

GOLDEN BEAMS DEVELOPMENT (PVT) LTD
versus
FREDSON MUNYARADZI MABHENA

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 18 March 2021 & 17 June 2021

Opposed Application

F Chinwadzimba with *D Muchada*, for the applicant
G K Muchapireyi, for the respondent

DUBE J

1. The applicant seeks an order declaring that a court order granted against the respondent was compromised by subsequent settlement agreements entered into by the parties, notably, a deed of settlement and seeks relief based on the settlement.
2. The background to this application is common cause. On 26 February 2018, the applicant obtained default judgement against the respondent under HC 4277/15 for payment of US\$179 000 with interest. A property belonging to the respondent was declared especially executable. The respondent made payment proposals which were accepted by the applicant but failed to honour the terms thereof.
3. The respondent requested further indulgence resulting in the parties entering into a deed of settlement dated 13 November 2019. In terms of the deed of settlement, the respondent undertook that his two residential stands in Hatfield would be sold and proceeds paid to the respondent. He agreed to settle an outstanding debt of USD\$155 440. He was to continue paying USD\$5000 a month until the debt was extinguished in full. The attached property was to remain under judicial attachment.
4. The applicant submitted that the deed of settlement compromised the order creating a new obligation and rendering the respondent liable for the outstanding debt in terms of the deed of settlement.

5. The respondent is opposed to the order sought on the basis of the following submissions. The debt emanated from a judgment debt expressed in United States dollars and is payable at the rate of 1:1 in RTGS dollars. The court order fell within s 4(1) (d) of the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) Regulations 2019(S.I 33 of 2019) The effect of this provision is that, all assets and liabilities, including judgment debts, denominated in Unites States dollars immediately before 22 February 2019 shall be valued in RTGS dollars on a rate of 1:1. All payment of debts denominated in United States dollars made after 22 February 2019 ought to have been converted into RTGS. His indebtedness was extinguished by virtue of the *Zambezi Gas Zimbabwe v NR Barber & SC 3/20*. The debt did not belong to that class of debt that was excluded from the operation of S.I 33 of 2019.
6. He submitted further that there was a misapprehension as to whether the provisions of section 4(1) (d) of S.I 33 of 2019 applied to judgement debts. There was a common mistake of the parties as regards the outstanding balance due to the applicant when they entered into the deed of settlement. He only realised in January 2020 after the *Zambezi Gas case* which gave an interpretation of s 4(1)(d) of S. I 33 of 2019 that the parties laboured under a common mistake as regards payment of liabilities existing immediately before 22 February 2019.The deed of settlement did not create new obligations due to the fact that the parties laboured under a common mistake.
7. The respondent maintained that as at 13 November 2019 when the deed of settlement was entered into, the liability of the respondent was not USD\$155 440 as the respondent was no longer indebted to the applicant. He submitted that subsequent payments made in United States dollars after February 2019 were not converted to RTGS at the rate of 1:1 rendering the balance in the deed of settlement of 13 November 2019 wrong. He also submitted that the amount due and payable now is not USD\$145 440 according to the computation. The computation did not take into account the provisions of section 4(1)(d) of S.I 33.
8. Both the amount due and the currency in which it was expressed was wrong. He does not owe the applicant any money. Immediately before 22 February 2019, his debt stood at USD\$89 357.95 which was turned into RTGS\$89 357.95 by

operation of the law under s 4(1)(d) of S. I 33 of 2019. After this, he continued to service the debt in United States dollars. These payments when converted to RTGS dollars, amount to RTGS\$337 957.90 and extinguish the debt.

9. He contended that the deed of settlement is *void ab initio* as both the applicant and the respondent were mistaken as to the amount due and payable by the applicant as the applicant failed to apply the law as expressed in S.I 33 of 2019 culminating in the mistake. He disputed that the deed of settlement created new obligations in view of the common mistake the parties laboured under. He urged the court not to consider the deed of settlement as it is tainted with some illegality in view of a common mistake as to the amount due. The applicant refuted that the *Zambezi Gas* case absolves the respondent from obligations created in terms of the deed of settlement because the deed was entered subsequent to 22 February 2019.

10. The central issue is whether there was a compromise agreement between the parties.

The effect of S.I 33 of 2019

11. Section 4 (1) (d) of S.I 33 provides as follows:

“that for accounting purposes, all assets and liabilities that were immediately before the effective date, valued and expressed in united states dollars (other than assets and liabilities referred to in section 44 C (2) of the principal Act) shall on and after the effective date be deemed to be values in RTGS dollars at the rate of one is to one to the United states dollar.”

