IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CIVIL APPEAL NO. 2 OF 2001

(Being High Court Civil Cause No. 3546 of 2000)

BETWEEN:

MARTIN BANDA.....APPELLANT

- and -

FELIX CHIKALAMBA.....RESPONDENT

BEFORE: THE HONOURABLE MR JUSTICE UNYOLO, JA
THE HONOURABLE MR JUSTICE KALAILE, JA
THE HONOURABLE MR JUSTICE TAMBALA, JA
Mtambo (Dr), Counsel for the Appellant
Mzumara, Counsel for the Respondent
Mbekwani (Mrs), Official Interpreter/Recorder

J U D G M E N T

Unyolo, JA

This is an appeal from a ruling of the High Court dismissing the appellant's action against the respondent for breach of contract.

This is a short case, really, but the facts are long and we think it is necessary that we recount them in detail. The appellant is a South African national and is a member of a horse racing club. The respondent made frequent visits to South Africa in 1998 and on one of the visits, he convinced the appellant and his club that he, the respondent, had charms which would enable them to win in a horse racing competition. It was thereby agreed that the respondent would provide the charms in exchange for money. The respondent and his club gave the appellant a total of R98,000.00 for this purpose. In another development, at around the same time, the respondent got the appellant's motor vehicle, a Mercedes Benz, under the pretext that he would spray medicine to it. It is, however, not clear from the facts what effect the medicine would have, either on the appellant or on the motor vehicle. Whatever the effect was, the respondent disappeared with the motor vehicle, and it has not been returned to the appellant to-date. And when the horses went for the racing, they did not win the competition.

After failing to get back the money and the car, the appellant lodged a complaint against the respondent to the Police, whereupon the Police charged the respondent before the First Grade Magistrate's Court at Limbe with the offence of obtaining money by false pretences, contrary to section 319 of the Penal Code. The particulars of the offence averred that the respondent obtained the said sum of R98,000.00 from the appellant by falsely representing that he, the respondent, would supply African medicine to enable the appellant and his club to win the horse race in South Africa, knowing fully that the representation was false.

The respondent denied the charge, whereupon the Court proceeded to hear evidence from both sides. The Court then adjourned the case to 2nd August 2000 for judgment. On that day, just before the Court began to read the judgment, the Public Prosecutor informed the Court that the appellant had approached him, saying that he wanted to withdraw the case against the respondent because the parties had reached an agreement to settle the matter. The Public Prosecutor then invited the appellant to confirm this.

The learned Magistrate responded by saying that since she had already written her judgment, she was inclined to read the same and hear the appellant afterwards. She read the judgment in which she convicted the respondent as charged. She heard the respondent in mitigation and then adjourned the matter for fifteen minutes for sentence. When the Court resumed, the learned Magistrate sentenced the respondent to 3 years imprisonment with hard labour. The learned Magistrate then called upon the appellant to say what he wanted to say. In response, the appellant told the Court that it had been agreed between him and the respondent that he should withdraw the case and that the respondent would pay back the R98,000.00 and return the Mercedes Benz. The appellant said that his colleagues in South Africa would be more interested in recovering the money and the car from the respondent than in having the respondent sent to prison. The respondent confirmed the agreement and intimated that he would pay the sum of K400,000.00 on 8th August 2000 and the balance by monthly instalments, and he pledged

to surrender his personal car to the Court in the meantime.

Upon hearing this, the learned Magistrate made an order staying execution of the 3 years' prison sentence she had imposed on the respondent. She ordered that the respondent's car be kept at Limbe Police Station and then adjourned the matter to 8th August 2000. The case resumed on that day, when the respondent told the Court that he was unable to pay the K400,000.00. He also failed to bring the car. The Court then adjourned the case again to 14th August 2000. On that day, the respondent brought a cheque for K320,000.00 payable on 28th August 2000. The case was again adjourned to the following day.

To cut a long story short, the cheque was later dishonoured by the bank, the respondent having stopped payment of the same. The money remains unpaid to this day. The respondent did not bring the car he had pledged either. He sold it to someone. It is also to be noted that the respondent has been free since he was convicted and sentenced on 2nd August 2000.

It was against this background that the appellant consulted lawyers and instructed them to institute civil proceedings against the respondent. An action was then commenced by Originating Summons in which the appellant claimed from the respondent the sum of R98,000.00 or its equivalent of K10,642,800.00, being money paid by the appellant to the respondent for a consideration that had wholly failed and also on the basis of the agreement made and recorded by the First Grade Magistrate's Court. He further claimed the sum of K3,898,125.00, on the same basis, being the value of the Mercedes Benz.

