THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 410/04
Reportable

In the matter between :

HITLER ADOLF KLOKOW APPELLANT

and

MICHAEL BOYTON SULLIVAN RESPONDENT

CORAM : MPATI DP, CAMERON, BRAND JJA *et* NKABINDE, CACHALIA AJJA

HEARD : 6 SEPTEMBER 2005

DELIVERED : 29 SEPTEMBER 2005

Summary: Contract – Legality – facts need not always specifically be pleaded before court will relax the rule *in pari delicto potior est conditio defendentis*.
- Pleadings not to be approached in an overly technical and formalistic way.

JUDGMENT

CACHALIA AJA/

CACHALIA AJA:

[1] The Appellant claims repayment of a sum of R250 000 being part of the purchase price for a liquor-licenced business, which was paid to the Respondent pursuant to the conclusion of an agreement of sale. The agreement was illegal and void for want of compliance with the requirements of the Liquor Act, 27 of 1989 ('the Act'). It will be convenient to refer to the parties as they were cited in the court of first instance, as plaintiff and defendant respectively.

[2] On 4 September 2000 the parties entered into a written agreement in terms of which the plaintiff was to acquire, from the defendant, a business that provided 'adult entertainment', which included the sale of liquor to its patrons. Pursuant thereto the plaintiff paid to the defendant an amount of R250 000, which represented half of the agreed purchase price of R500 000. The plaintiff took possession of the business on 5 September 2000. However, on 18 October 2000, for reasons not relevant to this appeal, the plaintiff returned the business to the defendant and issued summons against him for repayment of the R250 000.[1]

[3] The matter originally came before Hartzenberg J in Transvaal Provincial

[1] The plaintiff sued for an amount of R700 000 and R489 956 96, alternatively R250 000. It is only the latter amount that is relevant in this appeal.

Division where the plaintiff was successful. He refused the defendant leave to appeal. Leave was then granted by this court to the full court. That court (per De Villiers J; Patel J and Jooste AJ concurring) upheld the defendant's appeal. The plaintiff now comes on further appeal, again with special leave of this court.

[4] In the plaintiff's amended particulars of claim, several causes of action are pleaded. Only one of those is relevant for a determination of this appeal. The plaintiff alleges that the defendant, as holder of the liquor licence, concluded the agreement permitting the plaintiff to procure a controlling interest in the business without obtaining the necessary permission of the Chairperson of the Liquor Board ('the Chairperson'). This omission, the plaintiff avers, constituted a contravention of Section 38(1) of the Act, which provides:

'The holder of a licence shall not permit any other person to procure a controlling interest in the business to which the licence relates, unless the chairperson has, on application by the holder, granted consent that such a person may procure such an interest in that business.'

(A 'controlling interest' in relation to any business or undertaking, 'means any interest of whatever nature enabling the holder thereof to exercise, directly or indirectly, any control whatsoever over the activities or assets of the business or undertaking…'[2]) In consequence of this contravention, the plaintiff avers that

[2] The definition is provided for in subsection 2(1) of the Act. It provides that "unless the context otherwise indicates, *controlling interest* means an interest as defined in section 1 of the Maintenance and Promotion of Competition Act 96 of 1979. Act 96 of 1979 has been repealed by the Competition Act, 89 of 1998. But subsection 2(1) has been incorporated by reference into Act 89 of 1998.

the agreement is illegal and void. Accordingly he cancelled the agreement, returned the business to the defendant and now seeks to recover the amount of R250 000 that he paid to the defendant in terms of the agreement.[3]

[5] In resisting the claim, the defendant pleads, inter alia, that regulation 28 as read with section 38(1) of the Act imposed an obligation on the plaintiff, jointly with the defendant, to make written application for the consent of the Chairperson. This he did not do. Regulation 28 provides as follows:

'28. Form of application

(1) The applicant who is the holder of a licence, shall jointly with the applicant who desires consent to procure a controlling interest in the business to which the licence… relates…make written application, in duplicate, for such consent, substantially in the form of Form 9…'

[6] Accordingly, the defendant pleads that the plaintiff is precluded from recovering the amount claimed, as 'both he and the Plaintiff were *in pari delicto*'. The plaintiff did not file a replication.

