IN THE SUPREME COURT OF NAMIBIA CASE NO. : SA 6/93

In the matter of:

L. FERRARI APPELLANT

and

W. RUCH RESPONDENT

Coram: Mahomed, C.J.; Dumbutshena, A.J.A; and Strydom, A.J.A. Heard on: 1994/04/04-05 Delivered on: 1994/10/14

JUDGMENT

MAHOMED, C.J.

The Appellant was the Defendant in an action brought in the Court a quo, by the Respondent as Plaintiff. For the sake of convenience I shall continue to refer to the Respondent in this Appeal as the Plaintiff and the Appellant as the Defendant.

It is common cause that the Plaintiff who is a Swiss National transferred from abroad in 1981 certain monies to the account of the Defendant in Windhoek. The first of these transfers was on the 18th of May 1981 and the relevant document emanating from the Plaintiff's bank in Oberburg shows that the Plaintiff was debited with an amount an amount of 185 750 Swiss Francs arising from

the payment of 100 000,00 financial Rand "to the Namibia Jannery Standard Bank, Windhoek". The second payment was made on the 11th of November 1981 and on this occasion the Plaintiff's account was debited with a sum of 142 790 Swiss Francs representing the value of 100 000,00 financial Rand on that date.

The Plaintiff contended that these payments were made as loans and that in terms of an agreement entered into between the parties, the Defendant was obliged to pay interest on these loans at the rate of 12% per annum. The Plaintiff further contended that the total amount due to him by the 31st of March 1987 was 63 3 591,05 Swiss Francs, after interest at the agreed rate had been capitalised quarterly in the interim.

The evidence of the Plaintiff was that on the 27th April 1987 the Defendant signed an acknowledgement of debt for this amount of 633 591,05 Swiss Francs and that in this acknowledgment the Defendant also undertook to pay interest in the sum of 20 000,00 Swiss Francs quarterly on the 31st March, 30th June, 30th September and 31st December 1987.

Although the Defendant did not dispute that the Plaintiff had indeed transferred to him the capital sums to which I have referred in the form of 200 000,00 Financial Rand during 1981, he disputed that these transfers were made pursuant to an agreement of loan or that any interest was payable thereon. The version of the Defendant was that these payments constituted investments which the Plaintiff had undertaken to make in a tannery business

which the Defendant was operating through a company called Namibian Tannery (Pty) Ltd ("the Company"). The Defendant contended that he had therefore issued shares in the name of the Plaintiff in this company and he denied that he had signed the acknowledgement of debt on the 27th April 1987 on which the Plaintiff relied.

After a careful and thorough analysis of all the relevant facts and the probabilities, Hannah, J., who heard the action in the High Court, rejected the evidence of the Defendant and concluded that the Defendant had indeed signed the acknowledgment of debt on the 27th April 1987 in terms of which he had acknowledged liability for an amount which included the capital amount of the loans which the Plaintiff had contended that he had made to the Defendant, as well as interest thereon which had been capitalised quarterly. The trial Court accordingly gave judgment in favour of the Plaintiff for payment of the sum of 1 221 855,09 Swiss Francs (inclusive of capital and interest up to the 1st February 1993) .

Both in the Notice of Appeal and in the Appellant's heads of argument, it was contended on behalf of the Appellant that the learned trial Judge had erred in rejecting the evidence of the Defendant and that he should have held that the capital sums admittedly paid by the Plaintiff to the Defendant were not intended as loans to the Defendant but were intended to constitute an investment in the tannery business operated by the

Company and that this investment had taken the form of an issue of shares in the Company to the Plaintiff.. This attack was, however, wisely not pressed in argument by Mr. Du Toit. who appeared for the Appellant on appeal.

The voluminous record of the trial which lasted for some 10 days, in my view, amply justifies the conclusion that the Defendant's version should be rejected.

The Plaintiff produced in evidence at least five letters which he wrote to the Defendant during the period 2nd August 1984 to 17th March 1987. The Defendant did not dispute the receipt of these letters. The consistent averment made in these letters was that the Plaintiff had made loans to the Defendant, that interest was payable on these loans, that the Defendant had continued to make promises to the Defendant to repay these loans and the interest thereon and that the Defendant had not kept his promises. These averments were quite inconsistent with the Defendant's version that the Plaintiff had made an investment in the tannery and that the monies remitted by the Plaintiff had been accounted for in the form of shares in the Company. If the version of the Defendant was true I would have thought that he would immediately have written to the Plaintiff, vigorously denying that any loans had been made to him by the Plaintiff or that he had ever promised to repay the capital sums which he had received by him or to make any interest payments thereon. The Defendant admitted, however, that he had written no such letter in reply. His attempts to explain why he did not write to the Plaintiff in this respect were rightly described by Mr. Hennincj. for the Respondent, as "irrational, self-incriminatory and pathetic".

