by the illegal structures. He said that they are of no benefit to him; and, (iii) the claim of US\$25 000.00 is not supported by the valuation quotations the plaintiff produced during trial.

The *in pari delicto* rule stipulates that when parties in an illegal contract are equally in the wrong and property or money has exchanged hands 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 and incorporeal rights in furtherance of an illegal transaction⁹. The courts however normally relax this rule in consideration of various factors which include but not limited to public policy and unjust enrichment. A party to an illegal contract can mount a general unjust enrichment action where there is unjust enrichment to the other party.¹⁰ In the case of *Industrial Equity v Walker*¹¹ Bartlett J spelt out the requisites for liability for this action as follows:

- “(a) the defendant must be enriched;
- (b) the plaintiff must have been impoverished by the enrichment of the defendant;
- (c) the enrichment must be unjustified;
- (d) the enrichment must not come within the scope of one of the classical enrichment actions;
- (e) there must be no positive rule of law which refused an action to the impoverished person.”

It is my view that generally if structures are erected on land they have the effect of improving the value of the property. This is irrespective of the fact that such structures were erected pursuant to an illegal contract. Naturally the owner or occupier of the said piece of land is enriched by those structures. On the other hand the party who effected the structures is impoverished by the enrichment of the other party. Such enrichment is unjustified. In *casu* it

⁹ *Dube v Khumalo* 1986 (1) ZLR 103 (S).

¹⁰ Innocent Maja *The Law of Contract in Zimbabwe* p 74.

¹¹ 1996 (1) ZLR 269 @ 270 (H)

is not disputed that the plaintiff erected two structures, a 4 roomed house and a 4 roomed cottage. It follows that these are improvements that he made to the property. Looking at the law outlined above it is just to award compensation to the plaintiff for the improvements he made. However, in the circumstances of this matter what bars me from awarding compensation to the plaintiff is the fact that the structures that he erected are illegal. During trial the witnesses were referring to them as temporary structures. It is not in dispute that these structures were not constructed on the basis of a plan or plans that were approved by the second defendant which is the local authority. Dennis Muranduri testified that there is need for all the people who fall under the jurisdiction of the second defendant with temporary structures to replace them with permanent structures that are constructed according to approved plans. This therefore means that the two structures that were erected by the plaintiff will have to be demolished as they do not meet the requirements of the local authority. In that regard there is no unjust enrichment to the defendant to talk about. It is for this reason that I cannot give an award of compensation to the plaintiff for the two structures that he erected on Stand 1957.

Conclusion

In the result, the plaintiff's claim is dismissed with costs.

Uriri Attorneys-at-Law, plaintiff's legal practitioners.
Madanhi, Mugadza & Company, 1st defendant's legal practitioners