TIAN ZE TOBACCO COMPANY (PVT) LTD
and
SIMBARASHE CHIHWAI

HIGH COURT OF ZIMBABAWE
MUNGWARI J
HARARE; 3 October 2022 & 12 January 2023

Opposed application

G K Muchapireyi, for the applicant
B Furidza, for the respondent

MUNGWARI J: The applicant is a corporate duly registered in terms of the laws of Zimbabwe. It is suing out for a declaratory order to the effect that the judgment debt in case number HC 1977/18 is payable in United States Dollars or in Zimbabwean dollars converted at the bank rate subsisting at the time payment will be made. The relief it seeks as per its draft is couched as follows:

1. The order by consent granted by HONOURABLE JUSTICE MUZOFA on 30 January 2019 under case number HC1977/18 be and is hereby declared payable in United States dollars or RTGS dollars at the existing rate at time of payment.
2. The respondent shall pay costs of suit on the legal practitioner and client scale.

The application was mooted after the respondent contented that the payments he had already made amounting to RTGS $104 000.00 extinguished the judgment debt in HC1977/18.

Background facts

The facts giving rise to this application are that on 2 March 2018, the applicant sued summons out of this court in case HC 1977/18 claiming the sum of $155 507.56 being the outstanding amount of the value of inputs supplied and delivered to the respondent plus costs of litigation. The respondent filed his plea as well as a counterclaim in the sum of $140 000 together with costs of suit. The amounts sued out by either party against the other arose out of tobacco farming contracts which the parties entered into between 2013 -2015. However, on 30 January 2019, the parties negotiated and found each other. They settled the dispute with the

respondent abandoning his counterclaim and consenting to the claim by the plaintiff. Consequently a judgment by consent was entered into under case no HC 1977/18. The consent order directed the respondent as follows:

> 1. "The defendant be and is hereby ordered to pay to the plaintiff an amount of $100000.00
> 2. The defendant be and is hereby ordered to pay agreed legal costs on a legal practitioner scale amounting to $4000.00"

Pursuant to the consent order, a deed of settlement was prepared and signed by the parties on 15 February 2019. It was subsequently issued and filed with the registrar of this court on 20 February 2019. It detailed how the payment of the $100000.00 and the legal costs of $4000.00 was to be staggered. In terms of the deed of settlement, the capital sum was to be satisfied as follows:

a. An initial amount of $10000.00 was to be paid on or before 31 December 2019
b. The amount of $22500.00 was due on or before 31 December 2020
c. Another amount of $22500.00 would be due on or before 31 December 2021
d. An equal amount of $22500.00 would be due on 31 December 2022.
e. The last amount of $22500.00 would be due on or before December 2023

In addition to this, the legal costs amounting to $4000 was to be paid within six months (presumably from date of signing of the deed of settlement) at a rate of not less than $400 per month

On 25 February 2019 the applicant through its legal practitioners delivered a letter addressed to the respondent's legal practitioners stating the following:

> "Kindly find attached a copy of the filed deed of settlement for your records. Below are our Trust Account Banking details for payment purposes"

After the applicant's legal practitioners availed its RTGS Trust account details, the respondent then religiously complied with the terms of the settlement arrangement until he thought he had paid his debt in full. Unbeknown to him, it was only the beginning of his problems.

Aggrieved by the respondent's contention that he had liquidated the debt in full, the applicant approached this court seeking the relief indicated at the beginning of this judgment.

Applicant's argument

In motivating its application, the applicant contends that the contracts which formed the basis of its claim in the action matter under HC 1977/18 were denominated in United States

dollars because tobacco loans are funded in foreign currency. Further the applicant argued that the funds which it used to finance the tobacco farming contracts were acquired from off-shore funding. As a consequence, the judgment debt under case number HC 1977/18 ought to be payable in United States dollars or in RTGS dollars at the bank rate prevailing at the time of payment. The respondent cannot be unjustly enriched by settling the debt in RTGS dollars at the rate of 1-1 with United States dollars. The applicant believed it had a proper case for a declaratory order.

