KATHRINE THORNTON
versus
SIHLE MCKENZIE
and
THE REGISTRAR OF DEEDS
and
THE RESERVE BANK OF ZIMBABWE

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 14th June and 2nd August 2006

Opposed Application

Ms *Matizanadzo*, for the applicant
Mr *Nyawo*, for the 1st respondent

BHUNU J: The applicant and first respondent concluded a contract of sale on the 2nd of June 2005 in which the applicant sold her immovable property known as 126 Malvern of Waterfalls in the district of Salisbury for $900 000 000.00 (nine hundred million dollars).

The 3rd respondent financed the purchase of the property and subsequently had a mortgage bond registered against the property.

The applicant acknowledges that the 1st respondent paid $135 000 000.00 on the 2nd of August 2005 and a further $588 000 000.00 on the 5th August 2005 totaling $723 000 000.00 leaving a balance of $132 000 000.00 plus agents fees $45 000 000.00 totaling $177 000 000.00.

The 1st respondent has since taken transfer of the disputed property.

The applicant now seeks cancellation of the sale and transfer of the disputed property from the 1st respondent to herself. She has offered a refund of the part payment of $723 000 000.00. She further seeks cancellation of the mortgage bonds registered against the property. An eviction order against the 1st respondent and all those

claiming occupation through her plus costs of suit against all the respondents jointly and severally the one paying the other to be absolved.

The applicant's claim is premised on 1st respondent's failure to pay the balance of the purchase price despite demand.

The application is hotly contested with the 1st respondent objecting to these proceedings on the ground that the parties' written contract is subject to an arbitration clause.

Indeed clause 23 of the agreement provides as follows:-

> "ARBITRATION
> Any dispute arising out of or in relation to or in connection with this contract, or the breach or termination or invalidity thereof shall be referred to and finally resolved by arbitration in Harare. If the parties fail to agree on the appointment of the arbitrator either party may, on giving not less than 7 (seven) days written notice to the other request the commercial arbitration centre in Harare (or any successor in that centre) to appoint an arbitrator." (my emphasis)

The applicant while agreeing that the contract is subject to the above clause contends that the dispute which has arisen between the parties is not one capable of resolution by arbitration because of a statutory prohibition. She has pointed to section 8(1) of the Deeds Registry Act [Chapter 20:05] which provides as follows:-

> "Save as is otherwise provided in this Act or in any other enactment, no registered deed, deed of transfer certificate of title or other deed conferring or conveying title to land, or any real right in land other than a mortgage bond and no cession of any registered bond not made as security shall be cancelled by a registrar except upon an order of court."

It is pertinent to note that the section does not prohibit arbitration in disputes of this nature. What it prohibits is cancellation without a court order. In other words the section prohibits enforcement without a court order. Thus if the plaintiff proceeds by

way of arbitration if successful he will obtain an unenforceable arbitral award. This is because the registrar can only effect cancellation on the basis of a court order and an arbitral award is not a court order.

Matters could have been different had the Arbitration Act [*Chapter 7:02*] not been repealed and replaced by Act 6 of 1996. Section 27 of the repealed Act rendered it possible to convert an arbitral award into a court order upon registration with the court.

The section provided as follows:-

> "27. Award May Be Made Judgment of Court.
>
> The report or award of any officer of the court or official or special referee or arbitrator may upon motion by any party after due notice to the other parties be made a judgment of the court."

It is self evident that in terms of the repealed law an arbitral award was easily convertible to a court order. The situation has however since changed drastically regarding the enforcement of arbitral awards by the enactment of Act 6 of 1996 which became law on the 13th September 1996.

Article 35 of the new Act provides for the recognition and enforcement of arbitral awards. It provides as follows:-

> "(1) An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and upon application in writing to the High Court, shall be enforced subject to the provisions of this article and article 36.
>
> (2) The party relying on an award or applying for its enforcement shall supply the duly authentical original award or a duly certified copy thereof and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in the English Language, the party shall supply a duly certified translation into the English Language."

It appears to me that the new Act introduced a fundamental change to the then existing law regarding the enforcement of arbitral awards. Whereas the old Act had provision for the conversion of arbitral awards into court orders that provision no longer exists. My reading of Article 35 of the new Act is that an arbitral award upon registration is simply enforced as an arbitral award without first being converted into a court order.

Such an award not being a court order is incapable of enforcement by the registrar because he is specifically prohibited from doing so by section 8(1) of the Deeds Registry Act [*Chapter 20:05*].

The net result is that if the applicant were to take the arbitration route as provided for under clause 23 of the written agreement he will end up with an unenforceable arbitral award which in itself will be a *brutam fulmen*. That is to say a harmless thunderbolt. The award will obviously be incapable of achieving its purpose.

Generally speaking the courts and society at large are averse to someone suffering harm without a legal remedy. For that reason I take the view that although the parties expressly agreed that any dispute arising from their contract be finally determined by arbitration, they were not by so doing ousting the inherent unlimited jurisdiction of the High Court.

That position finds expression in the words of MAKARAU JP in the recent case of *Cargill Zimbabwe v Culvenham Trading (Pvt) Ltd* HH-42-2006 at 3. In that case after surveying a number of authorities her Ladyship made the pertinent observation that:-

> "With respect the defendant is always subject to the jurisdiction of the court. It is only the proceedings that are stayed pending referral of the dispute to arbitration. <u>An arbitration clause does not have the effect of ousting the jurisdiction of the court. It merely seeks to compliment the court process in resolving disputes by engaging in an alternative dispute resolution process but remains under the control of the courts</u>." (my emphasis)

I am in respectful agreement with the above sentiments of wisdom. The natural and logical conclusion to that observation is that it is the primary function of the court to resolve all legal disputes serve where its jurisdiction has been expressly ousted by the law maker. All other alternative dispute resolution mechanisms are merely supporting structures meant to aid the court in its difficult primary duty of resolving legal disputes. While the courts prefer that where there is an arbitration clause the parties must first exhaust their domestic remedies. They will not insist on arbitration where that route is fraught with insurmountable hurdles.

Thus notwithstanding the existence of an arbitration clause where the dispute is incapable of resolution by arbitration as in this case, the question of exhaustion of domestic remedies before approaching the court does not arise.

In the result I come to the conclusion that the applicant was within her rights in bringing the dispute straight to court notwithstanding the existence of an arbitration clause in the parties' agreement. I accordingly rule that the application is properly before me and that the registrar is directed to set down the main application for hearing as soon as is reasonably possible. Costs are to be costs in the cause.

Mabalala & Motsi, the applicant's legal practitioners
Mandizha & Company, the 1st respondent's legal practitioners