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"We welcome your feedback and comments"

Whither to the right of ownership of land? A brief critique of the decision in CBZ BANK LIMITED v DAVID MOYO AND ANOTHER SC 17-18

The facts

CBZ Bank Limited (CBZ), pursuant to a judgment of court, instructed the Sheriff of the High Court to attach immovable property registered in the name of the judgment debtor. David Moyo (DM) challenged the attachment by the Sheriff and argued that he had bought the property from the judgment debtor before CBZ was granted the judgment. DM argued that even though the property was still registered in the name of the judgment debtor, it in fact now belonged to him as he had entered into an agreement of sale and was awaiting registration of the property in his name.

The legal issue before the Court

The legal question that was before the court therefore was whether a person, by merely having an agreement of sale, can claim ownership to an immovable property which is registered in someone else's name. In essence, the court had to decide who owned the property between the judgment debtor, whose name was registered on the Title deeds, and DM, who had an agreement of sale of the property.

Decision of the Supreme Court

In a unanimous decision of three judges of the Supreme Court (Patel JA, Uchena JA and Mavangira JA), the Supreme Court held that title deeds to immovable property were not conclusive proof of ownership of immovable property. It was held that a title deed registered in the Deeds Registrar's office is simply prima facie proof of ownership. Where a person with an agreement of sale can show that they actually purchased the property with the intention of having it transferred to themselves, then they can successfully be found to be owners of the property. In other words, there are circumstances in which an Agreement of Sale can be held to be proof of ownership over the Title Deed registered with the Registrar of Deeds.

Comments

Effectively, the Supreme Court has negated the importance of registration of transfer of land in the Deeds Registrar's office. A title deed has effectively therefore been reduced to no more than prima facie proof of ownership, akin to a motor vehicle registration book. The difference however is that a motor vehicle registration book specifically says that it is not conclusive proof of ownership while the same cannot be said of a title deed to immovable property. Section 14 (a) of the Deeds Registries Act is clear that transfer of immovable property may only be transferred "only by means of a deeds of transfer executed and attested by a Registrar". There is no other way to transfer ownership of immovable property. The Supreme Court has however held otherwise meaning that even an Agreement of Sale may transfer ownership of immovable property.

The far reaching and probably unintended consequences of this is that lenders of money, especially banks, may find themselves without any security even though they would have executed a mortgage bond on a property's title deed. Even in sale of land transactions, buyers may no longer take comfort following a deeds search with the Registrar's office as someone else with an Agreement of Sale may claim ownership of the land. Suffices to add that there is no legal requirement for agreements of sale to be registered. Additionally uncouth judgment debtors can now easily avoid execution of their immovable property by entering into bogus Agreements of Sales in order to avoid execution of their immovable properties. With respect, the Supreme Court decision needs to be revisited and hopefully another case will come up where the Supreme Court will be persuaded to overturn its decision.

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Construction Contract Options In Project Finance Transactions

'Project Finance' is a method of raising long-term debt financing for major projects through 'financial engineering', based on cash flow generated from the project alone. Project Finance techniques are now used, globally, for projects related to oil pipelines, petrochemical plants, power plants, rail systems, roads and major highways, amongst others. In 2012, an estimated $375 billion worth of investments in projects around the world were financed or refinanced using project finance techniques , indicative of the growth of Project Finance, including as a practice area for legal practitioners and attorneys world over.

In a typical project finance transaction, there are five main parties, namely the: Project Company, Sponsors, Government, Commercial parties and Financiers. The relationship between these parties is regulated by project finance contracts, which contracts define the project, set out the repayment terms, and apportion responsibilities and risks between all the project parties. Examples of such project finance contracts include the: Shareholders' Agreement, Government Agreement, Financing Agreement, Supply Agreement and Sales/Off-take Agreement.

This article will be centred on the Construction Contracts that underpin project finance transactions, more particularly, EPC and EPCM contracts, including what they entail, and their advantages and disadvantages.

In a project finance transaction, the Construction Contracts are entered into between the Project Company and Construction Contractor. The most commonly used contracts are either EPC (engineering, procurement and construction) or EPCM (engineering, procurement, and construction management) contracts. The contracts themselves are often based on industry standard forms such as JCT (Joint Contracts Tribunal forms produced by ICE Institution of Civil Engineers), FIDIC (Federation Internationale des Ingenieurs-Conseils) or IME (Institution of Mechanical Engineers).

