JASPER CHIMEDZA
versus
CITY OF HARARE
and
TOWN CLERK
and
ACTING DIRECTOR FINANCE N.O

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 15 January & 12 February 2020

Opposed Matter

T. Mafongoya, for the applicant
T. Goro, for the respondent

DUBE J: The applicant has approached the court for a declaratur and an order setting aside the decision of the first respondent cancelling a lease agreement entered into between the parties.

The brief background to this dispute is as follows. On 19 June 2018, the applicant entered into a lease agreement with first respondent's officials, in respect of stand number 24787 Budiriro Township, Harare. On 20 July 2018, third respondent wrote to the applicant indicating that it was cancelling the lease agreement on the basis that it had previously been allocated to the Government of Zimbabwe for a joint project with the Kuwait Government. The applicant 's case is that the respondents have not shown that the stand was indeed allocated for a joint government project. The applicant avers that the first respondent lacks any legal basis to cancel the lease as he has fully complied with the requirements of the lease and has not breached same.

The respondents defended the application and took preliminary points. The court directed that the parties argue both the preliminary points and merits of the matter. The parties agreed that it determine the preliminary points first and that the outcome of the challenge determine if the court may proceed and determine the merits of the matter. The respondents

submitted that the application is improperly before the court as the parties agreed in terms of clause 10.18 of the lease agreement that any dispute relating to the rights and obligations of the parties shall, failing agreement, be referred to arbitration. It was submitted on behalf of the respondents that the court has no jurisdiction to entertain the application and ought to refer the dispute to arbitration and stay proceedings pending the arbitration. The applicant argued that the arbitration clause does not provide arbitration as the expressed or implied first choice dispute resolution mechanism for the parties and hence the jurisdiction of the court was not ousted. The respondents also took the point that there was misjoinder of the second and third respondents. This point was conceded by the applicant, who agreed that the court strike off the second and third respondents from the proceedings, leaving only the first respondent to fight it out with the applicant. The challenge that the application ought to have been brought by way of review instead of a declaratur was not pursued.

According to the first respondent, who will henceforth be referred to as the respondent, the agreement was entered into and signed in good faith but the respondent discovered afterwards that there was a hindrance to the fulfilment of the lease agreement which was beyond its control. The respondent submitted as follows. Even before the entire process of leasing the land to the applicant had begun, the land had already been set aside for a government hospital which was to be built through a partnership agreement between the Zimbabwean and Kuwait Government. The Kuwaiti Government has already started pouring millions of dollars to fund the project. Had the respondent known this fact before entering into the agreement with the applicant, it would not have leased the land to the applicant. The mistake was corrected through termination of the lease agreement. The matter is of national importance and has the potential of creating a diplomatic fall out between the two cooperating states. It urged the court to dismiss the application.

The court will first consider whether the court's jurisdiction is ousted by the arbitration clause. If it finds against the respondent, it will proceed and determine whether the respondent made a mistake and if so, whether the mistake absolves it from its contractual obligations. The applicant's counsel raised two points in support of the assertion that the court has jurisdiction to entertain this application. It argued firstly that the High Court may, even in the face of an arbitration clause, still proceed and entertain a declaratur. The applicant submitted that it seeks a declaratur and that it is the High Court alone that can entertain a declaratur in terms of section 14 of the High Court Act, [*Chapter7; 06*]. He contended that for the reason that an arbitrator has no jurisdiction to entertain a declaratur, this court is properly seized with the matter. It

urged the court, if it finds that the arbitration clause ousts the jurisdiction of this court, to still proceed and entertain the application on this basis. This point does not find favour with the court. Where parties elect to have a dispute resolved by arbitration in circumstances where arbitration is the expressed or implied first choice dispute resolution mechanism chosen by the parties, that is the end of the matter. The dispute ought to be referred to arbitration in accordance with the wishes of the parties. This is so, despite that one party who has filed the dispute with a court and has sought remedies which may be outside the jurisdiction of an arbitrator. Where a court is seized with a matter where its jurisdiction is being challenged on the ground that an arbitration clause contend in an agreement, ousts its jurisdiction, the focus of the court at this stage is not on the remedies available to the parties at law in the matter before it, but rather, to give effect to the intention of the parties when they entered into the agreement. The fact that a party seeks a remedy that only the High Court can grant is of no consequence. What is paramount at this stage is what the parties agreed to regarding the forum for the resolution of their dispute and not what remedy one individual party elects to pursue. This point lacks merit.

