

GEORGE KAKOMA v THE STATE LOTTERIES BOARD OF ZAMBIA (1981)
Z.R. 111 (H.C.)

HIGH
SAKALA,
12TH
(1979/HP/1256)

COURT

AUGUST,

1981

J.

Flynote

Contract- Express exclusion of legal liability- Pick-a-lot ticket- Action in respect of alleged successful pick-a-lot ticket.

Headnote

The plaintiff's claim is for the sum of K30,000.00 being in respect of the prize allegedly won by him in the defendant's pick-a-lot jackpot for July week 2, 1979 on ticket number 636747. The defendant, denied liability on the ground that:

- (1) It did not own Freedomway pick-a-lot centre in Lusaka, hence it had no responsibility nor liability for the omission of the said centre.
- (2) It had not and never received the original of the plaintiff's ticket.
- (3) The award of prizes is the discretion of the defendant whose decision is final, in this case, the plaintiff's claim was rejected.
- (4) There was no legal relationship between the plaintiff and the defendant - thus no cause of action.

The questions for Termination were firstly, whether the plaintiff's, original ticket number 636747 was lodged within the designated security area at the State Lottery head office, Cairo Road, Lusaka before the draw to which it related was conducted and secondly, whether the transaction between the plaintiff and the board created a legal relationship

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Held:

- (i) The original ticket was lodged "within the designated security area" at the State Lottery Head Office, Cairo Road, Lusaka. It cannot be argued that when an original ticket is lost in the custody of the defendant then the allegation that it was not lodged within the designated security area can be sustained.
- (ii) The plaintiff bought his pick-a-lot ticket subject to the conditions and rules governing pick-a-lot draws, among them is that his holding of the ticket created no legal relationship whatsoever between him and the board. Thus even if the original ticket was received by the defendant, the plaintiff has failed to establish that he has a claim which he could enforce in court.

Cases referred to:

- (1) Dalrymple v Dalrymple (1811) 2 Hag. Con. 54.
- (2) Jones v Vernon's Pools Ltd, [1938] 2 All E.R. 626.

Legislation referred to:

Statutory Instrument No. 43 of 1975, r. 43.

State Lotteries Board of Zambia Act No. 7 of 1970, Cap. 439, s. 20 (1), (3).

For the plaintiff: M. Sikatana Esq, Veritas Chambers..

For the defendant: H.H. Ndhlovu Esq, Jacques and Partners.

Judgment

SAKALA, J.: The plaintiff's claim is for the sum of K30,000.00 being in respect of the prize allegedly won by him in the defendant's pick-a-lot jackpot for July week 2, 1979 on ticket number 636747.

The pleadings which are on record are substantially the same as the oral evidence by both parties. In the circumstances I propose to review the oral evidence.

The plaintiff, PW1, a soldier by occupation, testified that during the week beginning the 2nd July, 1979 he bought a big three pick-a-lot ticket from Freedom Way pick-a-lot centre at a price of K2.00. The duplicate of that ticket was returned to him while the centre retained the original copy. On Sunday, he discovered that he had won the jackpot, the winning numbers having been 18, 11, 63 and 47 appearing in the 18th line of the duplicate copy of the ticket. On the same copy but in the 12th line the numbers 11, 18 and 47 also appeared. In this court the plaintiff identified the duplicate copy of the original ticket numbered 636747. He explained that the jackpot at that time was K30,000.00. But on his ticket the claim was supposed to be K30,250.00. He further testified that when he discovered that he had won the jackpot he went to the pick-a-lot Head Office on a Monday to make a claim. He was attended to by a Mr Daka. Mr Daka took his duplicate copy and left his office. Mr Daka later returned to his office and asked him how many tickets he had bought in that particular week. He told him that he had bought two tickets. He showed

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him the other ticket as well which he had bought at 20th Century pick-a-lot centre. After that Mr Daka told him that the original ticket was not with the pick-a-lot head office, but perhaps with the agent. Mr Daka asked him to see him the following day at 1400 hours. The following day at 1400 hours the plaintiff again saw Mr Daka. This time, Mr Daka handed him a letter stating that his ticket was not valid, but the plaintiff requested Mr Daka to see the Director. He was instead taken to see an Assistant Director to whom he explained about his problem. The Assistant Director told him that there was nothing that he could do. The plaintiff then proceeded to see the owner of the Freedom Way pick-a-lot centre. In company with the owner he returned to the pick-a-lot Head Office. The owner of Freedom Way pick-a-lot centre entered Mr Daka's office while the plaintiff remained in the corridor. When the owner of the Freedom Way pick-a-lot centre came out of the office of Mr Daka he told him that there was nothing he could also do. The plaintiff told the court that he is now claiming K30,250.00. In cross-examination he testified that he had been a punter in pick-a-lot since 1976. He knew the rules and notes on the ticket. He stated that Mr Daka informed him that his ticket could not be entertained because they did not have the original ticket. The plaintiff further stated in cross-examination that he knew the conditions of pick-a-lot, but the agent told him that he

had forwarded everything on a Saturday morning.