This conduct on the part of the Defendant strongly supports the Plaintiff's evidence that during his numerous visits, to Namibi; in between these letters, the Defendant kept on renewing hi: promises to repay the loans and the interest thereon and that h< eventually signed the acknowledgment of debt dated 27th Apri! 1987 after the Plaintiff had expressed his intense frustratioi during Easter of 1987 by saying that he would not leave Namibic "without a previous receipt of an acknowledgement of debt signed".

The Defendant relied on the records of the Company to show that shares in that company were in fact issued to the Plaintiff or the 26th of June 1981 and that the Plaintiff had been appointee as a director of the company on the 26th June 1981 and had resigned on the 1st July 1984. The Plaintiff denies, however, that he ever paid for these shares or that any part of the monies he transferred from Switzerland was intended as e consideration for these shares. It may be asked why the Defendant issued these shares in the name of the Plaintiff, if the version of the Plaintiff was correct and he had not paid for these shares? The answer lies in a scheme which, on the Defendants own version, he had devised to introduce his own funds from abroad into Namibia at a substantial advantage, through *a* manipulation of regulations pertaining to financial Rands.

The operation of the scheme necessarily involved a circumventior. of the Exchange Control Regulation No. 1111 of the 1st December 1961. A Namibian resident who has or becomes entitled to a

foreign exchange abroad conceals that fact from the authorities in this Country and retains that foreign exchange in an account abroad. He then seeks to introduce that money into Namibia. He would be able to introduce substantially more Rands into the Country if he could bring it in the form of financial Rands as opposed to commercial Rands, because of the discrepancy in the rates of convertibility for the two forms of Rands. In order tc succeed in bringing his foreign money into Namibia in the form of financial Rands he requires, however, the permission of the Treasury. The Treasury would not give permission to a local resident to introduce into Namibia his own money in the form of financial Rands. The resident therefore pretends that the money is being transmitted by a non-resident from abroad in the form of an investment in a local Company. The Treasury is successfully deceived, the resident brings back his own money in the form of financial Rands and thereafter issues shares in a company controlled by him, to the foreign resident who lends his name to the scheme. Since the foreign resident is not a genuine investor he signs a share transfer form in blank and delivers it to the resident. The resident then proceeds to control those shares and enjoys the premium of the extra Rands which become available tc him through the mechanism of the financial Rand.

This, on the undisputed facts was exactly the scheme which the Defendant implemented to get some of his foreign moneys intc Namibia in the form of financial Rands. It is common cause that the Defendant had a number of bank accounts abroad and that during 1981 he used one Ernst Zysset, a Swiss National and

colleague of the Plaintiff, to transfer some of the Defendant' own funds from Switzerland to Namibia in the form of financia Rands, under the pretence that Zysset was making an investment i the company. The Treasury was deceived by this pretence an shares were subsequently issued in the company to Zysset, bu Zysset never paid for these shares and eventually the Defendan was able to retransfer those shares into his own name by havin the restrictive endorsement on the transfer of the share cancelled. The fact that the records of the company reflected . transfer of 92 shares in the name of Zysset on the 26th June 198 and a transfer of another 38 shares to him on the 19th Novembe •1981 therefore did not mean that Zysset had ever paid for thes; shares or that he was in truth the holder thereof or that he ha', ever intended to make an investment in the company. Zysset wa: simply used by the Defendant to enable the Defendant to bring hii own money back to Namibia in the form of financial Rands.

The Defendant similarly sought to use the name of the Plaintif: to transfer a further amount from his own funds abroad in th< form of 130 000 financial Rand. On the 20th January 1981 thf Defendant's wife wrote to the Plaintiff saying that the Defendan* wanted to start a tannery in Namibia and that "we would like yc to transfer to us in your name 130 000 financial Rand to Namibi. Tannery". It was clear from this letter that the Plaintiff was required to establish from Zysset what monies of the Defendan* were available abroad and that if it was not enough, thu Plaintiff should help and they would "settle up with" him. Tht Plaintiff testified that he had no intention whatever of makin.

any investment in the company and he did not do so. What if clear, however, is that an application was made in November 198f to the Reserve Bank by the company itself for the introduction o: 130 000,00 financial Rands on the basis that the Plaintiff wai introducing this money into Namibia for the purposes of acquirinc a 24% share in the tannery and after this application had beer approved, a deposit of R13 0 000 was indeed credited to the account of the company at the Standard Bank in Namibia. It was never suggested by the Defendant that the source of these funds was the Plaintiff. The transfer of shares into the name of the Plaintiff was, however, required by the terms of the officia] permission obtained to introduce these financial Rands and this would explain why the records of the company reflect the Plaintiff as a shareholder. The nominal records of the Company can therefore not assist the Defendant to prove that the Plaintiff was an investor in the tannery any more than the record of Zysset's shareholding in the company can be used to proof that Zysset was such an investor.

