

IN THE SUPREME COURT OF SEYCHELLES

Civil Appeal No. 62/2012

Appeal from Employment Tribunal case 177/2009

[2013] SCSC

BASIL SOUNDY

Appellant

versus

VERTEX MANAGEMENT LTD

Respondent

Heard: 18 March 2013

Counsel: Basil Hoareau for appellant
William Herminie for respondent

Delivered: 31 May 2013

JUDGMENT

Egonda-Ntende CJ

[1] The parties to this appeal entered into a contract of employment. The contract was never performed. The Employment Tribunal decided that Mr Soundy, the prospective employee, cannot enforce the contract against Vertex Management Ltd (Vertex), the employer, because a condition precedent implied by law was never satisfied. Mr Soundy had claimed that Vertex did not include this condition in the contract, and failed to take responsibility for satisfying the condition by making the necessary statutory application. In those circumstances, Mr Soundy claimed, Vertex is estopped from denying that it employed him. Although Mr Soundy has maintained his estoppel argument on appeal, the real issues raised by the appeal are whether this contract was valid and enforceable when first made and, if so, whether it became frustrated (incapable of performance).

[2] The employment agreement between Mr Soundy and Vertex is dated 24 September 2007. Mr Soundy was to be employed as a financial advisor for an initial fixed term from

25 October 2007 to 25 December 2009, continuing indefinitely thereafter unless terminated in writing by either party with at least three months' notice. No notice of termination has ever been given.

Legislative context

- [3] It is common ground that at all relevant times, Vertex was in the business of providing international corporate services and was licensed to provide those services under the International Corporate Services Providers Act 2003 (ICSP Act). Vertex was accordingly required to conduct that business in accordance with all requirements in the ICSP Act, including the Code of Practice of Licensees (Code of Practice) in Schedule 3.
- [4] The ICSP Act was substantially amended in 2009 and 2011, and a new Code for International Service Providers (ISP Code) came into effect in 2013. Each of those events post-dates the events in this case. It is important to emphasise that the law stated in this judgment represents the pre-amendment position and is of limited value for future cases. The 2011 and 2013 developments, in particular, touch directly on the procedures in issue in this case. With that in mind, the legislative context as at September 2009, when the relevant employment agreement was made, can be summarised as follows.
- [5] International corporate services licenses are granted to companies for one year and can be renewed annually thereafter.¹ Before granting a license, the administering authority, Seychelles International Business Authority (SIBA), must “ascertain” a number of matters. Relevantly for present purposes, SIBA must ascertain that “each director and manager of the applicant is a fit and proper person”. It is common ground that in his role as “financial advisor”, Mr Soundy would be taking up a managerial position.
- [6] The meaning of “fit and proper” is explained at length in cl 3 of the Code of Practice, which begins by imposing a continuing obligation on licensees:

All directors and members of the managerial staff of a licensee shall be and remain fit and proper persons as determined by the Authority.

¹ One effect of the 2011 amendments is the removal of the annual renewal obligation; assuming continued compliance with all legal requirements, licences now remain valid unless suspended or revoked.

[7] Section 6 of the ICSP Act requires the licensee to give SIBA prior notice in writing of the appointment or departure of any manager, at any time. That obligation is further specified in cl 7 of the Code of Practice:

A licensee shall give the Authority 28 days notice in advance of the proposed appointment of a director or member of the managerial staff so that the Authority may determine whether or not the appointment may proceed. The prospective appointee may be required to complete a questionnaire requiring such information as the Authority may need to make its determination.

[8] SIBA has one calendar month to object in writing to a proposed appointment (s 6(3)). If it does, the licensee must comply with SIBA's recommendation or risk suspension or revocation of its licence. If the licensee fails to notify SIBA of a managerial appointment, its licence may be suspended or revoked (ss 14(1)(b) and 15(1)(b)). A licence may also be revoked where SIBA is satisfied that any manager "has ceased to be a fit and proper person" (s 15(1)(f)). That provision assumes, of course, that the relevant individual *was* previously considered to be fit and proper.