PW2, a businessman, testified that he is the owner of the Freedom Way shop. He is also a pick-a-lot agent of State Lotteries Board of Zambia. He explained that the lot is closed at 1800 hours every Friday. After closure, on Saturdays, the money and tickets are handed to the Head Office of the State Lottery Board of Zambia. He explained that the till roll is printed with the tickets serial numbers. The amount collected is also handed to the State Lottery. He recognised the plaintiff whom he said he had met on a Thursday the very week he claimed to have won the jackpot. He made enquiries about his claim at the State Lottery Head Office. In this connection he saw Mr Daka. The plaintiff showed him a photostat copy of the duplicate ticket which he claimed to have won. PW2 further told the court that he could identify a ticket that has gone through his machine, since the machine has a serial number which is printed on the ticket. On being shown the duplicate ticket he explained that he was able to see a faint serial number of the machine which was 24. He further told the court that when he went to enquire at the State Lottery; he did not check the till roll or the tickets, but explained that on the till roll there would be an amount of money collected, machine number and the till number. He said the till roll contained information from various tickets identified by each ticket number. He further explained that at the end of Friday ticket sales at 1800 hours, the roll is cut from the machine and a fresh one is put in for the next day. The machine contains the reading of the till collection but on that day he did not check the takings against the till roll as they are taken straight to the State Lottery Office. At the Head Office the tickets as well as the till roll are handed over. He is never present when they are checked. He explained that during the 2nd week of July, 1979, he had three cashiers whose

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signatures he could recognise on the tickets. On being shown the duplicate ticket document 1 he said although he could see the signature he was not sure, but it must have been one of the lady cashiers by the name of Miriam Hangandu. He did not find out from her about the signature. The witness also informed the court that the commission for the sale of the tickets is deducted before tickets are handed over to the State Lottery Office.

In cross-examination the witness testified that he was appointed as an agent of Zambia State Lottery by letter. He does not do the selling of the tickets personally apart from occasions when the staff are not there. He did not sell the tickets on the day in issue. He explained that he checks the amount of money collected against the till roll but not against the tickets. He further informed the court that if the original ticket has been removed he is usually informed by the State Lottery, that a particular ticket has not been received. If, however, there is a shortage of money he then checks each ticket and if there is still a shortage, he makes a record and the money is deducted at the end of the month. He stated, that in the event of a ticket having been removed the State Lottery usually informs him by Saturday at 1000 hours or 1100 hours. He testified that it is not possible for any of his cashiers to misuse the system, because the money is printed as well as the ticket; but he would not know if a cashier put a ticket in a machine with one line blank and destroyed the original. He said he knew only after a week that the original ticket of document 1 was missing. He conceded that had he checked the tickets he would have found the mistakes. He further conceded that it is possible for a cashier to allow a printer to leave one line blank. In re-examination he pointed out that he had not come across a situation where a ticket is handed to the State Lottery but not printed on the till roll.

PW3, a cashier at Freedom Way pick-a-lot centre, testified that in July, 1979, she was employed at the Freedom Way pick-a-lot centre as a cashier. She explained that when a punter comes to their centre with a ticket she collects the ticket and the money. The ticket is punched in the machine. Before knocking off the tickets are checked according to the numbers. At the end of the day she checks numbers on the tickets and those on the machine roll to see that they agree. Thereafter the tickets and the machine roll are put together. On Saturday they are sent to the Head Office. At times they are sent through their boss and at times they are collected by the officials from the pick-a-lot office. She explained that their boss, Mr Nayee checks the till roll and the money. The tickets received are signed by them. She stated that she could recognise her signature on any ticket she signed. When shown document No. 1 she explained that she had seen the ticket before at her working place but that she could not remember dealing with the ticket. She told the court that the machine has one till roll which is sent to the State Lottery Office. When cross-examined she said she knew the plaintiff when he came to the centre. She also explained that the till roll is checked against the tickets by her boss on Saturdays. She confirmed that the signature on the duplicate ticket is similar to hers and the

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machine used then was still the same machine being used now. The witness explained in re-examination that if some of the lines on the ticket are not filled they are crossed out to avoid them being filled in later.

