

WINSLEY MILITALA  
(In his capacity as Provisional Judicial Manager of Pavelong (Pvt) Ltd)  
and  
PAVELONG (PVT) LTD  
versus  
DRUM CITY (PVT) LTD

HIGH COURT OF ZIMBABWE  
ZHOU J  
HARARE, 14 March 2017 & 28 March 2018

### **Opposed Application**

*W. Chirongoma* for the applicant  
*V. Shamu* for the respondent

ZHOU J: The applicant seeks the following order:

- “1. The order of this Honourable Court dated 2<sup>nd</sup> June 2015 under Case Number 448/14 is hereby varied to read judgment is hereby entered in favour of the plaintiff for the sum of US\$16 000.00.
2. Respondent shall pay costs of suit.”

The application is opposed by the respondent.

The background to the matter is as follows. On 2 June 2015 this Court (per MATHONSI J) issued an order by consent. The relevant portions of the order are as follows:

“IT IS ORDERED BY CONSENT THAT:

Judgment be and is hereby entered in favour of the plaintiff against the defendant as follows:

1. The plaintiff herein withdraws its exception to the counterclaim by defendant.
2. Defendant herein admits liability to plaintiff’s claim and that judgment be and is hereby entered in favour of plaintiff in the sum of USD16 000.00 together with 5 percent interest from the 23<sup>rd</sup> July 2013 being date of demand to the date of payment in full.
3. Plaintiff will not proceed to execute in terms of this order until case no. HC 9816/13 is finalized or judgment is handed down.
4. Defendant will allow plaintiff in this matter to amend its plea under case no. HC 9816/13

to the extent that it will incorporate the concession by defendant.

5. There will be no order as to costs.”

The instant application is made in terms of Order 49 r 449(1) of the High Court Rules, 1971 on the ground that there is an ambiguity in the order. That rule provides as following:

“(1) The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind or vary any judgment or order –

(a) . . .

(b) In which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission.”

The applicants particularly complain about the paragraph in terms of which they could not execute on order until Case No. HC 9816/13 was finalized. The respondent is the *dominus litis* in that case and, according to the applicant, has shown no interest in prosecuting it.

The order raises the issue of the extent to which the court must endorse a settlement reached by parties to litigation in the form of an order of court. That issue arises because in a settlement reached by the parties there is bargaining that takes place to such an extent that each party would be keen to entrench its position to protect its interests while at the same time limiting the advantages of the other party. This is a matter that has been the subject of judicial scrutiny. Recently, MUNANGATI J dealt with the issue in the case of *Yakub Mahamed v Adam Ebrahim Mohammed Dudhia & Anor* HH 140-18 where at pp 6-7 of the cyclostyled judgment she considered the observations made in a number of South African judgments, and said:

“Whilst the matter before that court pertained to contempt of court proceedings the order under consideration was a consent order incorporating a deed of settlement. These comments bring to the fore the problems that can be created by incorporating deeds of settlements in an order. However it is the manner in which the deed of settlement is incorporated that will determine the validity of the order . . . In my view, these sentiments speak to one important aspect, a judgment must be clear, unambiguous and capable of enforcement signifying the closure of the dispute and ultimate relief to the successful party. The order should speak to execution. Any difficulties presented by the order’s enforcement should be eliminated. Equally, any terms which may call for interpretation by another court or call for further litigation have no place in a judgment.”

See also *Thutha v Thutha* 2008 (3) SA 494(TkH) at 494.

While the above remarks were made in the context of an order that incorporated a deed of settlement they apply with equal force to any order that records and reflects a settlement reached by the litigants even though there may be no separate deed of settlement. *In casu* there is no

reference to a deed of settlement. However, it is clear from a reading of the order that it reflects an agreement between the parties to the litigation.

The term “ambiguous”, according to the *Longman Dictionary of Contemporary English*, means “able to be understood in more than one way; of unclear meaning; uncertain; unclear.” In the present case the uncertainty or unclear effect of the order which requires the intervention of the court arises from the following aspects of it. Where it pertains to the amount of the judgment debt the order refers to the defendant’s admission of liability and its agreement that judgment be entered in favour of the plaintiff as stated therein. The relief does not present itself as the order itself but merely a record of the defendant’s admission of liability. In para 3 it also records an undertaking by the plaintiff not to proceed with the execution of the order “until case no. HC 9816/13 is finalized or judgment is handed down”. Put in other words, the order is not an interdict preventing the plaintiff from executing the judgment as such, but even if it were an interdict, it does not state what happens if, as has happened, the respondent decides not to prosecute Case No. HC 9816/13 to finality. Thus the applicant is hamstrung by a condition the fulfilment of which is within the exclusive discretion of the defendant in that matter. Likewise, paragraph 4 of the order would suggest that the plaintiff is being granted leave to amend its pleadings by the defendant rather than by the court. The last part of the paragraph which states: “. . . to the extent that it will incorporate the concession by defendant”, is also unclear. The concession to which the order relates is not stated in the order.

All in all, the order is not capable of enforcement. It is therefore necessary for it to be corrected.

In the result, IT IS ORDERED THAT:

1. The order granted by this court in Case No. HC 448/14 on 2 June 2015 is corrected so that the entire order reads as follows:

“IT IS ORDERED BY CONSENT THAT:

1. The plaintiff’s application to withdraw its exception to the defendant’s claim-in-reconvention is hereby granted.
2. Judgment be and is hereby granted in favour of the plaintiff against the defendant for payment of US\$16 000.00 together with interest thereon at the rate of 5 per cent per annum from 23 July 2013, being the date of demand, to the date of payment in full.
3. The plaintiff is granted leave to amend its plea in Case No. HC 9816/13.
4. There be no order as to costs.

2. The respondent shall pay the applicants' costs of suit.

*C. Kuhuni Attorneys*, applicants' legal practitioners  
*Vasco Shamu and Associates*, respondent's legal practitioners