Respondent's argument

In his opposing affidavit the respondent was adamant that the application is misplaced because it is an attempt by the applicant to revisit a decision already made disguised as an application for a declaratory order. He further alleged that the parties knew and understood what they were agreeing to as evidenced by all the letters and emails that were exchanged between them and which were attached as annexures to his opposing affidavit. The exchanges spoke to the method of payment, the times when payment was due, where payment would be made as well as confirmation of receipts by the applicant as soon as any payment was made. To cap it all on 15 December 2020 the applicant obtained a writ of execution against the respondent, denominated in Zimbabwean dollars and not in United States Dollars.

It was the respondent's further contention regard being had to the subsequent conduct of the parties, that the applicant cannot belatedly try to rely on s 44 C of the Finance Act (No2) of 2019, he urged the court to disregard the applicant's attempt at re-opening a case which was finalised through the compromise agreement which the parties entered into. In his view, the applicant must not be allowed to prove in this application, that which they should have proved in HC 1977/18. There is no basis for attempting to drag this court back to the period before the consent order and subsequent deed of settlement.

The respondent further argued that, in the event that the applicant believed that there was an error in the order the remedy available to it was to approach the court for correction of that order and not to seek a declaratur.

At the time when the dispute was settled the parties were aware of the clear distinction between Nostro FCA and Real time Gross settlement (RTGS) accounts demanded by the Reserve bank of Zimbabwe. The respondent insists that it was indebted to the applicant in local currency, which debt it has extinguished with the implied as well as the express consent of the applicant in fulfilment of both the court order and the deed of settlement. He further contended that the applicant's attempts to rate the payments made is disingenuous in light of

how the payments were made and the communications exchanged between the parties. The applicant ought therefore to be estopped from refusing the currency of payment and denying that payment was made in full. Resultantly, so the respondent argued, no grounds were laid for the granting of a declaratory order.

Applicant's answering affidavit

In addition to generally refuting all of the respondent's contentions the applicant also stated that the consent judgment per MUZOFA J was denominated in United States dollars because the parties were *ad idem* as to the currency in which the judgment debt was to be paid. The consent order was granted following the applicant's claim which was in United States dollars. It further argued that the $ sign which appears on the consent order as well as the deed of settlement, and the writ of execution denotes United States Dollars.

At the hearing, the parties simply emphasised the arguments outlined above.

Issues for determination

The only issue which sticks out for determination in this application is whether in the circumstances, the judgment debt of $100 000.00 and costs of suit is payable in Zimbabwe dollars or in United States dollars. In resolving that matter the following corollary issues arise:

a. Whether there was a compromise agreement entered into by the parties in the form of the consent order and the deed of settlement
b. Whether the applicant by its own actions express and implied admitted compliance with the deed of settlement.
c. If it did whether the applicant should be estopped from claiming further sums of money
d. Whether the application at hand satisfies the requirements of a declaratory order.

Below I deal with the issues each in turn.

Whether there was a compromise agreement

RH Christie in his work titled *Business Law in Zimbabwe* at p. 108 characterises a compromise as follows:

> "Compromise is the settlement by agreement of disputed obligations and is a form of novation, replacing the disputed obligations by the obligations created by the agreement of compromise."

