IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 425 OF 1992

BETWEEN :

BENTRY DAVIS WINGA ..... PLAINTIFF

- and -

SOUTHERN BOTTLERS LIMITED ..... DEFENDANTS

CORAM : TEMBO, J

Kasambala, counsel for the plaintiff
Chisanga, Counsel for the defendants
Kamanga, Official Interpreter
Daudi (Mrs), Recording Officer

JUDGMENT

This case arises from a road accident which occurred along the main road between Lilongwe and Kasungu, on 21st December,1991. Bentry Davis Winga is a business man whose business is known as CIDA AGENCIES. He does fumigation and water proofing. The vehicle which was involved in the accident was a pick-up van which Winga had then used in carrying out his business . In this action Winga is claiming from Southern Bottlers damages in respect of towing charges, thus K1,900.00; hire charges for an alternative pick-up in the amount of K6880.00; cost of repair of the damaged pick-up in the sum of K5,980.00. In the alternative Winga claims general damages for loss of use. He is also claiming costs of this action. On its part, Southern Bottlers is not disputing the claims in respect of towing charges

and the cost of repair in respect of the damaged pick-up. However, Southern Bottlers is disputing its liability to pay damages in relation to hire charges for the alternative pick-up in that it is submitted that the agreement for the hire of that pick-up is unenforceable on account of illegality. Southern Bottlers has therefore admitted liability with regard to all the claims made against it by Winga, except that in respect of hire charges for the alternative pick-up, and it has already effected payment in respect of the claims it has so far admitted.

The relevant facts of this case which were adduced before me by two witnesses, one from either side, and which are not disputed by both parties are to the following effect: The pick-up vehicle for Winga was parked along the Lilongwe Kasungu main road at or near Kasungu Flue Cured Tobbaco Authority when it was hit by a vehicle of Southern Bottlers . The pick-up was so damaged that it had to be towed from there to Blantyre. Then in order that Winga continued to have transport for his business,he hired an alternative pick-up from his fellow business man,one Mr.R F Nthubula, who carries out his business in the name of Ronex Building and Painting Contractors. The rate of hire was K160.00 per day and Winga had used that vehicle for a period of forty three days. That being the case, Winga was required to pay a bill of K6880.00 as hiring charges in respect of the alternative pick-up, which bill Winga in fact duly paid. Winga's damaged pick-up was eventually repaired at a cost claimed against and paid by Southern Bottlers.In his evidence Mr. Nthubula told the court that the vehicle he had hired out to Winga was one used for the purposes of his business and that at that time the vehicle was only insured against third party risks.

In the circumstances, there is only one issue left for the determination of the court following Southern Bottlers' admission of liability for the damage caused to Winga's pick-up. Thus, should the court award Winga damages in respect of hire charges for the alternative pick-up in the face of Southern Bottlers' defence of ***ex turpi causa non oritur actio***, thus that Winga's claim or action in that regard arises from a base cause,in particular illegality. In that connection, Mr. Chisanga has argued quite strongly that the court should not award those damages to Winga in that his claim is found on an agreement which was illegal. He maintains that the contract of hire was unlawful in that the policy of insurance in respect of the hired vehicle prohibited the use of the vehicle for hire and reward and that conseqently, during the period of hire by Winga the hired vehicle was used in contravention of section 59 of the **Road Traffic Act.** In that respect, Mr. Nthubula told the court that he had

insured the hired vehicle with Commercial Union. However, he was not able to produce the insurance documents because he sold the vehicle and that he no longer kept documents in respect of that vehicle and that in the circumstances he could not remember the wording of the third party policy in question. However, he was quite certain that the policy had not prohibited him from hiring out that vehicle as he in fact did. On his part, Winga was not informed, nor was he otherwise aware, of the fact that the vehicle he was hiring out was so insured at the time he entered into the contract and indeed throughout the period Winga was in possession and use of that vehicle.

It is expedient that I should start with a direct reference to section 59 of the ROAD TRAFFIC Act:

> "(1) Subject to this **Act**, it shall not be lawful for any person to use or cause or permit any other person to use a motor vehicle or trailer on a road unless there is in force in relation to the use of such vehicle or trailer by that person or that other person , as the case may be,such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part:
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> (2) Any person who contravenes this section shall be liable in the case of a first offence to a fine of K200 or to imprisonment for one year, and in the case of a second or subsequent offence to a fine of K500 and to such imprisonment aforesaid."

