MOHAMMED S. SITOWALA AND VARIETY BUREAU DE CHANGE

SUPREME COURT
NGULUBE CJ, LEWANIKA, AG.DCJ AND CHAILA JS
13TH SEPTEMBER AND 13TH DECEMBER, 2001
(SCZ No. 15, OF 2001)

Flynote:

Headnote:

The appellant, a businessman purchased dollars from the Respondent's bureau de change. The Appellant gave the Respondents employee the sum of K24 million for the puirchase of 10,000 dollars. the employee then issued two receipts of K12 million each worth 5,000 dollars at the exchange rate prevailing at the time. An endorsement was made on the receipts that the money should be collected by the appellant the morning of the following day. The Respondent did not give the appellant the 10,000 dollars. As a result the appellant sued by commencing proceedings in the Magistrate Court to recover the K24m. The Respondent contention was that the transaction was tainted with illegality so may could not be refunded. It was contended that the transaction exceeded the limit allowed by a circular from Bank of Zambia. In the magistrate court, the appellant was successful but in the High Court the appellant was unsuccessful hence this appeal.

Held:

(i) There was no illegality, a circular only restricted and was only in report of the excess 5,000 dollars not the entrie amount.

Appeal partly allowed.

For the Appellant: Matiya Ndhlovu, of Central Chambers

For the Respondent: N. Mutuna, of NKM and Associates

Judgment

Ngulube, C.J., delivered the judgment of the Court.

Judge Chaila whose death is a grievous loss to the Court died before he could append his signature to this judgment which was to have been a unanimous decision. It may now be treated as one by the majority. On 13th September, 2001 when we heard this appeal we allowed it with costs and said we would give our reasons later. This we now do. For convenience we will continue to refer to the appellant as the plaintiff and the respondent as the defendant.

The facts of the case can be stated very briefly. The plaintiff, a businessman, was apparently in the habit of purchasing dollars from the defendants Bureau de Change. The transactions leading to the action took place on the 22nd day of March, 1999 when the plaintiff went to the defendant's bureau and gave to the defendant's employee one Mrs. Hellen Melu a sum of K24 million for the purchase of 10,000 dollars. The employee preferred to issue two receipts for K12 million each and each worth 5,000 dollars at the exchange rate then prevailing of K2,400,00 per dollar. The employee further endorsed on the receipts that the money in dollars should be collected by the plaintiff in the morning of the next day. The defendant did not refund the money to the plaintiff. As a result, the plaintiff launched proceedings in the Subordinate Court before the learned Principal Magistrate. He issued a default writ of summons to recover the K24 million which had been paid on a transaction which had wholly failed. The defendant pleaded that the transaction was tainted by illegality so that the money should not be refunded. It was the argument of the defendant that when the Cashier, Mrs. Melu, allowed the plaintiff to purchase 10,000 dollars, she allowed a purchase in excess of the

limit which she was allowed. In the circumstances, she was doing something which was prohibited. The learned trial Magistrate would have none of this holding that the employee was acting in the proper course of her employment and that, therefore, the defendant was truly and justly indebted to the plaintiff in the amount claimed. It was the opinion of the learned trial Magistrate that since what the Cashier did was within the scope of her proper employment, it was within the course of such employment and that it was immaterial whether or not the plaintiff was aware of the alleged authorized limit. The illegality claimed was based on a circular from the Bank of Zambia to all the Bureaux de Change in the country. Acting under Statutory powers of supervising the banking and financial sector, the Central Bank had issued a circular on 26th October 1998 addressed to all Chief Executive Officers of Bureaux de Change, Banks and non Bank Financial Institutions. In that circular the bank drew attention to the increasing phenomenon of money laundering activities throughout the world through bureau de change. The Central Bank Governor pointed out that the bureau de change had become a possible avenue through which money laundering transactions could pass undetected. He outlined the need to join in the worldwide efforts to combat money laundering. In addition the Governor of the Bank of Zambia pointed out the incidences of armed banditry directed at bureaux de change with the danger posed to the loves of those operating the bureau as well as the public. For these reasons – as the Governor said in the circular – the Bank was directing that bureau de change transactions with individuals or persons shall not exceed the equivalent of 5,000 dollars per transaction per day in whatever currency. The Bank directed that all transactions exceeding such amount must be transacted through a Commercial Bank which was duly registered under the relevant Act. In the background explanation in the circular the Bank of Zambia had observed that Commercial Banks at least tried to know their customers and would probably be on the look out against money laundering unlike Bureaux. That was the illegality relied upon by the defendant to resist refunding the money. As a result of the judgment granted by the Magistrates' Court, the defendant appealed to a Judge of the High Court. The learned Judge accepted the argument of the defendant that because the transaction involving 10,000 dollars was contrary to the directive of the Bank of Zambia it was illegal and accordingly the maxim ex turpi causa non oritur actio. (meaning no disgraceful matter can ground an action) would apply. The learned Judge was satisfied that although this was a mere directive under statutory powers what the plaintiff did in trying to buy 10,000 dollars at one go instead of 5,000 dollars per transaction per day was forbidden by law and therefore illegal. And for some reason which is not manifestly clear on the face of the record the learned Judge also considered that the plaintiff and the Cashier must have intended to defraud the defendant. As we say it is not clear how this could have been so since undoubtedly the plaintiff could have quite properly gone everyday and bought 5,000 dollars per transaction per day without infringing any directive at all. The finding of fraud was in fact without any support whatsoever and can be allowed to stand.