[9] Throughout this case the parties and the Employment Tribunal have referred to an "application" required when a licensee intends to employ a new manager, and to the need for "approval" from SIBA. That language reflects the wording of the new, extra-statutory ISP Code (to which neither party referred the Court). It is however neither helpful nor accurate as regards the position in 2009, before the promulgation of the ISP Code. What the ICSP Act itself requires is prior written notification by the licensee, so that SIBA has an opportunity to object to the appointment. In order to decide whether to object, SIBA must "determine" whether the prospective employee is a fit and proper person. If SIBA makes no objection within a calendar month, a licensee is entitled to assume that the determination was favourable and may proceed with the appointment.² If SIBA does object, the licensee's next steps may depend on what

² The law in this regard has changed since 2011, but the practical result appears to be the same. There is now an express obligation on SIBA to notify a licensee whether or not a proposed managerial appointee has been determined to be a fit and proper person (new s 3(4)(ii)(a)), and when any existing manager has in SIBA's view ceased to be fit and proper (new s 3(4)(ii)(b)). Mr Hoareau cited this provision in the Employment Tribunal, presumably overlooking its date of enactment. In addition, the new ISP Code, which is legally binding on licensees under s 13 of the Act, prohibits licensees from proceeding with an appointment except upon "the receipt of the written approval of the Authority *or* the Authority not

recommendations SIBA decides to make. SIBA could, for example, recommend that the appointment proceed, but on conditions.

- [10] Two other legislative provisions formed the basis of the Employment Tribunal's decision in this case. The first is the ubiquitous art 1108 of the Civil Code of Seychelles, which sets out the four essential conditions for the validity of an agreement:

The consent of the party who binds himself,
His capacity to enter into a contract,
A definite object which forms the subject-matter of the undertaking,
That it should not be against the law or against public policy.

- [11] The second provision is s 58(1) of the Employment Act 1995:

58(1) A contract is frustrated when it becomes impossible of performance as when, among other things or reasons –

(a) the business of the employer ceases through its becoming prohibited or illegal under any written law;

(b) a worker is disqualified through the suspension or cancellation of any licence, permit, registration or authority required under the written law for the purpose of exercising the occupation or profession of the worker,

and, except in the case of paragraph (b), the worker, other than a casual worker, is entitled upon frustration of the contract to one month's notice or to payment in lieu and to any additional compensation payable under section 62.

- [12] Section 62 of the Employment Act cross-refers to s 47(2), which provides for compensation in specified circumstances for workers whose contracts have been frustrated. There has been no discussion of compensation of that kind in the present case.

The evidence

- [13] The documentary evidence before the Employment Tribunal is minimal. There is no evidence of prior notice in writing by Vertex to SIBA regarding the proposed

objecting to the appointment within 28 days from the date of submission of the notice of appointment” (cl 9, my emphasis).

appointment, as required by s 6 and cl 7 of the Code of Practice. Nor is there any evidence of an objection by SIBA in writing to the appointment, as envisaged by s 6(3). The case simply proceeded on the assumption that as at 24 September 2007 or shortly thereafter, the absence of “approval” from SIBA can be equated to a decision that Vertex would be breaching the Act by appointing Mr Soundy.

[14] A letter from Mr Fanny, then CEO of SIBA, to Mr Herminie dated 6 February 2012 (while the case was pending before the Tribunal) was produced as an item, over Mr Hoareau’s objection, on the basis that Mr Fanny would be called to speak to the letter. This never happened. Furthermore, the letter is framed as a reply to a letter of inquiry from Mr Herminie. That earlier letter was not produced for context. In those circumstances the letter is of dubious if any evidential value.

[15] Mr Fanny’s letter is in any event somewhat ambiguous. It states that a personal questionnaire was submitted “for” Mr Soundy on 10 July 2007. That date is more than 28 days before the date of the employment agreement. So it suggests that SIBA was aware of the proposed appointment within the prescribed timeframe. But, as the questionnaire was not produced, that date cannot be directly confirmed.

[16] Mr Fanny does not refer to Vertex having given formal notice of the proposed appointment, nor to SIBA having requested the submission of a questionnaire, nor to SIBA raising any objection to the appointment. Mr Fanny simply cites the absence of an “approval letter” from SIBA as evidence that “the Fit and Proper application of Mr Soundy was not approved by the Authority”. As stated above, the language of “application” and “approval” is unhelpful in this context.

