THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

HCT-00-CV-CS-0086-2008

DAVID MAY :::PLAINTIFF

VERSUS

BUSITEMA MINING CIE LTD:::::::::::::::::::::::::::::::DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

JUDGMENT

The plaintiff's claim is for U.S $120,902.89 (US dollars one hundred and twenty thousand, nine hundred and two, point eight nine cents) as outstanding remuneration due under the employment contract, interest thereon, general damages and costs of the suit. It is the plaintiff's case that he was employed by the defendant; that under the contract with the defendant company he was entitled to remuneration of US $7000 per month of which only US$4000 was paid to him per month for the duration of the contract, and, that a sum of US$120,902.89 is due and owing under that contract. It is the plaintiff's contention that the defendant was legally and contractually liable to pay the remuneration and is also liable for payment of the damages and costs of the suit.

The defendant denies liability. It contends that the contract of employment which is the basis of the current suit is illegal and unenforceable. It has raised a point of law for the dismissal of the suit.

At the conferencing the parties agreed that:

1. The plaintiff was employed by the defendant Company as General Manager of its mine at Busia upon a contract commencing on 01/01/2002.

2. Under the contract, the plaintiff was entitled to a monthly salary of US$7000 net of all taxes and social security deductions.

3. Under the terms of the said agreement US$4000 was payable immediately at the end of every month and balance of US$3000 was to be deposited on a company savings account to be paid to him after commencement of production.

4. The plaintiff resigned from the defendant company.

Issues:

1. Whether there was legally a valid and enforceable contract of employment between plaintiff and defendant.

2. Whether US$120,902.92 (sic) or any sum is due and owing to the plaintiff from the defendant

3. Remedies, if any.

Counsel: Mr. Noah Mwesigwa for the plaintiff
Mr. Paul Kuteesa for the defendant

Issue No. 1:

Whether there was legally a valid and enforceable contract of employment between plaintiff and defendant.

It is contended for the plaintiff that there was no legally valid and hence enforceable contract of employment; that the contract of employment between the plaintiff and the defendant dated 01/01/2002, Exh. P1, is a nullity and the plaintiff cannot rely on it to found a cause of action neither can the court enforce such an illegal contract.

The alleged illegality stems from the fact of the impugned contract not being approved or attested in accordance with S. 14 (1) of the Employment Act, Cap. 219. Under that law, subject to Section 13, a foreign contract is not enforceable unless it has been approved or attested in accordance with that Act.

I should point out at this stage that the Employment Act, Cap. 219, is no longer on our Statute Books. It was repealed and re-enacted as the Employment Act (Act 6 of 2006) which came into force on 7th August, 2006 by virtue of S.I 33/2006 (Employment Act (Commencement) Instrument, 2006). However, the contract of employment between the plaintiff and the defendant is dated 01/01/2002, implying that it was governed by the repealed law. It is contended for the plaintiff that the proper law governing the matter is the Employment Act, 2006 and not the repealed Statute. Counsel's argument on this point runs as follows:

"First we contend that the Employment Act, Cap. 219 is not applicable and the proper law governing the matter in (sic) the Employment Act, 2006. Your Lordship, the entire Employment Act Cap. 219, was repealed by Section 98 of the Employment Act, 2006 (herein the 2006 Act) and ceased to the law applicable from the 7th day of August, 2006, when the latter Act came into force. Further but without prejudice to the foregoing, Section 99 (2) of the 2006 Act provides that all matters arising under the repealed Act have to be dealt with under current applicable law. Under the current law, attestation is not required and therefore Section 14 of the repealed Cap. 219 is inapplicable. Further, Section 100 (1) of the 2006 Act, directed the defendant to issue the plaintiff with a new contract of service immediately upon coming into force of the Act."

Section 99 of the Employment Act, 2006 is a savings section. It provides:

> "(1)**. *Without prejudice to the Interpretation Act, any Statutory Instrument, made under the Employment Act repealed by Section 98, and in force at the commencement of this Act, shall, with the necessary modifications, continue in force so***

far as it is not inconsistent with this Act, until revoked or replaced by Statutory Instrument made under this Act.

