PICKWERL MINING (PRIVATE) LIMITED
versus
CHAWARA SYNDICATE
and
MOSES CHINHENGO N.O

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 24 November 2016 and 07 June 2017

Opposed application

Adv. T. Mpofu, for the applicant
Adv. J. Wood, for the 1st respondent

MAKONI J: This is an application for setting aside of an arbitral award in terms of Article 34 (2) of the Model Law as set out in the Arbitration Act [*Chapter 7:15*].

The applicant seeks the setting aside of the award on the following grounds;

1) That the arbitral award is contrary to public policy.
2) The award is contrary to law
3) That the arbitral award rewards a criminal enterprise and enforces an agreement which is by all accounts void.

The first respondent opposed the setting aside of the arbitral award on the basis that the award is not contrary to the public policy and does not reward a criminal enterprise. It argued that the award is not contrary to law since it is based on a contract entered into between applicant and first respondent in 2005 and breached by applicant in May 2011. It instead applied for registration of the award in HC 5936/16 which was consolidated with this matter.

The brief facts are that the applicant Pickwerl Mining (Private) Limited is a non-trading cooperate entity registered and operating in terms of the laws of the Republic of Zimbabwe. The first respondent is a syndicate consisting of three individuals Mark Hook, Kurt Braunstein and Dennis Martin hereafter referred to "Chawara syndicate". The first respondent owned

agricultural tenements adjoining each other and constructed a dam, called Chawara dam in the 1990's at their own cost. The dam wall is partly on Doonside farm where Mark Hook lived and farm tobacco and wheat and partly on Martin's farm. Its throwback is on Braunstein's farm. The syndicate in its statement of claim alleges that it cost them USD$2 600 000.00 to build the dam wall. The applicant entered a contract with the respondent which granted the applicant a twenty-year water right on Chawara dam thus the applicant would draw water from the dam. On 17 July 2005, the applicant and the respondent agreed that the applicant would compensate the respondent by way of monthly payments of USD$3000.00 for the construction of the dam and at the same time the respondent would pump water from Chawara dam utilizing a pump house located on Doonside Farm. From May 2011, the applicant has not paid its dues and is in arrears of US$111 000.00.

Mr. *Mpofu* for the applicant submitted that the land on which the dam is situated was acquired by the state in terms of the Land Acquisition Act [*Chapter 20:10*].Thus, the respondents' no longer own both the land and the dam. He further submitted that a dam by elementary law accedes to the land on which it is situated. The first respondent could not retain any rights in the land and his occupation on the farm is unlawful.

Mr *Mpofu* further submitted that the contract was concluded after the acquisition of the land. The effect of that is that the first respondent had no rights on the land at the time the agreement was reached as the land belonged to the State not the first respondent.

Mr *Mpofu* further submitted that the arbitral award is contrary to the public policy of Zimbabwe as it subverts a constitutional process. He added that the award is contrary to the Constitution of Zimbabwe.

Mr *Mpofu* further submitted that since the State is the new owner of the land the respondent must be compensated by the State not the applicant. He further submitted that the respondent accepted in evidence, during arbitration proceedings, that he had a claim for improvements against the State. He further submitted that the respondent accepted that the State had not refused to pay him and that it was his intention to ask for compensation from the State.

In reply Mrs *Wood* for the respondent submitted that the respondents' occupation of the land in question is lawful because he has never been charged with contravention of Gazetted land (Consequential Provisions) Act [*Chapter 20:28*]. He further submitted that the issue of unlawful

occupation of the property is irrelevant to the proceedings as the contract between the parties was for reimbursement of costs to pay for the dam wall.

Mrs *Wood* further submitted that if someone wants to take over the obligation of the State to pay compensation there is nothing illegal about it. She further submitted that the issue of improvements is irrelevant to the cause of action.

Mrs *Wood* denied that the award rewards a criminal enterprise and that it is contrary to public policy. She submitted that the award is based on the contractual agreement which the applicant must abide to.

Mrs *Wood* argued that where two parties agree to be contractually bound after an acquisition, there can be no statutory infringement of the Gazetted Lands (Consequential Provision) Act Chapter 20:28. She added that the parties entered into the contract with full knowledge of the fact that the farms belonging to the syndicate member had been acquired by the state under the Land Reform Programme and the state would compensate the syndicate members for improvements. There is a binding agreement with the applicant, which was signed on the 13th of July 2005 and expires 13th of July 2020, by virtue of which it is entitled to a payment of USD$3000 per month.

The task of this court is to determine whether the arbitral award is contrary to public policy as alleged by the applicant and if it rewards a criminal enterprise.

