JACKSON MUGUTI
versus
UBOXIT WORLDWIDE (PVT) LTD
and
MOREBLESSING CHERAI
and
HYDEN MUPARANGANDA

HIGH COURT OF ZIMBABWE
MAKARAU JP
Harare 19 November 20009 and 13 January 2010.

**TRIAL CAUSE**

*Plaintiff in person*
*Defendants in default*.

MAKARAU JP: At the trial of this matter, the defendants were in default. They were duly served with the notice of the trial on 1 October at their chosen address for service. The plaintiff moved for default judgment to be entered against the defendants as prayed for in the summons. Entertaining doubts as to whether or not the plaintiff's claim was sound, I requested the plaintiff to address me on whether or not the original contract between the parties was not in contravention of the Exchange Control Regulations and thus unlawful. The plaintiff, who appeared before me in person, opted to file written head of argument even though in terms of the rules, he is not required to do so.

The plaintiff's written submissions have now been filed.

The facts giving rise to this claim are commonplace. They epitomize the trading pattern in the country prior to February 2009 when the fiscal authorities officially authorised the populace to trade in multi currencies that they identified.

On 31 July 2008, the defendants contracted with a freight company trading under the name Dunquist freight (Private) Limited to convey consignments from Harare and Mazoe to Lusaka. The parties agreed on a fee of US$6 500-00. This was at a time when the official currency of trade in the country was the now defunct local currency. A deposit in the sum of US$3000-00 was paid leaving a balance of $3500-00. The freight company ceded its rights to

collect the debt to the plaintiff who, on 12 March 2009, issued summons against the defendants claiming the balance due.

In view of the fact that the defendants were in default at the trial of the matter, it is not necessary in my view that I set out the details of the plea that they had filed in the matter. Suffice it to say that the matter was defended and a pre-trial conference held at which the parties filed to settle the matter, which in my view is quite simple. As I have indicated above, the issues raised in the defendants' plea fell by the wayside when the defendants failed to attend court for trial and had I been satisfied with the plaintiff's cause of action, I would have been enjoined to enter judgment in favour of the plaintiff as prayed.

The issue that raised my concern in the above matter is the legality of the original contract of services. It is not in dispute that the parties agreed to transact using "foreign currency" then as a medium of exchange. The plaintiff accepts that this was illegal. He however pleads with me to relax the rule against illegal contracts and allow him to collect the balance due under the contract. This, in his view, will prevent an injustice and will ensure simple justice between man and man.

In my view, the admission by the plaintiff that the original contract between the parties was illegal was well made. In testing whether a transaction that is paid for in foreign currency is illegal or not, I have invariably sought guidance from the decision by CHINHENGO J in Matsitka *v Jumvea Zimbabwe (Private) Limited and Another* 2003 (1) ZLR 71 (H). In that case, both parties, as in this case, were resident in Zimbabwe. The one sold to the other a motor vehicle. The price of the vehicle was denominated in foreign currency. The court held that the transaction was illegal as it contravened the provisions of the regulations.

I see no distinction between the facts in the *Matsika* case and the facts before me.

It appears to me that the law applicable to illegal contracts is quite clear and business people are well advised to take heed of this law before they institute litigation over contracts whose illegality may be questionable. Two rules are of general application. Where the contract has not been performed, the courts will not compel performance by either party to the contract. This rule is absolute and admits of no exceptions. Where the parties are equally in the wrong, the loss will lie where it falls unless, in its discretion, the court is of the view that one party will thereby be enriched at the expense of the other. In such cases, the courts will relax the *in pari delicto potior est condutio possidentis* rule to do simple justice between the parties.

In *casu*, it is common cause that the contract was performed in part. The defendants have thus made some payment towards the services that the freight company rendered them. They are not seeking to reap where they have not sowed as was the case in *Dube v Khumalo* 1986 (2) ZLR 103 (SC) where the Supreme Court relaxed the application of the in *pari delicto* rule.

It has not been advanced before me that to make the loss lie where it falls will enrich the defendants at the expense of the plaintiff. The true value of the services rendered to the defendants have not been shown to me and in the absence of such evidence, I cannot hold that the freight services rendered the defendants are so out of proportion with the payment made for such services that I must interfere by relaxing the rule operating against the contract. (See *Edson Mudzivo and Another v Norest Nyamakope* HH120/09 and *Maxwell Tawodzera and Another v Danny Masukuma* HH 124/09).

On the basis of the foregoing, I cannot grant default judgment as prayed for.

In the result I make the following order:

The plaintiff's claim is dismissed with costs.