HB 286/16
HCA 60/15

**JOSEPH TAMBU**

**Versus**

**QUICK CASH (PVT) LTD**

IN THE HIGH COURT OF ZIMBABWE
TAKUVA & MOYO JJ
BULAWAYO 9 MAY AND 27 OCTOBER 2016

**Civil Appeal**

*M. Ndlovu* for the appellant
*F. Museta* for the respondent

**TAKUVA J:** Respondent filed a court application in the Magistrates' Court claiming payment of US$4 300,00 arising from a loan agreement between the appellant and the respondent. According to an acknowledgement of debt signed by the appellant the capital sum was US$3 800,00, while the interest was to be charged at the rate of 15% giving a "maturity value of US$4 300,00. Appellant undertook to pay the whole amount by the 29th January 2015.

As usual, the appellant failed to pay and respondent then filed the application referred to above. The respondent opposed the application on two main grounds. Firstly, it was contended that the application form was fraudulently completed. Secondly, that the agreement was illegal for failure to comply with the provisions of the Micro Finance Act (Chapter 24:29).

When the matter came up for hearing counsel for the respondent submitted from the bar without producing the requisite licence to carry out any micro finance business that "On the question of the certificate I understand that money lending certificate exist (*sic)* but one of the directors could not be found but, it does exist." This response was made pursuant to appellant's legal practitioner's submission that the contract was illegal for want of a valid licence authorising the respondent to engage in a business of money lending.

Surprisingly, the court *a quo* in its judgment totally ignored this issue. However, in its response to the grounds of appeal, the court *a quo* noted that;

"Ad para 2

The respondent is a registered money lending company."

In my view, this response by the magistrate is baffling in that no licence had been produced during the proceedings. Even the respondent's counsel conceded that the licence "could not be found". The bottom line therefore is that no licence was ever shown to the court *a quo*. That being the case, one wonders on what basis such a finding was made. Could it have been on the basis that the court *a quo* found the respondent's averments to be so credible that its mere *ipsi dixit* sufficed? Assuming this to be the case, there is still a disturbing feature, namely that the court *a quo*, as evidenced by its judgment never at all considered the issue of illegality of the contract.

Notwithstanding the above, the court *a quo* ordered the appellant to pay to the respondent an amount of US$4 370,00. The appellant was ordered to pay costs of suit on an attorney and client scale.

Aggrieved by this ruling, appellant appealed to this court on the following grounds;

"1. The court *a quo* erred at law by enforcing an agreement that was materially illegal and contrary to public policy regard being the provisions of the Money Lending Rate of Interest Act, Chapter 14:14, Consumer Contract Act Chapter 8:03.
2. The court *a quo* misdirected (sic) by granting an application when the applicant had not produced any proof that they are a registered money lender.
3. The court *a quo* erred by dealing with the matter on papers when it was clear that the applicant had not shown how the loan of US$3 800,00 (three thousand eight hundred dollars) was advanced to the appellant. How an acknowledgment of debt was signed on the date of advancing the said loan? If the court a quo accepted that the loan was US$4 750,00 …, it follows that the applicant as at October 2014 had paid US$9 737,00 (nine thousand seven hundred and thirty-seven dollars) which is a violation of the *in duplum* rule."

Respondent in opposing the appeal made the following submissions regarding the crisp issue of the illegality of the contract;

"4. Respondent is and was a registered money lender under the Micro Finance Act (Chapter 24:29) at the time of entering into agreement with appellant. Appellant did not raise the issue of the respondent being an illegal entity in the court *a quo*." (my emphasis)

I make two observations in respect of this submission. Firstly, although counsel for the respondent could have applied for the production of the licence in terms of section 31 of the High Court Act Chapter 7:06, such an application was not made and no such evidence was tendered, despite a direct plea by this court for such a document. Secondly, it is simply not true that the appellant did not raise the issue of respondent being an illegal entity before the court *a quo.* The record of proceedings shows that the issue was raised and the respondent indicated that the licence's whereabouts were known to a director who was not available at the time.

It is trite that failure to consider an issue raised by the parties amounts to a misdirection. *In casu* it is common cause that the respondent was in the business of money lending. Respondent failed to produce a valid licence authorising it to so act. The question then becomes whether it was acting outside the provisions of the law when it entered into a contract with the appellant. The answer lies in section 3 of the Money Lending and Rates of Interest Act Chapter 14:143. It states:

"Money Lenders' Licences

(1) No money lender shall carry on business as such , whether alone or in partnership or association with any other person, unless he is the holder of a valid money lender's licence taken out in his true name in respect of every address at which he carries on business as a money lender.
(2) Every money lender's licence shall –
    (a) be in prescribed form; and
    (b) unless renewed earlier, expire on the 31st December of the year in respect of which it was granted or previously renewed, as the case may be
(3) …
(4) …
(5) …
(6) …
(7) Any person who –
    (a) contravenes subsection (1) or
    (b) …

(c) …
shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment."

A money lender is defined as;

"means any person who carries on a business of money lending or who advertises or announces himself or holds himself out in any way as carrying on such business, but does not include –

(a) any person engaged in any transaction exempted by section twenty or by regulations made in terms of section twenty-two, in so far as any such transaction is concerned or
(b) any person exempted by section twenty or by regulations made in terms of section twenty-two, to the extent that he has been so exempted."

