

ADMIRE T MUSINGARAMBWI  
and  
ONWARD DEWA

HIGH COURT OF ZIMBABWE  
TSANGA J  
HARARE, 12, 13 February & 29 April 2015

### **Trial Cause**

*R. Venge*, for the plaintiff with Mr Shoko  
*T. A. Chiurayi*, for the defendant

TSANGA J: This trial action emanates from an agreement of the oral variety, in the form of ‘gentleman’s agreement’, done among ‘friends’ to ‘help’ the other out. At the heart of the dispute is the issue of compensation payable when such agreement involving payment of monies goes unfulfilled resulting in loss of business for the other party. However, what complicates the compensation claim are allegations of illegality behind the agreement in question in the initial instance that are highlighted by the defendant. This court is therefore called upon to ascertain the true facts informing the agreement so as not aid the enforcement of an illegal contract or to encourage conduct which the law clearly forbids.

#### The claim and background facts

The plaintiff is Admire Musingarambwi who claims the payment of US\$44 050-00 and ZAR9 500-00 from the defendant Onward Dewa. The amount claimed is made up as follows:

- US \$ 4 900-00 for the cost of a motor vehicle
- ZAR 9500-00 for shipment costs
- US\$ 36 400-00 for loss of business over the last two years
- US\$ 2750-00 being clearing costs paid to the defendant.

Also sought is interest at the prescribed bank rate from the date of issuance of summons to date of payment in full. In addition, the plaintiff seeks collection commission and costs of suit on an attorney and client scale.

In 2009 the plaintiff imported a motor vehicle being a Toyota Hiace vehicle from Japan. He encountered difficulties in clearing the vehicle with the Zimbabwe Revenue Authority (ZIMRA) at the Beitbridge border post. What is not disputed is that the nature of these difficulties emanated from ZIMRA's classification of the vehicle as a private vehicle which was in fact to be used for commercial purposes since it had extra seats. As a result of the classification of the vehicle in this category as opposed to it being an outright commercial vehicle, he was required to pay duty of approximately US\$4000-00. This was more duty than the plaintiff had bargained for, having expected to pay no more than US\$2800-00. As he could not pay, the vehicle had to be left at the border.

Upon returning to Harare the plaintiff approached the defendant on how to proceed since he is in the business of importing motor vehicles. The plaintiff version is that he paid the defendant a sum of US \$ 2750-00 as fees and clearance costs to help him clear the vehicle, which the defendant failed to do, hence the claim. He says he only became aware that the vehicle had been sold in 2011 although the defendant continued to insist that everything was under control. It was in August 2012 that the plaintiff precipitated these proceedings for reimbursement when it was evident that he would not be getting the vehicle back. The amount he claims is said to arise from the losses he suffered as a result of the non-delivery of the vehicle. He also says that the defendant posed as a clearing agent.

The defendant denies that he was approached as a clearing agent. His standpoint is that he was approached to facilitate the illegal removal/clearance of the vehicle from the Beitbridge port. He says at no time did he ever pose as a clearing agent and that his role in the entire saga was to connect the plaintiff to one Sibonile Mpfu, in Beitbridge, who was in fact a clearing agent based there. He says that it was the intention at all times to get Sibonile Mpfu to cause an illegal reduction in the duty that ZIMRA had levied on the motor vehicle. He says he facilitated the connection between the plaintiff and Sibonile Mpfu and that when he received the money it was passed on to Sibonile Mpfu.

His position is that since the money was paid in pursuance of an illegal action it is not claimable in light of Sibonile Mpfu's failure to deliver. He denies causing the plaintiff's loss and insists that the entire claim is baseless given that whatever ensued was premised on an illegal action. He says the action is an abuse of court process.

The issues put forward for trial were formulated thus:

1. Whether or not the defendant entered into an agreement with the plaintiff to act as a clearing agent for the clearing of the plaintiff's vehicle.
2. Whether the defendant accepted payment from the plaintiff for his services and if so whether this does not constitute a valid contract for provision of services.
3. Whether or not the defendant is liable to the plaintiff for the sum of US\$44 050-00 plus ZAR 9500-00
4. Whether or not the plaintiff's claim is tainted with illegality.

