DISTRIBUTABLE (20)

(1) PEPPY MOTORS (PRIVATE) LIMITED t/a AGRITECH (2) SABRINO SARPO (3) TONY SARPO
v
1) RUZIRUN INVESTMENTS (PRIVATE) LIMITED (2) JOICE TEURAI ROPA MUJURU (3) THE SHERRIFF (N.O)

SUPREME COURT OF ZIMBABWE
BHUNU JA, CHATUKUTA JA & MWAYERA JA
HARARE, 3 MARCH 2022, 17 MARCH 2023

Mr T.S. Dzvetero with Ms. T. Dzvetero, for the first, second and third appellants

Ms G. Sithole, for the first and second respondents

No appearance for the third respondent

CHATUKUTA JA: This is an appeal against the whole judgment of the High Court which confirmed a provisional order that the first and second respondents had satisfied their judgment debt denominated in US Dollars by making payments in RTGs dollars converted at a bank rate of one United States dollar to one RTGS dollar.

BACKGROUND FACTS

Sometime in 2012, the appellants who are in the business of selling agricultural farming equipment obtained a loan from Steward Bank. The appellants used the money to obtain various farming machinery. They in turn sold the machinery to the first respondent in terms of an agreement of sale concluded on 25 July 2014. The second respondent acted as surety. The first respondent defaulted in making payments. The appellants then issued

summons under HC 2954/18 for payment of outstanding amounts in the sum of US$226 000.00 and interest thereon. At the pre-trial conference the parties agreed to settle the matter. They then entered into a deed of settlement on 20 May 2019. An order by consent denominated in United States dollars was issued on the same date as the deed of settlement, that is on 20 May 2019, for the payment of US$226 000.00. The respondents were to pay to the appellants the sum jointly and severally the one paying the other to be absolved.

The respondents thereafter made their first payment on 5 July 2019 through a bank transfer of RTGS$ 76 000 and furnished the appellants with proof of payment. After four days, the appellants wrote a letter, through their legal practitioners, that the judgment debt had to be paid at the interbank rate. The respondents objected arguing that the obligation to pay the amount had arisen before the promulgation of SI 33 of 2019. They further argued that payment was therefore supposed to be at the parity rate of 1:1. The appellants proceeded to order the third respondent to execute the judgment.

On 18 September 2019, the third respondent attached the first respondent's combine harvester. On 16 October 2019, the respondents made a payment of ZWL $ 140 000 directly into the third respondent's account. The appellants wrote to the respondents that there was still an outstanding balance of RTGS $7 423 413.30. The first and second respondents argued that the payments they made which totaled ZWL$ 470,282.50 covered the judgment debt in full. On 11 February 2020, the third respondent attached three tractors belonging to the respondents.

On 20 February 2020, the first and second respondents filed an urgent chamber application seeking, in the interim, a stay of execution of the judgment in HC 2954/18. They

sought as a final order a declarator that the total amount they had paid had extinguished their indebtedness and the release of the property attached by the third respondent. The application was duly granted. The respondents subsequently sought confirmation of the provisional order. The appellants opposed the application on the basis that the parties entered into a consent order denominated in USD which at the time was legal tender. They argued that payment was supposed to be at the prevailing interbank rate.

DETERMINATION BY THE COURT *A QUO*

The court *a quo* made a finding that the order by consent did not create any new liabilities but merely pronounced on the existing liabilities of the respondents. In the result, the court *a quo* found that the respondents' obligations were to pay the debt in the local currency at the rate of one-to-one to the United States dollar. Aggrieved by the judgment of the court *a quo*, the appellant filed the present appeal on the following grounds.

GROUNDS OF APPEAL

"1. The court *a quo* erred at law and grossly misdirected itself in disregarding and in failing to give reasons for disregarding that:

a. The legal effect of the deed of settlement and order by consent of the parties was to create a compromise; and that-

b. The compromise entered into by the parties in the Deed of Settlement and the consent order created new liabilities for the first and second respondents and new rights and obligations for the appellants.

2. The court *a quo* erred at law and grossly misdirected itself in finding that the Deed of Settlement entered into by the parties on 20 May 2019 and consent order granted

on 20th May 2018 fell within the ambit of the provisions of S.I. 33 of 2019 notwithstanding the deed of settlement and consent order having been entered and granted respectively after the effective date of S.I. 33 of 2019.

3. The court *a quo* erred at law and grossly misdirected itself in granting an order whose effect was to rescind an extant consent order when proceedings for rescission for the consent order were not before the court *a quo*.