[17] Mr Zaslonov, the managing director of Vertex, gave evidence that he personally submitted Mr Soundy’s personal questionnaire to SIBA on 10 July 2007. Mr Zaslonov deponed that it took “a while” to hear back from SIBA, but that after the contract with Mr Soundy was signed (that is, at some time *after* 24 September), a named individual from SIBA told him that Mr Soundy “is not a fit and proper person”. He said that Mr Soundy was advised of this fact, and that is why he “never turned up for work” on 25 October. Under cross-examination by Mr Hoareau, Mr Zaslonov admitted that he was

the person “in charge” of notifying SIBA about the proposed appointment and that he does not know if a “proper application” was ever made. When asked directly whether he had “anything from SIBA which says that Mr Soundy is not a fit and proper person”, he confirmed that he “did not see anything in written [sic] from SIBA”.

[18] Ms Pierre, who appears to have succeeded Mr Fanny as CEO of SIBA, gave evidence that SIBA has never received a fit and proper “application” from Mr Soundy. Under cross-examination, she clarified that “[a]ny licensee who wants to employ a person as Financial Advisor has to make an application which has to have with it a personal questionnaire of the intended employee”. This may reflect SIBA’s practice (as crystallised in the new ISP Code), but it does not appear to be a correct statement of the legal obligations on licensees as at 2009. Ms Pierre’s evidence does however tend to confirm that the only document submitted by Vertex to SIBA was the questionnaire.

[19] I observe that three other documents admitted as exhibits in the Employment Tribunal are not on the Court file. Those documents relate to events between the signing of the agreement and the filing of the Tribunal grievance. Since no reference was made to them by either party in the course of the appeal, I have not had regard to the record of evidence concerning them.

Employment Tribunal decision

[20] Both parties filed written submissions in the Tribunal. The submissions of Mr Herminie for Vertex, filed first, denied that Mr Soundy was ever “in its employment”, because his appointment was “subject to the approval of SIBA as is required under the [ICSP Act]”. Vertex relied on Mr Zaslouov’s evidence that SIBA’s approval was verbally declined or, in the alternative, on Ms Pierre’s evidence (consistent with Mr Fanny’s letter) that SIBA has no record of Mr Soundy being listed as a fit and proper person. According to Mr Herminie, if “at the end of the day the person is not the holder of a certificate of a fit and proper person as required by SIBA, he/she cannot by law be employed”. (It is unclear where this reference to a “certificate” originated; it has no basis in the legislation or evidence.) In these circumstances, the employment contract was frustrated (s 58(1) Employment Act) and thereby invalid for illegality/breach of public policy (art 1108

Civil Code). Mr Soundy suffered no loss or damage through not being employed by Vertex. And even if he had been validly employed, Mr Soundy would be in breach of contract for “non-performance”.

[21] The submissions for Mr Soundy, filed by Mr Hoareau, emphasised that the employment agreement was a concrete contract rather than a statement of intention, and that it contained no condition precedent that Mr Soundy “had to be declared by SIBA as a fit and proper person”. Mr Hoareau submitted that the onus of “applying” to SIBA regarding Mr Soundy’s appointment was clearly on Vertex. Section 58(1)(b) of the Employment Act did not apply because there was no pre-existing authority or registration to suspend or cancel. Vertex never made an application to SIBA, so SIBA never made a relevant decision, so the contract could not be frustrated. In any event, Vertex was estopped by both representation and conduct from denying “that it was employing” Mr Soundy. Mr Hoareau cited an extract from Halsbury’s Laws of England, vol 16, para 1594 in support of the submission that Vertex had represented that the employment agreement had “the legal effect of creating a contract of employment”. Vertex was also estopped by conduct because it “never actually applied ... for a declaration that [Mr Soundy] is a fit and proper person”. Finally, Vertex did not counterclaim for breach of contract by Mr Soundy, and has never terminated the contract or taken any disciplinary measures, so cannot now rely on non-performance as a defence.

