

WEDZERA PETROLEUM PRIVATE LIMITED
and
ERIC NHODZA
and
GRACE NHODZA
and
TOBIAS TAZVINGA MUPINGA
and
MUKAI MAHACHI
and
TUVI GARI INVESTMENTS (PVT) LTD
and
GOPE INVESTMENTS (PVT) LTD
versus
METROPOLITAN BANK OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 26 November 2018 & 21 January 2019

Opposed application

T. Govere, for the applicants 1st, 3rd, 4th, 5th, 6th, 7th
M.S.N. Nyamayedenga, for the 2nd applicant
B. Chidziva, for the respondent

MANGOTA J: The applicants and the respondent enjoyed a debtor-creditor relationship respectively. The relationship commenced when the respondent advanced the sum of \$500 000 to the first applicant. The sum was for the first applicant's working capital. It was advanced to it at its special instance and request. It was advanced on 9 December, 2009.

As security for the due repayment of the loan, the second to the seventh applicants offered unlimited guarantees as sureties and co-principal debtors with the first applicant. They also offered the following:

- (i) surety mortgage bond 3250/09 in favour of the respondent over a certain piece of land situated in the District of Urungwe called stand 113 Karoi Township held under Deed of Transfer Number 3239/03.

- (ii) Mortgage bond 3260/09 from the 6th applicant in favour of the respondent over a property known as stand 232A Midlands Township held under Deed of Transfer Number 12929/01 dated 7 December 2010- and
- (iii) Mortgage bond 3258/09 from the 7th applicant in favour of the respondent over a property known as Stand 21 Chadecombe held under Deed of Transfer 9966/97 dated 2 December 1997.

The first applicant failed to repay the loan which had been advanced to it. The respondent caused summons for provisional sentence to be issued. These were issued under HC 7241/10. The applicants opposed the same. The respondent withdrew the provisional sentence summons on 9 February, 2011.

The parties continued to engage each other. They failed to settle. The respondent sued the applicants. It did so under case number HC 1614/11. It claimed:

- (a) payment of \$799 347.23
- (b) interest thereon at the rate of 24% per annum reckoned from 1st February, 2011 to the date of full payment;
- (c) collection commission- and
- (d) costs of suit on a higher scale.

It also prayed that the abovementioned three properties be declared specially executable.

The applicants entered appearance to defend as a result of which the respondent applied for summary judgment. It did so on 3 March, 2012 and under case numbers HC 2262/11 and HC 7241/10.

The applicants filed their notice of opposition on 17 March, 2011. They pleaded that the amount claimed was not yet due and payable. They insisted that the respondent breached the contract and caused the first applicant to suffer damages in the sum of \$710 000. They moved the court to dismiss the application.

Whilst the process which related to the application for summary judgment remained in progress, the parties continued to negotiate with a view to reaching an amicable settlement. On 4 April, 2012 the parties' legal practitioners signed a consent order and the applicants signed a deed of settlement.

The respondent's legal practitioners lodged the consent order with the registrar of this court. They did so on 30 July, 2012. The court issued the order on 3 September, 2012.

The issued consent order constitutes the applicants' cause of action. They claim that it was erroneously sought/granted and/ or that it was granted as a result of a mistake which was/is common to both parties. They aver that the deed of settlement formed the basis of the consent order. They insist that the deed should have been lodged together with the order. They state that, without the proposed deed of settlement explaining where the figure of \$910 000 is emanating from, the consent order which claims the stated sum as owing does not concur with \$799 247.92 which the respondent is claiming in the summary judgment application. They aver that the court cannot grant a figure which is higher than what a party is claiming. They impute fraud on the part of the respondent's legal practitioners. They state that they have a *bona fide* defence to the respondent's claim. They filed their application under r 449 of the High Court Rules, 1971. They move the court to rescind the consent order.

The respondent opposes the application. It states that the parties negotiated and reached a settlement which is contained in the consent order. It insists that the consent order was properly issued. It avers that the deed of settlement was/is separate from the consent order. The deed, it says, deals with issues post the consent order. The deed of settlement, it claims, is dependant upon the consent order. It denies that its legal practitioners acted in a fraudulent manner. It moves the court to dismiss the application with costs which are on an attorney and client scale.

An applicant against whom a consent order has been entered can apply under the rules of court or under the common law or both for its rescission. SMITH J states as much in *Mukundadzviti v Mutasa*, 1990 (1) ZLR 342 wherein he remarked that:

“A judgment granted by consent can be set aside on the grounds of fraud, discovery of new documents, error or irregularities in procedure.”