DW1, the secretary/accountant of the State Lottery of Zambia, testified that he knows the plaintiff. He came to his office on a Monday after the July week 2 draw in 1979. He came to submit a claim for the jackpot for that particular week. He looked at the duplicate ticket submitted. He left to go upstairs where the ticket checking was in process. After consulting with the Auditors who carried out the Monday check, they searched for the original ticket but they did not find it. He thus got possession of the duplicate ticket and gave the plaintiff a receipt. He informed him that the original ticket was nowhere to be seen and since they did not have the original the claim was thus declared void. The secretary/accountant explained that on Saturdays the agents are requested to bring the original tickets, properly bundled to the State Lotteries Head Office. The tickets are brought in with the money and the returns. The returns being a summary of the gross takings less commission. When the tickets are brought in the money is checked first against the agent's sales returns. Then the tickets are checked. The witness also told the court that when the agent brings money he has with him the money, sales returns and the tickets. The tickets are bundled out in serial numbers in the order of the till roll. The tickets are then taken upstairs immediately by the office orderlies. The sales returns and the money are taken to the cashier. Some agents bring the tickets in boxes with till rolls on top. He does not handle the checking of the money himself. He explained that after the tickets have been taken upstairs they are placed on tables where there are two people, proof reader and a proof checker. The proof reader takes the bundle of the tickets, while the proof checker takes the till roll. The proof reader calls out the ticket, while the proof checker ticks out the till roll. He stated that all the tickets brought in are accompanied by a till roll. This is the roll the proof checker ticks out when the proof reader calls the ticket. This process is known as a preliminary check which shows that a particular agent has delivered the tickets. The final check is done on a Monday by the Auditors. After the Saturday check (preliminary) the tickets are bundled up in forties and put in small boxes, each ticket representing an agent. When the tickets have been checked and bundled up,

they are put into trunks. The auditors have one key for the trunks while he, DW1 has one. He is responsible for one lock, while the auditors are responsible for the other, this is for purposes of security. After the tickets have been put in trunks the trunks are led in the hall in the State Lottery Offices which in turn is locked until Sunday when the draw takes place. On Monday a team of 70 part-time checkers sits in pairs to check the tickets for the winning numbers. This is the time when the proof of the winning comes in. The auditors supervise the whole ticket checking process. No member of staff is allowed to go into the hall on a Monday. The auditors open their lock on the trunk while he, DW1 opens the other lock. DW1 testified that when the jackpot is won, the

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auditors will inform him and he will in turn inform the Director. He explained that tickets may miss if the agent has not brought in the tickets. In this case a declaration in the form of an announcement to the public is made. This is done during the draw. He stated that in the event of a single ticket missing it may be difficult to find out that it is missing; but it will be discovered on the Monday check. He explained that the tickets are put in bundles in accordance with the serial numbers. The machine through which tickets are punched and the various agents have a revolving serial number on which basis the tickets are bundled from the respective agents. Each machine from each agent has a different identity machine number. DW1 stated that a missing ticket must be discovered on a Saturday during the preliminary check, but if not it ought to be discovered on a Monday. He also stated that the agent is responsible to ensure that the tickets collected are handed to the State Lottery Office. DW1 informed the court that during the week in question the jackpot was actually won but not by the plaintiff. The punter who won requested his name not to be disclosed.