The proceedings before Hartzenberg J

[7] When the matter came before Hartzenberg J, the parties elected not to

[3] The plaintiff also alleges that he was induced to enter into the agreement as a result of certain fraudulent misrepresentations that were made by the defendant. The defendant in his plea denies this. This issue is not relevant for the purposes of deciding the present appeal.

lead any evidence at that stage. Counsel for the plaintiff, with the acquiescence of the defendant's legal representative, requested the court to record two admissions on his behalf: that neither party had complied with regulation 28,[4] and that the defendant had handed to the plaintiff a blank pro forma document (Form 16) on 24 August 2000, prior to the agreement being signed. This document is titled: 'Appointment in terms of section 39(1) or 39(2) of a natural person to manage and be responsible for the business to which the licence relates'. It is issued in terms of Regulation 95, which provides that:

'a person other than a natural person who is holder of a licence, shall in terms of section 39(1), and a natural person shall in terms of section 39(2) appoint a natural person to manage and be responsible for the business, substantially in the form of form 16…

Sections 39(1) and (2) of the Act provides as follows:

'(1) A person other than a natural person shall not conduct any business under a licence unless a natural person who permanently resides in the Republic and who is not disqualified in terms of section 25 to hold a licence, is appointed by him or her in the prescribed manner to manage and be responsible for its business.

(2) A natural person who is the holder of a licence may in the prescribed manner appoint another natural person who permanently resides in the Republic and who is not disqualified in terms of section 25 to hold a licence, to manage and be responsible for the business to which the first-mentioned licence relates.'

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[4] See para [4] above.

[8] Counsel for both parties thereupon requested the court to adjudicate four issues separately in terms of the provisions of Rule 33(4).

- Whether section 38(1) of the Act was of application to the agreement;
- If the answer to that question is positive, whether non-compliance with the section renders the agreement void;
- If the answer to second question is positive, whether any portion of the agreement is severable from the remainder of the agreement;
- Whether the plaintiff had made out a case for the repayment of the amount of R250 000.

[9] It was agreed between the parties' legal representatives that these issues were to be decided, 'as on exception', on the basis of the factual averments that were made in the plaintiff's particulars of claim, together with the facts that plaintiff had admitted. The learned judge answered the first, second and final questions in the affirmative, and to the third, he answered No. Each question was therefore decided in favour of the plaintiff. In so deciding, Hartzenberg J concluded that the rule '*in pari delicto potior est conditio defendentis'* ('the *par delictum* rule') relied upon by the defendant to defeat the plaintiff's claim, did not arise. The basis of this conclusion, so he reasoned, was that S 38(1) placed a burden to secure the consent of the Chairperson for the procurement of controlling interest by an applicant on the holder of the licence only, the

defendant in this case. He therefore attributed blame for the failure to obtain the consent before the signing of the agreement on the defendant alone.

The Proceedings in the full court

[10] When the matter came before the full court, it was rightly conceded that Hartzenberg J had decided the first two questions correctly. The concession was made because it was common cause that no consent had been obtained for the plaintiff to acquire a controlling interest in the business as required by section 38(1). This rendered the agreement illegal. Section 148, which had been overlooked, disposed of the second question (whether the agreement was void). Section 148 provides: 'a contract which contains a provision whereby a person purports to relinquish or forgo a right, privilege, obligation or liability in terms of this Act, shall be void'. The agreement was thus illegal and void. The issue of the severability of any part of the agreement fell away.

[11] The only remaining question that the full court was required to decide was reformulated as follows:

Whether the plaintiff has made out a cause of action for the repayment of the amount of R250 000…'

The full court also approached the matter 'as on an exception'. There are two questions to be answered in this appeal. The first is whether the full court was correct in finding that the conduct of the parties was equally morally

reprehensible; and if so, whether it was correct in finding an insufficient factual basis to sustain a cause of action.

