MEGA PAK ZIMBABWE P/L
**versus**
GLOBAL TECHNOLOGIES CENTRAL AFRICA P/L

HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE 10, 16 and 24 September 2008.

TRIAL CAUSE

*Adv Y Phillips* for plaintiff
*Mr T Mawere* for defendant.

MAKARAU JP: I am quite taken by the notion that justice is dispensed from "halls of justice". I further like the idea that these halls are sparkling clean, hence no litigant with grubby hands is allowed in. The conception of a clean hall of justice, in my view, finds further expression in the rule expressed in the maxim *ex turpi causa non oritur actio* which operates against any attempt to enforce an unlawful agreement, which rule I find to be of application in this matter.

It is my view that the conduct of the parties before me and the transaction they entered into is to all intents and purposes illegal as it violates the exchange control regulations. The approach to this court by the plaintiff, on 21 September 2007, seeking an order compelling the defendant to deliver to it a new Merceds Benz ML 280 CDI or alternatively payment of the sum of 64 994 Euros, being the reasonable cost of procuring such a motor vehicle, is in my view an attempt to enforce an illegal contract and must fail.

The material facts giving rise to this claim are largely common cause or are not seriously challenged. They are as follows:

The plaintiff, a company with limited liability and carrying on business in Harare, was desirous of procuring two luxury vehicles. It sourced these vehicles from a supplier in London, England, going by the trade name of Stenham Global Services Limited. It obtained proforma invoices for the two purchases. On the invoices, the buyer was

indicated as ZIMOCO LIMITED and the plaintiff as the consignee. It is common cause that armed with the invoices, the plaintiff approached the defendant with a request that it arranges for the payment due in terms of each invoice.

The defendant is a company whose core business is information technology. It deals in banking software. The astute may already start to wonder why the plaintiff was approaching such a company to pay for its vehicles that it had lawfully sourced from a company in London through a reputable dealer in Harare. This is where the illegality of the transaction between the parties emerges.

The defendant has acquired a name for being able to arrange for the payment of invoices to foreign suppliers. It had done so successfully for four years for an international corporation based in Harare which, presumably impressed by the ability of the defendant to source for foreign currency, referred the plaintiff to it. It had its own sources of foreign currency and had the source come through again this time, this suit would not have been filed.

The defendant did not have any offshore accounts. It did not hold any free funds anywhere. It would source its foreign currency from a third party within Zimbabwe who allegedly had these free funds. This was known to the plaintiff at the time of the transaction or ought to have been reasonably known to the plaintiff at the time.

Payment of local currency, agreed to between the parties as being sufficient to purchase the foreign currency illegally together with an agreed mark up for the defendant was deposited into the account of the defendant. The funds were transmitted to the third party who had all gone well, was supposed to wire the sum of 64 994 Euro into the account of Stenham Global Services Limited, the suppliers of the vehicles. Payment on the first invoice was made. Payment on the second invoice, involving the Mercedes Benz was not. A report was made to the police who declined to be involved, on the grounds that what the parties were engaged in was an illegal transaction.

As part of disguising the illegal transaction into something that the Board of the plaintiff would approve, the defendant wrote to the plaintiff, intentionally lying that it would use free funds to meet the value of the invoice and that the defendant would make the requisite payment to the seller of the vehicles. On the basis of this faslehood, the

request was made that the plaintiff pays the local currency equivalent, at an illegal rate of exchange, to the defendant in advance and before the defendant wired the foreign currency payment to the supplier.

After the third party had failed to come through with the foreign currency payment, the defendant used his own funds and paid to the supplier the sum of US$6 000-00. In addition, a sum of $15 trillion was transferred into the account of the plaintiff by the third party and at the instance of the defendant. It was alleged that these payments were in full and final settlement of the plaintiff's claim.

In its declaration, the plaintiff prayed for specific performance of the contract. It seeks the delivery from the defendant, of the Mercedes Benz. In the alternative, it seeks damages to place it in the position where it can procure a similar vehicle to the one the defendant allegedly failed to deliver. In essence, the plaintiff is seeking to enforce the contract between the parties. This it cannot do. *Ex turpi causa non oritur actio.*

In my view, the general principle expressed in the maxim does not permit litigants to bring their "dirty" transactions into the clean halls of justice. Justice will not soil its hands by touching such transactions. "Dirty" in this regard not only refers to immoral transactions, contracts specifically prohibited by law but also includes transactions that seek to defeat the law. (See *Myburgh v Neethling* 1948 (2) SA 515 (C) at 521) and *Mathews v Rabinowitz* 1948 (2) SA 876 (W) at 878).