A consent order can also be rescinded in terms of the rules of court. Rule 56 of the High Court Rules, 1971 is relevant. It offers a leeway to the court to set aside a judgment or order given by consent. It reads:

“A judgment given by consent may be set aside by the court and leave may be given to the defendant to defend or to the plaintiff to prosecute his action. Such leave shall only be given on good and sufficient cause and upon such terms as to costs and otherwise as the court deems just” (emphasis added)

The success or otherwise of the application does, in my view, depend on the circumstances which gave birth to the consent order. Where those are a result of the parties' genuine intention to settle the dispute by way of a consent order, the applicant's effort to rescind

the order would be insurmountable. Where, however, he is able to show, in the application, that the consent order should not have been issued, his task at having the same rescinded becomes a lot easier than otherwise.

Having established that the court has the power to set aside consent orders or judgments, my next port of call is to ascertain if the consent order which is the subject of these proceedings can be rescinded. An examination of the circumstances under which the consent order came about are a *sine qua non* aspect of the inquiry which is currently at hand.

The order is, from a *prima facie* perspective, properly made. It complies with rules 54 and 56 of the rules of this court. It is in writing. It is signed by the applicants' erstwhile legal practitioners who entered appearance for them as well as by the respondent's legal practitioners. The latter lodged the draft consent order with the court which, in turn, issued it on 3 September, 2012.

The applicant did not mince their words. They accuse the respondent's legal practitioners and their erstwhile legal practitioners of collusion. They say the two worked against their interests. They raise concern on the manner in which their erstwhile legal practitioner went about his duties to protect their interests. They state that he slept on duty. They claim that he was grossly negligent when he did not raise any query as to why the deed of settlement was not lodged together with the draft consent order.

The two legal practitioners who signed the consent order on behalf of their respective clients deposed to an affidavit each. They did so because the applicants accuse them of having colluded with each other to their prejudice when they signed the consent order.

Both legal practitioners who are senior and experienced officers of the court saw the need on their part to explain the circumstances which relate to the consent order. It is, therefore, in the mentioned spirit more than in any other that their respective affidavits should be read and considered. The affidavits explain the views which each of them entertained when he signed the consent order.

The legal practitioners are *ad idem* on the following matters:

- (i) that the consent order was signed on the same day that the first, second, sixth and seventh applicants signed the deed of settlement;
- (ii) that the legal practitioners signed the consent order and the mentioned four applicants signed the deed of settlement;

- (iii) that the respondent's signature onto the deed of settlement awaited further consultations within the respondent's rank and file - and
- (iv) that both documents - consent order and deed of settlement - were signed at one and the same time, in the presence of the parties' legal practitioners and the four applicants.

The legal practitioners' point of departure centres on the role which the deed of settlement would play in the resolution of the parties' dispute. The applicants' erstwhile legal practitioner entertained the view that the deed formed the foundation of the consent order which he signed. He states as much in his affidavit. Sub-paragraphs 3.1 and 3.2 as read with a portion of paragraph 4 of the same are relevant. They read:

- “3.1 What was agreed was that the two documents were contemporaneous and the order will only take effect after the deed of settlement was signed by the respondent.
- 3.2 The respondent never signed the Deed of Settlement even up to the time it obtained the order by consent.
- 4.The other letter addressed to this court raised the issue that in the absence of the Deed of Settlement then the order by consent could not stand and the matter should be heard as opposed”

The understanding of the respondent's legal practitioner on the point which is under consideration is diametrically opposed to that of the applicants' erstwhile legal practitioner. His statement on the same is that the deed of settlement would govern the parties' relationship post the consent order. He states as much.

It is evident that the minds of the two legal practitioners were at cross- purposes when they signed the consent order. For the applicant's legal practitioner, the deed supported the consent order. For the respondent's legal practitioner, the consent order supported the deed of settlement.

The legal practitioners' diametrically opposed views of the role which the deed of settlement was to play in the resolution of the parties' dispute viciates the parties' consent to the same. It is for the mentioned reason, if for no other, that the issue of the parties' dispute cannot be regarded as having been conclusively resolved. It is as live as it commenced to rear its ugly head in the parties' case.

A consent order which results from the parties' genuine but mistaken view of the role which the deed of settlement which relates to it should play in the resolution of the parties' dispute is not a consent order at all. Whilst the signatures of the parties' legal practitioners

appear on it, the order as read with the deed of settlement conveys two different meanings. The meanings go to the root of the parties' dispute. They exacerbate rather than they resolve it.

The applicants are not at fault when they apply under the common law for rescission of the consent order. The order appears to be a result of a violation of the basic principles of the law of contract.

