INNSCOR AFRICA LIMITED

versus

DOLPHIN TRADING (PVT) LTD

and

FERRIS RUTSITO

and

ROBERT RUTSITO

HIGH COURT OF ZIMBABWE

GOWORA J

HARARE 18 and 20 October and 12 January 2011

T Mpofu for the plaintiff

I.E G. Musimbe for the defendants

GOWORA J: On 5 March 2009 the plaintiff herein instituted proceedings against the three defendants, jointly and severally, the one paying the others to be absolved for the payment of an amount of US$ 30 306.13, interest at the prescribed rate and costs of suit. The defendants all entered appearance to defend and filed a joint plea. In due course the matter was referred to a pre-trial conference before a judge in chambers and it was thereafter referred to trial. A joint pre-trial conference was filed by the parties which encompassed the issues for trial as well as the admissions made. When the matter was called on the date of trial, *Mr Musimbe* on behalf of the defendants indicated that he wished to raise a point *in limine*. I requested that he file the same in writing to accommodate not just the court but the plaintiff's counsel so that argument would be based on authorities by both sides. Both parties then duly filed their submissions and the trial resumed a few days thereafter.

The background to this dispute is as follows. On 6 October 2006 the plaintiff entered into an agreement with all three defendants, the main thrust of the agreement being the securing by the defendants of foreign currency for the plaintiff. On the same day the plaintiff paid an amount of Z$165 million into an account held by the defendants. The plaintiff expected to be paid the sum of

US$150 000. In breach of the agreement between the parties the defendants have paid the sum of US$119 693.87 leaving a balance of US$30 306.13 still owing. This is the amount that the plaintiff has now claimed under these proceedings.

The defendants have taken an objection *in limine* to the effect that the agreement that the plaintiff seeks to enforce is an illegal agreement as it is contrary to the provisions of s 4 (1) of the Exchange Control Regulations 1996, S.I. 109/96.

The plaintiff has, in turn, objected to the point *in limine* being taken in the manner that it was raised and in addition the stage at which it was raised. It was the submission by Mr *Mpofu* that the defendants had to lead evidence to establish that the agreement between them and the plaintiff was an illegal one, or secondly they should have raised a special plea in bar on the legality of the agreement, which he contended could only be done if the facts were common cause. He submitted that *in casu* the material facts were not common cause.

I propose to deal first with the submission that the defendants have not complied with the Rules in that they failed to raise a special plea in bar. Under r 137 a party may take a plea in bar or in abatement where the matter is one for substance which does not involve going into the merits of the case and which if allowed may dispose of the whole dispute. It becomes necessary therefore to define what a special plea is and whether or not the defendants are disentitled at this stage to raise the question of the illegality of the agreement without the need to go into the merits of the dispute. In *Brown v Vlok* 1925 AD 56 INNES CJ referred to a special plea in the following terms:

> "Now a plea in bar is one which, apart from the merits, raises some special defence, not apparent *ex facie* the declaration-for in that case it would be taken by way of exception-which either destroys or postpones the operation of the cause of action,"

Mr *Mpofu* is correct when he submits that a special plea should have been specifically pleaded as it is a rule that all defences should be pleaded together. A close scrutiny of special pleas will reveal that they all have one characteristic, that they do not raise any defence on the merits but seek to have the matter disposed of either by declining jurisdiction, the postponement of the trial or by abating the declaration.

A special plea in bar interposes a purely formal objection to the proceedings in the particular court in which the action has been instituted, either that the court presiding over the

matter lacks jurisdiction to do so or because the constitution of the court itself is such that it ought not to exercise jurisdiction. Isaacs in his book Beck's Theory of Pleadings and Practice is of the view that there are only two possible cases for the application of a special plea in bar, firstly a plea to the jurisdiction proper, and secondly, a plea that the judge should recuse himself from hearing the matter on grounds of partiality, malice or corruption.

A dilatory plea is one that discloses some ground for not proceeding with the matter; i.e. a defect or a temporary bar which would require rectification before the matter can proceed. Examples of this would be lack of capacity of a director of a company who does not have a company resolution authorizing him to act on behalf of the company, an executor to an estate who has not been given letters of administration and thus has not been properly appointed as executor to the deceased estate or an insolvent who has not been given consent by his trustee to institute court proceedings. Misjoinder is also a dilatory plea.

On the hand a plea in abatement seeks to quash the claim either in substance or in the form in which it has been brought. A plea in abatement would be a plea that the matter is prescribed or that it is *res judicata*. There exists a number of special pleas that can be raised; viz – *lis pendens*, arbitration proceedings as a pre-condition for the institution of proceedings, prescription and *res judicata*.

I have not in my research come across a reference to a plea of illegality as a special plea. Mr *Mpofu* did not point me to any authority. The submission by Mr *Musimbe* is that the question of illegality of the agreement may properly be brought before the court as an objection by way of an application. In fact the issue is a legal point which can be brought up at any time in the proceedings. In my view there was no disregard of the rules of our court by the defendants and the objection was properly brought before the court.

