

ANTHON GREENBERG (1982) Z.R. 30 (H.C.)

HIGH COURT
MUMBA,
4TH
(1981/HK/515)

JUNE

COMM.
,1982

Flynote

Contract - Illegality - Contract in contravention of exchange control legislation - Whether enforceable by the courts.

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Headnote

The plaintiff had entered into an illegal contract with the defendant for the conversion of K24,000 into £8,000 sterling in contravention of the Exchange Control Act. The plaintiff paid the kwacha to the defendant but did not receive the foreign exchange as agreed. He was investigated by SITET and fined. He then sued the defendant for the return of the consideration and despite the illegality of the transaction he was granted judgment by default of appearance. And his application to the District Registrar for a *Garnishee Order Nisi* was unsuccessful.

Held:

(i) An agreement to commit a crime or perpetrate tort is illegal and will not be enforced by the courts.

Case cited:

(1) Bigos v Bousted [1951] 1 All E.R. 92

Legislation referred to:

Exchange Control Act, Cap.593.

Halsbury's Laws of England Vol. 4 para. 389, 392.

For the plaintiff: R. C. Simwanza, Nyangulu and Co.

For the Defendant: No appearance

Judgment

MUMBA, COMMISSIONER.:

On 10th November, 1981, the plaintiff sued the defendant for a sum of K24,000. On 3rd December, 1981, the plaintiff obtained judgment in default of appearance. In between, the plaintiff obtained on 11th November, 1981, an interlocutory injunction before my brother Commissioner in Ndola to restrain Figov's Auction Sales from parting with the proceeds of sale of the household goods of the defendant until the defendant had paid the plaintiff K24,000. On 12th March, 1982, the plaintiff unsuccessfully applied for a *Garnishee Order Nisi*. Not being satisfied with the ruling of the learned District Registrar, the plaintiff's advocates Messrs Nyangulu and Co., filed a notice of intention to Appeal on 19th March, 1982, and the file was passed over to me to allocate a date to hear the appeal. When I checked the papers on this file, discovered some illegality in commencing this

action by the plaintiff. I therefore caused a notice of hearing to be served on the advocates to come and be hard as to why I could not use my inherent powers of setting aside judgment and striking on the suit for illegality. Indeed Mr Simwanza informed the court, that he was constrained by the law of the country, he could no longer pursue the matter and he applied for the action to be struck out for illegality.

In his pedant, the plaintiff admitted that he entered into an illegal contract with the defendant who had told the plaintiff that he had money in the United Kingdom and that he wanted to convert some of it in kwacha £1 sterling for K3.00 in Zambian currency. The two agreed to have £8,000 converted to K24,000 in Zambian currency. The plaintiff gave K24,000 to the defendant and the defendant wrote out a cheque which

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he sent to Greece but later on gave instructions to his bankers not to cash that sterling cheque. As a result of this transaction, the plaintiff was investigated on by the Special Investigation Team for Economy and Trade (SITET) and was fined K13,512.00. This fine was paid by the plaintiff. It is for that, that he brought this action against the defendant. When I saw the affidavit in support of the application for an interlocutory injunction, I thought that this was a case where the advocates for the plaintiff as officers of the court would not mislead the court by making other subsequent applications lot alone commencing this action. There is no clearer case of abusing court process like this one. Properly advised as they were, the plaintiff's advocates must have known the principle *ex turpi causa non oritur ratio*. The plaintiff by entering into that bargain with the defendant was contravening the Exchange Control Act, Cap. 593. In other words, he had together with the defendant committed a crime against our laws of the land. *Halsbury Laws of England*, fourth edition para. 389 says:

"An Agreement to do that which is a crime or a tort, is illegal and will not be enforced by the courts." (*see the case of BIGOS v BOOSTED* [1951] 1 All E.R. p.92 Exchange Control Legislation).

This is exactly, the position in our case. The plaintiff committed a crime by exchanging our currency for the British sterling without the consent of the Minister of Finance as required by law. The agreement between the two was injurious to the public or against public good and as such this is invalidated on the grounds of public policy (*see para. 392 op cit*). The agreement was entered into for the purpose of evading the Exchange Control Act hence void *ab initio* and the plaintiff cannot reap from an illegal contract. To allow this situation to develop would be like allowing a felon to claim from the estate of his or her victim. It was in view of the background of the illegality disclosed by the plaintiff in his affidavit that I decided to intervene in this case. We are not going to allow people who contravene our laws more so, the Foreign Exchange Regulation and let them sue on their illegal contracts. That will not be condoned and using my inherent powers, I had to deal with this matter and as rightly conceded to by Mr Simwanza, the plaintiff could not sue on an illegal contract. The notice of intention to appeal is allowed and the decision by the learned District Registrar to refuse to issue a *Garnishee Order Nisi* is confirmed, the judgment obtained in default of appearance for the foregoing reasons is set aside and the action is struck out for illegality. I make no order as to costs.

Judgment set aside