In the case of *Georgias and Anor* v *Standard Chartered Bank* SC 183/98 the Supreme Court defined a compromise as follows;

> "Compromise, or *transactio*, is the settlement by agreement of disputed obligations, or of a lawsuit the issue of which is uncertain. The parties agree to regulate their intention in a particular way, each receding from his previous position and conceding something - either diminishing his claim or increasing his liability. See *Cachalia* v *Harberer & Co* 1905 TS 457 at 462 *in fine; Tauber* v *Von Abo* 1984 (4) SA 482 (E) at 485 G-I; Karson *v Minister of Public*

> *Works* 1996 (1) SA 887 (E) at 893 F-G. The purpose of compromise is to end doubt and to avoid the inconvenience and risk inherent in resorting to the methods of resolving disputes. Its effect is the same as *res judicata* on a judgment given by consent. It extinguishes *ipso jure* any cause of action that previously may have existed between the parties, unless the right to rely thereon was reserved. See *Nagar v Nagar* 1982 (2) SA 263 (ZH) at 268 E-H. As it brings legal proceedings already instituted to an end, a party sued on a compromise is not entitled to raise defences to the original cause of action. See *Hamilton* v *van Zyl* 1983 (4) SA 379 (E) at 383H. But a compromise induced by fraud, duress, *justus* error, misrepresentation, or some other ground for rescission, is voidable at the instance of the aggrieved party, even if made an order of court. See *Gollach & Gomperts (1967) (Pty) Ltd* v *Universal Mills & Produce Co Ltd and Ors* 1978 (1) SA 914 (A) at 922H.'' See also *FBC* v *Hwenga* 2016 (1) ZLR 451(H).

In Golden *Beams Development (PVT) LTD* v *Fredson Munyaradzi Mabhena* HH296/21 Dube J (now JP) put it as follows:

> "A compromise enables the parties to settle the dispute outside court. The compromise agreement has the effect of creating new rights and obligations between the parties separate from the original cause of action. It extinguishes the original cause of action which becomes *res judicata* thereby creating new obligations. Once a compromise agreement has been entered into, the defendant has no entitlement to raise defences to the original cause of action".

My understanding of the above authorities is that, a compromise is an agreement by the parties to abandon their previous rights and obligations. They substitute them with new ones which arise from the compromise. Any previous cause of action is extinguished except where the parties expressly agree that it is not. There must be a mutual intention to settle the dispute and bring it to an end. It is a give and take situation because each party is at liberty to either escalate or climb down from his previous demands.

A perusal of the contract farming agreements which were entered into between the parties indicates that the loans were denominated in United States Dollars and that the repayment was supposed to be made in the same currency. When the dispute arose the applicant claimed the sum owed. The respondent also made a counter claim for a sum slightly less than the applicant's claim. Possibly sensing the uncertainties attendant upon the disputes, the parties decided to negotiate. They reached settlement and signed a deed to that effect. They followed that up by making the deed an order of this court. The question which then arises is whether by entering into that deed of settlement and the subsequent order of this court obtained by consent, the parties entered into a compromise agreement. Those facts, when juxtaposed against the court's understanding of a compromise fit squarely into that definition. When they entered into the deed of settlement, the parties agreed to abandon their previous claims and positions. They consented to be regulated by the terms of the new agreement. Their agreement was a novation of the existing contracts between them. They agreed on the amount owed and how it was supposed to be paid. Significantly the respondent completely abandoned his claim

for $140 000. A new arrangement for settlement of the debt between the parties came into effect. It also follows that the old cause of action was altered and modified as the parties became bound by the new terms of the deed of settlement. Consequently, there cannot be a doubt that a compromise agreement came into effect. Once that happened, the applicant became estopped from demanding any payment in terms of the novated contract. It could only sue for the recovery of its debt in terms of the new agreement. If the parties had intended to maintain the debt as a USD debt and its repayment in United States dollars that must have been included in their deed of settlement. What appears in their communications and other actions as will be illustrated below shows an intention to depart from the original position.

Whether the applicant by its own actions express and implied admitted compliance with the Deed of settlement.

On 4 October 2018 the Reserve Bank of Zimbabwe issued an exchange control directive. The directive separated Nostro FCA on one hand and Real Time Gross Settlement, mobile money transfer and bond notes and coins on the other hand. By the time the parties entered into an order by consent and signed the deed of settlement there already existed a clear distinction between FCA and RTGS accounts. As such it was impossible to make foreign currency payments into an RTGS account.

