



IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Wambuzi P, Mustafa & Musoke JJ A)

CIVIL APPEAL NO. 40 OF 1976

BETWEEN

TAWS LTD.....APPELLANT

AND

OTHAYA FARMERS CO-OPERATIVE SOCIETY LTD.....RESPONDENT

(Appeal from the Judgment of the High Court (Madan J) Dated 3rd March 1976 in Civil Case No. 1450 of 1973)

JUDGMENT

Musoke JA This is an appeal from a judgment of the High Court at Nairobi dismissing the appellant's suit for a claim of Shs 39,642/50, being the balance of the price of goods sold and delivered by the appellant to the respondent during 1972 and 1973. The appellant, a limited liability company, is a printer, and the respondent is a registered primary co-operative society within the meaning of section 2 of the Co-operative Societies Act (hereinafter referred to as "the Act").

The evidence showed that the respondent had been ordering and receiving stationery from the appellant, with which it had an account, since 1970; and it was proved that the goods which gave rise to this suit were, on different dates during 1972 and early 1973, ordered, received and retained by the respondent, and that the respondent had in fact paid part of the price. Each such order was for goods in excess of Shs 100. The defence was that the contracts under which the goods were obtained were illegal and therefore void because certain formalities under the Act and the Cooperative Societies Rules (hereinafter referred to as "the Rules") made under section 84 of the Act had not been observed by the respondent when placing the orders. Madan J, the trial judge, accepted this defence, and he also accepted the respondent's further contention that to pay the sum claimed would be committing an offence under the Act. The relevant provisions of the Act and the Rules are as follows:

Section 84(1) The Minister may make rules, applicable ... to any class of registered society, for the better carrying out of the provisions and purposes of the Act. (2) ... such rules may ... (w) provide that any negotiable instrument, and any order for goods or services, in excess of a specified sum by a registered society shall be ineffective unless counter-signed by the Commissioner or a person nominated by him for the purpose; ...

Section 87. (1) It shall be an offence under this Act if (a) a registered society, or an officer or a member thereof, fails to do or cause to be done any act or thing which is required by or under this Act or any rules made thereunder to be done; or (b) a registered society, or an officer or a member thereof, does anything which is prohibited by or under this Act or rules made thereunder; ...

Rule 32(1) Every registered society shall have a committee ... Rule 34(1) The committee of a registered society shall be the governing authority of the society ... (2) The committee of a registered society shall ... (c) ensure that any negotiable instrument and any order for goods in excess of amounts specified hereunder are countersigned by the Commissioner or a person or persons nominated by him for the purpose or other officers authorised in writing by him: (i) in the case of a primary society all negotiable instruments in excess of Shs 100 and all orders for purchase in excess of Shs 100 unless placed through a co-operative union; ...

In his judgment Madan J said:

In my opinion in this instance the question of illegality in the contract arises in connection with its formation. The requirement is absolute that orders for goods in excess of Shs 100 must be counter-signed as stated in the statute. The contracts in the form of orders for the supply of goods in excess of Shs 100 placed with the [appellant] were not counter-signed by the Commissioner or a person or persons nominated or authorised by him for the purpose. The absence of this formality rendered the contracts illegal *ab initio*. Any performance of these contracts by a registered society, an officer or member thereof would constitute an offence under section 87 of the Act.

Mr Omesh Kapila, who appeared for the appellant at the trial, submitted that although each of the orders which gave rise to this suit was for purchases in excess of Shs 100 and none of these orders had been countersigned as set out in rule 34(2)(c) of the Rules, nevertheless the transactions were valid and not illegal because the Minister had made no rule, under section 84(2)(w) of the Act, that such orders shall be ineffective. This submission, which was substantially repeated before us by Mr Gautama, was, however, dismissed by the judge in these words:

That may be so. The real obstacle in the path of the [appellant] ... is that the order being ineffective the contract in respect thereof was illegal and void *ab initio*, and consequently unenforceable. The statute is aimed at protecting a class of people, ie members of a registered primary co-operative society. The right to recover the price of goods even though actually supplied is taken away. The aim of the statute can only be fulfilled by enforcing it strictly ... By making ineffective uncounter-signed orders for goods the statute imposes a prohibition upon recovery of price for the goods.

