

VERSAPAK HOLDINGS (PRIVATE) LIMITED
t/a VERSAPAK ZIMBABWE
versus
DAVID MAXWELL MIDDLETON
and
AAMIR M. ANSARI

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 23, 24, October 1, 10, 16, 24 November 2017 & 03 January 2018

Civil Trial

J Shekede, for plaintiff
P Ranchod, for 1st and 2nd defendants
G Nyengedza, for provisional liquidator

TAGU J: The plaintiff issued summons claiming firstly, payment by the first and second defendants jointly and severally, the one paying the other to be absolved, in the sum of USD 69 567.95 in respect of goods sold and delivered at the specific instance and request of POLYHANDY (PRIVATE) LIMITED, which is under provisional liquidation, and for which the first and second defendants bound themselves as sureties and co-principal debtors in respect of its debts. Secondly, payment by the first and second defendants jointly and severally, the one paying, the other to be absolved, in the sum of USD 11 922.96 in respect of interest charges for goods supplied in 2014 that POLYHANDY (PRIVATE) LIMITED), which is under provisional liquidation, undertook to pay in terms of an Acknowledgement of Debt and Agreement of Pledge it executed on the 29th May 2015, and for which the first and second defendants bound themselves as sureties and co-principle debtors in respect of its debts. Thirdly, payment by the first and second defendants jointly and severally, the one paying, the other to be absolved, in the sum of USD 8 449.06 in respect of interest charges for the period January 2015 up to September 2015 that POLYHAND (PRIVATE) LIMITED, which is under provisional liquidation, undertook to pay in terms of an Acknowledgement of Debt and Agreement of Pledge it executed on 29th May 2015, and for which the first and second defendants bound themselves as sureties and co-principal debtors in respect of its debts. Fourthly, payment by the first and second defendants jointly and severally, the one paying, the other to be absolved, in the sum of USD 5 113.03 in respect of legal fees that POLYHANDY

(PRIVATE) LIMITED, which is under provisional liquidation, undertook to pay in terms of an Acknowledgement of Debt and Agreement of Pledge it executed on 29th May 2015, and for which the first and second defendants bound themselves as sureties and co-principal debtors in respect of its debts. Fifthly, in respect of the first claim interest at the prescribed rate reckoned from 16th July 2015 to the date of full and final payment. Sixthly, in respect of the other claims interest at the prescribed rate reckoned from 1st March 2015 to the date of full and final payment, and seventhly, costs of suit on an attorney and client scale, and collection commission in terms of the Law Society of Zimbabwe By-Laws, 1982.

Before Justice TSANGA on the 16th November 2016 the matter was referred to trial on the following issues-

1. Whether or not the plaintiff and Polyhandy (Private) Limited which is under liquidation signed a Surety Agreement on the 29th May 2015?
2. Whether or not the plaintiff and Polyhandy (Private) Limited which is under liquidation signed an acknowledgement of Debt and Agreement of Pledge on 29th May 2015?
3. Whether or not the Deed of Suretyship signed on 25 March 2014 binds the first Defendant as surety and co-principal debtor for Polyhandy (Private) Limited's obligations to the plaintiff, both in terms of the Supply Agreement and Acknowledgment of Debt and Agreement of Pledge?
4. Whether or not the Deed of Suretyship signed on 11th March 2010 binds the second defendant as surety and co-principle debtor for Polyhandy (Private) Limited's obligations to the plaintiff, both in terms of the Supply Agreement and Acknowledgment of Debt and Agreement of Pledge?
5. Whether or not the Supply Agreement and Acknowledgement of Debt and Agreement of Pledge, both signed by the plaintiff and Polyhandy (Private) Limited on 29th May 2015, novated and superceded the Deeds of Suretyship signed by both the first and second defendants on the 25th March 2014 and 11th March 2010, respectively? and
6. If it is found that the Supply Agreement and Acknowledgment of Debt and Agreement of Pledge both signed by the plaintiff and Polyhandy (Private) Limited on 29th May 2015 did not novate and supercede the Deeds of Suretyship signed by the first and second defendants on the 25th March 2015 and 11th March 2010 as per paragraphs 4 and 5 above, whether or not the first and second defendants are liable for the amounts in the claims as per the Summons and Declaration?

