

ADVERSE REPORT

OF THE

PARLIAMENTARY LEGAL COMMITTEE

ON THE

AGRICULTURAL MARKETING AUTHORITY (COMMAND
AGRICULTURE SCHEME FOR DOMESTIC CROP,
LIVESTOCK AND FISHERIES PRODUCTION)
REGULATIONS, 2017.

STATUTORY INSTRUMENT 79 of 2017

In pursuit of its constitutional mandate as provided in section 152(2) of the Constitution of Zimbabwe, the Parliamentary Legal Committee (herein referred to as "the Committee) considered the Agricultural Marketing Authority (Command Agriculture Scheme for Domestic Crop, Livestock and Fisheries Production) Regulations, 2017. After deliberations the Committee unanimously resolved that an adverse report be issued in respect of the Statutory Instrument, due to the following reasons.

The Statutory Instrument creates a statutory hypothec in favour of the government to secure the monetary value of inputs supplied, but not consumed in accordance with a Scheme contract. The hypothec is over:

- (a) All agricultural inputs supplied to contract farmers;
- (b) All contract produce produced by contract farmers;
- (c) All identifiable proceeds from the sale or misappropriation of agricultural inputs, including cash; and
- (d) Any movable chattel on the land or premises of the contract farmer in the absence of the inputs, produce or proceeds specified in paragraph (a), (b) or (c) to the extent that those hypothecated items do not cover the monetary value of inputs supplied but not consumed in accordance with a Scheme contract.

The Statutory Instrument criminalises the breach of a civil contract in section 5, 6 and 7 of the regulations if a farmer – misappropriates agricultural inputs, unlawfully sales, purchases and possess agricultural inputs and contract produce and misuse agricultural inputs and contract produce. If a person borrows money from a bank and agrees to repay it with interest, there is a contract between the two parties which is enforceable in accordance with the relevant civil law. Any breach of contract to repay debt is not a crime. The only right of the aggrieved party is to approach the civil court to attach and sell securities or other unencumbered properties and recover

the defaulted loan. Criminalisation of breach of contracts is not an option to the strengthening of debt recovery laws for speedy recovery of loans in cases of breach of contract or default in repayment of the loan.

Command Agriculture is a government scheme which provides access of inputs by the farmers. The government scheme is governed by a civil contract between the government and the farmer are just like any civil contracts regulated by the law of contract, thus there is no need to create a criminal offence under a statute where it is already provided for in terms of a contract. The Statutory Instrument 79 of 2017 seeks to protect the scheme through criminalising the misappropriation of agricultural inputs and contract produce through criminal punishment. This not only contravenes Section 49(2) of the Constitution which provides that "*no person may be imprisoned on the grounds of inability to fulfil a contractual obligation*"; it is the Committee's view that this violates clause 11 of the contract which provides that variation of the terms and conditions of the contract shall be in writing and agreed to by both parties, it does not mention a Statutory Instrument having the authority to vary the contract or any other law.

A contract constitutes a promise for which the law gives a remedy in case of breach. Formation requires mutual assent and consideration. Courts use an objective test. It does not matter what the parties subjectively believed during the contract's formation, as long as they manifested the appropriate intent. A breach occurs when one party does not perform under the contract. This is a strict liability standard. If a party contravenes the terms of the contract, the party is in breach, regardless of the party's motivations or state of mind. Crimes stand apart from contracts. The state can prosecute these acts and seek sanctions including imprisonment. A crime typically requires a wrongful deed or act, an *actus reus*, combined with a guilty state of mind, a *mens rea*. The defendant does not need to be successful in completing the prohibited act. As long the person intended to cause the harm and takes some

affirmative action, this person can be punished. Crimes receive criminal punishment, but contract breaches only receive civil liability.

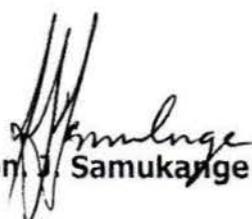
A civil contract entered into by parties is enforceable in any competent court and in terms of the Contractual Penalties Act [*Chapter 8: 04*] section 4 of the Act further stipulates that the penalties in a contractual agreement are enforceable in any competent court. It is prudent that the penalties that are stipulated in the Regulations (section 5, 6 and 7) for breach of contract be included in the contract agreement and not to be brought as a Statutory Instrument.

At law, the only remedy available to an aggrieved party is to approach the civil court and institute civil proceedings, thus any breach of material terms of a civil contract attracts civil remedies such as specific performance, rescission and payment of damages and not criminal punishment. The common phrase used here is that "*criminal law punishes while civil law prices.*" The aggrieved party cannot seek recourse from the criminal court because the cause of action emanates from a purely civil contract and thus attracts civil remedies not punishment. Criminalization of breach of contract is not an option whereas the strengthening of debt recovery laws governing loans (in whatever form) in cases of breach or default in repayment of loans is the solution. The mischief that Statutory Instrument 79 of 2017 seeks to remedy can be included under breach of contract under clause 8 of the contract between the government and the Farmer. Thus any breach thereof will be dealt with under the civil law since the breach of contract between the government and the farmer is like any other civil contracts regulated by law of contract.

The contract between the government and the farmer are just like any other civil contracts regulated by the law of contract, thus there is no need to create a statute where it is already provided for in contract. "*Every agreement...made deliberately*

and seriously, by a person capable of contracting, and having a ground or reason which is not immoral or forbidden by law, may be enforced by action." [**Innes CJ in Rood v Wallach. 1904. TS**]. This reveals that should the farmer breaches the contract the government can institute an action in any competent court to recover the debt owed by the farmer. Civil contractual agreements cannot be criminalised like what the Statutory Instrument seeks to do, this is *ultra vires* the Declaration of Rights in the Constitution. The offences created under this Statutory Instrument are already covered by the Criminal Code.

Conclusively, Statutory Instrument 79 of 2017 undermines a constitutionally entrenched right that is founded on fairness and justice to all. The Statutory Instrument goes against the founding principle of good governance, which binds not only the Ministry of Agriculture but all agencies of State, being the principle of transparency, justice, accountability and responsiveness, iterated in section 3(2)(g) of the Constitution. Accordingly the Committee unanimously resolved to issue an adverse report on the Statutory Instrument.



Hon. J. Samukange

CHAIRPERSON

PARLIAMENTARY LEGAL COMMITTEE