(2). ***Any proceedings pending under the repealed Act before the commencement of this Act may be continued and completed under this Act."***

It is evident from the above provisions that save for the second leg of Mr. Kuteesa's argument relating to alleged non-compliance with Regulation 50 (1) and (2) of the Mining Regulations 2004, which Regulations are still valid by virtue of S. 99 (1) of the 2006 Act, the substance of that section does not relate to the validity of the instant claim. I will comment on the Regulations later. Sub section (2) is not helpful to learned counsel for the plaintiff either since these proceedings were not pending under the repealed Act. The suit was filed on 28/04/08 when the 2006 Act was already in force. The issue as I see it is the effect of the repeal on acts or omissions committed under the repealed Act.

The answer is not contained in the Employment Act of 2006 or the repealed Act. It lies in Section 13 of the Interpretation Act, Cap. 3, which provides for 'Effect of repeal.' It reads:

"(1) Where this Act or any other Act repeals and re enacts, with or without modification, any provision of a former Act, references in any other enactment to the provisions so repealed, shall, unless the contrary intention appears, be construed as references to the provisions so re enacted.

(2) ***Where any Act repeals any other enactment, then unless the contrary intention appears, the repeal shall not-***

a. ***revive anything not in force or existing at the time at which the repeal takes effect;***

b. ***affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed;***

c. ***affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed;***

d. **………………………….**

e. **………………………….**

From the foregoing provisions of the Interpretation Act, a repeal does not in itself validate an act previously invalid. Accordingly, the validity or otherwise of the Employment contract, Exh. P1, can only be determined pursuant to the Employment Law at the time, Cap. 219. Turning again to the provisions of section 14 (1) of the Employment Act, Cap 219 (now repealed), a foreign contract was not enforceable unless it had been approved of attested in accordance with that Act. In the case ***of Prof. Syed Huq vs Islamic University in Uganda SCCA No. 47 of 1995 (reproduced in [1997] IV KALR 26)*** Wambuzi C. J did conclude thus on this point:

> ***"………I must therefore hold, in agreement with the learned trial Judge, that Section 13 of the Employment Decree applies to the respondent and that accordingly the contract between the appellant and respondent which is not in compliance with the Employment Decree is not enforceable."***

What was S. 13 in the Employment Decree became S. 14 in the Employment Act, Cap. 219 (the repealed Act).

Section 14 (2) thereof provided guidance on how attestation could be done. It provided:

> ***"The approval or attestation shall be by a Magistrate or an authorized officer in triplicate and shall be in such form and subject to such conditions as the Minister, may from time to time prescribe……"***

Therefore, for a foreign contract of employment to be valid and enforceable, it had to comply with the provision of S. 14 of the Employment Act (Cap. 219). In other words, it

had to be attested in order for it to be valid and enforceable. For the avoidance of the doubt, a foreign contract of service was deemed to exist where one of the contracting parties was a foreign element. The plaintiff herein is a British Citizen, a foreigner for that matter. And from the evidence of DW1, Sherwen, the defendant is a foreign company incorporated in the British virgin Islands and only registered in Uganda for a place of business. This evidence has not been challenged by the plaintiff. In these circumstances, the employment contract, Exh. P1, which was not attested was un enforceable under the Employment Act (now repealed).

It has been argued for the plaintiff that with the coming into force of the Employment Act, 2006, the approval or attestation requirement under the repealed Act is now unnecessary. Counsel has cited to me Section 100 (1) of the said Act as rendering the hitherto invalid contract valid.

Section 100 (1) of the Act is a Transitional Section. It reads:

> ***"(1) Subject to section 3 (2), every person who is employed by an employer under a contract of service, must be offered employment by the same employer as from the day this Act comes into force on terms and conditions of employment no less favourable than those that applied to that employee's employment under the Employment Act repealed by Section 98."***

Learned Counsel for the plaintiff has therefore submitted that the import of this Section is that upon coming into force of this Act, the employer was obliged to provide a contract of service that complied with the provision of the now Act; that the defendant did not comply with these legal directives and is now inviting this Honourable court to give judgment in his favour.