### **The evidence**

The plaintiff's evidence was that the defendant was known to him as a friend of his from having stayed in the same neighbourhood. He knew him as a car sales business man importing second hand vehicles and it was in this context that he approached him with his challenges in importing his vehicle. He added that he was advised by him that he could appeal to ZIMRA for a reduction in duty and if that failed the vehicle could also be placed in a bonded warehouse whereby it could be brought into his country and duty would be paid later after selling the vehicle or raising the requisite duty. It was his evidence that he asked the defendant to make arrangements to get the appeal through or if that failed to then use the bonded warehouse option. He said the defendant said he was in a position to assist and asked for the money, being the US\$2750-00 to facilitate the process. He confirmed that the arrangement was a verbal one. He was not given a receipt but had written down in his note book the fact that he had given the defendant the money. The plaintiff denied knowing anyone by the name of Sibonile Mpfu who was to act as the middle man in Beitbridge for this process and insisted that the agreement was strictly between him and the defendant.

His evidence was also that he had been told that two weeks would suffice to facilitate this process, a time period which was then moved to being a month before morphing into the defendant needing more and more time without a solution in sight. He stated that at all times he was given the impression that a solution was imminent. The defendant moved from Mabelreign and was not taking calls from the plaintiff. He had followed him to his office shared with one Gladman who intimated that the defendant was not being truthful and doubted whether he had anything to help his cause to get his vehicle. He also advised him that defendant had since moved offices to Chispite. He followed him there but was again met with a barrage of excuses. When he returned to Gladman with an update, the latter had

indicated that the best chance for success would be to get the vehicle into a bonded warehouse and was willing to assist. According to the plaintiff, Gladman asked for the vehicle particulars and later informed him that his “source” at Beitbridge had advised that the vehicle had already been sold. It was then that the plaintiff approached defendant to refund him for the losses indicated in the summons.

Regarding the loss of business, his evidence was that he had intended to use the vehicle as a commuter omnibus as a return on his investment. He estimated in this regard that he would have made earnings of US \$80-00 a day after meeting costs for fuel and wages for the driver. It was his standpoint that the loss of earnings came as a direct result of the vehicle not being delivered. He said he arrived at the estimated loss of earnings from others working in this business.

The defendant’s evidence was that the plaintiff approached him primarily to have the duty reduced as it was above what he expected to pay. He said the plaintiff told him he wanted someone to help him to get the car from the border at reduced costs or other means. The other means he stated referred to people who deliver for a fee. He said he told him that he knew someone in Beitbridge and said he called Sibonile Mpopfu in the plaintiff’s presence so as to get figures from him for doing the job. He said the figure of US\$ 2750-00 was what Mpopfu said he would charge. It was the defendant’s evidence that he received the money from the plaintiff in three batches and passed it on to Mpopfu in Beitbridge through Zimpost. He proved slips totalling \$1260-00 as evidence. These however were of not much use to the court as they did not indicate who the money was going to. The receipts could therefore have been for any transaction and not the one referred to by the defendant. He attributed the shortfall to missing receipts. The defendant highlighted his role as having been that of a mere middle man between the two and that he himself was not paid. He denied pursuing an option to appeal and insisted the \$2 750-00 was for paying the agent to do the clearance.

Asked why he had agreed to act as a link to a transaction which he himself said was illegal, the defendant’s response was that he had agreed to assist “as friends”. He also justified his involvement on the basis that the plaintiff was unknown to Sibonile Mpopfu although he denied that this placed him in a role of being agent. He said when he asked Mpopfu to return the money he said he could not do that as it was an illegal transaction. He stated that he had given Sibonile Mpopfu’s number to the plaintiff.

