REPORTABLE ZLR (15)

Judgment No. SC 84/06
Civil Appeal No. 84/06

THE PROVINCIAL SUPERIOR OF THE JESUIT PROVINCE OF ZIMBABWE v GODFREY KAMOTO AND OTHER RESIDENTS AT MANRESA FARM

SUPREME COURT OF ZIMBABWE
CHEDA JA, ZIYAMBI JA & GARWE JA
HARARE, SEPTEMBER 18, 2006 & JULY 10, 2007

L Mazonde, for the appellant

N Chikono, for the respondents

GARWE JA: At the hearing of this matter before this Court, the parties agreed that the matter be postponed *sine die* to afford them the opportunity to discuss the possibility of a settlement. In the event that no such settlement materialized, the parties were given leave to approach the Court so that the matter could be determined in the normal course. After some discussions the parties were unable to reach an agreement and this Court was then asked to determine the appeal.

The background to this matter is aptly summarized in the arbitral award forming the subject of this appeal. The appellant is the owner of Manresa Farm, a piece of land measuring 417.931 hectares in extent situated within the boundaries of the City of Harare. The respondents claim that they are all residing on Manresa Farm. It is unknown exactly how many families are living on the farm. Some of the families moved onto the farm with the appellant's authority whilst others did so without such authority. The appellant was given permission by the Harare City Council ("the Council")to subdivide the farm into residential stands, with land also being reserved for schools, crèches, churches, commercial use and other such purposes. It had been the appellant's intention

to accommodate the respondents in its development plans but because of developments that followed the appellant was prevented from doing so by the Council. In 1998 the Council advised the appellant that the settlement on Manresa was unlawful and that the position had to be regularized. The appellant started proceedings to get approval from the Council for the orderly and lawful settlement of persons at Manresa. The appellant had previously told the residents that they would be included in the scheme. The proposal by the appellant for the development of a high density residential scheme was however turned down by the Council on the basis that such a scheme would need to be connected to the Council sewerage system, which was not possible. A medium density scheme was also not acceptable to the Council for the same reason. Therefore the appellant adopted a low density scheme which the Council then approved. The respondents were given the option of purchasing these stands but, for financial reasons, only one was able to do so. The appellant then made some offers of relocation assistance to those households it had authorized to reside at Manresa. Some of the residents accepted the assistance and moved. Others accepted but did not move. In terms of the permit issued by the Council the appellant was required to build roads and storm water drains in the area and to provide a water reticulation system. To do this, the respondents would have to be moved and some of their houses demolished.

The appellant filed an application in the High Court seeking an order for the eviction of the respondents. The respondents opposed the application. Owing to a dispute of facts on the papers, the Court suggested and the parties agreed that, for a speedy resolution, the matter be referred to arbitration. The matter came before the arbitrator who concluded that any agreement that may have been reached between the appellant and the respondents in terms of which the latter were to occupy stands on Manresa was null and void in the light of the provisions of s 39(1) of the Regional Town and Country Planning Act, [*Cap. 29:12*]. That section provides that such an agreement must be in accordance with a permit. The arbitrator also found that there was no basis in law upon which the appellant could be said to be liable to pay compensation since the buildings constructed by the respondents were to be demolished and the appellant had not been enriched in any way.

The respondents filed an application in the High Court challenging the award on the basis that it was contrary to the public policy of Zimbabwe. In particular they challenged the award on the basis that the effect of the award was that the respondents should resettle themselves, that the award did not deal with the issue of alternative resettlement and that the award promotes the setting up of squatter camps. This, the respondents argued, would be against the public policy of Zimbabwe.

The High Court, after hearing argument, set aside the award. The Court concluded that the arbitrator made a gross mistake in finding that the appellant had no obligation to compensate the respondents "when the parties themselves seem to have accepted that principle and only needed guidance in its implementation in terms of the levels of compensation and identity of those so entitled". The Court further concluded that the arbitrator had failed to apply his mind to this question or had totally misunderstood the issue.

It is against this finding that the appellant has now approached this Court. More specifically the appellant submits that the arbitral award is not against public policy and that the respondents are not in any event entitled to compensation and relocation expenses. To determine this issue, it will be necessary to look at the law.