With the greatest respect to learned Counsel, I do not see any such burden being placed on the defendant by Section 100 (1) of the 2006 Act. All that the law states in that section is that existing contractual obligations under the repealed law would not be affected by the new law. The law maker pre-supposed existence of a valid contract of service, which was lacking in the instant case. While it is true, therefore, that under the current law attestation is not a legal requirement, it cannot be true that the impugned contract of service did not require attestation. It did.

Learned Counsel has also submitted that the duty to have the contract attested rested on the defendant; that the defendant committed an offence by not having the contract attested and it now seeks to benefit from its criminal conduct.

Section 15 (3) of the Act (Cap. 219) provided that if the omission to present the contract was due to the willful act or negligence of the employer commits an offence.

I have perused the impugned contract, Exh. P1, again and again. I have not seen in it the obligation in the absence of any law to that effect, that it was the defendant's duty under the impugned contract of employment to have it attested. That duty in my view rested on both the employer and the employee. I am therefore unable to accept the argument that both parties were not in pari delicto, that the plaintiff was innocent and cannot be denied justice on account of the defendant's criminal acts.

Learned Counsel (for the plaintiff) cited to me ***Ahmed Ibrahim Bholm vs Car and General Limited SCCA No. 12 of 2002*** in which His Lordship Justice Tsekooko while considering the question of illegal employment due to non-compliance with the law, (Immigration Act) observed that the parties were not in pari delicto since only the employer commits an offence for non-compliance with the law.

It would appear to me that this argument is unsustainable on the facts of this case. In the ***Ahmed Ibrahim Bholm*** case, the contract of service itself provided that the contract was conditional upon the company obtaining a work permit on the employee's behalf. There

was also evidence confirming that it was the responsibility of the respondent to obtain the work permit for the appellant, which it had not done. It was in the context of that omission on the part of the employer that court observed:

> ***"The respondent cannot, therefore, avoid fulfilling its obligation, under the contract, of getting the work permit for the appellant by turning round claiming that the appellant worked illegally because he had no permit."***

My understanding of that case is that there was evidence before the court that when immigration officials visited the respondent's offices, its officials chose to conceal the appellant by ordering him to stay in, and from work, his residence rather than allow him to be seen by, or take him to, the immigration officials for him to explain his plight to them. Court found this to be evidence of guilty conduct on the part of the company. No such evidence exists herein, to raise inference that the defendant was aware as to the non-attestation of the contract document and chose to take no action. It was the duty of both parties to ensure due compliance with the law. In these circumstances, the inference is that both parties were at fault (in pari delicto). This piece of lawyer's Latin (***in pari delicto, potior est canditio defendentis***) simply means that where the parties are equally at fault, the defendant is in the better position. It expresses the general rule applying to otherwise void contracts. Lord Denning M. R made this clear in ***Ashmore Ltd vs Dawson Ltd [1973] 2 All E.R. 856***:

> ***"I know that Dawsons were parties to the illegality. They knew, as well as Mr. Bulmer, that the load was overweight in breach of the regulations. But in such a situation as this, the defendants are in a better position. In pari delicto, potior est condition defendentis."***

It follows from this that a plaintiff might be able to recover where he could show that he is at fault to a lesser degree than the defendant. And that is what happened in the ***Ahmed Ibrahim Bholm*** case, supra. The plaintiff in the instant case has not shown that he was at

fault to a lesser degree than the defendant. The Supreme Court decision in ***Ahmed Ibrahim Bholm*** is therefore distinguishable from the instant one on facts.

Learned Counsel for the defendant has also submitted that the contract of employment is further rendered invalid by virtue of the provisions of the Ministry Regulations, S. I 2004 No. 71. Under this law (Regulation 50), ***every holder of a mineral right, who is not personally continuously in charge of the operations under mineral right, shall at all times have an agent at the site of the operations to be in charge of the operations and shall notify the Commissioner of every appointment or charge of such agent***. (emphasis mine).

The defence argument on this point is that for all intents and purposes the plaintiff was the agent of the defendant for its mine in Busia for purposes of Regulation 50 above.

