RCM CIVIL (PRIVATE) LIMITED
versus
PETROTRADE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 27 June 2016, 04 August 2016 and 10 January 2020

Civil Continuous Roll

Mrs *R. Makamure*, for the applicant
J. Mutonono, for the respondent

CHIWESHE JP: In this action the plaintiff issued summons against the defendant claiming the sum of US$67 118.60, being damages incurred by the plaintiff as a result of defendant's negligence and, or wrongful and unlawful failure to obtain an environmental impact assessment certificate (the EMA certificate).

The background facts are as follows. Sometime in January 2012 the State Procurement Board published a tender for the construction of a service station for the defendant. The plaintiff submitted its winning bid. Having been awarded the tender the plaintiff entered into an agreement with the defendant in terms of which the plaintiff would undertake to construct the service station and the defendant would be required to meet certain statutory requirements, including obtaining an environmental impact assessment certificate. A further party to the contract, an engineer, would plan the process, provide structural designs and generally oversee the technical aspects of the project.

On 3 September 2012 the defendant and the engineer handed over the construction site to the plaintiff. The plaintiff then mobilised labour and machinery on to site. On 13 September 2012 an Environmental Management Agency (EMA) officer attended at the site and stopped all construction work for want of an environmental impact assessment certificate. However, the plaintiff remained on site allegedly on the instruction of the defendant who assured plaintiff that the certificate was being processed and would soon be at hand. The certificate was only issued on 23 October 2012 and work was commenced on 13 November 2012. Thus the plaintiff

had remained on site but idle for a period of two months. During this period the plaintiff says it had on site a backhoe loader and two tractors hired in the sum of $52 743, it paid salaries in the sum of $9 200.00 and hired security at the cost of $5 175.00. The total cost amounts to $67 118.60, the sum claimed in the summons. The above narrative summarises the evidence given by the plaintiff's managing director, Richard Mujati.

Charles Masunda was employed by the plaintiff as a site clerk. On 28 August 2012 he attended a meeting held between plaintiff and defendant at NOCZIM House, Harare. The purpose of the meeting was for the parties to discuss the site handover and how the work was to be done. He told the court that the site was handed over to the plaintiff on 3 September 2012. Equipment was delivered on site and work commenced on 10 September 2012. On 12 September 2012 an EMA inspector visited the site and enquired as to whether the plaintiff had an environmental impact assessment certificate. He was directed to the defendant's offices. The inspector returned the following day and stopped all construction for want of the said environmental impact assessment certificate. According to this witness, an official from the defendant's office nonetheless advised them to remain on site as the issue of the certificate was being attended to. He said that at the time the plaintiff had equipment on site hired from one Mwera and six guards. He said the defendant never instructed them to move offsite and that the EMA certificate only came on site on 12 November 2012 and work commenced on 13 November 2012.

The defendant called Kudzanai Paruzeni its administration officer. He confirmed that works commenced on site despite that certain requirements had not been met and that the non-availability of the EMA certificate was the reason why construction was halted. He confirmed that it was the defendant's obligation to obtain the EMA certificate. The second witness for the defendant was Alban Nyakurimwa an employee of the engineer KAN Consult. Their project role was to prepare the design and tender documentation and to attend to the tender process. They would supervise the works, administer the contract and adjudicate disputes between the parties. He stated that at the meeting held on 28 August 2012 the plaintiff had requested to move on site. He attended the meeting representing KAN Consult. Despite dissuading the parties from moving on site as the drawings were not ready and further that the EMA certificate was not at hand, the parties agreed that plaintiff moves on site despite the risks.

The evidence given in this action clearly shows that the plaintiff moved on site on 3 September 2012 with the full knowledge and approval of the defendant. It is common cause that the plaintiff moved on site without the EMA certificate, a requirement provided by law.

As a result of non-fulfilment of that requirement, EMA proceeded to stop construction. It is also clear that the parties had entered into a prior agreement in terms of which the defendant was to secure the EMA certificate. The plaintiff's case is based on failure by the defendant to secure the EMA certificate which failure led to the stoppage of construction by EMA. The plaintiff avers that as a result of this stoppage, it suffered loss in the sum claimed.

Section 97 of the Environmental Management Act [*Chapter 20:27*] provides as follows:

> **"97 Projects for which environmental impact assessment required**
> (1) The projects listed in the First Schedule are projects which must not be implemented unless in each case, subject to this Part—
>
> (*a*) the Director-General has issued a certificate in respect of the project in terms of section *one hundred*, following the submission of an environmental impact assessment report in terms of section *ninety-nine*; and
> (*b*) ……..
> (*c*) ……..
>
> (2) Subject to subsection (4) <u>any person</u> who knowingly implements a project in contravention of subsection (1) shall be guilty of an offence and liable to a fine not exceeding level twelve or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment." (My emphasis).