I agree that where a statute is designed to protect members of a registered co-operative society it should be strictly enforced to achieve its objective. The difficulty here, however, is that there is no statutory provision to be enforced strictly. There is nothing under the Act or the Rules prohibiting the sale and delivery of goods in excess of Shs 100 to the respondent under an uncounter-signed order placed by the respondent. Rule 34(2)(c), which is relied upon by the respondent, does not say, in terms of section 84(2)(w), that any order for goods in excess of Shs 100 “shall be ineffective unless counter-signed by the Commissioner or a person nominated by him for the purpose”. The rule merely enjoins the committee of a registered primary society to ensure that any order for goods in excess of Shs 100 is “counter-signed by the Commissioner or a person or persons nominated by him for the purpose or other officers authorised in writing by him”; but it does not say that such order shall be ineffective unless it is so countersigned. I accordingly reject the submission of Mr Wamae, counsel for the respondent, that by implication rule 34(2)(c) covers section 84(2)(w) of the Act, and that the Minister exercised his powers under that section. The orders were not illegal.

The case of *Anderson Ltd v Daniel* [1924] 1 KB 138, which “considerably influenced” Madan J in reaching his decision does not, in my view, apply to the present case. In the *Anderson* case there were statutory provisions as to certain formalities to be observed in a contract for the sale of fertilisers, and non-observance of these formalities rendered the contract illegal. There was no such provision in the present case.

I would accordingly allow this appeal with costs here and in the court below. I would set aside the judgment and decree of the court below and enter judgment for the appellant as prayed in the plaint.

Wambuzi P delivered the following Judgment. I agree with the judgment of Musoke JA. There is no dispute, as Madan J found, that the respondent society ordered for the goods from the appellant company which were in fact supplied.

The judge also found that the respondent made part payment for the goods. He, however, found that the contracts in the form of orders placed by the respondent were illegal *ab initio*, as they contravened sections 84(2) and 87(1) of the Co-operative Societies Act and rule 34(2) of the Co-operative Societies Rules. The orders were in excess Shs 100 and they were not counter-signed by the Commissioner or a person nominated or authorized by him in accordance with the law.

There can be no doubt that the Minister is empowered to make rules to the effect that any order for goods in excess of a specified sum given by a registered society shall be ineffective unless counter-signed by the Commissioner or a person nominated or authorised by him for the purpose. The question is whether such rules had in fact been made. The trial judge held in effect that the Minister had so enacted by rule 34(2) (c). With respect, I do not think so; and here I agree with Mr Gautama's submission that the Minister did not exercise all his powers under section 84(2)(w) of the Act. All that the rule provides is that the committee of a primary registered society shall ensure that any order for goods in excess of Shs 100 is counter-signed by the Commissioner or a person nominated or authorised by him, but does not say that the order shall otherwise be ineffective. In my view, this rule is a direction to the committee of a society as to how it shall perform its functions and is not intended to affect the legality of any transaction between the society and a third party.

In *Anderson Ltd v Daniel* [1924] 1 KB 138 which influenced Madan J, the relevant statute required a vendor of fertilisers to issue an invoice to the purchaser specifying the respective percentages of certain chemicals contained in the article and failure to do so constituted an offence. It was held that the object of the statute was to protect purchasers of fertilisers and the effect of noncompliance with the requirements of the statute did not only render the vendor liable to a penalty but also rendered the sale illegal and precluded the vendor from suing for the price. In the instant case, there is clear provision in section 84(2) (w) of the Act which confers powers to enact rules to protect the society if desired by making the orders not properly counter-signed ineffective, but the rules which were enacted do not have this effect. In these circumstances, I think that it would be wrong to say that the rules as worded were intended to protect the society from the consequences of its own maladministration against apparently innocent parties.

As Mustafa JA agrees with the judgment of Musoke JA there will be an order in the terms proposed by Musoke JA.

Mustafa JA delivered the following Judgment. I agree that the appeal be allowed on the terms proposed by Musoke JA. Out of respect to Madan J, with whom we disagree, I will say a few words.

Section 84 of the Co-operative Societies Act empowers the Minister to make rules rendering ineffective the purchase by a registered society of goods in excess of a certain sum of money unless counter-signed by the Commissioner or his nominees. However, no rules to this effect have been made by the Minister. Rule 34 of the Co-operative Societies Rules merely enjoins committee members of a registered society to ensure that any order for goods in excess of Shs 100 is counter-signed by the Commissioner or his nominee. That rule is clearly concerned with the internal management and administration of a registered society; it cannot be extended or interpreted to mean that an order of purchase of that nature not properly counter-signed would be ineffective or illegal *vis-a-vis* a third party. With respect I think that the trial judge erred when he dismissed the appellant's claim on the ground he did.

Appeal allowed with costs.

Dated and Delivered at Nairobi this 22nd day of April 1977.

S.W.W.WAMBUZI

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PRESIDENT

A.MUSTAFA

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JUDGE OF APPEAL

J.S.MUSOKE

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JUDGE OF APPEAL

I certify that this is a true copy of
the original.

DEPUTY REGISTRAR