If the two amounts of R100 000,00 each were paid by the Plaintiff to the Defendant through a conversion from Swiss francs(on the 18th May 1981 and 11th November 1981 respectively) for ar investment in the shares of the company, how was the consideration for such shares determined? Prior to the second transfer on the 11th November 1981 the Defendant caused ar application to be lodged with the Reserve Bank in which he statec that 256 shares had been issued to the Plaintiff previously for a consideration of R178 023,00 and that another 104 shares would be

issued to him for an amount of R73 239,00 after the second application had been approved. These figures are difficult to understand. When the 256 shares had been issued, the Plaintiff had on the Defendant's version only paid R100 000,00. Why did he therefore get a credit for R178 023,00? The second payment was also going to be for 100 000,00 financial Rand. Why should the Plaintiff then only get credit for R73 239,00? The amounts for which credits are given bear no relationship to the amounts paid and would seemed to justify the inference that the exact amount of the credits was a matter of no consequence for the company or for the Defendant, because they were simply fictitious entries made to justify the introduction of the Defendant's own monies from abroad in the form of financial Rands. This inference is fortified also by the way in which the Defendant caused the shares to Zysset (wrongly referred to as "Szechenyi") to be treated. In the same letter of application to the Reserve Bank, it was said that 38 shares were to be allocated to Zysset for an amount of R26 761,00. This is also an arbitrary amount but it is perfectly explicable on the basis that Zysset was, on the facts which were common cause, only a name used by the Defendant for the purposes of bringing his own funds from abroad into Namibia at a favourable rate of exchange and that the amounts which were ostensibly credited to Zysset as a consideration for shares were quite irrelevant because in truth and in fact no shares were going to be held by Zysset for his own benefit.

The Plaintiff's explanation for the payment of the two amounts converted into R100 000,00 each, does not present any of the difficulties which are inherent in the version of the Defendant. The Plaintiff says that he was in Namibia from the 26th March

1981 to the 14th April and that during this time the Defendant approached him to find out whether he, defendant, could obtain a loan from a Swiss bank to finance the tannery because interest rates on loans which he could obtain in Namibia would cost 20% per annum whereas similar loans in Switzerland could be obtained much cheaper. The Plaintiff said that he agreed to investigate this possibility on his return to Switzerland. His enquiries were unsuccessful and he informed the Defendant that such loans were only available to Swiss nationals. It was then agreed by the parties that the Plaintiff would obtain a loan in his own name and transmit this to Defendant. Plaintiff then raised loans from a Swiss Bank in his own name which were thereafter made available to the Defendant on the basis that Defendant would pay interest at 12% per annum and that it was pursuant to this agreement that he transmitted the two amounts to which I have previously referred to the Defendant in 1981. The Plaintiff stated that this loan was made to the Defendant personally although the purpose was to enable the Defendant to finance the operations of the tannery conducted by the company.

It was contended on behalf of the Defendant that the Plaintiff's money was advanced to the company itself and in support of this suggestion it was pointed out that the transfer was made to "Namibia Jannery Standard Bank Windhoek - Namibia". The Plaintiff's explanation was that he thought at the time that "Namibia Jannery Standard Bank" was the name of the Bank and that he had mistaken the "T" in the word "Tannery" used by the Defendant's wife in the letter of the 20th January, to which I have referred, for a "J". The handwritten letter in fact supports the Plaintiff's- explanation and is fortified by the terms of the Bank's confirmation of the transfer which reads :

"Our payment to the Namibia Jannery Standard Bank Windhoek in favour of Mr. Lellio Ferrari, Windhoek".

This confirmation also supports the Plaintiff's version that he was making a loan to the Defendant personally and not an investment in the company in the form of shares.