The petrochemical project *in casu* is listed under para 5 (d) to the First Schedule to the Act. Simply put the commencement of works on site by the plaintiff was in direct violation of the law! The provisions of section 97 of the Act are clear and unambiguous. Both the plaintiff and defendant knew that an EMA certificate was a prerequisite to commencement of the works. The plaintiff should have foreseen the consequences of his actions. It cannot now blame the defendant for the resultant losses. It was obvious from the word go that without the EMA certificate the inspectors would intervene in the manner they did. Both parties took that risk fully aware of the legal requirements and of the fate that the project would meet. Whilst both parties were to blame the plaintiff was the greater culprit. It is the plaintiff that requested permission to move on site prematurely. The plaintiff did not ask to be furnished with the certificate nor was it shown any. It knew or ought to have known that the EMA certificate was yet to be acquired by the first defendant. It is a requirement that the EMA certificate be displayed at the site office. The plaintiff had nothing to display. After work was stopped by the EMA inspector, the parties agreed that the plaintiff remains on site, absence of the EMA certificate notwithstanding! The actions of both parties show without doubt that both parties knowingly and deliberately acted in flagrant violation of s 97 of the Environmental Management Act. The agreement between the parties to move to site before

the issuance of the EMA certificate was thus illegal. The parties were *in pari delicto*. The courts will not enforce an illegal agreement.

In *Jajbbay v Cassim* 1939 AD 537 the court had occasion to discuss the import of the two rules of our law with regards illegal contracts. The first rule is the *ex turpi causa non oritus action* which means no action can arise from a disgraceful or dishonourable cause. This rule means that an illegal contract is void and unenforceable. The rule is absolute. The second rule is the *in pari delicto potio est conditio* defendant's *sen possidentis* (in case of equal guilt the defendant, or possessor is in the stronger position). The purpose of this rule is to discourage illegal agreements by preventing a person (such as the plaintiff) from recovering that which he has performed in terms of his illegal contract. This rule is not absolute. It can be relaxed at the court's discretion. A guilty party may be allowed to recover his performance if public policy or simple justice between man and man so requires. *In casu* I do not see any basis for the relaxation of that rule in order to entertain the plaintiff's claim for damages. Firstly, both parties knew that the law requires that there be obtained first the EMA certificate. They had at their disposal, in addition, the services of a specialist consultant whose advice they ignored. Thirdly, any project to do with fuel or petroleum products is potentially hazardous to the environment and indeed the community. It would not in my view be in the interests of public policy to allow the plaintiff to recover under circumstances where it has brazenly acted in violation of the law. To do so would be to send the wrong signal to would be offenders. In this regard the sentiments expressed in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA (1) (A) are apposite.

> "Agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy, not be enforced."

In their book "Contract – General Principles" 4th ed, the authors, Van der Merwe and three others reiterate, the following point at p 166.

> "Agreements are illegal if they conflict with Statutory law (including, of course, the Constitution) or common law. Typical instances of illegality occur where the conclusion of an agreement or the agreed performance or the purpose for which the agreement is concluded is contrary to the law."

I conclude therefore that the agreement reached between the parties allowing the plaintiff to move to site and commence work was illegal because it contravened the clear provisions of section 97 of the Environmental Management Act. It is for that reason null and void and is therefore not enforceable. Further the plaintiff should not be allowed to recover its

damages under the *in pari delicto* rule as to do so would only serve to undermine public policy. Would be offenders would not be deterred by such an approach.

In their papers none of the parties raised the issue of illegality on the agreement to move on site without the EMA certificate. The issue has been raised by the court post closure of proceedings. It is trite that a point of law can be raised at any time even where it has not been previously pleaded. In their book "Contract: General Principles", 4th Ed the authors, Van der Merwe and 3 others state at p 173, para 7.3.1 as follows:

> "Validity and Enforceability of agreement
> It is generally said that illegal agreements are void (or invalid) in the sense that they are not contract and do not create obligations. No claim can therefore be brought to enforce what was promised in the agreement – *ex turpi vel iniusta causa non oritur actio*. This maxim has been said to be inflexible and to admit of no exception. It applies even where the parties are not aware of the illegality of their agreement. The court should in fact take cognisance *mero motu* of the illegality of an agreement, if it is not raised by one of the parties but appears from the transaction itself or from the evidence before the court."

I proceeded accordingly *in casu* and considered from the evidence before me that the agreement to comments works without an EMA certificate is contrary to statutory law and therefore illegal. See also *Yannakou v Apollo Club* 1974 (1) SA 614 A.

Finally, I wish to comment on the legal effect, if any, of the initial agreement between the parties in terms of which the obligation to obtain an EMA certificate was placed solely on the defendant. This agreement is consistent with s 98 of the Environment Management Act, which places the responsibility of applying for the EMA certificate upon "The developer", assuming the defendant to be the developer *in casu.*

However, the Act defines the word developer to mean "any person who proposes or undertakes to implement a project." This definition would appear to include persons in the applicant's position and raise the question whether it is competent for the applicant to contract out of a statutory obligation. I raise this issue as a moot point, not having been canvassed by either party.

As already indicated the plaintiff's case. cannot succeed.

Accordingly, it is ordered as follows:

1. The plaintiff's claim be and is hereby dismissed in its entirety.
2. The plaintiff shall pay the costs of suit.

Kantor & Immerman, Applicant's legal practitioners
Chadyiwa & Associates, Defendant's legal practitioners