The first and second defendants attended Court for the purpose of trial on the 23rd October 2017 and 24th October 2017. Before the trial could commence negotiations and discussions were held by the litigants and their respective legal practitioners and an offer of settlement was made to the plaintiff's legal practitioners by the defendants. The trial was postponed on a number of occasions to enable the parties to pursue settlement discussions. The plaintiff's legal practitioners also submitted a counter –proposal for settlement and negotiations continued between the parties. On 25 October 2017 a Notice of Substitution of plaintiff was served on the defendants' legal practitioners seeking to substitute the plaintiff with Versapak Holdings (Private) Limited (in Liquidation). Prior to the service of that Notice the defendants were unaware that the plaintiff had been placed in liquidation. Correspondence from the Provisional Liquidator confirming that he was aware of the proceedings and authorised the continuation of those proceedings was placed on 30th October 2017.

On 1 November 2017 the litigants legal practitioners compromised and settled the matter on the basis that the defendants would pay the agreed sum of ZAR 420 000.00 to the plaintiff's nominated account and plaintiff's legal costs. Correspondents from the plaintiff's legal practitioners was addressed on the same day to the defendant's legal practitioners and the defendants proceeded to effect payment in full and final settlement of the claim in accordance with the terms of settlement. The plaintiff's legal practitioners duly confirmed that all payments in terms of the settlement agreement were made and received and that the case was now closed.

However, the provisional liquidator subsequently raised objections to the settlement and the court was informed of the objection and the provisional liquidator's legal practitioners were requested to attend before the court to explain the cause for the objection.

The provisional liquidator laid down his basis of objection to the settlement and out lined the relevant rules relating to insolvency law which he thought were not complied with in this case. He then said in relevant part-

“6) Whilst the above laid down relevant rules of insolvency law remain to be complied with, the provisional liquidator as should the Master, remains nonthewiser as to why the shareholders and/or former directors are behaving in flagrant and wanton disregard of clearly laid down rules of law and procedures in the manner in which they have clearly elected to do in the circumstances. The provisional liquidator is also quite concerned as to the basis upon which a payment of R420 000 by Messrs David Maxwell Middleton and Aamir A Ansari could constitute the full and final settlement for a debt owed in the region of US\$ 92 000, let alone the destination bank account for said payment. Converting the R420 000 by a factor of 12.5 would give a total of US\$ 33 600, which paltry amount does not moderately equate to sums due and owing. As such, it is manifestly unreasonable and nothing short of scandalous that this could be deemed adequate in settlement of matters thereof. For the avoidance of doubt, the

provisional liquidator 's letter to Wintertons Legal Practitioners dated the 30th of October 2017 merely authorised the distinguished law firm to continue with debt collection, which instructions are not to be read as authorising settlement in terms of any reduced amount. It would be indeed appreciated that any reduced settlement would result in the possibility of leaving Versapak Holdings (Private) Limited (in liquidation)'s creditors seriously confounded. Such an outcome cannot be taken lightly. That the decision was taken by a shareholder/creditor and grantor of a subordination undertaking, speaks volumes as to why the purported arrangement must not come to fruition.

7) Furthermore and in any event, any proceeds by way of settlement as may be agreed upon would be expected to flow into the bank account of Versapak Holdings (Private) Limited [in liquidation], Zimbabwe. Directing payments outside jurisdiction would amount to externalisation and also contrary to Exchange Control Regulations. In the premises, this matter has been submitted to the Master of the High Court for guidance (see Annexure 'VSP012'); hence this matter ought to be stood down pending the Master's direction. In the alternative, the claims against Defendants should proceed to trial, unless a settlement can be reached by consent of the provisional liquidator. Any such payments must, at the very least, lead to the agreed payments in settlement thereof being directed to the account of Versapak Holdings (Private) Limited [in liquidation]'s Zimbabwe bank account."

The plaintiff and the defendants opposed the application by the provisional liquidator to have the matter referred to trial. Both were unanimous that the case is now closed.