The Arbitration Act [*Cap. 7.15*] in the First Schedule has incorporated the United Nations Commission on International Trade Law (UNCITRAL) Model Law, with modifications. Article 34 of the Model Law has prescribed the procedure to be followed in applying for the setting aside of an arbitral award. For purposes of the present appeal, the relevant provisions are to be found in paragraphs 2(b)(ii) and 5. Paragraph 2(b)(ii) provides as follows:-

"2. An arbitral award may be set aside by the High Court only if -

(a) …

(b) the High Court finds, that –

(i) …

(ii) the award is in conflict with the public policy of Zimbabwe."

The term "public policy" is a somewhat vague and amorphous concept. It does not lend itself to a clear definition. As stated by GUBBAY CJ in *ZESA v Maposa* 1999 (2) ZLR 452:

> "Public Policy is an expression of vague import. Its requirements invariably pose difficult and contentious questions."(at p 464D)

The position is now settled that in ascertaining the meaning of this elusive concept in the context of the Model Law, regard must be had to the structure of articles 34(5) and 36(3). These articles deal with two aspects. The first relates to the circumstances connected with the making of the award, whilst the second relates to the substantive effect of the award itself. For purposes of the present appeal, it is the latter that is pertinent. In *ZESA v Maposa supra* GUBBAY CJ stated:

> "What has to be focused upon is whether the award, be it foreign or domestic, is contrary to the public policy of Zimbabwe. If it is, then it cannot be sustained.
>
> In my opinion, the approach to be adopted is to construe the public policy defence, as being applicable to either a foreign or domestic award, restrictively in order to preserve and recognize the basic objective of finality in all arbitrations; and to hold such defence applicable only if some fundamental principle of the law or morality is violated."

At p 466B, the learned Judge further observed:

> "The difficulty, then, is not with the formulation of an appropriate and acceptable test. It is with the application of that test in an endeavour to determine whether the arbitral award should be set aside or enforcement of it denied, on the ground of a conflict with the public policy of Zimbabwe."

ZESA v Maposa supra is authority for the proposition that 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 a court would not be justified in setting aside the award. 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 consequences apply 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.

The question that arises in this appeal is whether the arbitral award is contrary to the public policy of Zimbabwe. In particular the arbitrator found that the respondents had no right to continue residing at Manresa and further that the respondents do not have any claim against the appellant in respect of the houses they have built or for relocation assistance.

Manresa farm was acquired by the appellant in 1902. In time the appellant allowed some of the respondents to reside at the farm whilst a number of respondents settled themselves on the farm without authority. In 1975 Manresa farm was incorporated into the Greater Harare Area by the Harare City Council. This meant that all activities in the area had to comply with the Council by-laws. It was for this reason that the Director of Works of the City Council advised the Chishawasha Area Board in 1998 that the settlement at Manresa was not in accordance with the law and required regularizing. It was then that the appellant established the Manresa Development Board to liaise with the Council. Eventually approval was granted in October 2002 for the subdivision of Manresa into stands.

It is clear from the evidence led before the arbitrator that Manresa is an unplanned residential settlement. Some houses are constructed of pole and dagga. There are no toilets and no running water. There are no schools or clinics or shops. The existing houses were not built under the supervision of any authority. The need for the proper development of Manresa appears to have been common cause. Indeed, during the arbitration proceedings the legal practitioner for the respondents submitted that the respondents were not opposed to the development of Manresa into a residential suburb. Their only concern was where they would go.

Section 39(1) of the Regional Town and Country Planning Act [*Cap. 29:12*] provides that no person shall subdivide any property or enter into an agreement conferring on any person a right to occupy any portion of a property for a period of ten years or more or for his lifetime except in accordance with a permit issued by the Council.

Although some of the residents may have settled at Manresa before the area was incorporated into the Greater Harare Area in 1975, it is clear that the effect of s 39 is to render null and void any agreement conferring upon any of the respondents the right to occupy Manresa for a period of more than ten years. The arbitrator also concluded that none of the residents had stayed at the farm for more than thirty years and that therefore none had acquired any rights through prescription. The arbitrator also found that the appellant has not been enriched and that a claim for unjust enrichment cannot succeed. The arbitrator concluded:

> "Because the claimant has allowed them to erect houses and stay at Manresa does not mean that the claimant is now required to assist in their relocation either by way of financial assistance or by providing alternative accommodation or places to build houses. The claimant has been forced by Council to remove the residents from Manresa. However even if it had voluntarily decided to remove them, the legal position would be the same."

