ZIMBABWE UNITED PASSENGER COMPANY
versus
JAYESH SHAH
and
GIFT INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 2, 3 November 2016 & 12 April 2017

Civil trial

T Magwaliba, for the plaintiff
1st defendant in person
L Uriri, for the 2nd defendant

TSANGA J: The plaintiff, Zimbabwe United Passenger Company, better known as ZUPCO issued summons in 2006 for the eviction of the defendants or any persons occupying the premises through them, to vacate premises known as No. 9 Hood Rd, Southerton, Harare. ZUPCO also sued for costs jointly and severally on a higher scale.

The background to the claim was that ZUPCO initially entered into a one year lease agreement with the defendants in November 2001 which lease commenced in January 2002 to the end of that year. Subsequently, on 25 November of 2003, a letter had been written by the then Chief Operating Officer as well as the then Acting Finance Controller, communicating the renewal of the lease agreement for a five year period with effect from 1 January 2004 to December 2009. This being during the Zimbabwean dollar era, rentals payable were pegged at Z$1 000 000.00 and were to be reviewed quarterly. The lease was to be renewable for a further five years on agreed terms and conditions. Endorsed in handwriting on the letter was also that the actual lease agreement would be submitted for signing. No written agreement however was ultimately ever signed.

The first and second defendants are Mr Jayesh Shah and Gift Investments (Pvt) Ltd respectively. Mr Jayesh Shah was the managing Director of Gift Investments at the relevant time.

In seeking the defendants' vacation from the premises, ZUPCO in its declaration stated that the defendants had become statutory tenants with effect from 31 December 2003, and that it now required the premises for its own use.

In the alternative, ZUPCO pleaded that the termination of the first lease, and, upon failure to reduce the new agreement into a written lease, an implied lease agreement was entered into for a period of five years with rentals reviewable quarterly. Further, they pleaded that the agreement could be terminated on three months' notice. Upon breach for failure to pay rentals, ZUPCO pleaded that it was entitled to terminate the lease agreement.

ZUPCO later amended its claim to insert a further alternative claim being that on 15 October 2003, the first defendant Jayesh Shah, had corruptly paid a bribe to the then Chairman of ZUPCO Professor Nherera, and to its then Chief Executive Officer, Mr Bright Matonga, in order to induce the renewal of the lease from 1 January 2004 to 31 December 2009. It was also averred in the amendment that ZUPCO's board was not aware of this and only became privy of this through an affidavit deposed to by Jayesh Shah indicating that he had paid US$20 000.00 at US$10 000.00 apiece to each of them for the purposes of inducing the extension of the lease. ZUPCO therefore averred that the extension of the lease was not enforceable.

The defendants refused to vacate. The essence of their plea was that there was a lease agreement communicated to them by way of a letter indicating that the terms were to be reduced to writing. The defendants further emphasised that the fact that no standard lease agreement was ultimately signed, did not mean there was no lease agreement. They denied breaching the lease and put ZUPCO to the strictest proof thereof. As regards the purported bribe, the defendants' stance was that they paid in circumstances that amounted to extortion and that ZUPCO was bound by the terms of the agreement as its then Chief Executive Officer and the then Chairperson of ZUPCO to whom the money had been paid, had been acting in their official capacity.

Whilst summons were issued in 2006, due to delays by the parties themselves the matter was finally only heard in 2015. Even then there was a break in the trial as the parties

had unsuccessfully tried to find each other. Of significance is that by the time trial was heard in 2015 the lease period in the disputed lease had long since expired and had not been renewed.

The evidence

Professor Chipo Dyanda gave evidence on behalf of ZUPCO in her capacity as the Chairperson of the ZUPCO Board at the time of the trial and having been a board member in 2002. Her evidence in chief was that the board had made a resolution in 2005 that it needed the premises for its own use due to its growing fleet. Whereas in 2002 when the premises had originally been leased they had a negligible fleet, her evidence was that by 2005 their fleet had grown such that they now needed the premises. The fleet had grown to about 100 buses at the time. This need had been communicated in writing to the defendants and notice had been given asking them to vacate by the 31 May 2005. It had also been communicated in that letter that the rentals payable were below market value and would be increased from Z$1 million a month to Z$34 million.

