REPORTABLE: (2)

JIMBATA (PRIVATE) LIMITED
v
(1) ZIMBABWE MINING DEVELOPMENT (2) KAMATIVI TIN MINES (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, CHIWESHE JA & MUSAKWA JA
HARARE: 3 NOVEMBER 2022 & 12 JANUARY 2023

Adv. *T. Zhuwarara*, for the appellant

Adv. *T. Magwaliba*, for the respondents

CHIWESHE JA: This is an appeal against the whole judgment of the High Court "(the court *a quo*) sitting at Harare, dated 1 December 2021 declaring that the joint venture agreement, signed by the parties on 2 February 2018, is null and void in that it was signed without prior cabinet approval as required in terms of s 13 (1) of the Joint Ventures Act [*Chapter 22:22*] (the Act).

Aggrieved by that declaration the appellant has noted the present appeal.

THE PARTIES

The appellant is a company duly registered in terms of the laws of Zimbabwe. The first respondent is a statutory corporation established in terms of s 3 of the Zimbabwe Mining Development Act [*Chapter 21:08*]. It has power to sue and to be sued and to perform all such acts as may be performed by a corporate body. The second respondent is a company

duly registered in terms of the laws of Zimbabwe. It is a subsidiary company of the first respondent which is its majority shareholder.

On 2 February 2018, the parties entered into a joint venture agreement (the agreement) for the purpose of processing the Kamativi tailings dump to extract lithium and other minerals. They agreed to incorporate a joint venture company (JVC) to implement the project. The appellant was to hold 60% and the first respondent 40% of the shares of the JVC.

The agreement suffered a still birth as the parties failed to fulfil a number of conditions precedent to its performance. Chief among these was the non-fulfilment of s 13 (1) of the Joint Ventures Act which provides as follows:

> "Subject to subsection (2) and section 8(4), no contracting authority shall award a project or sign a joint venture agreement relating to a project unless the joint venture agreement has been approved by the Cabinet in accordance with this Act and any agreement required to be so approved that is purported to be concluded without such approval shall be a nullity."

It was primarily on the basis of the above provision that the respondents sought and obtained in the court *a quo* an order declaring the joint venture agreement between the parties a nullity.

GROUNDS OF APPEAL

The appeal is premised on the following grounds:

"1. The court *a quo* misdirected itself in proceeding to determine the question of the alleged absence of cabinet authority for the conclusion of the Joint Venture Agreement between the parties without hearing evidence from the Minister of

Mines and Mining Development concerning the purpose and effect of the letter dated 4 July 2017.

2. The court *a quo* grossly erred when it determined that the Joint Venture Agreement between the parties had been concluded without cabinet approval notwithstanding the approval that is contained in the letter dated 4 July 2017 from the Ministry of Mines and Mining Development.
3. The court *a quo* erred in law when it declined to enforce the provisions of clause 3.4.3 of the Joint Venture Agreement in the face of an express agreement between the parties as to the enforceability of that clause regardless of the invalidity of the Joint Venture Agreement."

RELIEF SOUGHT

The appellant prays that the appeal be allowed with costs and that the judgment of the court *a quo* be set aside and substituted with the following:

"1. The application be and is hereby dismissed.

2. The first applicant shall pay the respondent's costs."

THE ISSUES

1. The first and second grounds of appeal raise one issue, namely whether the parties to the joint venture agreement sought and obtained prior Cabinet Approval for them to enter into the joint venture agreement as required by s 13 (1) of the Act, and if not, whether the joint venture agreement was rendered a nullity.
2. The third ground of appeal requires a determination as to whether clause 3.4.3 remained enforceable regardless of the declaration of invalidity of the joint venture agreement. The appellant has not motivated this ground – it must be deemed abandoned. Instead

the appellant has introduced a new issue not covered by its grounds of appeal. The appellant now challenges the jurisdiction of the court *a quo* in view of the arbitration clause in the joint venture agreement. It is a point of law which can be raised at anytime.

ANALYSIS

Whether Cabinet Approval was sought and granted.