The acknowledgement of debt in favour of the Plaintiff executed on the 27th of April 1987 in the name of the Defendant is plainly inconsistent with the version of the Defendant that the Plaintiff intended his transfers to constitute a payment for shares in the company. The Defendant was therefore compelled to contend that his signature on the document must have been forged by the Plaintiff. But the Defendant was unable to explain why, if the Plaintiff was prepared to resort to such forgery, he did not simply forge the Defendant's signature on a document purporting to set out the fact and terms of a loan with the agreed rate of interest. Such a document would have much more directly and crisply supported his version.

The date of the acknowledgement of debt, is also significant. It supports the Plaintiff's narration of broken promises made by the Defendant to repay the loans and the interest due thereon, his growing frustration with the Defendant, and his eventual insistence that he would not leave Namibia without the Defendant's commitment to such a document.

During the cross-examination of the Plaintiff, it was suggested to him that the Defendant always signed his name as "Lellio G. Ferrari". This was obviously done to suggest that the signature on the acknowledgement was forged, because it was not in that form. Other documents, subsequently proved in evidence showed clearly however, that the Defendant did not always use the same form in signing documents.

The inherent probabilities, the documentary evidence and the quality of the Plaintiff and the Defendant as witnesses were all carefully analysed by the trial judge and caused him to reject the version of the Defendant and to conclude that he did in fact sign the acknowledgement of debt relied upon by the Plaintiff in his main claim and on the basis of this finding he gave judgment against the Defendant for payment of the sum 1 221 885,09 Swiss francs (or its equivalent in Namibian currency at the time of payment) plus interest calculated from the 1st February 1983 at the rate of 12% per annum.

On the evidence and on the probabilities, the learned trial judge was in my view clearly correct in rejecting the version deposed to by the Defendant and in concluding that the two transfers of foreign currency in November 1981 made by the Plaintiff were intended as loans to be repaid v/ith interest which had beer, capitalised in the acknowledgment of debt signed by the Defendant. In my view the learned trial judge was also correct, in rejecting the plea of prescription because prescription was interrupted by the Defendant's promise to pay on each occasior. when accounts were rendered by the Plaintiff.

Mr. Du Toit who appeared for the Appellant in the appeal contended, however, that even if the findings of fact made by the trial Court against the Defendant were correct and even on the assumption that the transfers made by the Plaintiff to the Defendant were pursuant to an agreement of lending and borrowing between the parties, the Plaintiff was not entitled to any of the relief claimed by him in the action, because such an agreement was prohibited by law.

For the submission he relied on Regulations 2(1), 8(1) and 14A(1) of the Exchange Control regulations which read as follows:

> Regulation 2(1) of the Exchange Control Regulations 1961 (as amended) provides as follows:
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> "Except with permission granted by the Treasury, and in accordance with such conditions as the Treasury may impose, no person other than an authorised dealer shall buy or borrow any foreign currency or any gold from, or sell or lend any foreign currency or any gold to any person not being an authorised dealer."
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> Regulation 8(1) provides as follows:
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> "The treasury may from time to time prescribe, by notice in the Gazette or by instructions to authorised dealers, the currency or currencies or the manner in which payment may or may not be made in connection with imports or exports or other transactions involving payments between persons in the Republic and persons outside the Republic, and no person shall, except with the permission of the Treasury or an authorised dealer, and in accordance with such conditions as the Treasury or authorised dealer may impose, make or receive payment otherwise than in the currency or currencies or in the manner so prescribed."
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> Regulation 14A(1) provides as follows:
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> "No person shall, without permission granted by the Treasury or a person authorised by the Treasury and in accordance with such conditions as the Treasury or such authorised person may impose, buy, receive, acquire or sell, deliver, dispose of or otherwise deal with any financial Rand".

Regulation 22 provides as follows:

> "Any person who contravenes or fails to comply with the provisions of any of these regulations, or contravenes or fails to comply with the terms of any notice or order or direction issued or any permission or exemption granted under these regulations, or who obstructs any person in the execution of any power or function assigned to him by or under these regulations, or makes any incorrect statement or declaration made or return rendered for the purposes of these regulations (unless he proves that he did not know, and could not by the exercise of a reasonable degree of care have ascertained, that the statement was incorrect) or refuses or neglects to furnish any information which he is required to furnish under these regulations, shall be guilty of an offence and liable upon conviction to a fine not exceeding RIO 000,00 or to imprisonment for a period not exceeding 5 years or to both such fine and such imprisonment; provided that where he is convicted of any offence against any of these regulations in relation to any security, foreign currency, gold, bank note, cheque, postal order, bill, note, debt, payment or goods, the fine which may be imposed on him shall be a fine not exceeding R10 000,00 or a sum equal to the value of the security, foreign currency, gold, bank note, postal order, bill, note, debt, payment or goods, whichever shall be the greater."