She further explained that its Northern Division has had to rent premises in Chitungwiza which she said would not have been necessary if they had access to their own property. Accidents were said to sometimes occur as shunters fail to manoeuvre the limited space at these other depots. About 350 buses were said to have been bought between 2011 and 2014 and some were being refurbished. The size of the fleet was described as approximately 500 buses. ZUPCO's efforts to diversify its operations include a cargo division was also highlighted to as well as its intended acquisition of new buses which will take its fleet to approximately 600.

She stated that at the very least given the resistance to leave, ZUPCO's expectation had been that the defendants would vacate once the lease expired since the lease that the defendants placed reliance on had not been renewed. She also emphasised ZUPCO's status as a state enterprise which needs to effectively discharge duties and was being hampered from doing so by the continued occupation of the premises by the defendants. In terms of the non-payment of rentals at the material time the summons were issued, what she put to the court was that the defendants had persistently at the material time refused to pay the rentals asked for and were at one time paying as little as $1.00 due to the high rate of inflation at the

time. Her evidence was whilst the finer details were operational issues, in any event ZUPCO was not seeking any backdated rentals. The reason why the defendants had refused to vacate was said to be because they had a lease agreement which was valid until 2009. She stressed that with 2009 having come and gone, whatever had been the basis for his refusal to vacate had ended. She also emphasised that ZUPCO's position in any event had been that there was no lease agreement since the purported lease had not been reduced to writing.

Mr Shah who was the managing director of Gift investments at the time the lease agreement was entered into gave evidence. He had negotiated the lease on behalf of Gift Investments. The gist of his evidence was that apart from leasing the premises from ZUPCO, Gift Investments had also been a supplier of buses and spares to ZUPCO. He said as at February 2005 it was owed a sum of Z$2 735 561 369.86 by ZUPCO from which he stated that ZUPCO could have offset its rentals since it was at that time that ZUPCO had given notice of its rental increase. The reason for the defendants' objection to the payment of increased rentals at the time was said to be because the amount represented a 3400 % increase. The defendants' preference had been that the matter be referred to the Rent Board which it said ZUPCO had not done. There were other subsequent letters are regards rental increases which he said all included increases that were exorbitant.

Mr Shah stressed that having been forced to pay the then Chairperson of ZUPCO Professor Nherera and the then CEO Mr Matonga US$20 000.00, the quest for his eviction was spurred by his subsequent refusal to pay them a further bribe of US$5 000.00 for every bus supplied by Gift Investments to ZUPCO. He said he had refused and had instead reported the matter to various arms of government.

Whilst he conceded refusing to pay the rentals that were being asked for on account of the sums being exorbitant, he stated he was never technically in arrears as claimed since defendants paid what they deemed due in the absence of the Rent Board's approval.

He also stressed that ZUPCO in fact owed it money and that spares had been ordered on its account which they were still holding in stock. These stocks held on behalf of ZUPCO were said to be well over a million dollars. He also complained of defendant's refusal to take into consideration the fact that improvements had been done to its premises and that permanent structures had been put up. A commitment was said to have been made to give him the option to purchase and it was said that investments on the premises had been made

on that ground. He maintained that the purported eviction was because of the refusal to pay the two ZUPCO officials US$5 000.00 per bus. This was despite the fact that the two officials had long since left ZUPCO. The need by ZUPCO of its own premises was denied.

Only Mr Shah gave evidence but it was very apparent from his evidence that his interests and those of Gift Investments were in fact inseparable. The second defendant who was legally represented opted to not to give evidence despite having cross examined the first defendant as if their interests were separate and having asked leading questions of the first defendant. The purpose of this cross examination appears to have been to merely enter information into the record. Not surprisingly, the plaintiff's counsel raised valid objections to the stance that had been adopted by the second defendants counsel when it became clear that the second defendant would not be giving evidence as there would be no opportunity to cross examine the second defendant. The High Court Rules, 1971 are clear on co-defendants who are represented by different legal practitioners and where their interests are the same.