However the matter does not rest there. The invocation of the maxim ex turpi causa appears to have been misdirected. We wish to take the opportunity to reaffirm as do the learned authors of Chitty On Contracts, "General Principles", 26th Edition, in paragraph 1257 that when a contractual right is said to be unenforceable on the ground that ex turpi causa non oritur actio this is an illustration of the general principles of the law regarding the effect of illegality on the formation, performance and enforcement of a contract. In this regard sight should not be lost of the fact that the plaintiff at no time sued for the payment of 10,000 dollars which he had set out to buy. He simply sued to recover his money. We wish to draw attention to paragraph 1138 of the same Chitty On Contracts in which the position at common law is discussed. The authors observe under the subheading "Both parties aware of legally objectionable features." "Neither party can sue upon a contract if:

(a) both knew that it necessarily involved the commission of an act which, to their knowledge, is legally objectionable, that is illegal or otherwise against public policy, or

(b) both knew that the contract is intended to be performed in a manner which, to their knowledge is legally objectionable in that sense, or

(c) the purpose of the contract is legally objectionable and that purpose is shared by both parties, or

(d) both participate in performing the contract in a manner which they know to be legally objectionable."

All the foregoing is on the assumption that in fact there was an illegal transaction. The directive for the purposes of countering money laundering and robberies was addressed to the public at large so that quite clearly there can be no suggestion that the plaintiff was aware of the circular. Indeed he said so in his evidence, that he was not so aware. The parties were therefore not both aware nor did they both intend to perform something illegal. In this particular case even assuming that the plaintiff was aware of the illegality and was trying to

perform all illegal contract, the illegality would only have been in respect of the excess 5,000 dollars and not the entire amount of money. But in fact there was no occasion to assume that the appellant intended an illegal way of doing anything. It was clearly a misdirection to find that there was any question of anyone trying to defraud anyone else when the plaintiff applied to buy the dollars. We also wish to draw attention to paragraphs 1257 to 1277 of the same Chitty On contracts where they discuss among other things the question of Locus Poenitentiae if the plaintiff because the transaction is frustrated repents of it altogether he is free to recover his money. The plaintiff's title to his money is unaffected and did not result from an illegal transaction. Quite clearly he did not obtain K24 million from an illegal transaction. In the circumstances of this case therefore, it could not be said that the money became irrecoverable. The plaintiff did not need the alleged transaction in order to found his cause of action based on his clear title to the K24 million which must be paid back to him. It would have been exceedingly strange if in fact it could be properly accepted that the other party to the transaction could pocket the money and benefit from the alleged illegality.

It was for the foregoing reasons that we allowed the appeal and dismissed all arguments which sought to rely on the maxim ex turpicausa and which sought to persuade that the defendant could simply pocket the other person's money. We must point out that we have no quarrel with the cases and the authorities which were cited on the subject of illegal contracts; but in the view that we take, it is unnecessary to recite those authorities and cases because as pointed out in the quotations from Chitty those principles ought not have been upheld in this case. The costs will be taxed if not agreed.