Money lenders' licence is defined as "means a licence granted to a money lender in terms of section three."

Quite clearly, the respondent is not registered in terms of the Money Lending and Rates of Interest Act Chapter 14:14. The other statute that could be relevant is the Micro Finance Act Chapter 24:30. Micro financing business is defined in section 2 as -

"means any person who carries on, or who advertises or announces himself or herself or holds himself or herself out in any way as carrying on, either or both of the following -

(a) money lending business; or
(b) credit only finance business or deposit – taking micro finance business that is not conducted for the sole or exclusive benefit of the member of that business."

Section 6 provides for the registration of a micro finance business. It states;

"6. Prohibition in relation to conduct of Micro Finance Business.

(1) No person -

(a) shall conduct any micro finance business unless he or she is registered in terms of this Act;

(b) shall be registered as a micro finance institution unless that person is a company;

(c) register as a money-lender in terms of this Act shall conduct deposit – taking micro finance business

(2) Any person who contravenes subsection (1) (a) or (c ) shall be guilty of an offence and liable to a fine not exceeding level 14 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

(3) Without derogating from subsection (2) where a person advances a loan or credit to another person in the course of micro finance business that is conducted in contravention of subsection (1) (a) –

(a) no interest shall be payable on the loan or advance; and

(b) the capital sum of the loan or advance shall not be recoverable from the borrower unless a competent court, on application by the lender, has condoned the lender's failure to comply with subsection (1).

(4) …"

*In casu,* the respondent has not provided proof that it is registered as a money lender in terms of the latter Act. Also, there is no evidence whatsoever that the respondent made an application to the court for condonation of its failure to comply with the provisions of the Act.

At common law, the general and well established principle is that anything done contrary to a direct statutory prohibition is void and of no legal effect – see *Kudakwashe Mavindidze & Anor* v *Murisi Mukonoweshuro* HC-1366-09.

Christie *Business Law in Zimbabwe*, Juta & Co Ltd 1998 at p 88 defines illegality as follows;

> "Illegality, on the other hand has nothing to do with defective consent, but affects the enforceability of contracts because some rule of law has been contravened. The rule may be statutory, or it may stem from the common law, and, each of these types of illegality needs to be examined …. At its simplest, statutory illegality occurs when the legislature expressly prohibits a contract of a certain type and declares that any such contract shall be void. See the words of LEWIS ACJ in *York Estates Ltd* v *Wareham* 1949 SR 197, 198 where he stated;
>
> "As a general rule, a contract agreement which is expressly prohibited by a statute is illegal and null and void even when, as here, no declaration of nullity has been added by the statute."

As regards enforceability, the question is whether this case calls for a relaxation of the *par delictum* rule? In *Dube* v *Khumalo* 1986 (2) ZLR 103 at 109D – F, GUBBAY JA (as he then was) underscored the point thus;

> "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 enforceable (by the courts). This rule is absolute and admits no exception. 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 potio 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. But in suitable cases the courts will relax the *par delictum* rule and order restitution to be made. They will do so in order to prevent injustice, on the basis that public policy should properly take into account the doing of simple justice between man and man".

In *Jajbhay* v *Cassim* 1939 AD 537 at 544 – 545, STRATFORD CJ stated that "in cases where public policy is not foreseeably affected by a grant or refusal of the relief claimed a court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment.

In *Hattingh & Ors* v *Van Kleek* 1997 (2) ZLR 240 (S), KORSAH JA (as he then was) held that; "where a contract is on the face of it legal but, by reason of a circumstance known to one party only, is forbidden by statute, it may not be declared illegal so as to debar the innocent party from relief; for to deprive the innocent person of his rights would be to injure the innocent, benefit the guilty and put a premium on deceit ." (my emphasis)

The real issue in this case is, and has been, the question whether the parties having entered into an agreement which is clearly in contravention of the law, the respondent should be entitled to receive assistance from the court to recover what it had paid under the illegal agreement. As the cases clearly show, the well established rule is that, where a party has paid monies pursuant to an illegal agreement, the loss lies where it falls, unless, on the facts of the particular case it is clear that an injustice would be caused thereby. In that event, and by way of exception to the rule, the court will relax the maxim and order that restitution be made.

In my view, this is not a proper case for the court to relax the *par delictum* rule. The respondent is not the right candidate which the court ought to assist to recover its losses. It is patently obvious from the proceedings in the court *a quo* and in this court that the respondent lacked condour and frankness in that notwithstanding the knowledge that its conduct was steeped in illegality, it insisted that it was duly licenced to carry on the business of a money lender. What makes that insistence reprehensible and thoroughly odious is the failure to produce the requisite licence when challenged to do so. It appears the respondent was bent on misleading both the court *a quo* and this court. Unfortunately, the court *a quo* fell for the trick and granted judgment in its favour.

For these reasons, I am not prepared to relax the *pari delicto* rule. In the result, I make the following order;

1. That the appeal be and is hereby allowed.
2. That the decision of the court a quo be and is hereby set aside.
3. That respondent pays appellant's costs of suit.

Moyo J …….. I agree

*Messrs Mlweli Ndlovu & Associates*, appellant's legal practitioners
*GN Mlotshwa & Co. Titan Law,* respondent's legal practitioners