At the time when the matter was argued, Mr. Du Toit was uncertain v/hether Regulation 14 (A) (1) was in existence in its present form when the relevant transactions between the Plaintiff and the Defendant took place. Counsel was then allowed to file further written argument before the Court. Both Counsel availed themselves of this opportunity. From these written arguments, it seems clear that Regulation 14(A)(1) in its present form came into existence during 19S5. It follows that the relevant transactions between the parties were not subject to Regulation 14(A)(1) in its present form.

It is necessary, however, to have regard to Regulations 8(1) and

22, in examining the evidence of Mr. Van Staden, an assistant general manager in the exchange control department of the South African Reserve Bank who was able to depose "to the practices, procedures and policies of the Reserve Bank in relation to exchange control".

According to Mr. Van Staden all financial rand transactions required prior Treasury approval. The policy of the Reserve Bank was "not to agree to any loans through the financial rand mechanism".

He confirmed that the second transfer of 100,000 financial rand by the Plaintiff was authorised by the Treasury but it was "for investment in beneficiary company on the basis indicated". The "basis indicated" was that it be invested in Defendant's company Namibian Tannery (Pty) Ltd for the acquisition of shares therein by a foreigner. It follows that the use of these financial rands as a loan to the Defendant, constituted a breach of the conditions of this authority and therefore prohibited by Regulation 8(1) which provides inter alia that in transactions involving payments between persons outside the Republic (defined to include the present territory of Namibia) and persons inside the Republic, no person shall make or receive such payments save in accordance with such conditions and prescriptions as are made by the Treasury or an authorised dealer. It also constituted a breach of Regulation 22, which makes it a criminal offence inter alia for any person who fails to comply with the provisions of the regulations or who fails to comply with the terms of any

direction issued or any permission or exemption granted under the regulations.

Mr. Van Staden also confirmed that the Treasury had authoris ed certain other transfers in financial rands to the Defendant on the same basis, but there was no authority sought by the Plaintiff to receive loans in the form of financial rands from the Plaintiff and no such application would have been granted.

It accordingly follows that both the loans which the Defendant received from the Plaintiff in the form of financial rands were prohibited by the Exchange Control Regulations.

Agreements so prohibited by law cannot therefore be enforceable by virtue of the operation of the maxim ex turpi causa non oritur actio. rJaibhav v Cassim. 1939 AD 53 7; Venter v Vosloo, 1948(1) SA 631(E); Bobrow V Meverowitz, 1947(2) SA 885(T).] As was said by Stratford, C.J., in Jaibhav's case at p. 542:

> "The maxim ex turpi causa non oritur actio is self-explanatory and requires no elucidation. It is complete and unquestioned in our Courts as in the Courts of England".

The maxim ex turpi causa non oritur actio must, however, be distinguished from the maxim .in pari delicto potior conditio defendentis. The former maxim prohibits the enforcement of illegal contracts and the latter seeks to restrict the right of the offending parties to avoid the consequence of their performance or part performance of such prohibited contracts.

The first maxim is "complete and unquestioned". But the second is clearly not and admits of exceptions to prevent manifest injustice or inequity.

The object of the maxim .in pari delicto potior conditio defendentis is clearly to discourage illegal or immoral conduct, by refusing the help of the Courts to delinquents who part with money or chattels in furtherance of prohibited agreements, but if it was never capable of relaxation, it might perpetuate immorality and cause gross injustice in some cases (eg. where a seller of a prohibited article refuses to deliver the prohibited article but still retains the purchase price which has been paid to him).

Since Jaibhav's case therefore the Courts in Southern Africa have often relaxed the strict operation of the maxim In pari delicto potior conditio defendentis in order to do "simple justice between man and man" (Petersen v Jaibhav, 1940 TPD 182; Mancheriee v Bala, 1946 WLD; Padavachev v Lebese, 1946 TPD 11; Osman v Reis. 1976(3) SA 710 (C) at 712 G - 713 A).

It is difficult and even undesirable to lay down fixed rules to define the circumstances which would permit the relaxation of the par delictum rule, but there are clearly some considerations which are relevant to such an enquiry.

(1) It is clearly relevant to enquire whether one party would unjustly be enriched at the expense of another if the rule .in pari 'delicto potior conditio defendentis is

not relaxed in a particular case. (Jaibhav's case f supra) at page 545) . This appears to be the dominant underlying motivation for the relaxation of the rule in the cases of Peterson v Jaibhav. Mancheriee v Bala. Padavachev v Lebese and Osman v Reis (supra) and in such cases as Mia v Mohideen; Bawa v Mohideen. 1942(2) PH A 28(W) and Albertvn v Kumalo, 1946 WLD 529.