I turn then to the substance of the objection. The defendants contend that the plaintiff claims the payment to it of the sum of US$30 306.13 which is a balance due under an illegal transaction. They contend that the transaction between the parties was illegal and that it fell foul of the Exchange Control Regulations, 1996 S.I 109/96. The appropriate section of the regulations that the defendants base their argument on, s 4(1) is in the following terms:

Subject to subsection (3), unless permitted to do so by an exchange control authority:-

(a) No person shall, in Zimbabwe-

(i) buy any foreign currency from, or sell any foreign currency to any person other than an authorized dealer; or.

(ii) n/a

The substance of the objection taken by the defendants is that the agreement is illegal and this court should not even entertain the claim and that to do so would soil the pristine character of these courts. The contention is that this court should not soil itself by acceding to the claim by the plaintiff for the enforcement of what is clearly an illegal agreement. For this proposition Mr *Musimbe* quoted *Mega Pak Zimbabwe (Pvt) Ltd v Global Technologies Central Africa* HH 109/08 where MAKARAU JP (as she then was) stated:

> "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 Rabinowizt* 1948 (2) SA 876 (W) at 878)"

Before me the plaintiff in this matter is not claiming a refund of the Zimbabwe dollars it advanced to the defendants for the sourcing of United States dollars. The plaintiff is claiming the payment to it of the outstanding balance of the US $ 150 000 the parties had contracted for. The position taken by the plaintiff is that the defendants have an *onus* to prove that the agreement between the parties was illegal and that by objecting *in limine* without leading evidence on the alleged illegality the defendants have failed to discharge the onus that lies upon them. The plaintiff contends that *onus* of proving unlawfulness lies upon the party alleging it. (See *Hattingh & Ors v Van Kleek* 1997 (2) ZLR 240 at 245.)

In the plea filed on behalf of the defendants it had been alleged in para 2 the following:

2.1 There was never any arrangement between the second and third defendants in their personal capacities. There was however, an agreement between the plaintiff and the first defendant, wherein, the first defendant would try to source for foreign currency on behalf of the plaintiff at the rates that were prevailing on the parallel market at each given time. It should be noted that the first defendant is not an authorized foreign exchange dealer in

terms of the Reserve Bank Foreign Exchange Control Regulations, from whom the plaintiff could legally purchase foreign currency.

2.2 The first defendant would try and source foreign currency for the plaintiff on the parallel market as and when it could find the same, at the prevailing parallel market rates. There was, therefore, no fixed rate and the rate would be determined when the first defendant sourced the foreign currency. The first defendant did not guarantee that the rate would remain fixed and the same thus fluctuated upwards.

2.3 ….

2.4 …

2.5

In answer to this plea the plaintiff filed a replication in which it averred as follows:

> "Save for the admissions contained in first, second, and third defendants' plea, plaintiff denies every averment of fact and conclusion of law contained therein and joins issue thereon"

It seems to me that the defendants made an admission that the first defendant is the one who undertook to source for foreign currency on behalf of the plaintiff. It also seems apparent that the first defendant admitted that it was not an authorized foreign currency dealer and that it was not authorized to sell or purchase foreign currency. In its replication the plaintiff accepted these admissions, and went even further at the pre-trial conference to admit that the defendants were not authorized foreign currency dealers. Logic, in my view, would then demand that if the fact is admitted that the defendants were not authorized foreign currency dealers, any transactions conducted by them as such would be illegal. The defendants were specific in referring to the regulations and any admissions made by the plaintiff accepting that the defendants were not authorized could only be in relation to the foreign exchange regulations. An admission puts no point in issue but operates to eliminate the admitted fact from the issues to be tried. Its effect is to bind the party making it. In this the party making the admission being the plaintiff, it therefore stands to reason that it was bound by its admission that the defendants were not authorized foreign currency dealers.

The issues for determination at trial between the parties were captured in a joint pre-trial conference minute signed by the legal practitioners of both sides. One of the admissions made was that the defendants were not authorized foreign exchange dealers. This was an admission sought by the defendants and it stands to reason therefore that the plaintiff accepted that the defendants were not authorized foreign exchange dealers. The plaintiff also admitted that it had received US$119 693.87 from the defendants

I am unable to accept the position adopted by the plaintiff that the defendants have to prove that the plaintiff was not authorized to deal in foreign currency by the authorities or that it was not authorized to so receive the foreign exchange. I am also not convinced that the defendants would need to prove that the central bank did not give the plaintiff permission to purchase foreign currency. It was not the plaintiff purchasing foreign currency on the parallel market, it was the defendants, which of them was doing it is irrelevant for this application. If indeed the plaintiff was licensed it would not have required the services of the defendants to obtain the foreign currency for it on the parallel market. It was also never suggested by the plaintiff that it was an authorized foreign currency dealer. The admissions in the plea and the pre-trial conference minute rendered the question of the illegality of the transaction a non issue. Even assuming that the plaintiff was licensed to purchase foreign currency the transactions would still have fallen foul of the regulations in that the plaintiff was purchasing from an unlicensed dealer.

