

NATIONAL SOCIAL SECURITY AUTHORITY
versus
TRUST BANK CORPORATION LIMITED
and
TRANSTOBAC (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 31 January & 22 March 2017

OPPOSED APPLICATION

F Girach, for applicant
T Mpofo and *N Chamisa*, for 2nd respondent

TAGU J: The applicant is praying for judgment against second defendant as follows:

- (a) US\$ 4 297 170.00
- (b) US\$ 80 000.00 and
- (c) Costs of this application.

The basis of the claim is that on 17 May 2013 and at Harare the applicant (who was then the plaintiff) instituted legal proceedings against the first and second defendants jointly and severally seeking payment of-

- (a) US\$ 4 058 380.02 being capital;
- (b) US\$ 25 696.87 being interest;
- (c) Interest on the sum of US\$ 4 058 380.02 at the rate of 15% per annum with effect from 1 April 2013 to date of payment;
- (d) Costs of suit on a legal practitioner and client scale and collection commission as provided for under the Law Society of Zimbabwe by-laws (1982.)

The first and second defendants entered appearance to defend through Gill, Godlonton & Gerrans and Mawere & Sibanda respectively. On 8 August 2013 the second defendant filed a plea whilst first defendant filed a consent to judgment. However, the first defendant was placed under liquidation resulting in cessation of litigation against it, with plaintiff's claim proceeding against second defendant only. Pre-trial conference papers were filed by

both plaintiff and second defendant and a pre-trial conference was held on 2 April 2014 before Mrs Justice Matanda-Moyo and the matter was referred to trial.

Initially the matter was set down for trial before Mr Justice MAFUSIRE in May 2014, but was later transferred to Mr Justice ZHOU where it was set down after several postponements during the last week of November 2014.

Before the trial date the plaintiff and the second defendant discussed the matter and reached a settlement which was reduced to writing and signed by plaintiff and second defendant's legal practitioners and duly filed with this Honourable Court. For avoidance of doubt the signed Deed of Settlement read as follows-

“DEED OF SETTLEMENT

Whereas Plaintiff instituted legal proceedings in this matter against 1st and 2nd Defendants jointly and severally, one paying the other to be absolved on the 17th of May 2013 seeking payment of :-

- (a) US\$ 4 058 380.02
- (b) US\$ 25 696.87
- (c) Interest on the sum of US\$ 4 058 380.02 at the rate of 15% per annum with effect from the 1st of April 2013 to date of payment.
- (d) Costs of suit on a legal practitioner and client scale and collection commission as provided for under the Law Society of Zimbabwe by-laws (1982)

And whereas 1st Defendant consented to judgment as prayed for by the Plaintiff on the 2nd of January 2014, whilst 2nd Defendant contested Plaintiff's claims.

1st Defendant has since been placed under liquidation.

And whereas Plaintiff and 2nd Defendant have settled the matter and they are desirous of reducing the terms of the settlement to writing.

Now therefore these Presents Witnesseth

1. In full and final settlement of Plaintiff's claims in this matter, 2nd Defendant shall pay to Plaintiff a sum of US\$ 4 297 170.33.
2. Additionally, 2nd Defendant shall pay Sawyer & Mkushi's legal charges in the sum of US\$ 80 000.00.
3. 2nd Defendant is the owner of an immovable property (the property) situate in the district of Salisbury being the Remainder of Stand 14906 Salisbury Township, measuring 34,8592 Hectares, held under Certificate of Registration Title number 10879/2002, which property is mortgaged to Plaintiff.
4. 2nd Defendant shall sell the property to Plaintiff at a price of US\$ 5 940 000.00 and to that end, the parties shall execute a separate agreement of sale reflecting all the terms and conditions of the transaction.
5. The sum of US\$ 4 297 170.33 payable to plaintiff shall be deducted from the property's purchase price and the balance of US\$ 1 642 829.67 shall be paid into Sawyer & Mkushi's Trust Account, for release to 2nd Defendant less Sawyer & Mkushi's collection charges, upon fulfilment by the parties of all the conditions of the agreement of sale.”

It can therefore, be noted that in terms of the deed of settlement above the second defendant was and is to pay to plaintiff a sum of US\$ 4 297 170.33 and a sum of US\$ 80 000.00 to Sawyer & Mkushi in respect of legal charges. Further, it can be noted that second defendant was to sell an immovable property, being the Remainder of Stand 14906 Salisbury

Township to plaintiff at a price of US\$ 5 940 000.00. The sums of US\$ 4297 170.33 and US\$ 80 000.00 were to be deducted from the purchase price of US\$ 5 940 000.00 with the balance being payable to second defendant upon fulfilment of all the conditions of sale.

The judge who was to deal with the trial endorsed that the matter had been settled in terms of the deed of settlement. In fact the court noted that elsewhere in the record Mawadze J on 18 May 2015 signed a draft order to the effect that-

- “judgment be and is hereby entered against 2nd Defendant for payment of:-
- (a) US\$ 4 297 170.33.
 - (b) US\$ 80 000.00.
 - (c) Costs of this application.”

This orders tallies with the one the applicant now seeks.

Immediately after the filing of the said deed of settlement the applicant’s legal practitioners prepared an agreement of sale in respect of the property in question and forwarded it to Mawere & Sibanda for the second defendant’s signature.

However, the second defendant refused to sign the agreement of sale as captured in the deed of settlement. The second defendant sought to introduce new issues such as VAT at the rate of 15%. This had the net effect of increasing the purchase price by US\$891 000.00. Further, the second defendant introduced new conditions to do with the redeeming of all the class “C” shares held by some other shareholders within 6 months from the date of transfer of the property. These new conditions are not appearing at all in the deed of settlement.

The applicant wants an order directing the second defendant to pay the amounts agreed in the deed of settlement, whether the property has been sold to plaintiff or not.

The second defendant opposed the application firstly, on the basis that the deed of settlement has no provision for an order to be granted in terms of it in the event of a disagreement, secondly, that the relief being sought seeks to enforce half of the deed of settlement since the other half that deals with the sale of the property has not been fulfilled and lastly that since there is now a dispute this matter should be referred back to trial.

What is clear in my view is that it is the second respondent who refused to sign the agreement of sale in order to give effect to what the parties agreed. It is therefore necessary to give an order compelling the second respondent to pay what was agreed by the parties in their deed of settlement.

In the result it is ordered that

- Judgment be and is hereby entered against the second defendant for payment of:-
- (a) US\$4 297 170.33

(b) US\$80 000.00

(c) Costs of suit on the ordinary scale.

Sawyer Mkushi, applicant's legal practitioners
Mawere & Sibanda, 2nd respondent's legal practitioners