SUBMISSIONS MADE BY THE APPELLANTS

Mr *Dzvetero*, for the appellants, submitted that the court *a quo* erred by finding that a deed of settlement executed by the parties on 20 May 2019 and consequently granted as an order by consent on the same day fell within the ambit of Statutory Instrument 33 of 2019. He argued that the deed of settlement constituted a compromise which resulted in a new cause of action which new cause arose after the effective date of 22 February 2019. He further argued that the consent order, also having been issued on 20 May 2019, fell under the ambit of s 4 (1)(e) of S.I 33 of 2019. Mr *Dzvetero* further submitted that the appellants had accepted payment in RTGs instead of United States dollars. He contended that the first and second respondents ought to have paid off their debt at the prevailing interbank rate and not at the parity rate of one-to-one.

SUBMISSIONS MADE BY THE RESPONDENTS

Ms *Sithole*, for the first and second respondents, submitted that the deed of settlement did not create a new agreement between the parties but was merely based on the agreement of sale executed in 2014. Counsel further submitted that the deed of settlement did not extinguish the original obligations of the respondents as seen from its preamble. She

submitted that the first and second respondents only consented to a judgment of a debt which arose in 2015.

ISSUE FOR DETERMINATION

Whether or not the deed of settlement and the order by consent constituted a new cause of action requiring the first and second respondents to pay their debt at the prevailing interbank rate.

ANALYSIS

All assets and liabilities, including judgment debts denominated in United States dollars immediately before the effective date of 22 February 2019 would, on or after the aforementioned date, be valued in RTGs dollars on a one-to-one rate. (See *Zambezi Gas Zimbabwe (Pvt) Ltd* v *NR Barber and Anor* SC 3/20). All assets and liabilities, including judgment debts denominated in United States dollars after the effective date did not therefore fall under the ambit of s 4 (1)(d) of SI 33 of 2019. They instead fall under s 4(1)(e). Such assets and liabilities including judgment debts are converted to RTGs dollars at the rate used by authorized dealers under the Exchange Control Act to exchange the RTGS for the United States dollar (the prevailing interbank rate).

Although the original debt arose in 2014, the parties entered into a deed of settlement in May 2019. The question whether a deed of settlement constitutes a compromise and creates a new obligation was answered in the case of *Georgias & Anor v Standard Chartered Bank Zimbabwe Limited* 1998 (2) ZLR 488 (S) at 496 E-G where the court held that:

> "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 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 268E-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."(Own emphasis)

More importantly, this court has pronounced itself on the import of a consent order issued after the effective date. It was remarked in *Reggis Magauzi* v *Francis Jekera and The Sheriff of Zimbabwe* SC 54/22 after a consideration of the decision in *Zambezi Gas Zimbabwe (Pvt) Ltd* v *NR Barber and Anor* (*supra*) that:

> "It is apparent that the court *a quo* erred when it relied on the acknowledgment of debt which had resulted in the granting of the consent order, after the effective date had come into effect. The court *a quo* erred in finding that the first respondent ought to have paid the debt arising from the acknowledgment of the debt. It should have taken into consideration the fact that when the parties consented to judgment on 22 February 2019 under case number HC 11449/18, the liability became a judgment debt and it ought to have taken into consideration the extant court order in arriving at its determination."

In that case the court was dealing with a case where a court order was issued on 22 February 2019. The court held that "s 4(1)(d) applies to the time before midnight on 21 February 2019, while s 4 (1)(e) applies from 0.01 am on 22 February 2019." The time between the effective date and issuance of the order was a matter of hours.

In *casu*, the deed of settlement and the consent order were issued on the same date, 20 May 2019, three months after the effective date. The argument by the respondents that the deed of settlement and the consent order were merely based on the agreement of sale executed in 2014 therefore lacks merit. This is because the deed of settlement and the consent order constituted a new obligation different from the original obligation to pay the appellant. A compromise by its nature extinguishes the original rights and obligations creating new ones as happened in this case.

The court *a quo* therefore erred when it held that the order by consent did not create any new liabilities but merely pronounced on the existing liabilities of the respondents. The respondents were therefore required to discharge their indebtedness by converting the United States dollar judgment to RTGs dollars at the prevailing interbank rate. Payment made by the respondents at the one-to-one rate therefore did not discharge their indebtedness to the appellants. It merely constituted part payment with the balance remaining due and payable.

We therefore find that this appeal has merit and ought to succeed.

DISPOSITION

It is accordingly ordered as follows:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* be and is hereby set aside and is substituted with the following:

"1. The provisional order granted by this court on 28 February 2020 be and is hereby discharged.

2. The application for a declarator be and is hereby dismissed.

3. The first and second respondents shall pay costs of suit jointly and severally the one paying the other to be absolved."

BHUNU JA : I agree

MWAYERA JA : I agree

Antonio & Dzvetero Legal Practitioners, appellants' legal practitioners

G. Sithole Law Chambers, first and second respondents' legal practitioner