12. This provision was entrenched by S.I 142 of 2019 which confirmed that the United States dollar shall no longer be legal tender in any transaction in Zimbabwe. The Finance Act (No 2) also settled the position in s 22 (1) (d) which regulates the provisions of s 4(1)(d) of S.I 33 of 2019. See *Zambezi Gas case* where the court held that section 4(1)(d) of S.I 33 of 2019 provides that all assets and liabilities, including judgment debts, denominated in United States dollars immediately before the effective date, being 22 February 2019, shall on or after the aforementioned date be valued in RTGS dollars on a one to one rate. The parties are agreed that judgment debts are included under s 4(1)(d) of S.I 33 of 2019.

13. The respondent argued that the *Zambezi Gas case* applies directly to the circumstances of this case on the basis of the court order. I do not agree. All

things being equal, the respondent would have been entitled to pay the debt in RTGS dollars at the rate of 1:1 to the United States dollars after 22 February 2019. The chain of events that followed changed all this.

14. The respondent made offers to pay the debt in United States and in fact paid instalments in terms of payments plans agreed to. He proposed payment plans which were accepted by the applicant and continued to service the debt in United States dollars. He failed to adhere to the payment plans he proposed and agreed to culminating in a deed of settlement being entered into between the parties in November 2019. The respondent agreed to clear the debt in United States dollars.
- Was there a Compromise agreement?*

15. A compromise is defined by RH Christie in *Business Law in Zimbabwe* at p 108 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”.

16. In *Georgias and Anor v Standard Chartered Bank* SC 183/98 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).

17. A compromise agreement is an agreement of the parties to amicably settle a dispute. A compromise agreement is a contract and is governed by the general principles of contract law. The formalities of a compromise are, offer and acceptance, consideration and capacity to enter into the contract. There must be

mutual intent to settle the dispute and bring it to an end and reciprocal concessions in settlement of the dispute.

18. 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.
19. The law is that parties have the latitude to vary a court order by way of a deed of settlement, See *Kempen v Kempen* SC 14/16. Once parties have varied a court order by way of a deed of settlement, they are said to have compromised the court order and are bound by the terms of the deed of settlement even if the deed of settlement has not been reduced into a court order. The creditor may not recover the debt based on the court order. The rights and obligations of the parties become governed by the compromise agreement. The deed of settlement becomes a compromise at law. The court order ceases to regulate the relationship between the parties and falls away.
20. The events that transpired after 22 February 2019 transformed the cause of action.
21. Once the parties entered into a deed of settlement, the parties agreed to regulate the outstanding debt in a particular manner. The terms of the deed of settlement are entirely different from those in the court order thereby creating a new cause of action. A new arrangement for settlement of the debt between the parties came into being. The old cause of action became extinguished and the parties became bound by the terms of the deed of settlement. Consequently, a compromise agreement came into effect.
22. The compromise agreement created new rights and obligations between the parties separate from the court order. The rights and obligations of the parties became contractual and determined only in terms of the deed of settlement. The deed of settlement varied the court order and superseded it. The rights and obligations of the parties ceased to be governed by the court order. The debt is no longer a judgment debt and the court order is no longer within the purview of

the reasoning of the court in the *Zambezi Gas* case. The applicant became entitled to sue for recovery of the debt on the basis of the deed of settlement.

23. Had the applicant not entered into the settlement plans and deed of settlement with the applicant, the respondent would have been entitled to pay the debt in terms of the court order in terms of s 4(1)(d) of S.1 33 of 2019. The respondent took the risk and complicated his case by making offers to pay in United States dollars and entering into the deed of settlement as it has not turned out to be advantageous to him.

Was there a mistake?

24. The respondent seeks to impugn the deed of settlement on the basis of common mistake. A compromise agreement is voidable on the grounds of fraud, *justus error*, common mistake, misrepresentation or other ground for rescission, see the *Georgias case*.

25. Wikipedia, the Free Encyclopaedia defines a mistake as follows;

“in contract law, a mistake is an erroneous belief, at contracting, that certain facts are true. It can be argued as a defence, and if raised successfully can lead to an agreement in question being found *void ab initio* or voidable or alternatively an equitable remedy may be provided by the courts.”

26. Where a mistake is material it has the effect of excluding consensus. A mistake is material if it has a bearing on the performance of the contract, the identity of the object of performance of the contract and the persons contracting where the mistake affects a party’s decision to agree to the contract. The mistake must be shown to have caused a party to enter into a contract that it would otherwise not have entered into. Generally, a mistake renders a contract *void ab initio* or voidable depending on the nature of the mistake involved.