Four days earlier statutory instrument 33 of 2019, (now s 44 C of the Reserve Bank Act) came into effect. The relevant portion of the Statutory Instrument provides as follows:

> **"44 C issuance and legal tender of electronic currency**
> 1……
> (2) For the avoidance of doubt it is declared that the issuance of any electronic currency shall not affect or apply in respect of-
> A……..
> (b) Foreign loans and foreign obligations denominated in any foreign currency, which shall continue to be payable in such foreign currency."

As at 25 February 2019, the position regarding foreign loans was very clear. They were to be repaid in foreign currency. The relevant section did not even provide for the repayment of such foreign loans in RTGS Dollars at a given rate. Both parties were aware of this legal position. It was against that background and full understanding that the applicant through its legal practitioners communicated to the respondent the details of the account into which the amount owing was to be deposited. The banking details supplied to the respondent were in relation to the applicant's legal practitioners' RTGS Trust account. It designated that account as the one into which payments to liquidate the judgment debt would be made. The letter made

no reference whatsoever to the payment being made in United States dollars. When the respondent paid the first instalment of $10 000.00 the applicant through its legal practitioners confirmed receipt thereof. The applicant closely followed respondent's compliance with the deed of settlement. When the date of payment of each instalment drew closer, the applicant would alert the respondent to the impending payment through various communication channels. In all the communication that was directed to the respondent by the applicant, there was neither the mention of payment in USD nor any indication of rating the amounts paid against the USD. If anything, there was always acknowledgement of payment and a deduction of the payment from the capital sum.

In addition, the $4 000.00 legal costs were also paid into the same RTGS account and confirmation of full and final payment of the legal costs was communicated by the applicant to the respondent in an email dated 15 August 2019. The email is reproduced hereunder:

> "We acknowledge receipt of $5176.80 towards debt payment and $2400.00 for our legal costs. Our legal costs have been settled as per the deed of settlement. We await the other $5000.00 which is to be paid on or before the 31st of December 2019"

For purposes of illustrating the common understanding which existed between the parties and for completeness I also reproduce below the various communication exchanged between the applicant and the respondent's legal practitioners. Some of them were:

a. Annexure N a letter authored by the Applicant on 5 December 2019 for example provides as follows:

> "We advise that according to the deed of settlement signed by the parties your client is supposed to pay $5000.00 on or before the 31st of December 2019.May you kindly forward the proof of payment, once payment has been effected. We hope this is in order".

b. The response authored by the Respondent and dated 6 January 2020 is captured in an email in the form of Annexure O. It states the following:

> "Kindly find attached hereto ZIPIT payment of $5000.00 by our client as per the deed of settlement. Please confirm payment"

c. Annexure P an email by the applicant dated 9 June 2020 states the following:

> "We acknowledge and confirm receipt of the payment of $5000.00 made by your client towards repayment of the outstanding amount as per the deed of settlement.
> Regards"

d. Annexure Q an email by the applicant dated 18 March 2020 detailed the following:

> "We refer to the above subject matter and the deed of settlement that was signed by the parties. Attached hereto is a copy of the same for ease of your reference.
> May you kindly advise when and how your client intends to pay the amount of $22500.00 as per paragraph 1.2 of the deed of settlement."

e. Annexure R dated 20 May 2020, an email by the respondent was to the following effect:

> "Kindly be advised that our client today made an accelerated payment of $90 000.00 thus discharging in full his debt. The reference number for the payment is 090FTMC201500020. Kindly confirm payment so that we can proceed to close our file."

f. Annexure S dated 2 June 2020 being a letter from the applicant stated the following

> "We confirm and acknowledge receipt of $90000.00 received from your client towards repayment of the debt."

In July 2020, the respondent approached the applicant's offices seeking the release of his documents which were being held as security for repayment of the debt. He was surprised to be advised that the debt had not been fully settled and as a result the documents would not be released.

