

IN THE SEYCHELLES COURT OF APPEAL

IN THE MATTER BETWEEN:

**AVALON (PROPRIETARY) LIMITED
COMEDIAN (PROPRIETARY) LIMITED
ANDRE RASSOOL
ROBERT MORGAN
BERNARD GEORGES**

**1ST APPELLANT
2ND APPELLANT
3RD APPELLANT
4TH APPELLANT
5TH APPELLANT**

AND

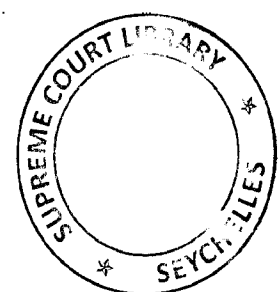
OGILVY BERLOUIS

RESPONDENT

Civil Appeal No. 25 of 2002

[Before: Ayoola P, Silungwe & De Silva, JJA]

Mr. P. Boule for the Appellants
Mr. F. Chang-Sam for the Respondent



JUDGMENT OF THE COURT
(Delivered by Silungwe, JA)

At the trial, the appellants were defendants and the respondent was the plaintiff.

The first and second appellants are limited liability companies incorporated in Seychelles which own parcels of land: PR423 and PR422, respectively, at Pointe Zanguilles, Praslin. The third, fourth and fifth appellants are not only the holders of the entire share capital, but also the directors, of the first and second appellants. In the first paragraph of the plaint, the respondent made the following averments:-

Consequently, this letter will also serve to revoke forthwith any agreement that you may have with us (as an Estate/Commission agent or in your personal name) in regard with the marketing or sale of the above property..."

On that same date, the appellants, acting through the third appellant, wrote to the Managing Director of Seychelles Breweries informing him of their decision not to proceed further with the proposed sale of the property in question. A copy of that letter was sent to the Ministry of Land Use and Habitat which was/is responsible for processing applications for sanction under the Immovable Property (Transfer Restriction) Act.

Since the respondent could not proceed further on the agreement, he approached the Supreme Court for relief which included a claim for R1,000,000/- as damages for the loss suffered.

The Supreme Court held that liability had been established against the appellants and accordingly entered judgment in favour of the respondent for R1,000,000/-, with costs. The challenge to that decision on liability rests on four grounds of appeal. For purposes of this judgment, it is needful to start with the third ground for reasons that will soon become apparent.

The third ground is couched in these terms:-

"The learned trial judge erred in his finding that the agreement was not illegal."

In canvassing this ground, Mr. Boule contends, on behalf of the appellants, that the respondent was bound by his pleadings that he "was a commission agent at all material times." This being so, the argument goes on,

"The plaintiff is and was at all material times a commission agent carrying on business at Aarti Chambers, Mont Fleuri, Mahe."

The claim by the respondent that he was at all material times a "commission agent" was strongly resisted by the appellants in their pleadings, their evidence and their submissions and this still remains a live issue. We shall shortly revert to this issue.

On June 9, 1997, the third, fourth and fifth appellants, acting on behalf of the first and second appellants, entered into an agreement with the respondent whereby it was agreed that, should the respondent succeed in selling parcels PR423 and PR422 for a net total of R5,000,000/-, a sum of R1,000,000/- would be paid to him.

In consequence of the said agreement, the respondent found – about three and a half years later – a prospective buyer, namely, Guinness Overseas Limited whose agent in Seychelles was Seychelles Breweries Limited. Being ready, willing and able to purchase the two plots of land above-mentioned, the prospective buyer lodged an application for sanction in terms of the Immovable Property (Transfer Restriction) Act on December 4, 2000, for which a fee of R75,000/- was paid.

On April 17, 2001, the third appellant, who was acting on behalf of all the appellants, addressed a letter to the respondent in these terms:-

"Proposed Sale of land – Praslin

I am instructed to inform you that following discussions with my partners, it has been decided not to proceed with the above-proposed sale of land at Pointe Zanguilles, Praslin.

a simple issue arises as to whether the respondent could lawfully carry on his business without a licence.