In cross-examination DW1 explained that he was on duty on the particular Saturday following the Sunday draw in question. He stated that Freedom Way Store is one of their agents selling pick-a-lot tickets. He explained that the application to be an agent of the State Lottery is by ordinary letter. There are no standard forms for appointing individuals as agents of State Lottery. The State Lottery merely gives permission to the agent to sell State Lottery tickets and act on behalf of the punter. DW1 told the court that the appointment of an agent is done on behalf of the punters and not on behalf of the State Lottery. He explained that the State Lottery does not pay commission but that the commission is deducted at source by the agents themselves. The agent brings to the State Lottery offices the tickets and the till roll. But he is not physically involved in the receipt of tickets and rolls. There are no records made of the receipt of the tickets and the rolls and no account is made of the tickets and the rolls immediately upon receipt as they are taken straight upstairs and the money is handed by the agent to the cashier while the tickets and the rolls are taken to Room 5. The cashier only receives the amount of money given. At that time the cashier cannot tell whether she has received the correct amount for the tickets until later. The till roll and the tickets are placed on a bench in the hall without receipting them. They are thereafter collected by the proof reader and ticket checker. He told the court that he knows that the tickets were received from Freedom Way centre on a Saturday prior to the draw in question. He testified that on receipt of the complaint from the plaintiff they checked his duplicate ticket against the till roll from Freedom Way centre. The ticket number of that particular ticket appeared on the till roll from Freedom Way Centre. He stated that this was prima facie evidence that they had received the original ticket of that number from Freedom Way Centre. Upon that discovery they started looking for the original of that duplicate but they did not find it. DW1 further told the court that according to the records the official winning

numbers for July week 2 were 47 first number, 18 second number, for July week 2 were 47 first number, 18 second number,

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63 third number and 11 fourth number. He said according to the duplicate ticket for winning purposes line eighteen had the winning numbers but in a different order. He said that the order of the numbers for the purposes of winning does not matter. He further explained that line twelve on the duplicate ticket had three numbers namely, 11, 18 and 47. He said in the circumstances of the duplicate during that week, it would have been a split jackpot, that is, it would have been shared. He said the jackpot for that week was K30,000.00. He also said from the duplicate ticket in respect of line twelve, the plaintiff would have been entitled to K250.00, but in the circumstances of the missing original ticket the matter would have been referred to the agent, who is the agent of the punter informing him that the State Lottery did not receive the original ticket, this they did. The original ticket and the claim was thus nullified. DW1 also explained that in the normal circumstances they would be able to discover that a ticket is missing on a Saturday and if the ticket was there and it was the winning ticket it would have been picked by the Auditors on a Monday. At the time of the complaint lay the plaintiff on a Monday the auditors had not yet finished but they still searched for the original ticket. He said that after the tickets and the till roll and cash have been handed to State Lottery they come under the custody of the State Lottery but the tickets are not checked at the time of their being handed in by the agent until later in the day.

In re-examination the secretary/accountant testified that he knew that Freedom Way Centre was appointed as an agent, but the agency has since been terminated because a similar case arose where the ticket was put through the machine and the same ticket was never delivered to the State Lottery Office but this was discovered on a Saturday and a declaration was made on a Saturday stating that that ticket would not take part in the draw. The secretary/accountant pointed out that if it had not been discovered on a Saturday it would have taken part in the draw resulting in the same situation as in the present proceedings where the punter would have accused the State Lottery of having lost his ticket. He stated that there is another action based on that ticket, but in that case a declaration was made on Saturday and a punter claimed on Monday while the agent of Freedom Way Centre brought the ticket on Monday after the Sunday saying "this ticket was misplaced." The secretary/accountant also stated that there have been cases when mistakes of missing tickets have not been found out on a Saturday but on a Monday. He also informed the court that the reconciliation of the actual cash with the tickets is done on a Thursday.

DW2, an accountant, testified that he does some work for the State Lottery Board which involves yearly auditing, monthly and weekly auditing. He stated that the Monday checking of the tickets is organised by them. They distribute the tickets and organise the checking in which the State Lottery has nothing to do. They make up a list of the winning second dividends and the jackpot and hand them to the State Lottery. The checking are done at the State Lottery Hall and the checkers are temporary. They have identification badges. They ensure that nil handbags or anything is brought in the checking hall. During the checking

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the checkers are not allowed any telephone calls or any visitors. Only few designated State Lottery officials are allowed in the hall. The seats for the checkers are allocated at random, the tickets are kept in locked big trunks with two locks on each one and one key is kept by them while the other by the State Lottery. The tickets are distributed at random. The checkers are instructed to call out for second dividends above K100.00, immediately that ticket is collected by one of the members of auditors. The second dividend winnings are brought to the accountant in charge who checks the list, meanwhile the third dividend winnings are checked and collected by one of the members on the floor. They are not listed the first dividend which is the jackpot involves two procedures. If the checker calls for a jackpot win then the bundle is taken from her and the whole thing is checked. The Director or the Deputy Director or the secretary/accountant are immediately informed and the corresponding agent listing is made. The ticket number is checked as well as the stake and the agent. They keep a record of the ticket and pass the ticket and the whole bundle to the Director. The bundle is later passed back to them for double checking but without the winning ticket.