[22] The Tribunal dismissed Mr Soundy’s claim on two grounds. First, the contract was unenforceable (or incapable of performance) as against public policy, contrary to art 1108 of the Civil Code. Secondly, the contract was “frustrated seconds if not minutes after the parties had agreed to it” because it was impossible for Mr Soundy to perform it legally. Section 58(1) of the Employment Act is not, in the Tribunal’s view, limited to situations where the law has changed since the contract was made. The words “amongst other things or reasons” are broad enough to cover a situation where failure to comply with a pre-existing legal requirement means that performance “has always been illegal”.

[23] Both grounds for the Tribunal’s decision were based on what it called “the statutory requirement that [Mr Soundy] needed approval from SIBA as ‘A Fit and Proper Person’”.

The Tribunal was unimpressed by the argument about who should have made the relevant “application” to SIBA (albeit tending to agree with Mr Hoareau that the responsibility lay with Vertex), seeing it as a distraction from the issue of enforceability. The Tribunal was similarly unmoved by the estoppel argument, holding simply that estoppel as a rule of evidence is “not applicable” where a contract is illegal or against public policy.

Arguments on appeal

[24] The memorandum of appeal can be quoted in full:³

- (i) The Employment Tribunal erred in law in holding that estoppel was not applicable in the circumstances of this case;
- (ii) The Employment Tribunal erred in law in failing to hold that the Respondent had the duty and obligation to apply for the fit and proper assessment of the Applicant; and
- (iii) The Employment Tribunal erred in law in failing to hold that there was a valid contract of employment between the Appellant and Respondent.

[25] On the first ground, Mr Hoareau relied on his written submissions to the Tribunal, arguing that Vertex is “estopped from claiming this contract is against public policy” because its conduct in signing “had represented to [Mr Soundy] that it was willing to be bound by this agreement”. Put another way, Vertex should be estopped from “taking advantage of their [sic] own failure to seek the fit and proper approval from SIBA”. The second ground of appeal was “linked with” this argument.

[26] The third ground of appeal was described as also “directly linked” with estoppel in that:

there was a contract which was signed, it was exhibited before the Employment Tribunal and **the only issue was: was this contract valid or not and on the basis of estoppel this contract ought to have been held to be valid** [*emphasis added*].

³ This memorandum of appeal is deficient because it does not contain a prayer for the relief claimed as required by r 12 of the Appeal Rules. As a result, under r 14, the appeal is deemed to have been withdrawn. In the interests of justice, and given that the point was not taken by this respondent, I have decided to proceed to consider the appeal on its merits. The same latitude should not be expected in future cases.

[27] When reminded that estoppel is a shield not a sword, Mr Hoareau attempted to clarify that Mr Soundy “did not rely on estoppel” in the Tribunal, but on the contract itself. Estoppel only became relevant because of the public policy defence raised by Vertex.

[28] Mr Herminie, for Vertex, “entirely agreed” with the decision of the Tribunal. The term implied by statute into this agreement was, in Mr Herminie’s submission, that a prospective manager “can only be employed unless and until [sic] you have obtained this status of fit and proper person”. Mr Herminie relied for this interpretation on cl 3 of the Code of Practice, which requires managers to “be and remain fit and proper persons as determined by the Authority”. Mr Herminie emphasised that Mr Soundy never did a single day’s work under this contract.

Analysis

[29] There is only really one basis for this appeal, which is estoppel. Mr Soundy has not sought to criticise other aspects of the Tribunal’s reasoning. Vertex has “entirely” defended the approach taken. However, before any argument based on estoppel can be considered, it is necessary to address the logically prior question of validity (raised by the third ground of appeal).

[30] The Tribunal readily accepted that there was “a valid contract of employment” between these parties, describing the issue as one of enforceability. But the Tribunal then contradicted itself by relying on the public policy limb of art 1108 of the Civil Code, which is a condition of validity. If a contract does not satisfy the four conditions in art 1108, it is not valid. Questions of enforceability, or frustration, or for that matter estoppel (as discussed below), do not arise.

Validity

[31] Unfortunately, neither the parties nor the Tribunal in this case paid sufficient attention to the words of the ICSP Act. Where a contractual term is said to be implied by law, it is of paramount importance that the alleged term be precisely identified. Contract is founded on agreement. The implication of terms which have not been agreed, and of which one or both parties may have been ignorant, is not to be undertaken lightly. Paraphrasing a

legislative requirement is dangerous in any circumstances. Repeated, and inconsistent, paraphrasing by the parties suggests that the source and content of the alleged requirement is unclear. That should alert the decision-maker to the need for particularly careful consideration of the legislative framework.