This principle finds expression in the maxim whose literal translation is "no action arises from an immoral cause". The principle is meant to discourage illegality and to advance public policy. Van ZYL J in *Director of Public Prosecutions: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C) at 561 D goes further to opine that the maxim bears some resemblance to the Biblical concept of 'filthy lucre' found in 1Timothy Chapter 3 verse 3. He holds that filthy lucre is anathema to the values of human dignity, equality and freedom pertaining in an open and democratic society.

Whether the maxim is founded on principles of natural justice or the Bible, it is the settled position in our law that the maxim is part of our law. It is also absolute, admitting of no exceptions. In considering whether a claim for relief , based on an

agreement to defraud a local authority could be entertained by the court, GUBBAY JA (as he then was), had this to say in *Dube v Khumalo* 1986 (2) ZLR 103, at 109 D-F :

"There are two rules which are of general application: the first is that an illegal agreement which has not yet been performed, either in whole or in part, will never be enforced. This rule is absolute and admits no exceptions. See *Mathews v Rabinowitz* 1948 (2) SA 876 (W) at 878; *York Estates Ltd v Wareham* 1950 (1) SA 125 (SR) at 128. It is expressed in the maxim *ex turpi causa non oritur actio*. The second is expressed in another maxim in *pari delicto potior est conditio possidentis*, which may be translated as meaning "where the parties are equally in the wrong, he who is in possession will prevail." The effect of this rule is that where something has been delivered pursuant to an illegal agreement the loss lies where it falls. The objective of the rule is to discourage illegality by denying judicial assistance to persons who part with money, goods or incorporeal rights, in furtherance of an illegal transaction."

In argument, *Adv Phillips* has found little to say on the illegality of the contract. He submitted that I did not have any evidence before me on which to make a finding on the matter. With this submission I am unable to agree. The facts of this matter are largely common cause and clearly reveal the illegality. There was no agreement of sale between the parties relating to the motor vehicles. The defendant is not in the business of supplying vehicles. The payment of the local currency to the defendant was not in pursuance of an agreement of sale. It was for the defendant to source foreign currency for the plaintiff from sources other than the lawful sources and at rates other than the legally approved rates. It was clearly an illegal transaction.

Further, *Advocate Phillips* suggested that I apply the in *pari delicto* rule and order restitution in favour of the plaintiff. In this respect, he urged me to order restitution not of the local currency that the plaintiff paid over to the defendant but of the foreign currency equivalent it would have purchased on the black market.

I am confident that this submission was made with *Advocate Phillips'* tongue firmly in his cheek.

I have already made a finding above that the plaintiff is seeking to enforce the contract between the parties. It is seeking to enforce a contract that was partially performed. It would like delivery of the vehicle or enough money, in foreign currency that will enable it to purchase a similar vehicle. Were it simply seeking to extricate itself from the contract by seeking a refund of the local currency payment it made in respect of the motor vehicle yet to be delivered, there may have existed scope for me to apply the *in*

*pari delicto* rule and attempt to do justice between the parties. This is not so and cannot be so in light of the undisputed evidence that the plaintiff has to date received some money from the defendant which in local currency exceeds that which it paid over.

I am here dealing with the attempted enforcement of a contract which arises *ex turpi causa* and not an attempt to undo performance pursuant to an illegal contract. It follows that the plaintiff must be entirely non-suited.

Finally I must deal with the issue whether the plaintiff's claim was compromised by the payments made to the plaintiff after the deal to source foreign currency from a third party had soured.

In my view, the defence that the claim has been compromised falls on the same sword that killed the plaintiff's claim. If the court cannot probe into the merits of an illegal agreement by operation of the maxim *ex turpi causa*, I see no basis upon which it can determine whether the tainted agreement has been discharged by way of a compromise. In my view, once a court makes a finding that the maxim applies against the enforcement of the contract, the parties may not enter the hall of justice with their soiled agreement for the purpose of determining whether such a contract has been discharged anywhere.

In the result I make the following order:

1. The plaintiff's claim is dismissed.
2. Each party shall bear its own costs.

*Gill Godlonton & Gerrans,* plainitff's legal practitioners.
*Mawere & Sibanda*, defendant's legal practitioners.