In the second instance if the punter has come to the State Lottery before the checking is finished they immediately check for that agent's ticket and try to locate the winning ticket. Once the first checking is done all the tickets are collected and distributed for double checking. The re-distribution is done to ensure that the checkers do not get the same tickets again. Once the double check is over the tickets are filed in individual boxes and agent numbers written on them. The second dividend winnings and third are handed to the State Lottery with the list. If on the first check the checker misses the numbers she is fined. If second dividend misses the checker is fined 10n while for the third she is fined K1.50 and for the jackpot it is a sack.

DW2 stated that during the second week of July, 1979, he was the accountant involved. During this week the jackpot was won but he did not have the details. On the same day he was approached by the plaintiff with a claim, they tried to locate the bundle, they found the bundle but did not find the original ticket.

Under cross-examination he explained that he was not sure when the tickets were received by the State Lottery, they were only there when the tickets were placed in the trunks. He confirmed that the plaintiff's complaint was received on a Monday during the checking, he looked at the list. In this particular case the number of the ticket in question appeared. He said the first time to locate the missing ticket should be from the Saturday checking when one of their members is present for the spot checking which consists of a random check of the listing done in the absence of the agent.

The foregoing was the oral evidence in the proceedings at the end of which both learned counsel filed brief written submissions to the court. In his written submissions on behalf of the plaintiff, Mr Sikatana argued that on the evidence available, Freedom Way pick-a-lot centre

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is the agent of the defendant. Thus the agent having testified that all the tickets prior to the draw and the till roll, on which it is confirmed the plaintiff's ticket number was reflected, were handed to the defendant the onus for the safety of the tickets shifted on to the defendant rendering them liable to satisfy the plaintiff's claim for the jackpot of that week in question won by him.

On behalf of the defendant Mr Ndhlovu argued that pick-a-lot is a game played according to certain rules. Relying on rules 12 (6) of Statutory Instrument No. 43 of 1975 which precludes the Director from paying a prize unless satisfied that the original ticket was lodged within the designated security area of the State Lotteries Head Office. Mr. Ndhlovu submitted that the plaintiff's claim was properly rejected since the original was not within the designated area of the defendant's offices. Mr Ndblovu also cited several rules of that Statutory Instrument and various conditions on the reverse side of the ticket in support of his contention that the defendant properly rejected the plaintiff's claim. I propose to deal with these matters later in my judgment.

A consideration of the pleadings, oral evidence and the submissions reveal that the relevant material facts are not in dispute. These are: the defendant is a Board established by an Act of Parliament. During the week beginning Monday, the 2nd July, 1979, the plaintiff bought a big three pick-a-lot ticket number 636747 at Freedom Way pick-a-lot centre in Lusaka.. The plaintiff retained the copy of the ticket. This copy bears the till number of the machine at Freedom Way pick-a-lot Centre. It is also signed. On a Saturday before that week's draw Freedom Way pick-a-lot centre handed pick-a-lot tickets, money and a till roll to State Lottery legend Office, Cairo Road, Lusaka. There was a defendant's draw for July week two, 1979. The numbers of that draw were 47 first number, 18 second number, 63 third number and 11 fourth number. According to the evidence for purposes of winning the order of the numbers does not matter so long they are in the same line. The plaintiff's duplicate ticket No. 636747 shows the following numbers in the 18th line 18, 11, 63 and 47. In the 12th line, the following numbers are seen 11, 18 and 47. According to DW1 if the claim was valid the plaintiff would have been entitled to a jackpot of K30,000 plus K250.00. Also on the same duplicate the number 19 appears in lines 3, 7 and 15. The number 11 appears also in line 7 while the number 47 also appears in line 9. On the Monday following the draw, the plaintiff went to the defendant's head office and presented his duplicate ticket number 636747 to Mr Daka, DW1, the defendant s secretary/accountant. DW1 checked for the original ticket. He did not find it although the number was reflected on the till roll of Freedom Way pick lot centre. Subsequently, the plaintiff's claim was nullified on the basis that the original was not within the defendant's designated area.

