MADINDA NDLOVU

VERSUS

HIGHLANDERS FOOTBALL CLUB

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 24 JUNE 2011 AND 30 JUNE 2011

Mr N Ndlovu for applicant
Mr Z Ncube for respondent

Summary Judgment

CHEDA J: This is an application for a summary judgment.

The historical background and genesis of this matter is that applicant [hereinafter referred to as "Madinda"] is a yesteryear international football icon, entered into an employment contract with respondent, Highlanders Football Club [hereinafter referred to as ["the club"]. The contract was signed on the 7th October 2008. One of the terms and conditions of the contract was that the club was to pay him US$5000-00 per month and US$3000-00 for the 2009 season. The club fell into financial difficulties and failed to pay him. The total amount due is US$18580-00 which amount was acknowledged to by the club's representative on the 3rd of August 2009.

Despite demand, respond has failed to honour their part of the agreement resulting in these proceedings.

At the start of this hearing, respondent raised two points in limine namely that this court has no jurisdiction to hear this application as it is a labour dispute.

The second point being that this was an illegal contract as the club and Madinda contracted to pay and be paid in foreign currency respectively without authority from the Exchange Control Authority.

Where, points in limine have been raised the court has a discretion, either to deal with the points in limine first before hearing the merits or to allow submissions to be made on merits before making such determination on the points raised in limine. In the exercise of that discretion, I, allowed arguments on merit to proceed.

With regards to the issue of jurisdiction, I have had sight of the case of *Tuso v City of Harare* HH 1/04 which was referred to me by *Mr Z Ncube* for which I am grateful. I am of the, view, that the present case is distinguishable as it deals with an acknowledgement of debt, which is, itself, a liquid document and therefore does not fall within the definition of a labour dispute as envisaged under section 89(6) of the Labour Act [Chapter 28:01]. It is my respectful view, that while it was the intention of the Legislature to oust the jurisdiction of the courts from adjudicating on matters involving labour disputes, an acknowledgement of debt even if it arises from a contract of Labour is not what the legislature intended to mean. An acknowledgment of debt is nothing but a liquid document which is covered by the rules of this court, for which an application for a summary judgment can be applied for.

The second point deals with illegality.

It is their argument that the transaction which involved the agreement to pay applicant in the United States dollars was illegal. Sections (4) and (10) of the Exchange Control Statutory Instrument 109/96 make it clear that such transaction is illegal unless authorised by the Exchange Control Authority. The parties contracted to deal in foreign currency in an unlawful manner. In other words they agreed to commit a crime. In the circumstances they are both culpable.

The general rule is that the court cannot enforce a contract whose object is to commit an illegality. The element of intention is crucial in this instance, if it is unilateral it is unenforceable at the suit of the party who is proved to have the intent to break the law at the time of the contract. If the intent was mutual the contract is not enforceable at all. This principle has been with us under the Roman Dutch and the English laws, see, *Hindley and*

Company Ltd v General Fibre Company Ltd [1940] 2KB 517 and *Hire purchasing Furnishing company v Richens* (1887) 20 QBD 387 CA.

For that reason no court will lend its support to a man who bases his cause of action upon an illegal or immoral act.

In casu the parties knew that at the time, the country was going through economic hardships and the Zimbabwean dollar was tumbling uncontrollably. From an economic point of view they felt that it was only proper for them to transact in foreign currency which was in direct contravention of the provisions of the Exchange Control Regulations.

By acting in this manner, they were no doubt mutually committing an offence. It is for that reason that applicant cannot be allowed to enforce an illegal contract.

I must add here that the parties have a long established relationship which is held, in high esteem by the nation and as such it was not necessary for this matter to have been allowed to degenerate to this level. It is clear that both parties have immensely benefitted from each other during their blissful days and as such there may be a need for them to re-visit the negotiating table and iron out their differences. This, in my view, will help resolve this matter once and for all. This is only, but my opinion.

What cannot escape this court is that, this was an illegal contract and the law as stated above is also clearly laid down in *Heyns v Heyns* 1978 RLR 324(A); York estates Ltd v Wareham 1950(1) SA 125 (SR) where Lewis ACJ , said:

> "As a general rule, a contract or agreement which is expressly prohibited by statute is illegal, null and void even when, as here, no declaration of nullity has been added by the statute."

The position is that the contract becomes a nullity and not even the principle of equity can rescue it.

The parties have made submissions on merits, but, in view of the points raised in limine, it is not necessary to proceed to determine the issue any further.

Order

The point raised is upheld and the application is dismissed accordingly.

Cheda and partners, applicant's legal practitioners
Coghlan and Welsh, respondent's legal practitioners