After considering the evidence and the submissions made by Counsel thereon, the learned Judge observed that the decisive question in the case was whether in the execution of the agreement, whereby the respondent received the R98,000.00 from the appellant, under the pretext that he would make the horses win in the race, the respondent would exercise the power of witchcraft. Since the Witchcraft Act does not define the term "witchcraft", the learned Judge resorted to the Oxford Advanced Learner's Dictionary for a definition. The learned Judge observed that from this dictionary "witchcraft" means the use of magic powers, and "wizard" means magician. He went on to observe that what the evidence disclosed was that the respondent held himself out to the appellant to be a wizard and that he would exercise the power of witchcraft in making the horses to win the race; so too in spraying the medicine to the Mercedes Benz. The learned Judge observed that this was in contravention of section 6 of the Witchcraft Act which prohibits a person from representing himself or herself to be a wizard or witch or having or exercising the power of witchcraft. The learned Judge held that in the circumstances, the agreement between the appellant and the respondent was illegal and unenforceable, and he dismissed the action accordingly. This appeal is against that decision.

Counsel for the appellant contended that the learned Judge erred in finding that the respondent held himself out to be a wizard or magician. Counsel submitted that in fact going by the definition from the Oxford Advanced Learner's Dictionary it is not every use of magic powers which amounts to witchcraft, but rather the use of magic powers to do evil or bad things. He observed that some magicians are benevolent, and those are not wizards. Further, Counsel referred the Court to the mischief rule of statutory interpretation and observed that looking at the Witchcraft Act as a whole, it is clear that it was the bad practices of witch-hunting and the administration of mwabvi or poison that Parliament intended to outlaw and not "benevolent magic".

In reply, Counsel for the respondent submitted that what the respondent did was caught by the provisions of section 6 of the Witchcraft Act. Counsel argued that even if it was admitted that witchcraft involves the use of evil or magic powers, what happened here was still caught by the provisions of the said section 6. In this context, Counsel observed that the word "evil" is defined in the Oxford Advanced Learner's Dictionary as "bad in a positive sense" or "morally depraved". He submitted that from this perspective, there can be no doubt that what the respondent did was evil. Counsel submitted further that what the respondent must have been saying to the appellant was that he had supernatural powers to make the particular horses to win the race. He submitted that the message the respondent communicated to the appellant was that he had magic power to make the horses run and win the competition. He submitted that even on this score, what the respondent did was caught by the provisions of the said section 6 of the Witchcraft Act.

Counsel for the respondent further contended that what the respondent did was also caught by the provisions of section 9 of the Witchcraft Act which prohibits a person from using or assisting in using any lot or charms with a view to the commission of any unlawful act.

Finally, Counsel for the respondent submitted that although it was not clear as to why the respondent was to spray medicine to the Mercedes Benz, it could be assumed that the exercise was connected to the horse race. Counsel submitted that even that transaction was equally tainted with illegality. He submitted that on these facts, the learned Judge was right in holding that both transactions relating to the payment of the R98,000.00 and the passing of the Mercedes Benz by the appellant to the respondent were illegal and unenforceable.

As we have indicated, the main question for our determination is whether the learned Judge was wrong in finding that the respondent represented himself to be a wizard and that in the exercise of the agreement he had made with the appellant, he was going to exercise the power of witchcraft or magic.

Going by stories that make the rounds commonly in Malawi, witches or wizards are supposedly persons who engage in supernatural practices like surreptiously killing people using all manner of weird means such as sending a lightning on a clear day to strike at and kill a victim miles and miles away. Such persons are also renowned for going out at night, literally naked, and fly, for example, in a flat basket, to graveyards to dance and feast on human corpses. Such practices, among so many, would be perceived to be witchcraft.

The learned Judge, in the present case, based his decision on the interpretation of section 6 of the Witchcraft Act. The section provides as follows:

"Any person who by statements or actions represents himself to be a wizard or witch or having or exercising the power of witchcraft, shall be liable to a fine of £50 and to imprisonment for 10 years."

As was observed by the Court below, the Witchcraft Act itself does not define the word "witchcraft", nor does it define the word "wizard" or the word "witch". We have indicated that the learned Judge resorted to a definition of the word "witchcraft" that is given in the Oxford Advanced Learner's Dictionary. In arguing this appeal before us, Counsel also referred the Court to definitions from dictionaries.

The Oxford Advanced Learner's Dictionary defines the word witchcraft as "the use of magic powers (especially evil ones) or sorcery. The word sorcery is defined as the "art or practice of magic, especially with evil spirits". The word wizard is defined as "male witch or magician". And the word magic is defined as "the

power of apparently using supernatural forces to change the form of things or influence events".

When these definitions are applied to the facts of the present case, the impression that is made is that the respondent implied to the appellant that he, the respondent, had the power to use supernatural forces, magic powers, that is, to influence events; in this case, to influence the result in the horse race competition.