[12] On the basis of the facts before it, the full court concluded that the parties were *in pari delicto* (equally morally guilty). This conclusion was based on its finding that the agreement contemplated a contravention of section 38(1) and was void in terms of section 148. The finding was underpinned by the fact that the defendant had handed a blank form 16 to the plaintiff before the agreement was signed. The full court inferred that this was probably a subterfuge for the plaintiff to take control of the business by utilising the existing licence. It said that the inference was also supported by the fact that neither party had taken any steps to obtain the necessary consent of the Chairperson in accordance with the procedure provided for in regulation 28.

[13] The full court rejected an argument advanced on behalf of the plaintiff that as s 159(b)[5] of the Act penalises only the holder of a licence for a contravention of s 38(1) of the Act, the *par delictum* rule was, for that reason, not applicable to him. The argument, which was pursued zealously in this court

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[5]Section 159 reads as follows:
‘ Offences by holders of licences in general
The holder of a licence who—
(b) contravenes section 38(1);
shall be guilty of an offence.’

as well, is misconceived. The *par delictum* rule is concerned with the moral guilt of contracting parties, not their criminal liability. Whether or not the plaintiff is also *prima facie* liable for prosecution under the Act, albeit as an accomplice as found by the full court, has no direct bearing on the question of his moral turpitude.

[14] Apart from this argument, plaintiff's counsel made no other submissions to impugn the finding by the full court that the parties were *in pari delicto*. Nor can I find any reason to interfere with it. I therefore proceed to deal with the second question, whether the plaintiff nevertheless has a cause of action.

[15] The fact that the matter was decided on exception has two consequences. The first is that the plaintiff is confined to the facts alleged in the particulars of claim and the further agreed facts. The second is that the defendant is required to show that on every possible interpretation that can reasonably be attached to the particulars of claim, and the further facts, no cause of action is disclosed.[6]

[16] Having decided that the parties were *in pari delicto*, the full court approached the matter on the basis that it was then incumbent upon the plaintiff to have pleaded 'further facts' to show that justice and public policy required

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[6] *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 (3) SA 960 (SCA) para 6.

the relaxation of the *par delictum* rule to prevent the defendant being unjustly enriched at his expense. It concluded that as no further facts had been pleaded, the *par delictum* rule operated against the plaintiff. This was because its operation placed the defendant in a stronger position. Consequently, so it reasoned, the plaintiff had not established a cause of action for the repayment of the money. It accordingly reversed Hartzenberg J's order.

[17] Before dealing with the facts germane to this issue, a brief explanation of the genesis and application of the *par delictum* rule is necessary. Before the now famous decision in *Jajbhay v Cassim* in 1939,[7] a party seeking to extricate himself from the consequences of an illegal or immoral contract had to demonstrate that he had come to court with clean hands. The 'clean hands doctrine' derived from English law, is similar in effect to the Roman law maxim *in pari delicto potior est conditio defendentis*, which operated as an absolute bar to the grant of relief to the plaintiff.[8] As a general rule, a plaintiff who was found to be *in pari delicto* was hence unable to recover any money paid or property handed over to a defendant pursuant to it; and if a plaintiff based his case on such a contract in formulating his pleading, he would fail on this basis alone.[9]

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[7] 1939 AD 537.
[8] *Brandt v Bergstedt* 1917 CPD 344.
[9] See Christie *The Law of Contract in South Africa* 4 ed p 459-465.

[18] In *Jajbhay v Cassim*, this court, while affirming the principle underlying the *par delictum* rule ─ that courts must discourage illegal transactions ─ nevertheless recognised that its strict enforcement may sometimes cause inequitable results between parties to an illegal contract. To prevent inequities, therefore, it thus enunciated the principle that the rule must be relaxed where it is necessary to prevent injustice or to promote public policy.[10] One such instance where the rule would be subordinated to 'the overriding consideration of public policy' was where the defendant would be unjustly enriched at the plaintiff's expense. The approach that commended itself in *Jajbhay* was that:

'…(W)here public policy is not foreseeably affected by a grant or a 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.'[11]

[19] Since *Jajbhay* courts have frequently relaxed the protection afforded to defendants by the *par delictum* rule on grounds of public policy.[12] In this matter however the full court considered itself unable to come to the plaintiff's assistance because, in its view, he had failed to plead 'further facts' to justify the relaxation of the rule. The full court's main source of authority for this