The first type of Construction Contract commonly used in Project Finance transactions is the EPC contract. In an EPC Contract, the contractor is responsible for constructing the whole project by a fixed time and for a fixed price. EPC Contracts are distinguished by their single point responsibility , as the contractor assumes responsibility for the overall performance of all subcontractors. As a result, EPC contracts are often referred to as "turnkey" contracts.

The advantages of EPC Contracts include the fact that many of the completion related risks are shifted to the Contractor, including those related to cost and completion time. Furthermore, the single point of responsibility eliminates the risk of there being 'gaps' in the construction and commissioning of the project. Importantly, in an EPC Contract, remedies are pursuable by the Project Company directly against the EPC Contractor.

The disadvantages of EPC Contracts are that they are unsuitable for large scale and complex projects, where no one contractor is comfortable taking on the full turnkey risk, e.g. nuclear projects and certain petrochemical projects. Furthermore, EPC Contracts are unsuitable for 'first of a kind' projects, or those that involve technology beyond the skill of the main contractor, e.g. offshore wind farms.

The second type of Construction Contract commonly used in Project Finance transactions is the EPCM contract. In an EPCM Contract, the contractor provides a professional service but does not take direct and sole responsibility for the overall cost, performance or execution of the project. Accordingly, there is multi-point responsibility, as the Project Company individually negotiates and contracts with separate contractors for different elements.

The advantage of EPCM Contracts are that they are capable of being used in large scale and complex projects, where the completion related risks may be shared amongst numerous contractors.

The disadvantages of EPCM Contracts are that there is no "turnkey" responsibility on the EPCM contractor, the Project Company has to negotiate with each contractor separately and remedies have to be pursued against individual contractors with liability caps fixed by reference to their separate contract values.

Though EPC and EPCM Contracts remain the popular option for major Project Finance transactions, a merged option has increasingly been adopted. This option, is to have all of the contracting companies form a construction consortium which enters into the construction contract- with joint and several liability on the part of all of its members.

The advantages of this approach are that no one contracting company in the consortium has to assume responsibility for the performance of the others (they all do) and the employer retains his single port of call for damages and remedial work. In addition to mitigating the issue of responsibility, the merged option can also include stipulations relating to both price and completion date, thus mitigating the central risks associated with the construction contract package.

Construction Contracts form one of the most essential contracts in Project Finance transactions, as they directly impact factors such as project cost and completion time. In this piece, the most common Construction Contracts, being EPC and EPCM contracts, have been explored including their main characteristics, advantages and disadvantages. This piece has further gone on to explore the fast-growing 'merged option' as a Construction Contract solution within the Project Finance matrix. All these options must be borne in mind when dealing with Project Finance transactions, in order to provide the most suitable advice to clients in managing existent risks.

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A Brief Update and Summary of the Competition Policy of Zimbabwe 2017

INTRODUCTION

This note seeks to discuss in brief the new Competition Policy for Zimbabwe ("The Policy") which was published in 2017 and serves as a "gateway" document that will aid in the reviewing of the existing Competition law framework in Zimbabwe ("The Act") and drafting of the new Competition legislation in

Zimbabwe.

The Competition Policy has been formulated as a strategy for enhancing Zimbabwe's ability to promote free entry in the market place by investors and all firms irrespective of their size; the attraction of both domestic and foreign investment flows; innovation and transfer of technology from intellectual property rights holders and other related objectives that will ensure healthy competition and fair business practices amongst competitors.

Below I shall dissect the important aspects that make this Policy document of such groundbreaking importance in both the legal and business environments.

CHAPTER 4

Although the current Legal framework has managed to bear fruits and address inefficiencies which were obtaining in the business market, there are gaps which need to be filled. Chapter 4 identifies those gaps and highlights the deficiencies that exist and which ought to be remedied by the implementation of the Policy. A few will be discussed below.

