BLESSMORE CHANAKIRA
versus
TAWANDA MAPFUMO
and
W.R. GABRAITH

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 7 June 2010 and 21 July 2010

L.Uriri, for the applicant
Mr *Kwenda*, for the first respondent

CHIWESHE JP: On 29 October 2008 the applicant and the first respondent entered into a written agreement in terms of which the applicant advanced to the first respondent the sum of one hundred thousand United States dollars (the equivalent then of two hundred Old Mutual Ordinary Shares, listed on the Stock Exchange). As a return on this investment, it was agreed that the applicant would be entitled to thirty percent of the capital sum invested "each and every month" regardless of the performance of the investment. The thirty percent return was to accrue without deduction each and every month the capital sum remained outstanding, and, in the event the applicant did not withdraw the thirty percent return, such outstanding amounts were to accrue to the capital as capital. Either party could terminate the agreement by giving one month's notice and in that event the first respondent would be required to pay to the applicant the entire compounded capital plus any outstanding returns before the expiry of the thirty day notice period. Any payments still outstanding after the notice period would accrue thirty percent return on investment, which would accrue to capital for each and every month it remained unpaid. Disputes arising from the performance of the agreement were to be referred to arbitration.

It is common cause that at the time the capital sum of one hundred thousand United States dollars was advanced to the first respondent neither party had sought exchange control approval for that transaction as then required in terms of the Exchange Control Regulations, 1996. Similarly the first respondent's repayment in terms of the agreement would have required exchange approval. Following changes to the law in February 2009 the need to seek exchange control approval fell away. The first respondent failed to meet the terms of the agreement before and after February 2009. The applicant then terminated the agreement on 1 October 2009. However on 13 October 2009 the parties entered into another written agreement. They signed an acknowledgement of debt in terms of which

the first respondent acknowledged his indebtedness arising from his outstanding obligations under the terminated agreement. As assurance and security of his indebtedness, the first respondent surrendered to the applicant the title deeds of stand 2253 Bluffhill Township, a property registered in his name.

It is common cause that on 17 September 2009 and on 9 October 2009 the first respondent made payments the total sum of which amounted to one hundred and fifty eight thousand United States dollars. The parties however failed to agree on the exact amount of money owed by the first respondent.

The parties then referred the matter to arbitration. The arbitration process consisted of a claim by applicant for payment in full in terms of the agreement between the parties and a defence by the first respondent who argued that the agreement constituted a loan and not an investment and as such fell foul of the Money Lending and Rates of Interest Act [*Cap 14:14*] as it bore interest rates above the stipulated levels. The first respondent also argued that the agreement was illegal as it contravened the exchange control regulations as no authority had been obtained by either party to deal in foreign currency. For these reasons, the first respondent argued that the agreement was against public policy and that therefore the arbitrator had no jurisdiction to determine the matters under it.

The arbitrator ruled that the agreement was not a loan but an investment and that as such the agreement was not against public policy as the *in duplum* rule did not apply. He however held, under para 6.2 of his determination, that the agreement contravened the Exchange Control Regulations, 1996 in that authority to pay had not been sought from the Reserve Bank. He was of the view that as a result the agreement was subject to that suspensive condition whose non fulfillment rendered the agreement void. On that basis he dismissed the claim and held, further, that as the parties were both guilty, the *in pari delicto* rule applied and the loss must lie where it falls.

Aggrieved by that arbitral decision the applicant approached this court by way of the present application. He seeks an order to the following effect:

"IT IS DECLARED THAT:

1. Para 6.2 of the arbitration award handed down by the second respondent at Harare on 13 March 2010 in the arbitration proceedings between the applicant and the first respondent is contrary to the public policy of Zimbabwe.
2. Consequently, it is ordered that the said para 6.2 of the arbitration award aforesaid be and is hereby set aside in terms of art 34 (2) (b) (ii) of the Unictral Model Law, First Schedule to the Arbitration Act [*Cap 2:15*].
3. Consequently it is ordered further that the matter be and is hereby remitted back to the second respondent for the computation of the amount due to the applicant under the investment agreement between the applicant and the first respondent.
4. That the first respondent shall pay the costs of this application only if the

application is opposed"

Is the arbitration award contrary to the public policy of Zimbabwe? In terms of art 34 of the Model Law a party may apply to the High Court for setting aside an arbitral award. Art 2 thereof provides:-

"(2) an arbitral award may be set aside by the High Court only if –
(a)…………..
(b) the High Court finds that –
(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Zimbabwe.
(ii) the award is in conflict with public policy of Zimbabwe."

The applicant contends that the award is contrary to the public policy of Zimbabwe *inter alia* because it is contrary to the substantive law of Zimbabwe. In terms of s 34 (5) an award is in conflict with the public policy of Zimbabwe if the making of the award was induced by fraud or corruption or a breach of the rules of natural justice occurred in connection with the making of the award. However the provision makes it clear that public policy may be impinged for reasons other than the above, by providing that the generality of para 2 (b) (ii) shall not be limited to these categories.