> ***"443. Legal practitioner for co-defendants: cross-examination: order of addresses***
> Co-defendants may be represented by different legal practitioners. Where the interests of the defendants are the same, the case shall proceed as though the defence were joint and not separate. Where the interests of the defendants are different, the legal practitioner for each defendant shall be allowed to cross-examine plaintiff's witnesses and to address the court in such order as the court shall decide."

Of significance is that where the interests of the co-defendants are the same the rules are clear that the case shall proceed as though the defence were joint and not separate. It was very clear from Mr Shah himself that at the material time he was the managing director of Gift Investments and that he continues to have interests in this company as a major investor. At the start of the trial the defendants had indicated that they were proceeding by way of separate representation on account of Mr Shah having been a former director and having separate interests. Where interests are said to be separate the rules of the High Court, 1971 provide as follows:

> ***"444. Procedure where co-defendants are opposed in interest to each other***
> Where co-defendants are opposed in interest to each other, permission may be given to each defendant or set of defendants to open and prove their cases separately as well as to cross-examine each other's witnesses."

No such permission was sought to cross examine. The separation of Mr Shah from Gift investments at the start of the trial had been in attempt to argue that the lease agreement had not been entered into with Gift Investments, but with Mr Shah. I had dismissed this

argument in the application for absolution from the instance. See *ZUPCO* v *Jayesh Shah & Anor* HH 644/16. The cross examination of Mr Shah by the second defendant as co-defendant was therefore not proper and is disregarded in this case.

Analysis

At the close of the defendant's case the plaintiff sought an amendment of its claim to introduce the following paragraph:

> "The purported lease agreement from the period I January 2004 to 31 December 2009 has since expired while those legal proceedings were pending. The defendant has no cause for continued occupation of the disputed premises. Accordingly, the plaintiff seeks an order for their ejectment"

Mr Shah who gave evidence opposed this application on the ground that the application had not followed the rules of the court in particular r 134 (2) which states that the court or judge granting such leave shall fix the times for the defendant's entry of appearance to the new cause of action and for the filing of all subsequent pleadings. In particular, reliance was placed on the case of *ZFC Ltd* v *Taylor* 1999 (1) ZLR 308 (H) which articulates that where the other party does not consent to an amendment, then the proper procedure is to make an application either to court or to judge in chambers depending on the criteria set in r 226 which deals with court applications. The gist of his objection was that there was no affidavit in support of the amendment and that there was no draft order. It was therefore argued that the purported amendment was a nullity and the cases of *Macfoy* v *United Africa Co. Ltd* 1961 ALL ER 1169 (PC) at 11721; *Muchakata* v *Netherburn Mine* 1996 (1) ZLR 153 (S) at 157 (B) were relied on heavily for the point that a void act has no legal standing.

Mr Shah also argued that the amendment would be prejudicial to the defendants and that this could not be remedied by an order of costs. He also argued that the amendment pleaded a new cause of action which had not been pleaded in the alternative. He maintained that the amendment would further necessitate the reopening of the pleadings and the referral of the matter to another pre-trial conference.

Materially this was an amendment sought at the close of the trial. Rule 132 is the starting point as it states that pleadings can be amended at any time prior to judgment. It would of course be highly unusual if not undesirable to have to send a matter back for pre-trial where in effect all the evidence has been given. Suffice it to state that where an

amendment is sought under such circumstances when evidence has been led, it would simply be for the court to make a decision at that point whether or not to allow the amendment to conform to the evidence and to raise the unpleaded issue. I do not agree that under such circumstances so late in the day a formal application would have to be made. The overall purpose of allowing pleadings at any time prior to judgment is to facilitate a judgment on the merits. This is the fundamental basis upon which a court will exercise its discretion especially in a case such as this where evidence has been led. What is important is that the quest for amendment should not be made in bad faith. See *Lamb* v *Beazely NO* 1988 (1) ZLR 77 (H).

In this instance it is not necessary to decide on the issue of whether or not to allow the amendment at this point given Mr Shah's own very clear articulation of the circumstances that surrounded the renewal of the lease in the first instance and the gravamen of his dispute. The lease agreement as he stated, and, as supported by his affidavit which was before the court, was grounded in extortion and his agreement to pay the bribe of US$ 20 000.00 to have the lease renewed and to have ZUPCO purchase its buses from him.