On the other hand the relaxation of the rule can legitimately be resisted if it has the indirect effect of enforcing the illegal agreement. fVenter v Vosloo. 1948(1) SA 631 (E) ; Rail v Bester. 1951(3) SA 541 (T) and Essop v Abdullah, 1986(4) SA 11(C) and 1988(1) SA 424 (A).]

The fact that the plaintiff who seeks the relaxation of the rule was aware of the fact that the agreement entered into with the Defendant was prohibited by law, is not by itself a bar against his claim for recovery of monies or property which he has transferred to his adversary, pursuant to such an agreement. [Jaibhav v Cassim (supra at page 549) ; Peterson v Jaibhav, and Osman v Reis (supra) ] . The logical corollary of that proposition must be that the relative degrees of turpitude attaching to the conduct of the parties ir entering and implementing the unlawful agreement, is *e* relevant consideration in determining whether the rul should be relaxed in a particular case (Jaibhay V Cassir (supra) at page 544).

In applying these consideration to the circumstances of the present case, it is necessary to distinguish between the capital component in the Plaintiff's claim and the interest charged thereon and to examine whether the par delictum rule should be relaxed in respect of each of these two components. It is true that the acknowledgement of debt of the 27th of April 1987 in fact capitalises the interest from the preceding period but this does not detract from the fact that the interest component in the capitalised amount remains interest charged pursuant to a prohibited agreement (Schuster v Guether. 1933 SWA 19 at 25).

In my view the par delictum rule should, in the circumstances of this case, be relaxed to allow the Plaintiff to recover from the Defendant the capital sum of the transfers which he made to the Defendant in 1981. The Defendant would unjustly be enriched if the rule was not so relaxed and the Defendant retained for himself the proceeds of the loan of 185 790,00 Swiss francs and the loan of 142 790,00 Swiss francs made to him respectively on the 11th of May and the 11th of November 1981, both of which, on the evidence, he had repeatedly promised to repay to the Plaintiff on diverse occasions.

It was the Defendant who persuaded the Plaintiff to make these loans to him through the mechanism of financial Rands. It was the Defendant, who devised the illegal scheme to circumvent the Exchange Control Regulations. It was the Defendant who stood primarily to gain from this scheme, by receiving the benefits of a more favourable exchange rate. It was the Defendant who sought to win the Plaintiff's co-operation by suggesting that the scheme

was lawful. It was the Defendant, who mislead his auditors and solicited their help in motivating his applications for the procurement of financial Rands on the false representation that a foreign investor was going to invest monies in a local business. It was the Defendant who seduced the Plaintiff into his scheme by saying that the Defendant's real reason for seeking a loan from abroad was because interest rates were cheaper overseas, by appealing to his bonds of friendship with the Defendant and by his solemn undertakings that he would repay the loans with interest (and when the Plaintiff became frustrated by the broken promises of the Defendant, it was the Defendant who bought time for himself by signing an acknowledgment of debt). When the moment of truth arrived and he was sued he shamelessly denied all liability. To allow such an unscrupulous man to enrich himself by retaining the capital amount of loans made to him would manifestly be unjust.

In coming to this conclusion I have not overlooked the fact that the Plaintiff, had himself to blame to some extent for allowing the Defendant to persuade him to make the loans in the form he did. He was perfectly aware that the Defendant was making him a shareholder and a director in a Namibian company when he had not paid for the shares. It is difficult to accept that he did not connect the ostensibly gratuitous allocation of these shares to him, with the transfer of financial Rands to the defendant, and at the very least he must have suspected that the loans were part of a larger transaction which was illegal, although as a non-resident he might not have fully appreciated the proper contours of such illegality.

There is, in my view, however, a far greater degree of turpitude and unscrupulousness involved in the conduct of the Defendant and none of the criticisms I have articulated concerning the Plaintiff can justify the gross injustice which will necessarily ensue for him, if the Defendant is not directed to return the capital amount of the loans he received from the Plaintiff.

The grounds for relaxing the pari delictum rule in order to prevent injustice in this matter is certainly not less formidable than the grounds on which such relief was sanctioned in cases such as Padavachee v Lebese, (supra) where two parties had been involved in a contract for the sale of stolen property and the purchaser was allowed to sue on promissory notes given by the Defendant to refund the purchase price when it was discovered that the delivered cases of merchandise did not contain the milk which was the subject matter of the sale but bricks. The Plaintiff's right to repayment of the capital loans in this case is in principle also not distinguishable from the case of Omar v Reis (supra) in which the Plaintiff was allowed to recover from the Defendant a portion of the purchase price paid to the Defendant pursuant to a prohibited transaction and was even allowed to retain the profits from the business operated by the partnership pursuant to that transaction.