27. In *Nhamo Madzima v Doris Runesu Mate* HH 86/17, the court dealt with the effect of a mistake and remarked as follows;

“Mistake renders a contract void ab initio or void depending on the nature of the mistake, where a mistake relates to the subject matter of a contract and it has a bearing on the performance of an agreement, it is material and renders the agreement void”.

28. The effect of a mistake in a contract is that it negates the contract and renders it void. If the mistake is of one party, it will only void a contract where the error is not of his own making. A unilateral mistake that does not stem from a

misrepresentation by the other party does not entitle a party to resile from a compromise agreement.

29. In *Agribank v Machingaiifa & Anor* 2008 (1) ZLR 244 (S) at p 254 D-F: the court expressed this position as follows;

“..... a party to a contract relying on an error of judgment, who can go further and show that at the time of the contract he was labouring under some misapprehension, may escape liability under the contract. The onus however is not easy to discharge. Unless the mistaken party can prove that the other party knew of his mistake or that as a reasonable man he ought to have known of it, or that he caused it, the onus of showing that the mistake was a reasonable one justifying release from the contractual bond will not be easy to discharge. However, material the mistake, the mistaken party will not be able to escape from the contract if the mistake was due to his own fault. This principle will apply whether or not his fault lies in not carrying out the reasonably necessary investigations before committing himself to the contract and in fact in any circumstances in which the mistake is due to his own carelessness or inattention, for he cannot claim that his error is *iustus*”.

28. Common law recognises three types of mistake being common mistake, mutual mistake and a unilateral mistake. A mistake is either one of fact or law. In *Contract General Principles*, by van Der Merwe, 4 ed, 2012, at p 25 the authors describe a common mistake as follows,

“A common mistake is said to be present where both parties to an agreement labour under the same incorrect perception of a fact external to the minds of the parties. Such a mistake, of course, does not lead to dissensus; the parties are in complete agreement although their consensus is based on an incorrect assumption or supposition”.

29. A common mistake occurs when both parties to a contract are of the same mind, share the same mistake and believe a certain fact to be true which later turns out to be untrue or incorrect. Their minds must be *ad idem*. A common mistake will render a contract *void ab initio*, “only if it leads the parties to make a contract which is impossible of performance, such as a sale in *res extincta*”, see sentiments expressed by RH Christie and GB Bradfield in Christie’s, *The law of contract in South Africa*, 6 ed (2011). The contract must be rendered impossible of performance through no fault of the parties.

30. The respondent has basically raised the defence of mistake of law. A mistake of law occurs when a party is, at the time of contracting, mistaken as to an understanding of the law. All persons are presumed to know the law, See *S v Blom* 1977 3 SA 513 (A). Mistake of law as a ground of challenging a contract has no effect of voiding a contract because of the principle illustrated by the Latin maxim, *ignorantia juris non excusat* which translates to mean that

ignorance of the law is not an excuse. A party to a contract cannot simply claim that he was unaware of the law or had a wrong interpretation of the law when he entered into a contract.

31. When both parties are mistaken as to the position of the law, it is called a common mistake of law. It is settled that a common mistake of law has no effect of invalidating a contract, see *Vluvo Investments (Pty) Ltd v Bezri* 1985 (4) SA 367 (T), *Port Elizabeth Divisional Council v Uiten the Divisional Council 1868 Buch* 221, *Hodgetts Timbers (East London) (Pty) Ltd v HBC Properties (Pty) Ltd* 1972 (4) SA 208 (E) 213.

32. In *Ncube v Ndhlovu* 1985 (2) ZLR 281, the court held that a contract induced by mistake of law or mistaken motive remains enforceable. The court remarked as follows,

“It is however, trite law that a voluntary payment under a mistake of law cannot be recovered. In *Sampson v Union and Rhodesia Wholesale Ltd (in liquidation)* 1929 AD 468 at 481 WESSELS JA explained the proposition in these words: The general proposition of law is that if you think the meaning of a clause is such and such, you cannot get rid of your liability when you discover that the true legal meaning is different from what you thought, for you cannot be heard to say that you did not know the law. And if the other party innocently expresses as his opinion that the legal meaning of the clause is the same as you read it, then if both put a wrong legal construction on the clause you are still bound because the law is presumed to be equally within the knowledge of both parties”.