The Plaintiff's evidence shows that he was appointed the General Manager of the defendant's mine in Busia; that he was in charge of all operations of the mine and the day to day management of the defendant's operations at the Mine. From the evidence the plaintiff is a mining engineer whilst DW1 Sherwen has no mining background. From the evidence of the plaintiff, therefore, that of DW1 Sherwen, and from the contract document itself, Exh. P1, the day to day management and operations of the Mine were the responsibility of the plaintiff as DW1 Sherwen solicited investors for the defendant. The plaintiff's appointment was, in my view, subject to confirmation by the Commissioner, a requirement under Regulation 50.

Learned Counsel for the defendant has submitted, very correctly in my view, that non-compliance with Regulation 50 also rendered the contract invalid and unenforceable regardless of whose duty it was to ensure compliance with it. It sounds rather absurd and weird that an argument such as this should be advanced by the party who should have ensured strict compliance with the law. Even then that is beside the point. The court cannot be made an instrument of enforcing an otherwise un enforceable and illegal contract. The rule has long been established that a court of law cannot sanction what is

illegal and an illegality once brought to the attention of the court overrides all questions of pleading, including any admissions made thereon: ***Makula International Ltd vs His Eminence Cardinal Nsubuga & Anor [1982] HCB 11*** at p. 15.
What then is the effect of all this non-compliance with the law on the plaintiff's claim?

It is trite that a contract is a legally binding agreement. An agreement arises as a result of offer and acceptance but a number of other requirements must be satisfied for an agreement to be legally binding. For instance it must be legal and the agreement must not be rendered void either by some common law or statutory rule or by some inherent defect, such as operative mistake. In the instant case, the non-compliance with mandatory provisions of the law (section 14 of the Employment Act, Cap. 219) rendered the contract void. If an act is void, then it is in law a nullity. It cannot be enforced. The reason for the law's refusal to uphold such agreements is commonly encapsulated in the Latin maxim ex turpi causa non oritor actio (no claim arises from a base cause).

The policy was well summarized by Lord Mansfield C. J. in the 18th century case of ***Holman vs Johnson Cowp. 343*** when he declared that no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. That if the cause of action appears to arise ex turpi causa……. The court says he has no right to be assisted: SUCCESS IN LAW by Richard H. Bruce, 4th Edition, at p. 260. It (the policy) was also approved in ***Scott vs Brown, Doering, Mcnab & Co. [1892] 2 QR 724 at 728 when Lindley, L. J.*** declared:

"***Ex turpi causa non oritor action. This old and well known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he***

has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him."

For the reasons I have given above, court is in agreement with the submission of learned Counsel for the defendant that Section 14 of the Employment Act, Cap. 219 (since repealed) applied to the plaintiff. It is immaterial that it has since been repealed as long as there is evidence that there was non-compliance with it as it lasted. Accordingly the impugned contract is un enforceable on account of non-compliance with that law.

I would answer the first issue in the negative and I do so.

Issue No. 2: Whether US $ 120,902.92 or any sum is due and owing to the plaintiff from the defendant company.

Having found under issue No. 1 that there is no valid and enforceable contract of employment, it follows that the sum claimed herein is not due and owing from the defendant. Subject to court's decision on the prayer for costs, I would dismiss the suit.

However, in the event of a successful appeal, since the plaintiff has prayed for special and general damages, I shall try to address the issue of damages as well, for academic purposes only.

I will start with special damages.
The rule has long been established that special damages must be pleaded and strictly proved by the party claiming them, if they are to be awarded.

In paragraph 4 (d) of the plaint the plaintiff has averred that a sum of US$120,902.89 being salary arrears has accrued to him under the contract agreement and that it remains outstanding to date. He has attached a summary sheet, Exh. P4, indicating how he arrived at that figure.