The court will now proceed and determine whether the arbitration clause ousts the jurisdiction of this court. In the case of *Shell Zimbabwe (Pvt) Ltd* v *ZIMSA (Pvt) Ltd* 2007 (2) ZLR 366, the court held that while courts are bound to give effect to arbitration clauses in contracts, they are only to do so where arbitration is the expressed or implied first choice dispute resolution mechanism for the parties. The following remarks of MAKARAU J (as she then was), are pertinent. The court remarked as follows,

> "It is the second jurisprudential basis of arbitration that concerns me most in this matter. This relates to the contractual autonomy of the parties to choose the method of resolving their differences under the agreement. This autonomy has been described as paramount in the arbitration regime in this jurisdiction and explains the respect with which arbitration awards are treated by the courts. It is however my view that this contractual autonomy on the part of the parties has to be viewed in the context of the inherent powers of the court to dispense justice to all who seek it from the court. Thus, in my view, while the court is bound to give effect to arbitration clauses in agreements, it is not bound to do so in circumstances where arbitration is not the expressed or implied first choice dispute resolution mechanism of the parties. The turning point in any such inquiry in my view ought to be the intention of the parties. It is my further view that the parties *in casu* did not intend arbitration to be the first procedure to be resorted to in resolving differences arising from their lease agreement. They chose mediation in the first instance. It is therefore not out of place to suggest that this was an agreement subject to a mediation clause."

The court's observations make it succinctly clear that a court will only stay proceedings pending arbitration, where the arbitration clause states clearly and unequivocally that the parties to the agreement intend that arbitration be the procedure to be resorted to in the first

instance. The deciding factor in matters such as these is the intention of the contracting parties. Where an arbitration clause provides for other processes before arbitration such as mediation or other forms of engagement, the arbitration clause ceases to be exclusive. Arbitration no longer becomes the procedure of first choice of dispute resolution chosen by the parties.

Clause 10. 18 of the lease agreement reads as follows,

"DISPUTE RESOLUTION

> 10.18 In the event that a dispute or difference arises between the parties relating to the rights and obligations of the parties under this agreement and cannot be resolved within (14) days from the time it arose, the parties shall refer the matter to arbitration to be conducted by the Commercial Arbitration Centre, Harare.''

The arbitration clause provides that if, "the dispute cannot be resolved within (14) days from the time it arose, the parties shall refer the matter to arbitration." The arbitration clause makes provision for possible engagement of the parties before the dispute is referred to arbitration. The engagement envisaged could involve either mediation or any other process of dispute resolution. The intention of the parties clearly was not that arbitration be the first procedure or only procedure to be resorted to in the event of a dispute**.** In the event of the parties failing to resolve the dispute 14 days from the date it arose, the parties are to resort to arbitration. Clause 18 does not make arbitration the first procedure to be resorted to in the event of a dispute. Arbitration plays second fiddle to other processes of resolving disputes. I do not agree with the respondent that the expressed first port of call for the resolution of disputes as envisaged by the agreement of the parties is arbitration. The fact that the parties did not subject the dispute to mediation or any other process of dispute resolution is of no consequence. The arbitration clause does not oust the jurisdiction of this court.

The respondent gave out that it made a mistake by allocating the stand to the applicant. The papers filed do not exhibit such a mistake in the sense that there are no papers on record that show that the stand had previously been allocated for the hospital project. It is only the respondents say so. There is no paper trail showing the allocation. It was not shown to who the stand had previously been allocated to if at all and when. The only piece of evidence of the supposed allocation is a letter written to the city authority by the Ministry of Health, highlighting the mistake. Even so, it is not evidence of allocation of the stand to the Government of Zimbabwe jointly with the Kuwait Government. Even assuming that the mistake was made, the mistake is not due to the fault of the applicant.