## **Factual and analysis and legal disposition**

In essence the defendant's argument is that the reduction in duty would have been by illegal means perhaps more easily understood as through act of corruption. Corruption is said to be:

“...deviant behaviour associated with a particular motivation, namely that of private gain at public expense. But whether this as the motivation or not, it is the fact that private gain was secured at public expense that matters..... The pattern of corruption may therefore be said to exist whenever a power holder who is charged with doing certain things, that is a responsible functionary of office holder is by monetary gain or other reward ...induced to take action which favour whoever provides the reward and thereby damages the other group or organisation to which the functionary belongs”<sup>1</sup>

Notably, there is no evidence of any government official having been involved in any corrupt act. Instead the car was sold. The defendant's claim that the money was remitted to Sibonile Mpofu who would have used it for the purpose of corrupt intentions in having the duty reduced is also not supported by any evidence since the receipts that the defendant produced do not in any way confirm that the money was sent to Sibonile Mpofu. All that was produced were receipts with varying amounts and no indication as to who was the recipient. The defendant clearly took the plaintiff for a ride who was intent on beating the system and appears to have put the money to his own use.

Whilst the defendant was clearly not able to produce convincing evidence that he merely acted as go between the plaintiff and one Sibonile Mpofu, the issue nonetheless remains of whether the contract itself remains in essence fundamentally illegal so as to be unable to found a cause of action. Ordinarily if the contract is knowingly made for illegal purposes, then it is fundamentally tainted. Being aware that ZIMRA had calculated the duty at US\$4 000-00 the plaintiff sought to advance only US\$ 2750-00 to facilitate the vehicle's full clearance inclusive of agent's fees. This suggests that the reduction was to have been effected through illegal means since the plaintiff's actions show that he was determined to get the car in at the reduced value at all costs. There is no escaping this fact. There is no reason why he simply did not raise the shortfall of some \$1250-00 to pay customs what was due if his intention was not to avoid the payment of the amount that had been calculated. The

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<sup>1</sup> Definition taken from C J Friendrich., *Corruption Concepts in Historical Perspective* in Arnold J Heidenheimer and Michael Johnstons ( Eds) **Political Corruption: Concepts and Contexts** (Transaction Publishers New Brunswick USA and London UK (3<sup>rd</sup> Edition) 2001 at p 15-16

inference therefore is that his expectation was for the car to be brought in for a reduced value using the US\$ 2750-00 which is what he had advanced to the defendant. This case in fact exemplifies a classical instance of being penny wise and pound foolish.

The general principle as captured in *York Estates Ltd v Wareham 1949 SR 197, 1950 (1) SA 125 at 128* is that the court has no jurisdiction to grant relief to the plaintiff seeking enforcement on a prohibited contract. Courts however are not bound to enforce the *par delictum* rule. They will sometimes come to the aid of a party to an invalid contract where considerations of equity justify the avoidance of unjust enrichment by one party at the expense of another (*Wakefield v ASA Seeds (Pvt) Ltd 1976 (4) SA 806 (R)*). But it is not in every case that the courts will do so. What amounts to unjust enrichment depends on the facts of each particular case. (See *Jordan & Another v Penmill Investments CC & another 1991(2) SA 430 E*).

In view of the facts of this matter which reveal that the spectre of corrupt intentions was what informed the agreement between the plaintiff and the defendant, I do not think that it would be in the interests of public policy to uphold any claim for compensation by the plaintiff on any of the grounds upon which it seeks compensation. The loss was largely self-inflicted in an attempt to circumnavigate the customs duty payable. This court needs to send the correct message regarding its non-acceptance of contracts that seek to avoid fiscal requirements and that seek to deny the State of its revenue. Were this court to be the one to actively sanction compensation in light of the facts of this case, it would indeed be signalling the wrong form of encouragement that customs' tariffs can be illegally avoided through dubious agreements which would still find favour with the court. It is the duty of the courts to ensure that such agreements founded on corrupt intentions, do not unwittingly become the norm through the aid of the court. Accordingly, the contract being illegal and unenforceable, it cannot found a cause of action and there is no basis to canvass compensation.

In the result, the claim is dismissed with each party paying their own costs.

*Mambosasa*, plaintiff's legal practitioners

*Coghlan welsh and Guest Incorporating Stumbles and Rowe*, defendant's legal practitioners