The manner in which the respondent's legal practitioner lodged the consent order leaves a lot to be desired. His letter of 30 July, 2012 which accompanied the lodging of the order gives the distinct impression that he lodged the draft consent order together with the deed of settlement. The correct position is that he lodged only the consent order. It is for the mentioned reason, if for no other, that the applicants plead fraud as one of the grounds for the setting aside of the consent order. They state that the respondent's legal practitioner acted fraudulently when he conveyed to them the impression that he lodged two documents in a situation where he lodged only the consent order. Paragraph 12 (d) (1) of their founding affidavit is relevant in the mentioned regard.

It is trite that the minds of the parties' legal practitioners were not *ad idem* in regard to the manner which relates to the settlement of the dispute. The legal practitioners were also not of the same mind in respect of the role which the deed of settlement would play in the resolution of the parties' dispute. The consent order can, therefore, be rescinded under the common law on the basis of the above – described set of circumstances.

Rescission of the consent order can, in my view, be granted notwithstanding the fact that the applicants' draft order is couched in terms of r 449 of the High Court Rules, 1971 and not on the basis of the common law. It is, in any event, a draft order which the court is at liberty to modify depending on the circumstances of the case.

The position which I take of the matter on the stated aspect of the case finds fortification from what DEVITTE J said in *Gondo & Anor v Syfrets Merchant Bank Limited*, 1978 (1) ZLR 201 (H) wherein he remarked as follows:

“... the court also has a discretionary power under the common law to rescind its own judgments. This power extends beyond, and is not limited to, the grounds set out in the Rules of the High Court.”

The applicants' second ground for the setting aside of the consent order is contained in para 9 of the founding affidavit. The paragraph states that the application is in terms of r 449 of the High Court Rules, 1971. The rule confers power on the court or a judge to correct, rescind or vary any judgment or order. It reads:

- “1. The court or a judge may *mero motu* or upon the application of any party affected, correct, rescind, or vary any judgment or order –
 - a) that was erroneously sought or erroneously granted in the absence of any party affected thereby; or
 - b) in which there is an ambiguity or a patent error or omission but only to the extent of such error or omission; or
 - c) that was granted as the result of a mistake common to the parties.
2. The court or a judge shall not make any order correcting, rescinding or varying a judgment or order unless satisfied that all parties whose interests may be affected have had notice of the order proposed.”

The importance of the abovementioned rule can hardly be over-emphasized. It takes cognizance of the fact that judicial officers are, like all human beings, not immune to making mistakes. It gives them a leeway to revisit their orders and judgments where they observe that they have made a mistake. It confers a discretion on them to correct, rescind or vary their orders and judgments so that these remain in consonant with the notions of real and substantial justice. It allows them to do so on their own volition or on an application by a party whose interests have been prejudicially affected by their erroneous orders provided the applicant satisfies subrule (2) of the rule which is under consideration.

MAKARAU J (as she then was) made some incisive remarks on the meaning and import of r 449. She stated in *Tiriboyi v Jani & Anor*, 2004 (1) ZLR 470, 472 D –E that:

“The purpose of rule 449 appears to enable the court to revisit its orders and judgments, to correct or set aside its orders and judgments given in error and where to allow such to stand on the excuse that the court is *functus officio* would result in an injustice and will destroy the very basis upon which the justice system rests. It is an exception to the general rule, and must be resorted to only for the purposes of correcting an injustice that cannot be corrected in any other way. The rule goes beyond the ambit of mere formal, technical and clerical errors and may include the substance of the order or judgment.”

It is the case of the applicants that the consent order violates para (1) (a) and/or (1) (c) of r 449. They anchor their first argument on the contents of the letter, Annexure 01, which the respondent’s legal practitioner addressed to the registrar of this court on 30 July, 2012. They submit that the letter suggests that the legal practitioner was lodging;

(i) the consent order – and

(ii) the deed of settlement when, in actual fact, he was lodging only the consent order.

They state that the conduct of the legal practitioner accounts for the erroneous granting of the order because, according to them, it was granted in the absence of their views as contained in the deed of settlement which they signed. The legal practitioner, they argue, misled the court

into granting the order. They state that if the court had been made aware of the correct circumstances of the case, it would have refused to issue the consent order.

The respondent's statement on the same is to the contrary. It states that the deed of settlement was a separate document. The deed dealt with issues after the issuance of the consent order, according to it. It insists that the deed of settlement recorded the parties' undertakings. It avers that the applicants suffered a misconception when they entertain the view that the deed of settlement formed the basis of the consent order.

Annexure 01 which forms the subject of the parties' dispute appears at p 161 of the record. It is addressed to the registrar of this court. It is dated 30 July, 2012. The respondent's legal practitioner is its author. It reads in the relevant portion as follows:

"We advise that the parties engaged and entered into an order by consent attached hereto. Could you kindly place the aforesaid deed of settlement before the Honourable Judge so that it can be made an order of court" [emphasis added].

