

DISTRIBUTABLE (38)

**CABAT TRADE AND FINANCE
v
MOVEMENT OF DEMOCRATIC CHANGE**

**SUPREME COURT OF ZIMBABWE
MALABA DCJ, GOWORA JA & OMERJEE AJA
BULAWAYO, NOVEMBER 26 & 27, 2012**

R Fitches, for the appellant

L Uriri, for the respondent

MALABA DCJ: This is an appeal against the judgment of the High Court dated the 5 January 2012 by which a claim by the appellant against the respondent for payment of money for goods delivered as per contract was dismissed following the upholding of a special plea in abatement.

The grounds of appeal allege a misdirection on the part of the court *a quo* in accepting the allegations placed before it as a special plea. The brief background to the dispute is that the appellants issued summons against the respondent in the High Court on 14 July 2009 claiming payment of a sum of ZAR 4 627 863-93 for goods manufactured and delivered at the respondent's specific instance and request in March 2008.

The appellants alleged that the respondent authorized one Eddie Cross and Simon Spooner to enter into an oral agreement with them, in terms of which the order for the manufacture of the goods was placed. They alleged that in performance of the contract the goods comprising of T-shirts, wraps, and headscarves, which the respondent wanted to use for its election campaign in the June 2008 presidential election campaign were manufactured and delivered.

In the main plea the respondent denied any knowledge of the alleged contract with the appellant. It denied entering into or authorising anyone to enter into the alleged contract with the appellant. It denied purchasing or receiving any of the goods. Therefore the matter went to trial, but before trial commenced the respondent filed a special plea in bar on 30 November 2009. The contents of the plea were as follows:

The Defendant pleads in bar of the Plaintiffs' claims as amended as follows:

- “1. The Defendant denies that it is obligated to the plaintiffs either in contract or in delict.
2. The defendant is a political association with its headquarters in Zimbabwe accordingly it is a Zimbabwean based association.
3. The contract alleged by plaintiffs would have been tainted with illegality for want of compliance with the Exchange Control Act [Cap. 22:05] as read with the Exchange Control Regulations, 1996 contained in Statutory Instrument 109 of 1996.
4. The alleged contract would have required payment to be made by Defendant to first plaintiff outside Zimbabwe.
5. The Defendant does not have any free funds nor did it then hold any money in a foreign currency account.
6. Accordingly the alleged contract if void for illegality and the plaintiff's claims *ex contractu* should be dismissed.”

At the hearing of the special plea the appellants argued that the allegations made did not meet the requirements of a special plea. The learned judge however took the view of the respondent's legal practitioners and held that the requirements of a special plea had been met. In upholding the special plea, the learned judge said that:

“The issue that the defendant raised in this matter is that of illegality. In that the plaintiffs were attempting to enforce a contract tainted with illegality for want of compliance in the Exchange Control Act [Cap. 22:05] as read with the Exchange Control Regulations, 1996 contained in Statutory Instrument 109 of 1996 as the contract would have required payment to be made by defendant to first plaintiff outside Zimbabwe.

Ideally a plea of illegality should be raised before the trial and not *in limine* as stated in *Abreu v Campos* 1975 (1) RLR 198 at page 204H-205A. In *Adler v Elliot* 1988(2) ZLR 283 (S) illegality was raised as an exception as it appeared on the papers. Illegality was also raised as an exception that the summons disclosed no cause of action in the case of *York Estate Ltd v Wareham* 1950 (1) 3A 125 (SR) where the summons had set out the factual basis that was then used to argue the point of illegality. In *Barker v African Homesteads Touring and Safaris (Pvt) Ltd and Anor* 2003 (2) ZLR 6 (S) illegality for contravening section 8 (now section 11) of the Exchange Control Regulations raised *in limine* was upheld both by the High Court and an appeal in the Supreme Court resulting in the plaintiffs' claim being dismissed. Consequently, the submission by the plaintiffs that illegality should not have been raised as a special plea and can only be raised on the merits is clearly untenable.”

The unanimous view of the court is that the court *a quo* misdirected itself by upholding the special plea on the allegations that were placed before it. The allegations reflected a material dispute of facts arising from the defendant's plea. As a result, the court *a quo* was required to resolve the dispute by the hearing of evidence on whether or not the denial by the respondent of having entered into a contract with the appellants was true. If the denial was found to be substantiated, that would have terminated the action proceedings. There would be no question of illegality of the contract. The special plea would not have arisen in the circumstances.

A special plea is a plea in trial susceptible of a replication and must be heard separately on the adduction of evidence. *Doelcam v Pitchanik and ors* 1999 1 ZLR 390 (H) 396 G-E.

In this case the court *a quo* did not resolve the dispute, of fact on which the special plea was founded. It determined the issue of illegality of a contract which one of the parties was denying having entered into. The special plea was based on speculation of fact of a contract which the respondent denied entering into.

Mr *Uriri* who appeared for the respondent, conceded that the court misdirected itself in considering the issue of illegality of the contract which on the plea, did not concern the respondent without first determining whether or not as a matter of fact a contractual relationship existed between the parties.

It was in light of the clear misdirection by the court *a quo* that it was not found necessary of to hear Mr *Fitches* for the appellant. As a result it is ordered as follows:

1. The appeal succeeds with costs.
2. The judgment of the court *a quo* is such abide and substituted with the following:
‘The special plea is dismissed with costs’.
3. The matter is remitted back to the court *a quo* for confirmation of trial.

GOWORA JA: I agree

OMERJEE AJA: I agree

Joel Pincus & Wolhuter c/o Kantor & Immerman, appellant's legal practitioners

Coghlan & Welsh c/o Honey & Blackenberg, respondent's legal practitioners