The deed of settlement between the parties stated that any failure by the respondent to comply with any of its terms would mean that the whole amount would become due and payable. During the period when the respondent attended to the payments, there was no indication by the applicant that the respondent had skipped any instalments or that there were shortfalls on any payment. The applicant did not at any stage allege that due to the respondent's default, the whole amount had become due and payable. It only attempted to do so on 15 December 2020 when it obtained a writ of execution denominated in Zimbabwean dollars, some seven months after the respondent had indicated that he had paid the debt in full after paying the last instalment of $90 000.

It would appear that the respondent is within his rights to maintain that he has fully paid the $100 000.00 he owed in terms of both the court order and the deed of settlement. The events described above clearly support the view that the arrangement that the parties entered into and their subsequent actions in fulfilment of the agreement illustrate that at all times the intention and the understanding was that the debt was denominated in Zimbabwe Dollars and not United States dollars. The applicant's silence, inaction and continued acceptance of payment in Zimbabwean dollars constituted an implied representation that it accepted the arrangement the parties had entered into in settlement of the dispute. It can only be concluded that both parties knew that, in terms of their compromise agreement the court order would be settled in RTGS. That also explains why both the costs of litigation and the capital sum were in RTGS. The applicant itself confirmed in a letter in the following words:

> "Our legal costs have been settled as per the deed of settlement"

The same order for costs was denominated in the same $ sign which impacted all the other subsequent amounts that were paid by the respondent and were accepted by the applicant without issue. It was for the same reasons that counsel for the applicant Mrs *Muchapireyi* was at pains to explain why the applicant would raise objection to the currency of payment some eighteen months later well after the respondent was convinced that he had settled his obligations.

The Applicant admitted as authentic, the various emails and letters exchanged between the parties which were produced by the respondent. It did not seek to contradict any of the communication but rather tried to hang onto the unconvincing argument that the judgment was made in settlement of a dispute relating to tobacco contract farming which is governed by SI 33/2019 which allows the repayment of foreign loans in foreign currency.

On the basis of the above, I am convinced that the respondent's argument that their compromise agreement stipulated the payment of the amount owed in Zimbabwean dollars is unassailable.

Whether the applicant is estopped from claiming further sums of money

The doctrine of estoppel prevents another from asserting a right where he has caused another to act on the basis of what they previously said or did.

In *Aris Enterprise (finance) (pty) Ltd* vs *Protea Assuarance Co Ltd 1981(3) SA274 (A)* the court at p. 291 defined estoppel as follows:

> "The essence of the doctrine of estoppel by representation is that a person is precluded, i.e. estopped, from denying the truth of a representation previously made by him to another person if the latter, believing in the truth of the representation, acted thereon to his prejudice.(see Jourbert The Law of South Africa vol 9 para 367 and the authorities there cited) The representation may be made in words, i.e. expressly or it may be made by conduct, including silence or inaction, i.e. tacitly(Ibid para 371); and in general it must relate to an existing fact(Ibid 372)"

In this matter, the applicant entered into a deed of settlement with the respondent which stipulated a particular payment structure in Zimbabwean dollars. If the applicant had not desired this arrangement it should have protested at the first available opportunity. It did not but continued accepting and acknowledging receipt of all payments made without issue. Acting upon this representation the respondent parted with $100 000.00 and $4 000 in legal costs. The applicant cannot now be heard to say that the judgment debt was not satisfied.

In the case of *Chidziva* and *Ors* vs *Zimbabwe Iron & Steel Company Limited* 1997 (2) ZLR 368 (SC), the Supreme Court cited the American case of *Mutual Life Insurance Company of New York* vs *Ingle* 1910 TPD 540 where it was held that:-

> "When a person entitled to a right knows that it is being infringed and by his acquiescence leads the person infringing it to think that he has abandoned it, then he would under certain circumstances be debarred from asserting it."

I have already concluded that there was both tacit and express approval by the applicant for the payments to be made in RTGS.