The above cited portion of the letter is as confusing as its author intended it to be. It conveys the distinct impressing which is to the effect that two, and not one, document(s), was/were lodged with the registrar on 30 July 2012.

The respondent's statement which is to the effect that its' legal practitioner used the phrase *deed of settlement* to refer to the consent order is, in my view, misplaced. Nothing prevented him from requesting the registrar, as he should have done, to place the aforesaid '*consent order*' before the Honourable judge.

Whilst a consent order and a deed of settlement are documents which fall into the family of a settled dispute, the weight which is placed on each is different. A consent order, once issued, assumes the status of an order of court. The deed of settlement does not assume any status at all. It remains what its name suggests it is.

Further, the consequences which attach to a deed of settlement, whether or not it is placed before the court, are not the same as those of an issued consent order. The latter document carries the force of law unlike the deed of settlement which can only be enforced after it has been converted into an order of the court by way of a consent order. A deed of settlement is not, therefore, synonymous with a consent order which has been issued by court.

Having clarified the meaning and import of the two documents, the next matter which I must consider is whether or not, in the absence of the partially signed deed of settlement, the consent order was erroneously sought and/or granted. The consent order which the applicants' erstwhile legal practitioner signed cannot be said to have been issued in the absence of the

applicants. The signature of their legal practitioner suffices for purposes of r 54 of the High Court Rules, 1971. Rule 449 (1) (a) does not, therefore, apply to the case of the applicants.

The question which I should resolve is whether or not the consent order in respect of which rescission is sought was granted as a result of a mistake which is common to the parties in terms of r 449 (1) (c) of the rules of court. NESTARDIT JA clarified the meaning of the phrase ‘mistake common to the parties’. He did so in *Tshivane Road Council v Tshivane*, 1992 (4) SA 852 (A). The learned judge stated that the requirements which must be satisfied for r 449 (1) (c) to be successfully invoked are that:

- i) there must have been a mistake which is common to the parties in the sense that they should be *ad idem* on a particular matter—and
- ii) there must be a causative link between the mistake and the granting of the order.

It is a mistake which is common to the parties for them to:

- i) refer to a document which only the applicants signed as a deed of settlement; and/or
- ii) entertain the view that the document would regulate the parties’ relationship; and/or
- iii) think that the document resolves their dispute.

The document is not a deed of settlement. It is one – sided in character. It cannot be enforced against the respondent. It remains with the status which it assumed when the applicants signed it. It is a nothing.

The applicants signed the document in April 2012. The respondent has not signed it from the stated period of time to date. Six years have come and gone by without the respondent signing it. Its reasons for not signing remain largely unknown.

It is a misnomer for the parties to refer to the document as a deed of settlement. It is not. It governs nothing. It does not speak to the parties’ relationship before or after the purported resolution of their dispute which is very much alive. The fact that the purported deed does not explain how the difference of the figure which is contained in the summons/summary judgment application and the one which is mentioned in the consent order arises says it all.

That the purported deed of settlement was the causative factor in the signing of the consent order requires little, if any, debate. The applicants signed the consent order on the strength of the purported deed of settlement which they signed. The respondent signed the

consent order also on the strength of the same. The first sentence of the preamble of the purported deed of settlement confirms the observed matter.

It is clear, from the foregoing, that the consent order violates r 449 (1) (c) of the High Court Rules, 1971. It was issued as a result of a mistake which is common to the parties. It cannot, on the mentioned basis, stand.

The applicants state, and I agree, that they have a *bona fide* defence to the respondent's claim. They challenge the *quantum* which it is claiming.

Given the respondent's claim as contained in the summons and/or application for summary judgment, the sum of \$910 000 which is contained in the consent order which they are challenging requires some explanation. *A fortiori* when it is an accepted fact that a claimant cannot get more than what it claimed in the summons and declaration or, by extension, in the application for summary judgment.

The applicants, in my view, proved their case on a balance of probabilities. They must have their day in court. The purported consent order which the parties' legal practitioners signed is a nullity. It is premised on a mistake as well as an apparent deceit. It cannot, therefore, stand. It is, accordingly, ordered that:

1. The consent order granted by the court under case number HC 2262/11 be and is hereby set aside.
2. The respondent be and is hereby directed to apply for set down of the application for summary judgment within seven (7) days of service of this order on it.
3. The respondent shall pay the applicant's costs.

Govere Law Chambers, 1st, 3rd, 4th, 5th, 6th, 7th, applicant's legal practitioners
C Nhemwa & Associates, 2nd applicant's legal practitioners
Kantor & Immerman, respondent's legal practitioners