It is an admitted fact that under the terms of the employment agreement, US$4000 was payable immediately at the end of every month and balance of US$3000 was to be deposited on a company savings account to be paid to him after commencement of production. In view of this admission, I have failed to appreciate learned counsel for the defendant's argument that the company could only pay when it was in a financial position to pay. It is of course correct that the court cannot renegotiate the contract for the parties. However, as counsel for the plaintiff has correctly submitted, it is the duty of this court to interpret such contracts and render justice to the parties. From the construction of the agreement, the plaintiff was promised that US$3000 would be deposited in the savings account monthly to be paid to him immediately the company was in position to pay. In interpreting the clause, I cannot lose sight of the fact that the employment contract was negotiated at a time when there was no activity at the Mine. The plaintiff was recruited to establish that Mine. It is the evidence of the parties that the Mine is now operational, thanks to the effort of the plaintiff. DW1 Sherwen did concede that the plaintiff was appointed as director but locked out of Board meetings, implying that he was not in position to ascertain the complete financial status of the company as a General Manager. He (DW1 Sherwen) also conceded that the company is not in liquidation or under receivership. By necessary implication, it is a going concern, struggling to survive like any other business organization.

In considering this issue, I have considered the intention of the parties, the surrounding circumstances, the commercial purpose of the agreement and what makes commercial sense in transactions of this nature. Upon doing so, I have come to the conclusion that as the parties negotiated the terms of employment, it could not have been the intention of any of them that the plaintiff would accept contract price of US$7000, be paid US$4000 monthly and do without the balance until the defendant felt that it was in position to pay. This to me sounds rather illogical and extortionist. In my view, the words "*immediately the company is in position to pay*" must be construed in the context of the plaintiff's recruitment by the defendant being at a time when business had not commenced. This was in 2001. It is not disputed that the plaintiff served the company for more than five

years thereafter. He would, in these circumstances, be entitled to the difference between the contract price (US$7000) and what he had been paid along the way, in the event that court found the contract enforceable.

As regards the amount, it is the law that a fact is said to be proved when the court is satisfied as to its truth, and the evidence by which that result is produced is called the proof. The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. When that party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof; that is, his allegation is presumed to be true, unless his opponent adduces evidence to rebut the presumption. In the instant case, the plaintiff pleaded in his plaint and adduced evidence at the trial to show that the defendant owed him salary arrears and other benefits under the contract to the tune of US$120,902.89. He came up with a summary sheet, Exh. P4, which shows very meticulously how he arrived at that figure. That position was given to the defendant at the time of filing. There is evidence that before the suit was filed, the defendant did pay to the plaintiff a hefty sum of about US$75.000 towards his claims. The computation takes all that into account.

On being shown Exh. P4, the sole witness for the defendant, DW1 Sherwen, stated:

> ***"I have seen the document before. He provided it to me on adhoc basis. I never verified the content. He was my General Manager and I trusted him implicitly. I still do. So I don't feel any need to verify these figures. I probably couldn't at this stage. I presume the computation is correct."***

Surely if the computation had been unacceptable to them on account of being a fabrication, they (the defendants) have had ample time, space and opportunity to verify the claim. They have not done so. The plaintiff has in these circumstances adduced evidence sufficient to raise a presumption that the amount stated in his plaint is correct. He has thereby shifted the burden of proof to the defendant. I have already made a

finding that the defendant didn't adduce any evidence to challenge the plaintiff's claim, beyond denial of liability to settle it. Accordingly if I had found that the contract of employment was enforceable, the US$120,902.89 (not point 92 as it appears in Issue No. 2) would have been decreed to him.

As regards general damages, these are at large. The quantum would be within the discretion of court. Evidence has been adduced that the plaintiff suffered inconvenience and has been deprived of his accrued rights under the impugned contract. Working on the presumption that he would be entitled to general damages, I would have awarded him damages assessed at Shs.5,000,000/= (as its equivalent in dollars at the current exchange rate) with interest and costs of the suit.

For reasons I have endeavoured to give, the suit stands dismissed. Given the court's finding that the impugned contract is unenforceable on account of non-compliance with mandatory statutory provisions, and that both parties were at fault, I would order that each party bears its own costs.

Orders accordingly.

Yorokamu Bamwine
JUDGE
26/06/2009

26/06/2009:
Kenneth Sebagayi for defendant

Parties absent.

Mr. Sebugayi: Holding brief for Mr. Paul Kuteesa.

Court:

Judgment delivered.

Yorokamu Bamwine

JUDGE

26/06/09