In *Sasfin Pty Ltd V Beukes* SA 1989 (1) the court had occasion to deal with the nature and extent of the elusive concept of "public policy". In deciding whether an agreement is contrary to public policy the interests of the community or the public are of utmost importance. Agreements which are contrary to law or morality are contrary to public policy and may not be enforced. The court's power to declare transactions or contracts contrary to public policy should be exercised with caution and with a view to do justice as between individuals. It must be borne in mind that public policy upholds the freedom of contract and requires that "commercial transactions should not be unduly tramelled by restrictions on that freedom." The power to declare contracts contrary to public policy should thus be exercised sparingly lest the whole field of contract is thrown into uncertainty as to the validity of contracts.

In *ZESA v Maphosa* 1999 (2) ZLR 452 (S) GUBBAY CJ (as he then was) had this to say at p 465: "…………….. the approach to be adopted is to apply the public policy defence……………restrictively in order to preserve and recognize the basic objective of finality in all arbitrations: and to hold such defence applicable only if some <u>fundamental principle of the law or morality or justice</u> is violated"(My underlining). At p 466 of the same judgment it was held thus:

> "An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. In such a situation the court would not be justified in setting the award aside.………….. 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 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."

In this case I agree with the Arbitrator's decision in holding that the agreement was not a loan but an investment, in terms of which a return on investment rather than interest accruing on the capital sum loaned was payable. As to the legality of the agreement there is no doubt that the agreement was a legal and binding document. It is its performance that would require the prior approval of the Exchange Control authorities. The agreement was therefore subject to that suspensive condition. In *Hattingh and Others vs Van Kleek* 1997 (2) ZLR 240 the court held as follows:

> "It seems to me pertinent that s 8 of the Regulations only prohibits, but does not declare void or illegal, the transactions enumerated therein."

In *Macape v Executrix, Estate Late Forrepper* 1991 ZLR 315 it was held that

> "The contract to pay is lawful. Actual payment in pursuance of the contract is unlawful, without permission. There is no reason why the court should not order payment, subject to the condition that authority is obtained. I must make it clear that this judgment in no way inhibits the Reserve Bank in the exercise of its discretion. It is entirely for the Reserve Bank to decide whether or not to authorize the payment. If it decides not to do so the payment may not be made. The contract remains lawful. Payment will then have to await a change either in the law or in the policy of the Reserve Bank." In other words "the plaintiff is entitled to his judgment and Treasury permission is a hurdle which can be jumped when it is reached."

In my view therefore the Arbitrator erred in holding that the agreement was void on account of the parties not having obtained Reserve Bank approval in terms of the Exchange Control Regulations. The regulations impose a punitive penalty, they do not declare void or illegal transactions made without that approval. If this view is correct, does that mean that the decision arrived at by the arbitrator, being erroneous at law, is contrary to the public policy of Zimbabwe? The decision can only be held to be contrary to public policy if "some fundamental principle of the law or morality or justice is violated" or if it is so defiant of logic or accepted moral standards that the conception of justice in Zimbabwe would be "intolerably hurt."

It is a fundamental principle of our law of contract that the non fulfillment of a suspensive condition does not render the contract illegal or void. A suspensive condition merely suspends the operation of all or some of the obligations of the contract until the

occurrence of a future event. Its non fulfillment does not *per se* vitiate the contract. The arbitrator's award violates this fundamental principle of the law of contract in Zimbabwe.

More significantly, the arbitrator erred in that he did not give effect to the terms of an acknowledgement of debt duly signed by both parties in October 2009, when, owing to a change in the law, it was no longer a requirement to seek Treasury authority to transact in foreign currency. His refusal to recognize the acknowledgment of debt freely entered into by the parties, at a time when the constraint affecting the original investment agreement had been removed, is so defiant of logic or accepted legal and moral standards that if upheld, the conception of justice in Zimbabwe would be intolerably hurt. Public policy upholds, as a fundamental principle, the freedom and sanctity of contract and requires that commercial transactions should not be "unduly tramelled by restrictions on that freedom"

For these reasons I am inclined to grant the application on the grounds that the arbitrator's decision runs contrary to the public policy of Zimbabwe. Accordingly it is declared and ordered that:

1. Para 6.2 of the arbitration award handed down by the second respondent at Harare on 13th March, 2010 in the arbitration proceedings between the applicant and the first respondent is contrary to the public policy of Zimbabwe.

   Consequently it is ordered that para 6.2 of the said arbitration award be and is hereby set aside in terms of art 34 (2) (b) (ii) of the Unictral Model Law, First Schedule to the Arbitration Act [*Cap 7:15*].
2. The matter be and is hereby remitted to the second respondent for the computation of the amount due to the applicant under the investment agreement as read with the acknowledgement of debt both of which are filed of record.
3. The first respondent pays the costs of this application.

Nyandoro & Company, applicant's legal practitioners
Messrs Kwenda & Associates, first respondent's legal practitioners