Subsection (1) is equivalent to section 35 of the Road Traffic Act 1930 of England. That section provides that it is an unlawful act for any person to use, or cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person such an insurance against third party risks as the Act requires. Lord Wright, in the case of **Mcleod v. Buchanan (1940) 2 ALL E R 179,** at page 186,said that the section is imperative, and precisely specifies the act or default constituting the offence, which is sufficiently established by proof of the matters specified.The same can rightly be said of subsection (1) of section 59 of our **Act.**

In the case of **Alexander v. Rayson (1936) 1KB 169**, at pages 182 and 183 Scott,L J said the following in relation to the maxim ***ex turpi causa non oritur actio***:

> 'It is settled law that an agreement to do an act that is illegal or immoral or contrary to public policy, or to do any act for a consideration that is illegal, immoral or contrary to public policy, is unlawful and therefore void. But it often happens that an agreement which in itself is not unlawful is made with the intention of one or both parties to make use of the subject matter for an unlawful purpose, that is to say a purpose that is illegal, immoral,or contrary to public policy. The most common instance of this is an agreement for the sale or letting of an object,where the agreement is unobjectionable on the face of it, but where the intention of both or one of the parties is that the object shall be used by the purchaser or hirer for unlawful purpose. In such a case any party to the agreement who had the unlawful intention is precluded from suing upon it. ***Ex turpi causa non oritur actio.*** The action does not lie because the court will not lend its help to such a plaintiff..... It will be observed that in all these cases the plaintiff was endeavouring to enforce by action an agreement, or a clause in an agreement, which was tainted by the unlawful intention of the plaintiff or the unlawful intention of the defendant known to the plaintiff, as to the purpose for which the subject matter of the agreement was to be used. To such an action the maxim, ***ex turpi causa non oritur actio*** applies. But the maxim does not require, nor does the language of it suggests, that a completely executed transfer of property, or of interest in property, made in pursuance of such an agreement must be regarded as being invalid."

Let me point out that in considering the question of illegality of the contract and as that relates to the claim of Winga, it is important that the court should note that the contract in question may be said to be illegal, and thererefore void, as formed or in relation to its perfomance only or indeed in respect of both formation and

performance.In either case, the offending party cannot enforce the contract.Thus after the court has ascertained that the contract is illegal as formed and therefore void or as regards its perfomance, illegality in the perfomance of a contract may disable a person from suing on it, if the court holds the view that that person participated in the illegality: **Ashmore,Benson Ltd V. Dowson Ltd (1973) 1 W R L 828,** in particular at page 832 where Lord Denning cited in approval the following passage from the judgment of Lord Atkin in the case of **Anderson Ltd V. Daniel (1924) 1K B 138,149 :**

> "The question of illegality in a contract generally arises in connection with its formation, but it may also arise, as it does here, in connection with its performance. In the former case , where the parties have agreed to do something which is prohibited by Act of Parliament, it is indisputable that the contract is unenforceable by either party. And I think that it is equally unenforceable by the offending party where the illegality arises from the fact that the mode of performance adopted by the party performing it is in violation of some statute, even though the contract as agreed upon between the parties was capable of being performed in a perfectly legal manner."

In the **Ashmore,Benson Ltd** case, a big piece of engineering equipment called a tube bank had to be carried from Stockton-on-Tees to Hull where it was to be shipped to Poland. It was very heavy. It weighed 25 tons. It was loaded on an articulated lorry. Half way to Hull the lorry with its load tipped over. Damage was done to the load. It cost 2,225 pounds to repair. The manufacturers claimed damages from the hauliers.In answer the hauliers pleaded that the load was too heavy for the vehicle and that the contract of carriage, or the perfomance of it , was illegal. The relevant regulation had prescribed 30 tons as a maximum weight laden. The unladen weight of the lorry was 10 tons. So the total weight laden was 35 tons, thus, five tons over the regulation weight. The regulation had further provided that it shall not be lawful to use on a road a motor vehicle or trailer which does not comply with any such regulations. Relying on the finding of the trial judge, Lord Denning was prepared to accept that the contract was lawful when it was made. On his part , the trial judge had made this finding:

> "I find that this conrtact was concluded between Jones on behalf of the plaintiff and Maurice Dawson on behalf of the

> defendants. I find that Jones relying on Maurice Dawson and his company to carry out the contract, a contract which could perfectly easily be carried out lawfully, and that he relied on the defendants to do so. It was not a term of the contract that it should be carried on any particular lorry. The contract was concluded at a time when Mr. Jones was asking Mr. Maurice Dawson to look at the load say that he could carry it for the sum offered."