See also *Hodgetts Timbers (East London) (Pty) Ltd v HBC Properties (Pty) Ltd and Anor* 1972(4) SA 208 (E) at 213C-F, *Miller & Ors v Bellville Municipality* 1973 (1) SA 914 (C) at 919 A-C, *Sawyer and Anor vs Windsor Brace Ltd* (1942) 2 ALL ER 669, Christie, *The Law of Contract in South Africa* at 329; Cheshire and Fifoot’s *Law of Contract* 9 ed at 641.’

33. Equally, if parties to a contract put a wrong legal construction on a statutory provision, they are still bound by the contract as both parties are presumed to know the law. A compromise agreement is not invalidated simply because a party was at the time of entering into an agreement ignorant or mistaken as to the full extent of his rights.

34. The appearance is that the minds of the parties were *ad idem* that the debt would be satisfied in United States dollars. Not only did the respondent enter into the deed of settlement, he offered payment plans which were accepted by the applicant thereby compromising the court order. It is only when he failed to

meet them that the parties entered into the deed of settlement which becomes the new cause of action. The respondent has no entitlement to raise defences to the original cause of action. The deed of settlement specifies that the debt shall be payable in USD and in no way reveals any mistake or confusion on the currency to be paid. The respondent continued to service the debt in United States dollars. There is nothing to suggest that there was a common assumption between the parties regarding the currency payable and the applicable law. There is no support for the proposition that the applicant was aware of the respondent's mistake or laboured under any form of mistake. There was no common mistake that befell the parties. If there was a mistake, the mistake was due to the respondent's own fault and it cannot void the compromise agreement.

35. Both parties are deemed to have been aware of the law and the changes made to it. The respondent paid the debt in United States dollars voluntarily. Even assuming that there was a common mistake, a mistake of law has no effect of voiding a contract. The defence of ignorance of the law does not assist the respondent. Mistake of law does not operate as a defence to a contract and has no effect of rendering a contract *void ab initio*. This is simply on the basis that ignorance of the law is no defence. The respondent cannot rely on a flawed understanding of Zimbabwean law. Only a mistake of law as to the interpretation of provisions of a foreign law which is viewed as a mistake of fact has the effect of voiding a contract.
36. Both parties are deemed to be aware of the import of the provisions of S.I 33 of 2019. When the parties entered into the compromise agreement in November 2029 the changes introduced by S. I were already long in place. The fact that the respondent only became aware of the implications of s 4(1) (d) after the pronouncement of the law in the Zambezi Gas case regarding its effect on the order does not assist him as the case only interpreted a law already in place and had no effect of introducing any changes to the law itself.
37. In *Breast Plate Services (Pvt) Ltd t/a Nemchem International HMT v Cambria Africa PLC* SC 66/20, PATEL JA held that where it is the expressed intention of the parties that a contractual obligation shall be paid in foreign currency, courts are to give effect to that intention. This is a case where, despite the changes in the law, requiring payment of liabilities incurred before February

2019 to be paid at the rate of 1;1, the parties have expressed the intention that the debt be paid in United States dollars. The wishes of the parties take precedence. The respondent has failed to convince the court that there was a mistake that renders the compromise agreement void.

38. I must conclude that there exists no ground entitling the respondent to resile from the compromise agreement. The applicant has shown an entitlement to the order sought. Costs follow the event.

In the result it is ordered as follows,

1. It is hereby declared that the Deed of Settlement signed between the applicant and the respondent on 13 November 2019 compromised the High Court order of 26 February 2018 thereby creating new obligations between the parties, in terms thereof.
2. Consequently;
 - (a) The respondent be and is hereby ordered to pay, to the applicant, the sum of USD\$145 440 (One hundred and forty-five thousand, four hundred and forty United States Dollars) being the balance due and owing by the respondent in terms of Deed of Settlement referred to in para 1 of this order payable at the prevailing interbank rate
 - (b) The respondent be and is hereby ordered to pay interest on the above sum calculated at the prescribed rate, reckoned from 29 February 2020 to the date of full payment.
 - (c) A certain piece of land situate in the District of Salisbury called Stand 171 Ardbennie Township 2 of Subdivision A of Ardbennie measuring 631 square metres held under Deed of Transfer Number 4210/95 commonly known as Number 15 Cannock Close, Houghton Park, Waterfalls Harare, Zimbabwe be and is hereby declared specially executable.
 - (d) Respondent be and is hereby ordered to pay costs of suit on a legal practitioner-client scale.

Dube, Manikai & Hwacha, applicant's legal practitioners
Muvirimi Law Chambers, respondent's legal practitioners