There is no doubt in my mind that if these were the circumstances upon which the lease was renewed then there was no lease at all as the law does not recognise contracts that are founded on illegalities. I agree with the plaintiff's counsel that it makes absolutely no sense for the defendant to insist on holding on to a lease that was clearly obtained in violation of the law. Mr *Magwaliba* relied on the case of *Dumbura* v *Mahwehwesa* 2010 (2) ZLR 62 (H) in which an agreement grounded in extortion was deemed void and unenforceable by the court.

I am also in agreement with Mr *Magwaliba* that this was a case where the defendants clearly made a decision to associate in an illegal enterprise for their own private gain. The lease agreement from 1 January 2004 to 31 December 2009 was an illegality. Therefore the fact that it has since expired is neither here nor there and as there was never a legal contract as a result of the payment of the bribe which was extorted or otherwise. There is no official who is employed to breach the law and to receive bribes and therefore it cannot be said that the then ZUPCO officials whom he paid were acting in the course of their duty.

The act of giving something of value to an official or agent in exchange for the official or agent exercising his or her authority in a manner favourable to the party giving the payment is the essence of bribery. The rule of law must be upheld in the fight against

corruption in any shape or form regardless of its manifestation such as succumbing to extortion, or paying for favours or kickbacks. Both the person asking for the bribe and the person paying for the bribe are just as guilty of illicit conduct. No public officer is ever put in place so he can ask for bribe and no business person should expect to benefit from any agreement that may have come his way after the payment of a bribe. Instead of paying, he should have raised the alarm at the time and not just be aggrieved when the next bribe was now being sought. The defendant's argument that he is a statutory tenant cannot hold. There was simply no legal contract entered into with effect from January 2004. The fact that the contract may thereafter have been enforced is neither here nor there. In any event Mr Shah was equally clear in his evidence that he refused to pay increased rentals because they were exorbitant. Yet Zimbabwe's inflation is well documented. By mid-November 2008 it is documented to have reached a staggering rate 79 600 000 000 % and the time needed for prices to double was a mere 24.7 hours.[1] The first defendant did not dispute that at one time what he was paying as rentals was the equivalent of $1.00. Whilst he would ultimately pay what ZUPCO asked for, it was well after the sum had been over taken by inflation.

However, as I have already stated, what is decisive in this case is clearly the fact that there was no legal lease to talk about by virtue of the illegal manner in which the lease had come about. It is not the business of this court to wilfully endorse an illegality. As the first defendant has himself so ably pointed out in his reliance on the case of *Macfoy*:

> "If an act is void, then it in law a nullity. It is not only bad but incurably bad. There is no need for an order of court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

The observation in the *Muchakata* case also cited by the first defendant himself is apt. It is to the effect that it does not matter when and by who the issue of invalidity is raised; nothing can depend on it. The defendants have remained on the premises by virtue of an illegal contract. ZUPCO is a public entity that has suffered from the intransigence of the defendants in seeking to benefit from an illegal contract. It is therefore necessary and

[1] See Steve H Hancke and Alex K F Kwok *On the Measurement of Zimbabwe's Hyperinflation.,* Cato Journal Vol 29 .No.2 Spring/Summer 2009 pp 353-364

convenient for this court in the public interest to declare the agreement of lease to have been a legal nullity.

Costs have been sought on a higher scale on the grounds that the defendants have been unreasonably holding on to the premises. They have been in occupation on the strength of an illegal contract since January 2004 which is a period of more than 12 years. Costs on a higher scale are in my view justified as the plaintiff has had to drag them to the court for its intervention to enforce the public interest.

Accordingly in view of the fact that the agreement of lease entered into from 1 January 2004 was an illegality.

1. The defendant or any person occupying the premises through them are ordered to vacate the premises known as No.9 Hood Road, Southerton Harare.
2. The defendant shall pay the costs of this suit jointly and severally the one paying and the other being absolved on a legal practitioner and client scale.

Magwaliba and Kwirira, plaintiff's legal practitioners
Atherstone and Cook, 2nd defendant's legal practitioners