We have considered the argument relating to the mischief rule of statutory interpretation where Counsel for the appellant contended that looking at the Witchcraft Act, what the Legislature must have intended to outlaw when passing the Act were the bad practices of witch-hunting and the administration of mwabvi or poison and not "benevolent magic" as in the present case. Our short answer to this contention is that we do not believe that to defraud or trick someone of his R98,000.00 can be described as benevolent. In our view,

such an act is evil and depraved. It is also noted from the evidence which was given in the criminal proceedings that the respondent intimated to the appellant on several occasions that he was working in consultation with spirits in getting the horses to win the race. Further, we are unable to agree with Counsel for the appellant that the Witchcraft Act is limited to the practices of witch-hunting and the administration of mwabvi or poison. Those matters are specifically dealt with under sections 3 to 5 of the Act. But as we have seen, there are also sections 6 and 9 which deal with other matters.

All in all, we hold the view that the learned Judge was right in finding, as he did, that the respondent represented himself to be a wizard and that in the execution of the agreement he made with the appellant he was going to exercise the power of magic or witchcraft.

The matter does not, however, end there. An examination of the amended Originating Summons filed by the appellant in the Court below, shows that the appellant's action was based on the agreement made before the 1st Grade Magistrate and recorded by the Magistrate after she had convicted the respondent of obtaining by false pretences and sentenced him to serve a term of 3 years imprisonment with hard labour. The agreement made between the appellant and the respondent was essentially that the criminal proceedings against the respondent should be discontinued upon the undertaking by the respondent to pay back to the appellant the sum of R98,000.00 or its equivalent in the local currency and to return the appellant's Mercedes Benz. The respondent further agreed to pay K320,000.00 immediately, surrender his car to the Magistrate's Court and pay K400,000.00 on 8th August 2000 and settle the balance through some monthly instalments.

The 1st Grade Magistrate stayed execution of the judgment and sentence because of the agreement concluded by the appellant and the respondent. Unfortunately, the respondent breached the agreement soon after it was made. He failed to surrender his car to the Court and did not pay the K400,000.00 on 8th August 2000.

We take the view that the 1st Grade Magistrate had no power to stay execution of the judgment and sentence. Having concluded the trial, delivered the judgment and passed the sentence, the learned Magistrate, as a general rule, became functus officio. The Magistrate should have given way to the law to take its course. Exceptionally, however, a Magistrate who has convicted and sentenced an accused person can release such accused on bail upon application by the accused and showing exceptional circumstances.

We take the further view that it is in the interest of justice, as well as that of the public, that when an accused person is found guilty of having committed a crime and sentenced, the law should take its course and that the judgment and sentence should be executed. Therefore, any agreement made between a person accused of having committed a crime

and a complainant which would result in interfering with the law from taking its due course would, in our view, be illegal on the grounds of public policy. Any contract which tends to prevent or impede the due course of justice is illegal and unenforceable: see **CHITTY ON CONTRACTS General Principles, 27th Edn Par 16-033**. We come to the conclusion that the contract which was made at the 1st Grade Magistrate's Court by the appellant and the respondent was illegal and unenforceable; it was contrary to public policy.

In the circumstances, we set aside the Order made by the 1st Grade Magistrate staying the judgment and sentence which she imposed on the respondent. We direct that the respondent must be committed to prison to serve the sentence of 3 years imprisonment with hard labour, to take effect from the date of this judgment. Accordingly, we order that the 1st Grade Magistrate's Court at Limbe must issue the necessary Warrant of Commitment in this matter. While waiting for the said warrant, the respondent is to be committed into custody forthwith. The Registrar of this Court is directed to issue the necessary Remand Warrant and to communicate the gist of our Order to the 1st Grade Magistrate's Court at Limbe so that the Magistrate can issue the requisite Warrant of Commitment without delay.

In terms of section 148(1) of the Criminal Procedure and Evidence Code, we order that the sum of R98,000.00 must be paid by the respondent to the appellant. We further order that the respondent must return to the appellant the Mercedes Benz which was obtained from the appellant. In the event that the motor vehicle is not restored to the appellant, then the respondent is ordered to pay to the appellant the sum of K3,898,125.00, being the value of the appellant's Mercedes Benz. In the event that the respondent shall, for any reason, fail to comply with these restitution orders, we order that money and property, both real and personal, belonging to the respondent shall be seized and sold to realise a total sum of K14,540,925.00 which shall be paid to the appellant.

To this extent, the appeal succeeds, with costs.

DELIVERED in open Court this 24th day of September 2001, at Blantyre.

Sgd .....

L E UNYOLO, JA

Sgd .....

J B KALAILE, JA

Sgd .....

D G TAMBALA, JA