[32] In this case, the provision cited by the Tribunal was s 3(4)(1)(b) of the ICSP Act, which requires SIBA to “ascertain that” each manager is a fit and proper person before granting a licence. But Vertex already held the relevant licence. It did not have to re-apply for a licence just because it was appointing a new manager. This provision was not in issue.

[33] In fact, as indicated earlier in this judgment, the legislative scheme relating to the appointment of managerial staff is not straightforward (and has changed over time). The ICSP Act speaks of “notification” by the employer and an opportunity for “objection” by SIBA. The Code of Practice envisages a “determination” about whether the prospective employee is a fit and proper person. SIBA is empowered to call for information, including an employee questionnaire, to assist it in reaching that determination. The law is however silent as to the form of a favourable determination. Prior to 2013, there was no provision for “approving” someone as a fit and proper person; there has never been a “certificate” of “status” for those who make the grade (both concepts invoked by Mr Herminie); and, until 2011, there was no obligation even to notify the result of a positive determination. The only purpose of the determination process was to place SIBA in a position to object to the appointment, should SIBA wish to do so. In other words, the Act was structured so that SIBA only takes action after it determines that a prospective employee is *not* fit and proper.

[34] An objection to a proposed appointment (if made) may, of course, adversely affect the interests of the employer and prospective employee. It must therefore be properly notified and supported by reasons, and is, like other quasi-judicial decisions under the Act, subject to judicial review.

[35] Mr Herminie correctly emphasised the requirement in the Code of Practice for all managers to “be and remain fit and proper persons as determined by the Authority”. That requirement places a continuing general obligation on all licensees. The obligation is

however discharged by compliance with the specific provisions of the ICSP Act (including the Code of Practice). So far as the appointment of new managerial staff is concerned, as long as a licensee complies in good faith with all its notification requirements, it is for SIBA to apply the statutory criteria and make the relevant determinations. Unless and until SIBA determines that a manager is *not* fit and proper, there is no risk of suspension or revocation of license status on that basis.

[36] Accordingly, I find that both the parties and the Tribunal in this case erred in describing a need for “approval” from SIBA as a “pre-condition” of Mr Soundy’s employment. The ICSP Act does not require “approval” in a positive sense when a manager is appointed by an existing licensee.⁴ Furthermore, we have seen that the ICSP Act contemplates notification of a proposed appointment in sufficient time that any objection by SIBA will be raised *before* the employment agreement is signed. There is therefore no basis for an implied term making employment agreements conditional on “approval” in a negative sense (that is, the absence of an objection from SIBA).

[37] Leaving aside implied terms, where SIBA *has* objected to a proposed appointment, does the existence of that objection prevent the parties from entering into a valid employment agreement? The first point here is that an objection need not be absolute; as noted above, SIBA might simply recommend that certain steps be taken before the appointment proceeds. A second point is that failing to follow SIBA’s recommendation when an objection is raised is not, unlike failure to follow “directions” or “guidelines” (s 13(2)), an offence under the ICSP Act and does not necessarily lead to disciplinary action. SIBA “may” suspend or revoke a license in such circumstances; meaning it also may not. I observe that this is true across the board for SIBA’s disciplinary powers (ss 13 and 14), even where a licensee has breached the ICSP Act or is carrying on business “in a manner detrimental to the public interest”. A third and countervailing point is that, as Mr Herminie has submitted, the Code of Practice (binding on all licensees by virtue of s 8(3)) does require all directors and managers of a licensee to be and remain fit and

⁴ Even under the new ISP Code, receipt of written approval from SIBA is not a precondition to proceeding with an appointment. Where approval is not given, SIBA must still object within 28 days if it wishes to stop the appointment from proceeding; see footnote 2 above.

proper persons determined by SIBA. That provision of the Code is however almost unique in that it does not place an obligation directly on the licensee (i.e., “the licensee shall ensure that...”).⁵

[38] Weighing all these matters in light of the requirements of art 1108 of the Civil Code, I do not consider that, as at September 2009, it was against the law to agree to employ a manager in the face of an objection from SIBA. There was at the time no equivalent of cl 9 of the new ISP Code, which prohibits a licensee from proceeding with an appointment where an objection has been received.