It was suggested in argument that the agreement to sell or purchase foreign currency is legal but it is the performance of the agreement that is illegal. I was referred to *Macape (Pty) Ltd v Executrix Forrester* 1991 (1) ZLR 315 (S). The dicta that the plaintiff relies on is at p 321A-C of the judgment of McNALLY JA who stated thus:

> "……..The contract to pay is lawful. Actual payment in pursuance of the contract is unlawful without permission. There is no reason why the court should not order payment subject to the condition that authority is obtained. I must make it clear that this judgment in no way inhibits the Reserve Bank in the exercise of its discretion. It is entirely for the Reserve Bank to decide whether or not to authorize payment. If it decides not to do so the payment may not be made. The contract remains lawful. Payment will then have to await a change either in the law or in the policy of the Reserve Bank."

With respect to counsel, the point that counsel missed is the distinction between the agreement to pay and the actual payment. In the Macape case the court had to consider the

meaning of ss 7(1) and 8(1)(a)(ii) of the same regulations. The court therein made a distinction between the meaning of the two sections and stated thus at 320C-E:

> "The essential point to be noted is that there is a clear difference between ss 7 and 8. The former proscribes only the payment. The latter proscribes both the payment and the underlying agreement to pay.
>
> In other words, when one is concerned with payments inside Zimbabwe it is perfectly lawful to enter into the agreement to pay. But, without authority from the Reserve Bank, the actual payment may not be made. By contrast, when dealing with payments outside Zimbabwe it is unlawful even to enter into the agreement to pay, without first obtaining the authority of the Minister, whose powers have been delegated to the Reserve Bank.
>
> This fundamental distinction between the two sections was not appreciated in the court *a quo*. It is a distinction which, to my mind, is clearly apparent on an ordinary grammatical construction of the two sections……"

In *casu*, what is at issue is not an agreement to pay foreign currency but rather that the plaintiff actually purchased foreign currency from an authorized dealer in the absence of prior authority from the Reserve Bank of Zimbabwe. Section 4 (a) (ii) proscribes the purchasing or selling of foreign currency from or to a person who is not an authorised dealer. Whether the plaintiff could have proved that it was authorized to purchase foreign currency from an authorized dealer is not the point. The point is when it purchased the foreign currency from the defendants, were the defendants authorized dealers or not. The facts, as admitted by all the parties herein, are that the defendants were not authorised dealers of foreign currency for purposes of the regulations. By virtue of the provisions of s 4 of the regulations the buying of foreign currency from the defendants is consequently illegal and accepted as such by the plaintiff.

In *International Who's Who Ltd v Bernstein Clothing (Pvt) Ltd* SC 28/99 in considering an appeal against the upholding of an application of a point *in limine* brought at the start of a trial, MUCHECHETERE JA stated:

> "At the outset I should state that I agree with Mr *Moyo*'s submission that the contract between the parties was illegal, invalid and unenforceable because it was in breach of s 8(1) of the said Regulations. The provisions of that section are peremptory. See *Abreu v Campos* 1975 (1) RLR 198, and *Swart v Smuts* 1971 (1) SA 819 at 829-830 on the interpretation of peremptory provisions. As already indicated above the appellant conceded that no authority had been obtained by the parties from the relevant authority for any payment outside Zimbabwe when the contract was entered into."

Much has been made of the plaintiff's intention to establish that it did not lack authority for the purchase of the foreign currency from the defendants. As submitted by Mr *Musimbe* there is no averment on the pleadings filed by the plaintiff that it had the requisite authority to deal in foreign currency. There is no indication in the summary of evidence that it would call a witness to confirm the existence of the authority and more tellingly it made an admission that the defendants did not have the requisite authorization to deal in foreign currency. The arguments being proffered on behalf of the plaintiff in this regard fly in the face of the statement in the plaintiff's summary of evidence. Para 6 of the same is to the following effect:

> "It was known by both parties that the Defendants were not authorized foreign currency dealers but the Defendants undertook to make sure that they would be available to the plaintiff when it desperately needed foreign currency for their business operations."

It is surprising to say the least that once the plaintiff has made such an admission it can be seen to be arguing that the transaction could have been legal. There was no attempt to qualify the admission of illegality contained in para 6 of the plaintiff's summary of evidence. In the premises I have no hesitation therefore in upholding the point *in limine*. The contract was clearly illegal and this court should not be found to soil its hands in ordering its enforcement.

In the result I find for the defendants and uphold the point *in limine*. The plaintiff's claim is dismissed. As this transaction is illegal both parties have been found wanting. Although it was the plaintiff that sought to have the contract enforced the defendants were willing partners in the illegal transaction. The defendants have not succeeded as such, it is the court that has refused to enforce their illegal agreement. In my view an award of costs would be seen to be rewarding a party who participated in an illegal transaction. In the premises neither party deserves to be awarded costs. Therefore there will be no order as to costs.

Gill, Godlonton & Gerrans, legal practitioners for the plaintiff

I.E.G Musimbe, legal practitioners for the defendants