Firstly, the issue of the definition of mergers and acquisitions under the current Competition Act leaves a lot to be desired as mergers which are contrary to the public interest are prohibited. The prohibition is not categorical and is scattered in different provisions thus making the interpretation thereof a complicated undertaking. Furthermore, the provision does not clearly provide which among the merging parties (Acquiring or Target firms) is responsible for notifying the CTC (''Competitions and Tariffs Commission'') of the intended merger transaction. Also the Act as it stands only regulates mergers of entities which will result in a change of control whereas in certain circumstances two firms that intend to merge may not necessarily want to change the control of the firms.

Another shortfall of the current Zimbabwean competition legal Framework as highlighted in this Chapter is the lack of a comprehensive definition of dominance and the lack of a clear general prohibition of the abuse of dominance. The act also does not provide for a level of market share that a person must attain to be considered as dominant.

Furthermore the framework distinguishes between various forms of objectionable conduct, namely unfair business practices, restrictive agreements and unfair trade practices, but it does not contain a provision for general prohibition of anti-competitive agreements.

Although the framework provides for notification of rule of reason agreements, it does not stipulate neither the timeframe for which the notified agreement will be reviewed nor the period for which the agreement will be exempted from competition law. Another apparent gap is the lack of exploitation of the Channels available in respect of advocating and furthering competition culture in Zimbabwe. This ideally should be done through the media.

It should also be noted that the Competition framework in Zimbabwe does not expressly provide for recognition of the existence of supranational competition bodies such as COMESA. Unequal application of the Competition law with regards to State Owned Enterprises and firms in the Private sector has also fostered disparities to the detriment of the Competition process.

CHAPTER 5

This Chapter forms the crux of this Policy as it sets out the objectives and measures which shall be taken in order to deal with the so called ''gaps'' that exist in the Competition Act and the application and implementation of it thereof. These measures will for the most part be spearheaded by the Competition Authority (''The Authority'')

In general the Policy is moving in the direction of adopting clearer definitions and use of common competition language for terminologies to avoid mix-ups which may open unnecessary arguments. As well as the development of guidelines on various issues to be adopted by the Authority.

Specifically, the Policy will provide for a comprehensive definition of a merger that encompasses all mergers. In addition, appropriate merger notification guidelines and notification threshold values will be formulated to ensure certainty and promotion of SME's.

The Policy seeks to address the issue of Dominance and Abuse of Market power by providing a comprehensive definition of the concept of dominance that encompasses all types of dominances either unitary or collective. Non- Exhaustive lists of types of abusive conducts by firms and types of abuse of market power will be published. The commensurate sanctions will also be published.

The Policy aims to provide a comprehensive definition of what an essential facility is in order to create legal certainty. Furthermore, the new Competition law will prohibit unjustifiable denial of access to an essential facility. The Authority will also be tasked with the responsibility of publishing an access guideline on matters such as cost, timetable for access to the facility and timeframe for such permitted access to create certainty.

The Competition Law will expressly provide for definition of Government and Government bodies in so far as they engage in trade. The Authority will accord equal treatment to both State owned Enterprises and those in the private sector as per the provisions of the competition law. Other objectives and measures can also be gleaned from the Policy document itself.

CHAPTER 7

Three Institutions are given the mandate to implement the policy and these are the Competition Authority, Sector

Regulators and the Judiciary. However amongst the three of them the Competition Authority plays a central role. The Authority is tasked with monitoring, controlling and prohibiting acts which are likely to adversely affect competition in Zimbabwe. The Authority will be made accessible countrywide and also will publish it operations for the consumption of the greater populace.

The Judiciary through the court system will also play a role in enhancing the enforcement mandate of the Competition Authority. As per the policy document there will be an institutional coordination mechanism between the Authority and the courts for the purposes of identifying issues that may need the attention of either institution
Sector regulators exercising both economic and prudential regulation will play a key role in competition enforcement through institutional linkages and coordination with the Authority

CONCLUSION
The Competition Policy is to be embraced as progressive and very much needed especially given the current socio-political landscape the Country finds itself in at the moment. The Shortfalls of the current Competition Act required such a document which will bridge the gap between where we are now in terms of our Competition law and where we ought to be in the modern era. However, as it stands this policy is merely a set of aspirations of objectives and measures which are colourfully couched. They will remain so until a real effort is made to implement them.

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JOKE OF THE MONTH

Q: How many Lawyer jokes are there?
A: Only three, the rest are true stories.

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