Sub-article (3) of article 36 of the *Model law* gives some examples of aspects that would plainly be perceived as being contrary to the public policy of Zimbabwe. It reads:

> "(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
> (2) An arbitral award may be set aside by the High Court only if –
> (a) ……; or
> (b) the High Court finds, that –
> (i) ……; or
> (ii) the award is in conflict with the public policy of Zimbabwe.
> (3) For the avoidance of doubt and without limiting the generality of paragraph (1)(b)(ii) of this article, it is declared that the recognition or enforcement of an award would be contrary to the public policy of Zimbabwe if –
> (a) the making of the award was induced or effected by fraud or corruption; or
> (b) a breach of the rules of natural justice occurred in connection with the making of the award."

What this entails was expounded on by Gubbay CJ (as he then was) in *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (S) where he stated;

> "Under article 34 or 36, the court does not exercise an appeal power and either uphold or set aside or decline to recognise and enforce an award by having regard to what it considers should have been the correct decision. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it. The same consequence applies where the arbitrator has not applied his mind to the question or has totally misunderstood the issue, and the resultant injustice reaches the point mentioned above."
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> At p 453 B-C he then goes on to define what public policy is;
> "An award will be contrary to public policy if –
> (a) it was induced by fraud or corruption;
> (b) a breach of natural justice occurred.
> The substantive effect of an award may also make it contrary to public policy, if, for example, it endorsed the breakup of a marriage or some criminal act."

The question is whether the award in this matter is contrary to public policy as contemplated under article 34(2) of the Model law.

As correctly submitted by Mr *Mpofu* the respondent does not have any legal rights on the land since it was acquired by the state in 2001. The other members of the syndicate vacated the farms in compliance with the law but Mark Hook did not do so. His continued occupation of the land constitutes a criminal offence.

The Constitution of Zimbabwe sets out the legal framework governing the land reform programme. It does so in ss 72, 290, 291 and 295. These provisions make the point that the land reform program is irreversible and consequently that the rights lost under the programme stand irrevocably lost. Further to the above provisions s 3 of the Gazetted Land (Consequences Provisions) Act [*Chapter 20:28*] provides (The Act);

> (1) Subject to this section, no person may hold, use or occupy Gazetted land without lawful authority.
>
> (2) Every former owner or occupier of Gazetted land—
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> (a)referred to in paragraph (a) of the definition of "Gazetted land" in section 2(1), shall cease to occupy, hold or use that land forty-five days after the fixed date, unless the owner or occupier is lawfully authorised to occupy, hold or use that land;
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> (b)referred to in paragraph (b) of the definition of "Gazetted land" in section 2(1), shall cease to occupy, hold or use that land forty-five days after the date when

the land is identified in accordance with section 16B (2) (a) (iii) of the Constitution, unless the owner or occupier is lawfully authorised to occupy, hold or use that land:

Provided that—

(i) the owner or occupier of that land referred to in paragraph (b) may remain in occupation of his or her living quarters on that land for a period of not more than ninety days after the date when the land is identified;

(ii) the owner or occupier shall cease to occupy his or her living quarters after the period referred to in proviso (i).

(3) If a former owner or occupier of Gazetted land who is not lawfully authorised to occupy, hold or use that land does not cease to occupy, hold or use that land after the expiry of the appropriate period referred to in subsection (2)(a) or (b), or, in the case of a former owner or occupier referred to in section 2(b), does not cease to occupy his or her living quarters in contravention of proviso (ii) to section 2(b), he or she shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

(4) Any person, other than a person referred to in subsection (2), who contravenes subsection (1), shall be guilty of an offence and liable to a fine not exceeding level seven or imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

(5) A court which has convicted a person of an offence in terms of subsection (3) or (4) shall issue an order to evict the person convicted from the land to which the offence relates.

The above Act makes the point that once land has been acquired, continued use or occupation of such land without lawful authority is a criminal offence. Such people do not deserve the protection of the law.

In my view, the arbitral award endorses a criminal act in that section 3 (2) of the Act, clearly provides that a former owner or occupier who does not cease to occupy acquired land on the expiry of the period prescribed "shall be guilty of an offence". In *Commercial Farmers Union and others* v *The Minister of Lands and Rural Resettlement and others* 2010 (1) ZLR 576 (H) at 587G-H CHIDYAUSIKU J listed the essential elements for contravening s 3 of the Act which are:

(1) proof that the land has been acquired in terms of s 16B of the Constitution;

(2) the former owner or occupier has not ceased to use or occupy the acquired land and
(3) the former or occupier has no lawful authority to continue to occupy the land

In casu, the other two members of the syndicate (first respondent) vacated the farms in compliance with the law but Mark Hook did not do so. The land was acquired by the state and the first respondent continued to occupy the land without any lawful authority thereby meeting the essential elements for contravention of s 3 of the Act. As correctly submitted by Mr *Mpofu*, people who continue to occupy and or use such land are criminals and do not deserve the protection of law. Therefore, the first respondent's continued occupation of the land constitutes a criminal offence in accordance with s 3 of the Gazetted Lands (Consequential Provisions) Act.