A different view appears to have been taken by the English Courts in the case of Boissevain v Weil, 1950(1) All. ER 728

(HL); 1949(1) All. ER 146 (CA). The Plaintiff Boissevain a Dutch subject had lent foreign exchange to the Defendant who was a British subject. The Defendant had agreed to repay the loan, in sterling. It was held that Regulation 2 of the Defence (Finance) Regulations of 1939, prohibited "any person" from selling or borrowing any foreign currency and that for that reason the Plaintiff could not succeed in its claim for repayment of the loan. The main argument on behalf of the Plaintiff in the Court of Appeal was that Regulation 2 did not apply to the transaction. That argument was dismissed. The alternative argument based on unjust enrichment was considered by Tucker LJ and rejected in the following passage:

> "Finally, counsel for the plaintiff contended in the alternative that, if this transaction is hit by reg. 2, none the less the plaintiff ought to be entitled to recover on the principle of unjust enrichment, and he referred to the speech of Lord Wright in the Fibrosa case (1) relying on the observations made by Lord Wright, where, in dealing with the doctrine of unjust enrichment, he said ([1942] 2 All ER 136):
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> > •The gist of the action is a debt or obligation implied or more accurately imposed by law, in much the same way as the law enforces as a debt the obligation to pay a statutory or customary impost. '
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> It must remembered that in that case Lord Wright was dealing with a contract which was lawful when made, but the performance of which had become impossible and the consideration for which had, accordingly, failed. It is said that the transaction in the present case comes within the language which as there used and that it should be applied in the present circumstances. It is to be observed that in the present action there is no claim based on fraud or tort, or any alternative claim grounded on any implied obligation imposed by law or otherwise, and if, as I think, this transaction was one forbidden by reg. 2 and binding on a British subject abroad, it would, as counsel for the defendant forcibly

> says, be a curious result if we were compelled to say that the law imposed an obligation which had been expressly prohibited by a statutory enactment to which this court is bound to give effect. I think the whole notion of a debt or obligation imposed by law, as contemplated by Lord Wright in the Fibrosa case (1), is alien to a transaction of the kind with which we are dealing, where the regulation, which has the force of law, has, in terms, prohibited the particular transaction. For those reasons, I think the alternative contention of counsel for the plaintiff fails."

In the House of Lords, Lord Simons held that the argument based on unjust enrichment had not been properly pleaded and was therefore not properly in issue. Lord Normand, Lord Morton of Henryton and Lord MacDermott were of the same view, and the majority of the Court, therefore did not find it necessary to decide the appeal on this ground. Lord Radcliffe also agreed that the pleadings did not permit a proper consideration of the argument based on unjust enrichment but he expressed some views which agreed with the approach of Tucker LJ in the Court of Appeal.

The Court in Jaibhav v Cassim (supra) was critical of some of the English cases dealing with the relief of restitution in illegal contracts and I think that it is unnecessary in dealing with this question to examine the historical evaluation of the English learning on this problem or to enquire into the theoretical foundations which support the exceptions to the pari delictum rule in English law or to define the limits of those exceptions. Whatever be the approach of English law to the problem, I am satisfied that the Courts in this Country, have followed and should continue to follow the approach articulated in Jaibhav v Cassim (supra) and that the pari delictum rule should be relaxed in appropriate cases to prevent manifest

injustice. Thus approached, the Plaintiff should in my view be allowed to recover the capital transfers he made to the Defendant in terms of the relevant agreement of loan betv/een the parties.

It does not follow from this conclusion, however, that the Plaintiff should also be entitled to recover from the Defendant the interest on that loan in accordance with the terms of the unenforceable agreement. It may well be that the Defendant will unfairly have enjoyed the free and unfair use of the capital sums of the loan if he is not compelled to pay the interest thereon, but any order requiring the Defendant to repay both the original loan as well as the interest which was agreed upon between the parties to the unenforceable contract would indirectly constitute an order enforcing all the material terms of the unenforceable contract. This is not permissible. For similar reasons the Court in Rail v Bester (supra) refused a claim for compensation made by the landlord of premises which had been beneficially occupied by the Defendant under an unlawful lease. [See also Venter v Vosloo (supra)].