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[10] per Watermeyer JA at 550; cf Stratford CJ (with whom De Wet JA concurred) at 544 and Tindall JA at 558.
[11] Per Stratford CJ at p 545.
[12] See Christie *The Law of Contract in South Africa* 4 ed p 461 and the cases cited there.

assertion is the tentative suggestion by the learned author Christie to the effect that:

'the weight of authority seems to be that (the plaintiff) must plead facts upon which he seeks relief on the grounds of public policy or injustice',[13]

and the four cases cited by him (*Msibi v Sadheo* 1946 NPD 787; *Mamoojee v Akoo* 1947 (4) SA 733 (N) 739; *Warren and De Ville v Cacouris* 1951 (2) SA 574 (T) 577E; *Courtney-Clarke v Bassingthwaighte* 1991 (1) SA 684 (Nm) 697I-698A).

[20] *Msibi v Sadheo* was a claim for ejectment. The plaintiff, in his particulars of claim, sought the ejectment of the lessee from his property in the magistrate's court. The defendant resisted the relief claimed on the basis of the illegality of the lease. To this plea, the plaintiff filed no reply. The magistrate ruled in favour of the plaintiff. On appeal it was contended on behalf of the defendant that neither the illegality of the lease, nor the equal participation therein of the parties, nor any considerations of public policy had been put in issue in the pleadings. In upholding the plaintiff's claim for ejectment, the court did not consider the way the pleadings had been framed as an impediment to the grant of relief on the grounds of public policy. In so finding, the court said the following:

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[13] Christie (supra) p 461.

'In my view the legality of the lease and the illegal act of the parties in making it was clearly raised by the plea. By joining issue the plaintiff denied that the lease afforded any defence. He also denied that he was equally guilty with the defendant and that he, the plaintiff, was not entitled to an order of ejectment. No doubt it is the case that public policy was not specifically raised in the case. But, in fact, the defendant raised it for he must be taken to know, and so must the plaintiff, that it is not every illegal contract which necessarily entails the rigid penalty that a party to it is unable to obtain any relief whatever from the Court. The Courts will come to the rescue of one of the parties where such a course is necessary in order to prevent injustice, or to satisfy the requirements of public policy…(It was) suggested that this question of public policy should be specifically raised so that evidence could be led upon it. But public policy does not rest upon the evidence of any party. It exists as a fact just as much does air which a man breathes…(T)he magistrate was perfectly right in having regard to public policy in deciding whether or not he would make an order in favour of the plaintiff.'[14]

[21] In *Mamojee v Akoo*[15] the court explicitly left open the question whether facts must be pleaded to sustain a claim based on injustice or public policy. It found that the plaintiff had alleged sufficient facts in his declaration to support such relief. In *Warren and De Ville v Cacouris*[16], the question was not dealt with as the matter was decided on the basis that the parties were not *in pari delicto.* The relaxation of the *par delictum* rule was therefore not in issue. In

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[14] 1946 NPD 789-790.
[15] 1947 (4) SA 733 (N) at 739.
[16] 1951 (2) SA 574 (T) at 577E.

Courtney-Clarke v Bassingthwaighte[17] the plaintiff wished to enforce a contract which the court had found to be illegal and immoral *ex facie.* It did not deal with an attempt by the plaintiff to extricate himself from the consequences of an illegal or immoral contract. The relaxation of the *par delictum* rule, therefore, did not arise.

[22] These cases thus do not support the view that unless the plaintiff has specifically pleaded facts upon which he relies for the relaxation of the *par delictum* rule on grounds of injustice or public policy, the court will not assist him.[18]

[23] In *James v James' Estate,*[19] also cited by the full court in support of its view, the plaintiff sued the defendant for the refund of expenses arising from an oral agreement. The defendant pleaded the illegality of the agreement. The plaintiff then excepted to the plea on the basis that no defence was disclosed. In refusing the exception, the court held that whether the defence prevails depends

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[17] 1991 (1) SA 684 (Nm) at 697-698A-H. In this matter O'Linn J cited Christie's suggestion with approval. In an *obiter dictum*, the learned judge stated that if the court has a discretion to relax the maxim '*ex turpi causa non oritur actio*' on the grounds of public policy, the plaintiff must disclose facts in the pleadings to justify the exercise of such a discretion in his favour.