From a legal standpoint the reasoning of the arbitrator cannot be impugned in any way. It had been the appellant's intention to include the respondents in any

development plans that were to be approved by the Council. Indeed the representatives of the respondents were members of the Manresa Development Board that was tasked with the responsibility of liaising with the Council on the development of Manresa. It is clear that the appellant had allowed some of the respondents to stay at Manresa as a benevolent gesture. Such stay was indefinite. There were no basic standards to be met in the construction of houses at Manresa. There was no talk at that time of possible compensation in the event that it became necessary for the respondents to move. To suggest in these circumstances that the arbitrator was wrong in that he adopted a strict approach to issues of evidence and procedure is, to say the least, unfair to the arbitrator. The arbitrator was aware that the main issue was whether the respondents had the right to remain at Manresa. Having found they did not, he considered the issues of compensation and alternative settlement. He considered that the appellant was under no legal obligation to provide these. Whilst the net effect of the award is to render the respondents homeless, I am not persuaded that the arbitrator was wrong in coming to this conclusion.

The present position is that the continued stay of the respondents at Manresa is unlawful. The appellant has been forced to seek the eviction of the respondents. To have allowed the respondents to remain on the farm would have been, in the circumstances, tantamount to promoting an illegality. The public policy of this country cannot demand of a party in the appellant's position that he perpetuates the kind of settlement that is to be found at Manresa.

The circumstances reveal that the appellant did attempt to provide compensation and relocation allowance to enable those families it had authorized to occupy Manresa to move. It is apparent that the appellant felt obliged to do so from a moral rather than legal standpoint. The attempt was a failure. Some accepted and moved. Others accepted but stayed, citing possible intimidation by other respondents. There remains a dispute as to the identity of the residents that the appellant had authorized to set up home on Manresa.

The finding by the Court *a quo* that the arbitrator made a gross mistake in finding that the appellant had no obligation to compensate the residents "when the parties themselves seem to have accepted that principle and only needed guidance in its implementation in terms of the level of compensation and identity of those so entitled" is not supported by the facts. There is evidence that the appellant, alive to the difficulties the respondents would face in the event of eviction, tried to assist but failed in this endeavour. There certainly was no agreement that compensation be paid. In all the circumstances therefore the finding by the arbitrator cannot be said to be so outrageous as to intolerably hurt the conception of justice in Zimbabwe. The finding cannot be said to violate any fundamental principle of the law or morality or justice.

It is clear in this case that, Manresa having been incorporated into the Council Area, the responsibility of resettling the respondents would have rested firmly on the door of Government through the relevant Ministry. There is evidence Government became involved at some stage but at a somewhat superficial level. The arbitrator was alive to this and the problems that faced the appellant namely, that the appellant had wanted to accommodate the respondents in the development plans but was prevented from doing so by the Council which went further to advise that the respondents could not continue staying at Manresa owing to Council by-laws; that both the Council and Government were aware of the need for the respondents to be resettled; that both have the authority to acquire land for resettlement purposes but have done nothing to resettle the respondents. The result of the award is that the respondents will be evicted from Manresa. The stands that have been demarcated at Manresa have been purchased by third parties. Whilst the eviction of the respondents is a sad development, this cannot, in the circumstances, be said to be against the public policy of Zimbabwe.

In all the circumstances, the appeal must succeed.

It is accordingly ordered that -

1. The appeal is allowed with costs.

2. The order of the High Court is set aside and in its place the following is substituted -

"(a) The application to set aside the arbitral award dated 8 November 2004 be and is hereby dismissed.

(b) The arbitral award of 8 November 2004 be and is hereby registered as a judgment of the High Court of Zimbabwe.

(c) The respondents are to bear the costs of suit."

CHEDA JA: I agree.

ZIYAMBI JA: I agree.

Mutumbwa, Mugabe & Partners, appellant's legal practitioners
Mhiribidi, Ngarava & Moyo, respondents' legal practitioners