On appeal a question arose : was the contract lawful in its performance. The decision of the court on that point was in the negative. It was held that the plaintiffs had participated in sanctioning the loading of the vehicle with a load in excess of the regulations. That participation in the illegal performance of the contract debarred the plaintiffs from suing the defendant on the contract or for negligence, in that the plaintiffs were parties to the illegality. The plaintiffs knew, as much as did the defendant, that the load was overweight in breach of the regulations. In his judgment, Lord Scarman said that there must be knowledge plus participation as it was decided by Lord Denning MR in the case of **J. M. Allan(Merchandising) Ltd V. Cloke (1963) 2 QB 340,348 :**

> "I desire to say that where two people together have the common design to use a subject matter for an unlawful purpose, so that each participates in the unlawful purpose, then that contract is illegal in its formation: and it is no answer for them to say that they did not know the law on the matter."

Reverting to the situation in the instant case, the starting point must be the interpretation of section 59 of the **Act** and its application to the hire agreement between Winga and Mr. Nthubula. It has already been conceded by the court that section 59 of the **Act** is imperative and that it precisely specifies the act or default constituting the offence created thereunder. Thus, it is an offence for any person to use or cause or permit another person to use a motor vehicle on a road except where there is in force, in respect of the use of such vehicle by any or both of them,a policy of insurance in respect of third party risks. In hiring out his pick-up, Mr. Nthubula must have well known that the insurance cover that there was then in respect of the use of that vehicle by him was a mere third party insurance. He told the court that the insurance in question did not prohibit him from hiring out the pick-up as he in fact

did. In saying this, Mr. Nthubula had earlier on told the court, however, that at the time he gave his testimony in court he was not able to remember the wording of the policy in that he had long since sold the pick-up in quetion and that he no longer kept insurance documents in respect of that vehicle. In so telling the court, Mr. Nthubula appeared quite sincere to me. In the circumstances, it is the view of the court that when he subsequently said that the policy did not prohibit him from hiring out the pick-up as he in fact did, Mr. Nthubula was not, and he did not sound, sincere to the court. Be that as it may, the court holds the view that the contract of hire which Winga and Nthubula had concluded was on the face of it lawful. Certainly from the viewpoint of Winga it must have been so, in that Winga had no idea whatsoever of what,if any, insurance policy Nthubula had in place for the pick-up the subject matter of the hire agreement. As it has been noted from the evidence, Winga was neither informed, nor was he otherwise aware, of the fact that the vehicle he was hiring out was so insured at the time he entered into the contract and indeed thoughout the period Winga was in possession and use of that vehicle. This, in part,is evidenced by the fact that when the bill was presented for settlement, Winga readily paid it.

On the other hand, it is the view of the court that although the contract was lawful when made, on his part alone, Mr. Nthubula had intended to implement it in a way that was in contravention of the provisions of section 59 of the **Road Traffic Act.** The performance of the contract on the part of Nthubula was known to be in contravention of the section in that he knew or that he ought to have known that he in fact caused or permited Winga to use the pick-up without there being in force, in relation to that use, such policy of insurance in respect of third party risks.This is an offence. In the light of the principles of law which have been highlighted above Nthubula, being a party to the agreement who had an unlawful purpose or intention was precluded from suing on it. Thus, in so far as Nthubula is concerned, the agreement was unenforceable on account of illegality arising from his infringement of section 59 of the **Act.** The position is quite diferrent in respect of Winga who was not aware of Nthubula's unlawful intention in relation to the performance of the contract as shown hereinbefore. In the circumstances, the defence of ***ex turpi causa non*** **or**itur actio fails, and it is dismissed accordingly. The claim of Winga in respect of hire charges for the alternative pick-up,in the amount of K6880.00, therefore, succeeds.

Costs for this action are awarded to the plaintiff.

PRONOUNCED in open Court this 16th day of October, 1997, at Blantyre.

A.K. Tembo
JUDGE