In *Commercial Farmers Union* case *supra* CHIDYAUSIKU J held that:

> "(3) Every former owner or occupier of acquired or gazetted land who has no lawful authority is legally obliged to cease occupying or using such land upon expiry of the prescribed period (ninety days after acquisition). See sbss 23(2)(a) and (b) of the Act and s16B of the Constitution. By operation of law, former owners or occupiers of acquired land lose all rights to the acquired land upon the expiration of the prescribed period."
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> (4) A former owner or occupier of land who without lawful authority continues occupation of acquired land after the prescribed period commits a criminal offence. If the former owner or occupier continues in occupation in open defiance of the law, no court of law has the jurisdiction to authorise the continued use or possession of the acquired land."

The first respondent was stripped of all rights to the land it previously owned or occupied and does not have any legal rights on the land. It was in unlawful occupation of the land when the contract was concluded. It cannot continue to make use of acquired land or benefit from it.

According to Section 16 (a) and (b) of the country's Land Acquisition Act, which was last amended in 2006, government is required to pay fair compensation to any person who suffered loss or deprivation of rights as a result of expropriation of land within a reasonable time. The arbitrator erred in ordering the applicant to compensate the first respondent when the State was liable for compensating the first respondent.

In *Mike Campbell (Pvt) Ltd. and Another* v *Minister of Land Reform and Another* 2008 (1) ZRL 17 (S) at 25E-H MALABA J stated that

> "Section 16A of the Constitution was inserted by the Constitution of Zimbabwe Amendment (No. 16) Act 2000. It prescribes the factors which must be regarded as of ultimate and overriding importance in regard to the compulsory acquisition of agricultural land for the resettlement of people in accordance with a programme of land reform. These factors are that under colonial domination the people of Zimbabwe were unjustifiably dispossessed of their land and other

> resources without compensation and that consequently the people took up arms in order to regain their land and political sovereignty resulting in the independence of Zimbabwe in 1980. It declares that the people of Zimbabwe must be enabled to reassert their rights and regain ownership of their land. The section declares further that the former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement purposes through an adequate fund established for the purpose and if the former colonial power fails to pay compensation through such a fund the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement purposes"

From this one can denote that the land in question legally belongs to the Republic of Zimbabwe and the former owners of land cannot be compensated for any improvements on the land.

The fact that the parties entered into an agreement is neither here nor there. The agreement was and remains illegal and no cause can be founded on it. The arbitrator in upholding the agreement was giving effect to the first respondent's use of acquired land, thereby according him the rights of an owner. This he could not do. Speaking in the context of illegal contracts the court in *City of Gweru* v *Kombayi* 1991(1) ZLR 333 (SC) said;

> "That is not the position with the present contract. It is therefore prima farcie void. The respondent cannot sue on a void contract. I adopt, with respect, the reasoning of LEWIS AJP (as he then was) *in Abreu* v *Campos 1975 (1) RLR 198 (A) at 202D-G; 1975 (3) SA 73 (RA) at 75A-C* on this point"

The point was also made in *Dube* v *Khumalo 1986 (2) ZLR 103 (SC) at 109 D-F*;

> "There are two rules which are of general application. The first is that an illegal agreement which has not yet been performed, either in the whole or in part, will never be enforced (by the courts). This rule is absolute and admits no exception. See *Mathews v Rabinowitz 1948 (2) SA 876 (W) at 878; York Estates Ltd v Wareham 1950 (1) SA 125 (SR) at 128.* It is expressed in the maxim *ex turpi causa non oritur action*."

The applicant has managed to establish that the award is contrary to public policy, is contrary to the law and rewards a criminal enterprise.

In view of the above finding, the counter application for registration of the arbitral award automatically falls away.

Accordingly, it is ordered that:

1. The arbitral award dated 05 December 2015 rendered by second respondent in the matter between Chawara Syndicate and Pickwerl Mining (Private) Limited be and is hereby set aside.

2. The counter application for registration of the arbitral award in HC 5936/16 is dismissed.
3. Costs of this application shall be borne by the first respondent.

Gill, Godlonton & Gerrans, applicant's legal practitioners.

Venturas & Samkange, 1st respondent's legal practitioners.