The appellant avers that the parties did obtain cabinet approval for the joint venture and that the letter from the Ministry of Mines and Mining Development dated 4 July 2017 constituted such Cabinet Approval. The court *a quo* found as a matter of fact that the letter was written in response to the parties' request by letter dated 18 May 2017 for the Minister's approval of the Joint Venture agreement. There was no request made by the parties for the Minister to seek cabinet approval on their behalf. This position was confirmed by the secretary of the Ministry who was called to give evidence in that regard. This finding of fact by the court *a quo* cannot be faulted. It is based on solid documentary evidence. The Minister's letter does not purport to be the cabinet approval required in terms of s 13 of the Act, nor does it say that cabinet approval was being sought, or that it was at hand. Cabinet approval not having been sought, the appellant cannot argue that same was granted. Cabinet could not have been seized with a matter which had not been placed before it. The court *a quo* found as a matter of fact that the parties did not have the necessary Cabinet Approval.

> "The law is settled that an appellate court will not interfere with factual findings made by a trial court unless those findings are grossly unreasonable in the sense that no reasonable tribunal, applying its mind to the same facts, would have arrived at the same conclusion; or that the court had taken leave of its senses; or put otherwise, the decision is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at it."

See *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (5) at p 670

In *casu*, it has not been suggested that the factual finding of the court *a quo* was outrageous. On the contrary the finding is rational and judicious given the facts of this case.

What the parties sought and obtained was Ministerial approval. It is trite that the Minister is not cabinet. He or she is only a member of that organ. As correctly submitted by the respondents, the composition of cabinet is described under s 105(1) of the Constitution which provides that "there is cabinet consisting of the President, as head of the Cabinet, the Vice President and such Ministers as the President may appoint to the Cabinet." It is clear that the Minister is not the Cabinet and in *casu* he did not purport to act as such or to communicate any of Cabinet's decisions. Either it appears, as pointed out by the respondents, that the parties were not aware of the need for cabinet approval as the Joint Venture Agreement itself makes reference to approval by the Minister and not by Cabinet, or simply that the failure to seek cabinet approval was a costly oversight by the parties.

We agree with the respondents that there are no material disputes of fact that required that the court *a quo* calls the Minister to give evidence as to the import of the Ministry's letter dated 4 July 2017. That letter speaks for itself – it granted Ministerial and not Cabinet approval. The parties' letter to the Minister requested his approval not that of Cabinet. In any event, the Act prescribes the peremptory procedures to be followed when seeking cabinet approval. In terms of s 3 of the Act the procedures to be followed are elaborate. The Joint Venture proposal must first be presented to the Joint Ventures Unit, a department in the Ministry of Finance. The unit would then report its findings and recommendations to the Joint Venture Committee comprising secretaries of various ministries and the Attorney General. It is that committee that would make recommendations as to whether Cabinet should approve or

reject the Joint Venture. It is not contended by the appellants that such procedures were effected. In the absence of these statutory and mandatory procedures, the proposal could not have been properly before Cabinet and no valid Cabinet approval could have been obtained. Cabinet Approval is a condition precedent to the validity of the Joint Venture Agreement. One must either have Cabinet approval or not have it. It cannot be implied from Ministerial approval or be made the subject of conjecture or assumption.

The court *a quo's* factual finding that the parties to the Joint Venture neither sought nor obtained cabinet approval prior to their signing the joint venture agreement, nor subsequently, cannot be faulted.

Whether the court *a quo* had jurisdiction to hear and determine the matter before it

The appellants further argued that since the parties' Joint Venture Agreement had an arbitration clause, the court *a quo* should have deferred to the arbitration process and stayed the proceedings pending arbitration. There is no merit in that argument.