On the party of the plaintiff it submitted that the provisional order relied upon by the provisional liquidator is void *ab initio* because the resolution to place the plaintiff under liquidation breached the provisions of the Companies Act in that the resolution "Annexure P1" was signed by only one director of the Company and it was not a board resolution because it was not supported by the majority of the board. It said even if it had been, it is of no relevance because it would still not have been a special resolution approved by three fourth of shareholders at a general meeting nor is it a written resolution which was signed by all the shareholders after waiving of the convening of a general meeting. It therefore asked this court to exercise judicial notice to declare the provisional liquidation order void and to confirm the settlement agreement concluded between authorised representatives of the plaintiff and the defendant. Secondly the plaintiff submitted that the provisional liquidator does not have the *locus standi* to represent the plaintiff in these proceedings. It further submitted that the provisional liquidator in order to challenge the validity of the settlement would be required to formally apply to intervene in the proceedings and as such to obtain an order from this Honourable Court permitting his intervention. Without such an order to be joined as a party the provisional liquidator has no *locus standi* to intervene in these proceedings or to challenge the settlement agreement. The

further contention by the plaintiff was that the relief being sought by the provisional liquidator to either refer case to trial or to the Master of the High Court is incompetent because this court is already seized with the matter and the settlement agreement has already been concluded and its terms already implemented. The provisional liquidator could have applied to have the settlement agreement set aside and to tender restitution of the payments already made by the defendants pursuant thereto. The plaintiff prayed that the settlement agreement not to be disturbed by this court as it was reached by the legal practitioners who had been authorised by the parties.

The defendants on the other hand submitted among other things that the settlement amount was negotiated and settled with the legal practitioners representing the plaintiff and they abided faithfully with the terms of settlement. The defendants paid the settlement amount and legal costs to the accounts nominated by the plaintiff (the bank account details were provided by the plaintiff and payment was made into those accounts). They were only informed that the Provisional Liquidator had objected to the settlement after they had paid the whole amount agreed in the settlement. Consequently, the defendants submitted with respect that the compromise and settlement entered into by the legal representatives of the litigants is valid and binding and has been complied with faithfully by the defendants. The defendants therefore have no direct interest in the dispute between the Provisional Liquidator and the shareholder of plaintiff, or in the litigation between those parties in relation to the Provisional Order and they cannot be drawn into that dispute after they have paid the amounts agreed in the settlement Agreement. According to them the claim was compromised and is valid and finally settled. For these and other reasons the defendants respectfully prayed that the settlement agreement be given effect to and the proceedings in the present case be withdrawn by the plaintiff's legal practitioners.

In my view there is substance in the submissions by both the plaintiff and the defendants. To begin with the Provisional Liquidator, though his concerns are valid, he has no *locus standi* to appear before this court at this stage and to intervene in the settlement agreement without the leave of this court. While the figure agreed by the litigants is in the view of the Provisional Liquidator on the low side, it must be noted that it was a compromise agreement between the parties and where parties reached a compromise agreement this court has no power to refuse it if in the eyes of the litigants the compromise agreement settles the matter between them. A compromise agreement having been reached and full payment having been made the

course open to the plaintiff was to withdraw this matter. However, this court was asked to confirm or set aside the compromise agreement and continue with the trial.

In the eyes of the compromise agreement and the fact that full payment has already been made and the plaintiff is happy with the offer made by the defendants this marks the end of the litigation. I therefore refuse to order the continuation of the trial.

IT IS ORDERED THAT

- 1) The compromise agreement entered into by the plaintiff and the defendants in case number HC 348/16 is hereby declared valid and enforceable.
- 2) Case HC 348/16 is hereby declared finalised and the trial is declared closed.
- 3) The Provisional Liquidator's objection to the settlement agreement between the plaintiff and the defendants and his request to have the trial in case HC 348/16 to continue or be referred to the Master of the High Court is hereby dismissed.
- 4) Costs shall be costs in the course.

Wintertons, plaintiff's legal practitioners

Hussein, Ranchod & Co., 1st and 2nd defendants' legal practitioners

Scanlen & Holderness, provisional liquidator's legal practitioners