In Agricultural *Bank of Zimbabwe Ltd t/an Agribank* v *Machingaifa* SC 61 / 2007, the court dealt with a defence of mistake and held that a litigant relying on an error of judgment

who can go further and show that at the time of the contract he was labouring under some misapprehension may escape liability under a contract. The court however held that the onus is not easy to discharge. The court relied on sentiments expressed by *RH Christie, The Law of Contract in South Africa op. cit, p 353*: where the author states as follows,

> "Unless the mistaken party can prove that the other party knew of his mistake, or that as a reasonable man he ought to have known of it, or that he caused it, the onus of showing that the mistake was a reasonable one justifying release from the contractual bond will not be easy to discharge."

The author goes on to state at p 354 as follows,

> "However material the mistake, the mistaken party will not be able to escape from the contract if his mistake was due to his own fault. This principle will apply whether his fault lies in not carrying out the reasonably necessary investigations before committing himself to the contract … and in fact in any circumstances in which the mistake is due to his own carelessness or inattention, for he cannot claim that his error is Justus."

The position is now settled that an *offeror* cannot escape liability by establishing that he has made a wrong offer which was accepted – *University of Zimbabwe* v *Gudza* 1996 (1) ZLR 249 (S), 253 D-E. In this case, the court held that an offeror will not be permitted to rely on the absence of consensus if the mistake was due to his own carelessness.

Men of full age and competent understanding have the liberty to contract. Where such men enter into contracts freely and voluntarily, such contracts shall be held to be sacred and enforceable and the courts should shy away from interfering with their freedom to contract, see *The Printing Numerical Co* v *Sampson* (1875) 19 EQ 462. In the case of *Magodora & Ors* v *Care International Zima*, SC 191/2013, the court remarked that it is not for the courts to rewrite contracts for parties or excuse any party from its performance or its consequences where it is shown that the contract was entered into freely and voluntarily. The court emphasized that the fact that the contract has become onerous does not excuse its performance.

The law is clear that the onus of showing a mistake lies on the person seeking to rely on it. A party who wishes to resale from a contract on the basis that it entered into the contract through a mistake has no easy task. He must show that there was a mistake and that the mistake is through no fault of his. Where the mistake is of his own making and carelessness, he must show that the other side was aware of it and that a reasonable man would have become aware of the mistake before the contract was entered into. He is only absolved from the mistake where he is able to show that the other party was aware of the mistake, made the mistake or contributed to the making of the mistake. No matter how material the mistake may be, an

offeror may not escape the consequences of a contract entered into by mistake where it is shown that the mistake is due to his own fault. He cannot benefit from his own mistake.

The mistake arose due to the first respondent's own carelessness and inattention. The respondent entered into this lease, through its officials who are undoubtedly men of full age and capacity. They did enter into the agreement freely and voluntarily without any undue influence being brought to bear upon them. The maxim *caveat subscriptor* applies in the circumstances of this case. The respondent's officials ought to have carried out necessary investigations before offering this land to the applicant. The mistake was not due to the applicant nor has it been shown that the applicant was aware of the first respondent's mistake when the parties entered into the lease agreement or ought to have realised the mistake. The applicant cannot be expected to have known of the mistake at the time the agreement was entered into. The error cannot be justified. No matter how material the mistake is, the fact that the land may have been offered to a foreign government for construction of a hospital that will benefit the general public does not help the respondent. The respondent being an offeror cannot escape liability for a contract simply on the basis that he made a wrong offer when his offer has already been accepted. The first respondent has not discharged the onus of showing that the mistake was a reasonable one justifying its release from the agreement. The interests of justice demand that the respondent fulfils its contractual obligations. The resulting agreement is binding and enforceable. The respondent must live with the consequences of its own ineptitude. It cannot be absolved from its mistake.

Accordingly, the applicant is entitled to the order sought.

In the result it is ordered as follows,

1. The application for the declaratur is granted
2. The decision by the 1st respondent through the 3rd respondent dated 20 July 2018 to the effect that the applicant's memorandum of lease of land dated 1 July 2018 had been cancelled by the first respondent be and is hereby set aside.
3. Consequently, the applicant's memorandum of lease agreement is valid and the first respondent is ordered to take note, endorse and record the same in their records and systems
4. The first respondent shall pay costs of suit on an attorney client scale.

Mafongoya and Matapura Law Practice, applicant's legal practitioners
Tavenhave & Machingauta, 1st – 3rd respondents' legal practitioners