

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 528 OF 1992



BETWEEN:

C S CHIMDZEKA t/a  
CHIMDZEKA BUILDING CONTRACTORS.....PLAINTIFF

- and -

LILONGWE CITY COUNCIL.....DEFENDANT

CORAM: MBALAME, J.

Chikopa, of Counsel, for the Plaintiff  
Mbyundula, of Counsel, for the Defendant  
Mkhoma, Official Interpreter

R U L I N G

The plaintiff in this case, C S Chimdzeka, is a building contractor trading as Chimdzeka Building Contractors and claims from the defendant, among other things, the sum of K88,000.85, being balance of a contract price. The defendant is a local authority established under the Local Government (Urban Areas) Act (Cap 22:01) of the Laws of Malawi.

The facts of the case are not in dispute. The defendant, on the 1st day of November 1991, advised the plaintiff that he had been awarded a contract to paint its houses and market at a cost of K172,000.85. This was later reduced to writing. Pursuant to the aforesaid contract, by the 30th of November the plaintiff did paint 15 staff houses and a tavern for the defendant. Still to be painted was the defendant's Central Market. On 30th of December, the defendant through its authorised agent and or servant, Mr E Banda, Administrative Officer, terminated the contract. By that date the defendant had paid the plaintiff a sum of K84,000.00 out of the contract price, leaving a sum of K88,000.85. On being asked why the contract was being terminated, the defendant said the contract was, by virtue of the provisions of section 76(4) of the Local Government (Urban Areas) Act (Cap 22:01), illegal, because, the defendant, being unaware of those provisions, failed to award the contract to the lowest bidder or to obtain the consent of the Minister prior to awarding the contract to the plaintiff who the defendant claimed was not the lowest bidder. By his Order of 16th April 1993, the Registrar of the High Court ordered that the issue raised by the defendant as a defence, namely, whether the contract between



the plaintiff and the defendant was illegal, in terms of section 76(4) of the Local Government (Urban Areas) Act (Cap 22:01) of the Laws of Malawi, be placed before a Judge for determination.

Mr Chikopa, who appeared for the plaintiff, has submitted that the termination of the contract by the defendant was a breach of the contract on its part. He contends that section 76(4) of the Act does not invalidate the contract, as it is an administrative and procedural instrument. He further argued that, since the plaintiff had nothing to do with the awarding of the contract and obtaining of the ministerial consent, he cannot be held responsible for the defendant's mistakes, if any, as he is an innocent party. Since the defendant breached the contract, then he must pay the rest of the contract price, he concluded.

Mr Mbvundula appeared for the defendant. He contended that the contract was illegal and that the defendant was entitled to terminate it immediately it was discovered that the wrong bidder had been awarded the contract and that there had been no ministerial consent. He further submitted that the plaintiff is not entitled to the remaining contract price, because he has neither done the work nor has he expended any of his materials on any fresh work.

Section 76(4) of the Act is in the following terms:

"(4) A Local Government Authority may accept any tender which having regard to all circumstances, appears to it to be the most advantageous and may take security for the due and faithful performance of every contract or the Local Authority may decline to accept any tender -

Provided that the Local Authority before accepting any tender other than the lowest shall obtain the consent of the Minister."

There are various categories of illegal contracts and they may be declared **void ab initio** or in the course of their performance. A contract can be said to be illegal if it is a contract to commit a crime, a tort or a fraud on a third party, a contract that is sexually immoral, a contract prejudicial to public safety, a contract prejudicial to the administration of justice, a contract liable to corrupt public life, a contract to defraud revenue, or a contract that contravenes or does not conform to a statute under which it is made. In the instant case it is not disputed that the plaintiff was among people who tendered for the works in question, nor is it disputed that he won the tender, although he was not the lowest bidder. I am, however, aware that generally, the defendant would be under no obligation to accept the lowest tender. Since his, the

plaintiff's, tender was not the lowest, its acceptance had to have the consent and blessing of the Minister. This blessing was not there and has not been there to-date. The word used in the section is "shall", which means it is mandatory. What then is the effect of this omission? In my judgement, that omission, whether deliberate or by design, rendered the award of the tender and the subsequent contract null and void *ab initio*. It was illegal. It cannot stand, and I so find.

Mr Chikopa has vehemently submitted that since this omission was by the defendant and was no fault of the plaintiff, the Court should grant the reliefs sought, even if the contract were to be illegal. It is a plausible suggestion, but its viability in law is very doubtful. As Lord Halsbury observed in the case of *Mogul Steamship Co -v- McGregor, Gow and Co* (1925) AC 25, a contract that is illegal *ab initio* is treated by the law as if it had not been made at all. It is totally void and no remedy is available to either party. No action lies for damages, for an account of profits or for share of the expenses. Indeed, in the case of an illegal contract for the sale of goods, for example, the purchaser, even if he has paid the purchase price, cannot sue for non-delivery. Again, in the case of *Miller -v- Keliski* (1945) 62 TLR 85, it was held that a servant cannot recover arrears of salary under an illegal contract of employment.

The plaintiff in this case said he, as opposed to the defendant, was not aware of the provisions of section 76(4) of the Act and should, therefore, not be held victim of the defendant's act of omission. The law is settled on this one. Where a contract is illegal in its formation, neither party can circumvent the rule by pleading ignorance, *ex tumpi causa non oritur actio*. In my judgement, therefore, I hold that the contract in question between the plaintiff and the defendant was, and still is, as pleaded by the defendant in his second paragraph of the defence, illegal in terms of section 76(4) of the Local Government (Urban Areas) Act (Cap 22:01) of the Laws of Malawi. Costs to the defendant.

MADE in Chambers this 27th day of May 1993, at Blantyre.



R P Mbalame  
JUDGE