Firstly, the arbitration clause does not make it mandatory that the parties proceed to arbitration for purposes of dispute resolution. Clause 21 of the Joint Venture Agreement provides for dispute resolution. Clause 21 (1) provides that in the event of any dispute, the parties shall endeavour to resolve the dispute amicably in the first instance. Either party can invite the other to a meeting to discuss and attempt to resolve the dispute. Clause 21 (1) provides as follows:

> "21.2 If the dispute has not been resolved within fourteen days from the date of delivery of the written invitation referred to in clause 21.1 above, then the dispute may be referred by either party, to arbitration in terms of the Arbitration Act [*Chapter 7:15*]. (own underlining)

The use of the word "may" as opposed to "shall" shows that the parties contemplated that other dispute resolution platforms could be pursued at the discretion of the aggrieved party. In other words the arbitration route was not mandatory. An aggrieved party was thus at liberty to approach the court *a quo* if it so chose. That is what the respondent did and the court *a quo* had every right to entertain the matter.

In any event, the issue before the court *a quo* was whether the agreement between the parties was valid, itself a question of law. Article 8 (1) of the Arbitration Act provides:

> "(1) A court before which proceedings are brought in the matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed." (own emphasis)

In line with the above provision, the court *a quo* correctly stated at p 11 of its judgment as follows;

> "I therefore determined that the court had jurisdiction to determine this application because of the nature of the relief sought in the main which was the legal validity of the existence of the agreement as opposed to the interpretation of its disputed provisions."

The court *a quo* found that the agreement was null and void and therefore the question of referral to arbitration falls away. It stands to reason that a party cannot approach an arbitrator to enforce an agreement that is null and void. Again the court *a quo* cannot be faulted for determining the matter itself without referring the matter to arbitration. The question of validity or invalidity being one of law, the court *a quo* was better placed to deal with it than an arbitrator.

Whether the arbitration clause is severable

The appellant contends that "the Arbitration Agreement within the Joint Venture Agreement which the parties concluded was severable from the main agreement and so was enforceable regardless of the fate of the main agreement." In support of this contention, the appellant relies on the provisions of clause 21 of the Joint Venture Agreement and on the operation of law. In the latter regard, the appellant cited the case of *ZETDC v Tendai Masawi t/a Masawi & Partners & Anor* HH 404/20, where it was stated thus:

> "an Arbitration Agreement is an agreement by the parties to submit to arbitration in the event of a dispute. It is a separate and independent agreement from the terms of the underlying contract in which it may be included. The Arbitration clause is severable from the underlying contract."

Clearly the ZETDC case *supra* is distinguishable from the present case. In *casu* the agreement has been found to be null and void *ab initio*. In other words, it never existed. The whole agreement, including the arbitration clause, is a nullity. There is nothing to sever or save. The arbitration clause exists to assist the parties resolve disputes arising from the agreement. Where such agreement does not exist on account of having been declared a nullity, what purpose would the arbitration clause serve? The appellant's argument to the contrary is without merit.

DISPOSITION

We conclude that the parties failed to seek and obtain the necessary cabinet approval as required by s 13 (1) of the Act thus rendering the Joint Venture Agreement a nullity. The court *a quo's* finding to that effect cannot be faulted. We reject the assertions by the appellant that the Minister's letter dated 4 July 2017 be viewed as such Cabinet approval. The Minister's letter does not say it is communicating Cabinet's position on the matter. It

conveyed, in black and white, the Minister's approval as sought by the parties. None of the parties sought Cabinet approval at all and such approval was never given.

The court *a quo* correctly assumed jurisdiction despite the existence of the arbitration clause as the same did not make it mandatory that an aggrieved party must approach the arbitrator. The clause leaves an aggrieved party free to pursue other options of dispute resolution. Where an agreement is declared a nullity, the arbitration clause, being part of the agreement, falls with the rest of the agreement. It exists for purposes of resolving disputes arising from the agreement. Where such agreement no longer exists, the clause automatically falls away.

The appeal has no merit. It must be dismissed. Costs shall follow the cause.

Accordingly it is ordered that the appeal be and is hereby dismissed with costs.

MAVANGIRA JA : I agree

MUSAKWA JA : I agree

Gill Godlonton & Gerrans, appellant's legal practitioners

Sawyer & Mukushi, respondents' legal practitioners