[18] The full court also cites Harms '*Amler's Precedents of Pleadings*' 6 ed p 188 where the learned author states that once the defendant has alleged and proved that the plaintiff is also *in delicto*, it is then for the plaintiff to allege and prove facts that will enable the court to come to his assistance because justice and public policy so require. Properly understood, this means that once the defendant relies on the *par delictum* rule in his plea, the plaintiff must in reply allege a factual basis before the court is able to assist him. Such a reply is obviously not necessary where the plaintiff has alleged the relevant facts in his declaration (see *Mamoojee v Akoo* cited in para [21] of the judgment).

[19] 1941 EDL 67 at 74-75, 79.

upon the evidence. It further said:

'…(T)hough the pact will not sustain an action, the Courts, in equity, may look at the results brought about by such a pact, and in the interest of public policy adjudicate between the parties according to the requirements of natural justice…'[20]

[24] From these cases it is apparent that while courts are reluctant to decide the relaxation of the *par delictum* rule on public policy grounds on exception, since the issue is invariably fact-bound, it is also evident that courts have not adopted an overly technical approach to the pleadings, choosing instead to examine the results of the agreement at the end of the trial in order to determine where the equities lie. In general, where public policy considerations do not favour either party, the *par delictum* rule will operate against the plaintiff. At exception stage, however, the *par delictum* rule will generally defeat a plaintiff's claim only in the clearest of cases.

[25] The bare facts relevant to the determination of this appeal are the following: The parties entered into a written agreement for the purchase of a business, which contemplated a contravention of the Act. *Prima facie* they were therefore *in pari delicto.* The plaintiff paid to the defendant an amount of R250 000 towards the purchase price. Six weeks later the business was returned to the

[20] *James v James' Estate* 1941 EDL 67 at 79.

defendant. The defendant, however, refused to refund the purchase price. The result was that the defendant retained both the business and the money.

[26] Faced with these facts it is difficult to understand what 'further facts' the plaintiff was required to plead to persuade the full court that the *par delictum* rule should be relaxed. The defendant was left with both the business and R250 000. The equities clearly supported a return to the status quo. There was no need, in these circumstances, for the plaintiff specifically to plead the relaxation of the *par delictum* rule on grounds of public policy, or that the defendant had been unjustly enriched. Once it had been alleged that the defendant was in possession of the business as well as the money (which at exception stage must be accepted as true), it was he, not the plaintiff, who needed to show that he had not been enriched.[21]

[27] The full court's apparent reliance on the facts of *Jajbhay* in support of its approach is also misplaced. The landlord, Jajbhay, sublet a stand to a tenant, Cassim, in contravention of the relevant regulations, making the sublease illegal. Despite the tenant having complied with all the terms and conditions of the sublease, the landlord, without giving notice to the tenant as required by the terms of the agreement, sought his eviction on the grounds of its illegality. In

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[21] *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 (3) SA 960 (SCA) para 31.

dismissing the appeal, the court said that even though the parties had entered into a forbidden agreement there were no considerations of public policy in favour of the landlord. Unlike the present matter where the equities favour the plaintiff, in *Jajbhay* the equities clearly favoured the tenant (the defendant).

[28] It follows that the full court should not have disposed of the matter on the technicalities of the pleadings. If the full court had approached the matter from the point of view of whether, on the existing facts, public policy would best be served by upholding or rejecting the plaintiff's claim, it would have concluded in favour of the plaintiff.[22] Even if it was not clear where the equities lay, because the matter was being decided 'as on exception', the defendant was required to show a clear case that the plaintiff had not disclosed a cause of action. Far from this being so, the facts demonstrate that the plaintiff had a clear cause of action.

[22] cf *Jajbhay v Cassim* 1939 AD 537 at 543.

[29] In the result I would uphold the appeal with costs. The order of the full court is accordingly set aside and is replaced with the following:

'The appeal is dismissed with costs.'

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A CACHALIA
ACTING JUDGE OF APPEAL

Concur: Mpati DP
Cameron JA
Brand JA
Nkabinde AJA