The foregoing are the basic facts not in dispute and which I hold as proved. The plaintiff's contention is that he won the jackpot of the draw of July week two. He thus claims K30,250.00 as the prize for that

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draw. The defendant according to the pleadings denies liability on the following grounds:

- (1) It does not own Freedom Way pick-a-lot centre in Lusaka hence it has no responsibility nor liability for the omission of the said centre;
- (2) It has not and never received the original of the plaintiff's ticket;
- (3) The award of prizes is the discretion of the defendant whose decision is final. In this case the plaintiff's claim was rejected;
- (4) There was no legal relationship between the plaintiff and the defendant - thus no cause of action.

Although not pleaded in the exact words of some of the conditions endorsed on the back of the pick-a-lot ticket and the provisions of Statutory Instrument No. 43 of 1975, I am clear in my mind that the defendant is seeking to avoid payment on the basis of those conditions and the provisions of the Statutory Instrument. Whether or not the conditions and the provisions of the Statutory Instrument entitle the defendant to rely on them in order to avoid payment is a matter of law of general importance which would affect many punters. A detailed examination of some of these conditions and the provisions of Statutory Instrument No. 43 of 1975 is therefore imperative.

Some of the conditions relied on by the defendant endorsed at the back of the copy ticket read:

"This ticket is sold subject to the conditions set out below and to the rules governing pick-a-lot draws as amended from time to time and as authorised by the State Lotteries Act. A copy of the rules may be obtained on request. The conduct of a lottery and everything done in connection therewith shall create no legal relationship whatsoever between the Board and any ticket holder but shall be binding only, in honour. The decision of the Board on all matters relating to this Lottery shall be final.

The award of all or any prizes shall be in the absolute discretion of the Board. Any stake monies or tickets submitted to a collector are received by him as the agent of the person so submitting. Neither the Board nor any of its officers shall be liable in respect of any fraud, forgery, mistake, neglect, misrepresentation, delay or loss relating to this Lottery whether made or committed by any such officer or collector or any other person."

The State Lotteries Board of Zambia was established by Act No. 7 of 1970 (Cap. 439) Section 20 (1) and 20 (3) of Cap. 439 read as follows:

"20 (1) The Board may, by statutory instrument, with the consent of the Minister, make rules with respect of State Lotteries and pools and, in particular, but without prejudice to the generality of the foregoing..."

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20 (3) Rules made under this section shall be binding on the Board and on every person participating in any State Lottery or pool to which such rules relate."

Pursuant to the provisions of Section 20, the Board, by Statutory Instrument No. 43 of 1975 made the pick-a-lot draw rules. Rule 12 (6) of the Instrument reads as follows:

"12 (6). No prize shall be paid unless the Director is satisfied that the original ticket was lodged within the designated security area at the State Lottery Head Office, Cairo Road, Lusaka, before the draw to which the ticket relates was conducted."

Rule 14 reads:

"14. The conduct of a lottery and everything done in connection therewith shall create no legal relationship whatsoever between the Board and any ticket holder but shall be binding only in honour."

Suffice it to mention that most of the conditions endorsed on the copy ticket are taken directly from Statutory Instrument No. 43 of 1975. In my view therefore this claim fails or succeeds depending on the interpretation I place on rules 12 (6) and 14 (which are part of the conditions endorsed on the copy ticket). This being the case, I find it unnecessary to determine the effect of the other conditions endorsed on the copy ticket. But it is significant to observe that the Statutory Instrument defines "agent" to mean any person authorised by the Board to sell pick-a-lot draw tickets and "collector" to mean any person employed by the Board to sell pick-a-lot draw tickets at specified premises (See rule 2). The argument as to whose agent is Freedom Way pick-a-lot centre, only begs the issue and confuses the question for determination. The evidence as well as the provisions of the Statutory Instrument show that an agent is authorised to sell tickets while a collector is also employed by the Board to sell tickets. Thus from the provisions of the Statutory Instrument, Freedom Way pick-a-lot centre is an agent and collector of the defendant. But even if I were wrong on this point the issues for determination do not in my view centre on whether Freedom Way pick-a-lot centre was an agent or collector of the defendant or the punter.