[39] Nor was it necessarily “against public policy” to enter an employment agreement in these circumstances. If there is a clear expression of public policy underpinning the ICSP Act, it is that SIBA is mandated to protect the public interest by exercising broad – but not unlimited – discretion to control license status. It will generally be ill-advised for an employer to risk its license status by disregarding SIBA’s views on a prospective employee (and for an employee to risk termination of his contract when that risk materialises). But it is also possible that proceeding with an appointment could be a rational response to an objection which the contracting parties regard as unjustified and vulnerable to judicial review. To act in this way cannot be dismissed off-hand as contrary to public policy.

[40] The difficulty in this case is that neither Vertex nor SIBA followed proper process. Vertex breached its obligation to provide written notification of the proposed appointment (which, in itself, placed Vertex’s license position at risk). SIBA’s receipt of the questionnaire for Mr Soundy, in July, suggests that it condoned this breach. SIBA appears to have determined that Mr Soundy was not a fit and proper person, and to have communicated this determination orally to Vertex more than two months later (*after* the employment agreement had been signed). SIBA did not however object in writing to the appointment, within one calendar month or otherwise. This placed Vertex in an

⁵ Clause 20.5 of the new ISP Code clarifies that, as of 2013, “the primary responsibility for ensuring that a licensee is soundly and prudently managed rests with the licensee itself. Therefore, a licensee must ensure that, whenever it submits a “fit and proper” application to the Authority, it has conducted its own relevant checks on the individual and is of the opinion that the individual will be found “fit and proper” by the Authority.” While this provision was not in force at the time of the events in this case, I note that no evidence was led as to Vertex’s opinion of Mr Soundy in this regard.

unenviable position. To proceed with Mr Soundy's employment raised a real risk that SIBA would suspend or revoke its licence, either on the technical ground of non-notification or on the basis that Mr Soundy was not or had "ceased to be" a fit and proper person. But was this risk sufficient to treat the contract as avoided or frustrated?

[41] On the evidence as it stands, the agreement cannot be said to have been illegal or contrary to public policy at the time it was made. There is no evidence of *any* objection from SIBA prior to 24 September 2007, let alone a written objection sufficient to trigger disciplinary process under the ICSP Act. Even if there had been, Vertex would not (under the 2009 law) have breached the ICSP Act simply by signing the agreement. It will be recalled that Mr Soundy was not scheduled to begin work for another month. SIBA's concerns might have been addressed, or its position overturned on review, within that time. Even if not, Vertex would retain its license status unless and until SIBA decided to take disciplinary measures.

[42] Did the position change once SIBA's determination was communicated (orally) to Vertex? There is no evidence about the grounds for this determination, or whether those grounds were communicated to Vertex or Mr Soundy. Both parties appear to have accepted the adverse determination without question. So review was never in prospect. But it is not possible to say with certainty that Vertex would have lost its licence, or suffered any adverse consequence at all, if Mr Soundy turned up to work. That lay within the discretion of SIBA, and Vertex did not lead any evidence as to SIBA's intentions in this regard. Mr Soundy would not commit any offence in turning up to work. Nor is it easy to see what offence Vertex would commit in paying him to work. The considerable risk to both contracting parties in taking this course does not in itself undermine the validity of their contract.

[43] The Tribunal's application of s 58(1) of the Employment Act to this case was premised on a mistaken view of the requirements of the ICSP Act. The Tribunal was correct to state that the circumstances in which an agreement may be frustrated under s 58(1) are not limited to the situations specified in sub-paras (a) and (b). Section 58(1) is however clearly concerned with genuine *impossibility* of performance. The two examples given

are fairly extreme: the employer's entire business has become "prohibited or illegal", or the worker has lost the statutory authority necessary to participate in a regulated profession. Both examples presume a clear statutory prohibition of the kind which is just not present on the facts of this case. I can see no basis for extending the scope of s 58(1) to a situation in which the spectre of regulatory action has made performance unexpectedly risky. Risk may not materialise. If and when it does, an employment relationship can be reassessed.