No reliance needs to be placed on the terms of the unlawful contract itself, if interest on the capital amounts of the loan constituted "fruits" of the original delivery of capital, and therefore constituted a part of what the Defendant has to restore in making restitution, but such interest cannot properly be equated with "fruits." (Joubert, LAWSA Vol. 9 paragraphs 70

and 72; C. 4.7.4). Moreover there is no evidence that the Defendant ever enjoyed or still enjoys such "fruits" or what the extent of this benefit was. These facts were simply not properly ventilated in evidence. The Plaintiff cannot in these circumstances, recover any interest on the loans, without being compelled to rely on the terms of the unlawful contract with the Defendant. This is precisely what he is not allowed to rely on, in terms of the authorities.

In the result, the Plaintiff is entitled to the repayment of the capital amounts of the loan but not the interest thereon.

COSTS

It follows from this conclusion that the Plaintiff is entitled to the costs of the action in the High Court, because no tender was made by the Defendant to pay any part of the Plaintiff's claim and the Plaintiff was therefore obliged to proceed with the trial.

The Defendant has succeeded on appeal, in deleting from the award made by the Court a quo that part which pertains to interest on capital. This would ordinarily constitute sufficiently substantial success to justify an order that the costs of the appeal should be borne by the Plaintiff.

Ultimately, however, the liability for costs, must be determined by the exercise of a" judicial discretion based on the

circumstances of each case.

There are special circumstances in the present case arising from the conduct of the Defendant which justifies an order depriving him of the costs of the appeal, notwithstanding the fact that he has partially been successful on appeal.

The entire conduct of the Defendant borders on the scandalous. He unscrupulously devised a scheme for the contravention of the law, which involved the deception of his own accountant, and the perpetration of a fraud on the Exchange Control authorities. He created and maintained false records to make them consistent with this fraud. He repeated the same deceit and fraud on more than one occasion. He shamelessly broke numerous promises to repay the loans, to a friend whose friendship he cynically abused. He falsely denied the truth in his pleadings. He gave perjured evidence to support the lie that the Plaintiff had remitted the monies from abroad as an investment in a local company. And he abused the processes of Justice by keeping a busy Judge and a large number of others for 10 full days, while he persisted with that lie.

This conduct merits grave censure. I will deprive the Defendant of the costs of the appeal to show my extreme displeasure with the way in which he has behaved.

THE ORDER

What the Plaintiff is entitled to is repayment of the original loans of 185,790 Swiss francs and 142,790 Swiss francs made in November 1981, which must be satisfied in Namibia by payment of its equivalent in Namibian currency at the rate of conversion applicable at the time of payment. (Barclays Bank of Swaziland Ltd v Mavekete 1992(3) SA 425(w). It was not disputed that interest should run from the date of this judgment at the rate prescribed by law.

I accordingly make the following order:

1. The appeal is upheld and the order of the Court a quo is set aside and substituted by the following:

"(a) Judgment is entered against the Defendant for payment of the sums of 185,790 Swiss Francs and 142,790 Swiss Francs or the equivalent thereof in the currency of Namibia at the time of payment, together with interest on the said sums from the date of this judgment to the date of payment at the rate prescribed by law.

(b) The Plaintiff is directed to file with the Registrar an affidavit sworn by an authorised

dealer in foreign exchange, stating the rate of exchange between the Swiss franc and the Namibian unit of currency ruling at the time of swearing such affidavit;

2. A copy of such affidavit is to accompany any writ of execution issued in terms of Rule 45(1) of the High Court Rules, and Form 19 of the First Schedule or Form A of the Second Schedule. Subject to any further order the plaintiff is to use the rate of exchange stated in such affidavit to calculate the sum which the sheriff is directed to realise.

3. Save for one half a day's wasted costs, the Plaintiff is awarded costs of suit, including the costs of two counsel; and

4. The Plaintiff, Ernst Zysset and Charles Van Staden are declared necessary witnesses."

5. No order is made in respect of the costs of appeal.

6. The Registrar is directed to bring this judgment to the attention of the Attorney-General and the Prosecutor-General.

I. MAHOMED

CHIEF JUSTICE

I concur

E. DUMBUTSHENA

ACTING JUDGE OF THE SUPREME COURT

I concur

G.J.C. STRYDOM

ACTING JUDGE OF THE SUPREME COURT

APPELLANT'S ADVOCATES: S. du Toit, S.C. D.F. Smuts

(A. Vaatz)

RESPONDENT'S ADVOCATES: Dr. P.J. v. R. Henning, S.C. S. Vivier-Turck

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(P .F . Ko ep )