On behalf of the defendant, Mr. Ndhlovu contended that the plaintiffs claim must fail because he has not in terms of Rule 12 (6) of Statutory Instrument No. 43 of 1975 proved that his original ticket was lodged with the defendant's head office. On this point the facts already found proved are that the number on the copy ticket was reflected on the till roll handed to the defendant by PW2 a day before the draw in question. But a search of the defendant's premises did not reveal the presence of the original ticket. The question for determination therefore on this point is this: Was the plaintiff's original ticket No. 636747 lodged within the designated security area at the State Lottery Head Office, Cairo Road, Lusaka before the draw to which it related was conducted? This

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is a question of fact dependent on the evidence. But I must hasten to point out that there is no clear evidence on record describing a "designated security area" at the defendant's head office. According to DW1 when the tickets and the till roll are received by the defendant they are taken into room 5 where a preliminary check is carried out on a Saturday before the draw by a proof reader and a proof checker. The proof reader calls out the ticket while the proof checker ticks the till roll. At the end the tickets are put into trunks which in turn are put into the hall locked ready for the draw the next day. It is significant to observe that the tickets are taken to room 5 and the hall by the officials of the defendant long after the agent is gone. According to DW1 a missing ticket should be discovered at the preliminary check. If it is not it must be discovered on the Monday check. DW1 confirmed in his evidence that there was prima facie evidence that the original ticket bearing the same number as the copy in possession of the plaintiff was received by the defendant. This perhaps explains why in these proceedings the proof reader and the proof checker were not called as witnesses for either party. It also explains why perhaps the till roll in question is not part of the bundle of the documents and was not produced.

The Director declined to pay the plaintiff presumably because he was not satisfied that the original ticket was lodged within the designated security area of the defendant's office. Can this contention be accepted on the available evidence? It is in my view at this point in time that the evidence of the

till roll, the proof reader and the proof checker was very vital. But I think I am entitled to assume that at the preliminary check on a Saturday the proof reader read the actual original ticket and the proof checker checked the number on the till roll as read by the proof reader. This being the case I hold the view that the original ticket was lodged "within the designated security area at the State Lottery Head Office, Cairo Road, Lusaka." This was done before the draw to which the ticket related was conducted and was immediately after the defendant accepted the receipt of the money, the tickets and the till roll and took custody of the same. It cannot in my view be argued that when an original ticket is lost in the custody of the defendant then it "was not lodged within the designated security area." In the absence of any evidence to the contrary I hold that the original big three ticket No. 636747 was received by the defendant. The matter however does not depend on this finding.

The main defence for the defendant as I see it seems to be that the transaction between the plaintiff and the Board created no legal relation - ship. In other words, the defendant is relying on Rule 14 already quoted above of Statutory Instrument No. 43 of 1975. This defence raises a very important question of construction of the contract that existed between the plaintiff and the defendant. In many cases the existence of a contract is to be inferred only from the conduct of the parties. But in some cases the courts have to go beyond the immediate inferences to be drawn from words and acts. The plaintiff in the instant case told the court that he had bought pick-a-lot tickets before and

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he is familiar with the con-
ditions on the reverse side of the duplicate. The defendant relies on the conditions on the reverse side which reads:

"The conduct of a lottery and everything done in connection therewith shall create no legal relationship whatsoever between the Board and any ticket holder but shall be binding only in honour."

This is taken word for word from rule 14 of Statutory Instrument No. 43 of 1975. What then is the effect of this condition on the apparent contract between the plaintiff and the defendant? Did the parties agree not to create any legal relationship between them? The author of Cheshire and Fifoots' Law of Contract, 9th edition discusses in Chapter Three the question of Intention to Create Legal Relations. At page 102 he opens the chapter with the following paragraph:

"The question now to be discussed is whether a contract necessarily results once the court has ruled that the parties must be taken to have made an agreement and that it is supported by consideration. This conclusion is commonly denied. The law, it is said, does not proclaim the existence of a contract merely because of the presence of mutual promises. Agreements are made every day in domestic and in social life, where the parties do not intend to invoke the assistance of the courts should the engagement not be honoured. To offer a friend a meal is not to invite litigation."

The author then goes on to cite Lord Stowell in *Dalrymple v Dalrymple* (1) when he said:

"Contracts must not be the sports of an idle hour, mere matters of pleasantry and badinage, never intended by the parties to have any serious effect whatever."

The author of that book contends that in addition to the phenomena of agreement and presence of consideration a third contractual element is required - the intention of the parties to create legal relations. This view is said to be common only in England but not without challenge. I am myself inclined to accept it as a sound proposition of law otherwise the situation would be that to offer a friend a meal is to invite litigation. I see no reason why parties should not enter into agreements which they may expressly declare not to be binding in law.