Estoppel

[44] I have concluded that this employment agreement was valid and enforceable when made, and did not become frustrated under the Employment Act. The estoppel argument advanced by Mr Hoareau, which was given short shrift by the Tribunal, does not accordingly arise for decision.

[45] It may suffice to observe on this point that Mr Hoareau's submission is not supported by the English text on which he relies. As noted above, Mr Hoareau cited para 1594 of Halsbury's Laws of England in support of the submission that Vertex should be held to its representation that the employment agreement had "the legal effect of creating a contract of employment". That paragraph confirms that it is possible for an estoppel to be created by representation as to the legal effect of a document. More on point, however, is para 1596 ("Result must not be ultra vires"), stating the general rule that "a man cannot be estopped from denying the existence of a contract which is prohibited, or made illegal, by statute". To similar effect is para 1515 ("Estoppel against statute"), clarifying that estoppel "cannot be invoked to render valid a transaction which the legislature has, on grounds of general public policy, enacted is to be invalid".

[46] A similar submission to that made by Mr Hoareau in this case was rejected by the Court of Appeal in a 1994 decision concerning a lease of commercial premises to a foreign-owned company (*Casino des Seychelles Ltd v Compagnie Seychelloise (Pty) Ltd*, SCA 2/1994). The company in question had not received the necessary sanction from the Council of Ministers in terms of s 4(1) of the Immovable Property (Transfer Restriction) Act. The lease was accordingly invalid. Counsel for the appellant had argued that,

having been party to the lease for several years, the respondent could not plead the absence of this sanction. The Court accepted that both parties appeared to have been unaware of the need for the sanction until the dispute between them arose. But that was “immaterial where, as in this case, a provision of the law is a condition precedent”.

[47] Had I concluded that approval from SIBA was a condition precedent for Mr Soundy’s employment by Vertex (which it was not), the non-fulfillment of that condition could not have been overcome by any representation made by Vertex. The doctrine of estoppel cannot trump a legislative prohibition.

Decision

[48] The Tribunal erred in law in holding this employment agreement to be invalid and unenforceable. There was no legal impediment to making or performing the agreement. Mr Soundy’s claim for unpaid wages should not have been dismissed on that ground.

[49] Vertex has, understandably, pointed out that non-performance in this case was mutual. Despite Mr Soundy’s suggestion that he gave “oral” consultation services in the first three months of the contract period, it would clearly have been open to the Tribunal to find that, as the managing director of Vertex put it, he “never turned up to work”. There is a distinct air of artificiality in the claim that he remains employed to this day because Vertex has never given notice of termination.

[50] Mr Hoareau’s written submissions to the Tribunal, on behalf of Mr Soundy, claim that Vertex did not plead non-performance by Mr Soundy as a defence. Vertex did however plead in its amended reply (dated 1 September 2010) that Mr Soundy “never took up employment”. So an allegation of breach by non-performance can hardly have come as a surprise in the Tribunal hearing.

[51] Mr Herminie’s written submissions to the Tribunal for Vertex go so far as to assert that a contract “devoid of performance” is “by definition” frustrated. That assertion may not hold as a general rule but it does have resonance in this case. It has been three and a half years since Mr Soundy claims to have become entitled to wage payments. It took him almost two years to lodge a Tribunal claim. It is difficult to hold the absence of a

termination notice against Vertex in these circumstances; if anything, that absence reflects an apparently shared assumption that the agreement had never got off the ground.

[52] Clause 7 of Schedule 6 to the Employment Act gives the Tribunal broad discretion to “award compensation or costs *or make any other order as it thinks fit*” (my emphasis). While this employment agreement may have been mutually enforceable at inception, I am satisfied that it would have been unjust for the Tribunal to direct its performance by Vertex without regard to (a) the realities of the situation for both parties once SIBA’s disapproval had been communicated, and (b) Mr Soundy’s failure to either “turn up to work” or take prompt action to clarify his legal position.

[53] In fact, in the absence of proof of loss or damage by Mr Soundy, and given the unusual factual circumstances (which I hope will not be repeated), I see no basis for overturning the order made by the Tribunal in this case. The order accordingly stands. The appeal is dismissed with no order as to costs.

Signed, dated and delivered at Victoria this 31st day of May 2013

F M S Egonda-Ntende
Chief Justice