The facts of the present matter are on all fours with those with which the Supreme Court was faced in the case of *Econet wireless (Pvt)* v *ZIMRA* SC 17/2019, where the court remarked that:

> "For the appellant to succeed in proving estoppel, it has to prove, and the authority for this proposition is the case of *Andrew Phillips (pvt) Ltd v*) Ltd *v GDR Pneumatics(pvt)Ltd* 1986 (2) ZLR 65(SC) 67, that the respondents or their officers made a representation in word or deed which might have reasonably misled the appellant; that the appellant was misled and that the representation induced the appellant to act as it did".

In casu, the applicant accepted all payments as having been done in terms of the deed of settlement.

Counsel for the applicant in her heads of argument referred the court to the case of *Valentine T Mushayakurara* v *Zimbabwe Leaf Tobacco Co (Pvt) Ltd SC 108/21.* The case is however, clearly distinguishable from the present case. The parties in the *Mushayakurara* case entered into a deed of settlement which indicated the currency of settlement as United States dollars. The initial payment of RTGS $30 000.00 was rejected by the appellant when the appellant insisted on payment in United States dollars. In the present case the order did not indicate the currency as United States Dollars. In addition thereto, the applicant accepted all payments as being in terms of the deed of settlement. There was no insistence on payment in United States dollars or the equivalent in Zimbabwean dollars at the official rate. There wasn't even an inference to that mode of payment until the eleventh hour. It is this court's finding therefore that the applicant cannot now turn around and claim payment in United States dollars or at the official rate in Zimbabwean dollars. Just like in the *Econet Wireless* case, applicant cannot find refuge in s 44 C of the Reserve Bank Act or any other act for that matter. The doctrine of estoppel therefore fully applies to the facts at hand. The respondent cannot be penalised for reasonably believing that the applicant had abandoned its claim to payment in United States dollars.

Whether applicant satisfied the requirements for a declaratory order

An application for a declaratory is made in terms of the s 14 of the High Court Act [*Chapter 7:06*] which provides that:

> "The High Court may in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

The requirements of declaratory order were considered in the case of *Johnsen* v *Agricultural Finance Corporation* 1995 (1) ZLR 65 where the position was put as follows:

> "The condition precedent to the grant of a declaratory order under section 14 of the High Court Act of Zimbabwe, 1981 is that the applicant must be an "interested person", in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto. But the presence of an actual dispute or controversy between the parties is not a pre-requisite to the exercise of jurisdiction. See Ex P Chief Immigration Officer 1993 (1) ZLR 122 (S) at 129F-G; 1994 (1) SA 370 (25) at 376G-H; Munn Publishing (Pvt) Ltd v ZBC 1994 (1) ZLR 337 (S) and the cases cited …"

In casu the applicant is no doubt an interested party and has a direct and substantial interest in the subject matter of the suit. It effortlessly satisfies the first rung of the test for a declaratory order. The grant of a declaratory order is a matter of discretion by the court. Satisfying the first requirement alone would not entitle the applicant to obtain the relief it seeks. The existing rights and obligations of the parties are as already described in the preceding paragraphs. The applicant clearly has not made out a case to force the payment of a debt already extinguished in United States dollars.

DISPOSITION

This is not a suitable case for the exercise of my discretion in granting a declaratur. The judgment by consent and the subsequent deed of settlement is testament the applicant novated the original contract, leaving it without a leg to stand on and estopped from making demands in terms of the abandoned claim. Consequently the respondent is held to have discharged the debt. In light of the above the application must fail.

The issue of costs is always at the discretion of the court. It is the norm that costs follow the cause. While the conduct of the applicant left a lot to be desired I do not hold the view that it warrants an order of costs on a punitive scale.

In the premises, the application be and is hereby dismissed with costs.

Muvirimi Law Chambers, applicant's legal practitioners
Marume and Furidzzo Legal Practitioners, respondent's legal practitioners