In the instant case, I was not referred to any decided cases that have dealt with "honour clauses" in the contracts in which parties have expressly declared not to be bound in law. But in my brief research I have come across two decided English cases. In *Jones v Vernon's Pools Ltd.*, (2) the brief facts from the head note were that the plaintiff alleged that he had duly filled in a coupon in respect of a pool on football matches organised by the defendants, and the defendants alleged that they had never received that particular coupon. The conditions of the pool which the plaintiff admitted were well known to him, stated that it was a basic condition of the relationship between the parties that the sending in of the coupon or any transaction entered into in respect of

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the pool should not be attended by or give rise to any legal relationship, rights, duties or consequences whatsoever, or be legally enforced or the subject of litigation, but that all such arrangements, agreements and transactions should be binding in honour only. The court held that the conditions of the pool prevented the plaintiff from bringing any action to enforce payment or otherwise. There is an Editorial Note to that case which reads:

"It is settled law that there can be transactions between parties which are intended to be only gentlemen's agreements, and not to be enforceable in courts of law. Conditions attached to the pool in the present case obviously intended to oust the jurisdiction of the courts in the matter, and they are held to be effective for this purpose."

In the court of appeal case of *Appleson v H. Littlewood Ltd.*, (3) the plaintiff brought an action to recover 4,335 pounds alleged to have been due as a result of a football pool. The competition was subject to the usual rule, described as a basic condition that the transaction should not be attended by, or be legally enforceable or the subject of litigation. The defendants applied to have the statement of claim struck out as being frivolous and vexatious and an abuse of the process of the court, and as disclosing no reasonable cause of action. The court of appeal approving the decision in the *Jones* case (2) held that the condition was not contrary to public policy, and was binding according to its terms and no action could be brought in respect of the transaction. The statement of claim was struck out.

The facts of the two cases are on all fours with the case before me. Although the two authorities are not binding on this court they are certainly very persuasive. The clause relied upon in the *Jones* case (2) was couched in the following language:

"It is a basic condition of the sending in and the acceptance of this coupon that it is intended and agreed that the conduct of the pools and everything done in connection therewith and all arrangements relating thereto (whether mentioned in these rules or to be implied) and this coupon and any agreement or transaction entered into or payment made by or under it shall not be attended by or give rise to any legal relationship, rights, duties or consequences whatsoever or be legally enforceable or the subject of litigation, but all such arrangements, agreements and transactions are binding in honour only."

It may thus be said that that clause is more exhaustive than the one relied upon in the instant case. But one thing is common in both clauses namely, the transaction was never intended to create any legal relationship but binding in honour only. In both cases the plaintiffs must have fully understood that there should be no claim in respect of the trans - actions. The rationale of this conclusion seems to be well illustrated in the passage of Atkinson, J., in *Jones (2)* at page 630 when he said:

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"One can see at the impossibility of any other basis. I am told that there are a million coupons received every week-end. Just imagine what it would mean if half the people in the country could come forward and suddenly claim that they had posted and sent in a coupon which they never had, bring actions against the pool alleging that, and calling evidence to prove that they had sent in a coupon containing the list of winning teams, and if Vernons had to fight case after case to decide whether or not those coupons had been sent in and received. The business could not be carried on for a day on terms of that kind. It could only be carried on on the basis that everybody is trusting them, and taking the risk themselves of things going wrong. It seems to me that, even if the plaintiff established that this coupon was received, it was received on the basis of these rules, and that he had agreed in the clearest way that, if anything does go wrong, he is to have no legal claim. In other words, he had agreed that the money which prima facie became due to him if that coupon reached them is not to be the subject of an action of law. There is to be no legal liability to pay. He has got to trust them, and, if something goes wrong, as I say, it is his funeral, and not theirs."

For my part, I accept the principles stated in the quoted two English cases as sound law particularly when it is established that the parties entered into the transactions and accepted the conditions with their full eyes open.

Turning to the case before me, the plaintiff bought his pick-a-lot ticket number 636747 subject to the conditions and rules governing pick-a-lot draws among them is that his holding of the ticket created no legal relationship whatsoever between him and the Board but binding only in honour. Thus even if the original ticket No. 636747 was received by the defendant the plaintiff has failed to establish that he has a claim which he could enforce in court. In the circumstances, I enter judgment in favour of the defendant. This conclusion may appear to the plaintiff on the face of it to be unjust. But if one considers the business of pick-a-lot it would not be carried on for a week without the rules now governing it as most of the time the defendant would be in courts defending various claims. According to the issues raised in this case the fairest order as to costs is that each party must

bear its own costs.

Judgment for the defendant