Countering the appellant's contention, Mr. Chang-Sam submits on behalf of the respondent that his client deponed that he was a commission agent and explained that his function was not to sell property but to find a buyer for the appellants as sellers. As such, so argues Mr. Chang-Sam, there was nothing illegal in finding a buyer for the appellants. Further, Mr. Chang-Sam continues, the respondent was a partner in a partnership which had a licence to trade as a commission agent.

It is not in dispute that subsequent to the agreement between the parties, the respondent established a partnership known as Principal Consultancy Services of which he was the senior partner. Further, it is not in dispute that, although the partnership held a licence to trade as a commission agent, the respondent himself had none. The admission was elicited during cross-examination of the respondent as the following excerpts illustrates:-

“Q: I put it to you that you are not licensed to be a commission agent?”

A: Ogilvy Berlouis is a senior partner of Principal Consultancy Services.

Q: You, Ogilvy Berlouis (sic) are not licensed as a commission agent?”

A: My company is licensed and I am a partner of this company.

Q: You, Ogilvy Berlouis, the man I am seeing there is not licensed as commission agent?”

A: I do not have a license.”

In the first paragraph of the amended defence, the appellants averred:-

"1. Paragraph 1 of the plaint is categorically denied and the defendants aver that the plaintiff is not licensed and therefore cannot carry on the business of commission agent for real estate business."

Section 16(1) of the Licences Act, Chapter 113 provides that:-

"16(1) Notwithstanding any thing in any other Act, no person shall:-

- (a) engage in or carry on any activity, profession, trade or business specified in Schedule 1;*
 - (b) ...*
 - (c) ...*
- except under and in accordance with a licence granted by the authority."*

Schedule 1 catalogues, *inter alia*;

"25 (0) A commission agent."

This Act has not defined "commission agent". However, the parties have not contended that the services undertaken by the respondent are not those of a commission agent; nor that what he claimed was not commission for such services to be rendered in the course of his business.

In the light of the statutory provisions above-mentioned, it is abundantly clear that the respondent, being unlicensed, was not entitled to operate as a commission agent, either as a senior partner of the Principal Consultancy Services or on his own account. As such, he cannot hide behind

the name of his partnership or use the partnership as a shield. In the circumstances, we are satisfied that what the respondent did in this case was tainted by illegality.

What then are the consequences of the respondent's illegal activity? Well, a general principle which is rooted in public policy is that any transaction that is tainted by illegality involving a party (or parties) thereto is beyond the pale of the law. Thus, no person can claim any right or remedy whatsoever under an illegal transaction in which he participated.

Ex turpi causa non oritur actio. In this regard, the remarks of Lord Mansfield in *Holman v Johnson* (1775), 1 Cowp. 341, at 343, are opportune:

*"The objection that the contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: **ex dolo malo non oritur actio**. No court will lend its aid to a man who founds his cause upon an immoral or an illegal act. If from the plaintiff's stating or otherwise, the cause of action appears to arise *turpi causa*, or the transgression of a positive law of this country, then the court says he has right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally in fault portio est conditio defendantis."*

See also: **Cheshire and Fifoot's Law of Contract, 9th Ed, at page 345.**

It follows that this ground too succeeds.

The fourth and final ground on liability is that:-

"The finding of the learned trial judge that the plaintiff had capacity to enforce the agreement in his name by virtue of a licence held by the partnership is unfounded in law contrary to pleadings in paragraph 1 of the plaint that the plaintiff was at all material times a commission agent."

As this appeal is decisive and destined to succeed, it is unnecessary to discuss the other grounds.

For the reasons given above, the judgement of the Supreme Court is set aside and the appeal is allowed with costs.

PRESIDENT

JUSTICE OF APPEAL

JUSTICE OF APPEAL

Delivered at Victoria, Mahe, this 5 day of December 2003