ISOQUANT INVESTMENTS(PVT) LTD T/A ZIMOCO
versus
PLANNING AND DESIGN STUDIO CONSULTANTS (PVT) LTD
and
CITY OF HARARE

HIGH COURT OF ZIMBABWE
COMMERCIAL LAW DIVISION
CHIRAWU -MUGOMBA J
Harare, 16, 20, 21, 24 October 2022

OPPOSED APPLICATION

M.S Mlambo, for the applicant
J.B Matandire, for the 1st respondent

OPPOSED APPLICATION

CHIRAWU-MUGOMBA J

(1) This matter was placed before me as an opposed application. On the 20th of July 2015, the applicant pursuant to an action matter filed under case number HC 412/13, obtained judgment in the sum of US$53 301.00 with interest and costs of suit against first respondent.

(2) By way of a letter dated the 6th of April 2016, the first respondent notified the applicant that it was committed to reaching a permanent settlement of the matter. Further that it had residential stands that it could give. These were described as seven high density residential stands measuring 200 square metres each at an average price of US$7500. The combined value was therefore US$52 500. Further still that these stands had been availed to the first respondent for services rendered to a housing cooperative sanctioned by the Ministry of Local Government, Public Works and National Housing. That all relevant documentation

would be availed and that the stands were available for immediate occupation. A layout map depicting the stands was availed to the applicant.

(3) By way of a letter dated the 16th of May 2016 addressed to the first respondent, the applicant accepted the offer **but** it stated that the amount outstanding was US$56 498. That this represented 8 residential stands measuring 200 square metres each. A request was made to the first respondent to provide applicant with stand numbers and a commitment to honour the agreement.

(4) In an undated letter, the first respondent provided the applicant with the stand numbers a-g, thus seven in number each measuring 300 square metres. The applicant was advised to get in touch with the first respondent's technical operations officer who would show them the stands physically. Further that the relevant agreement document which set out the development conditions would be availed to applicant.

(5) After the first respondent's initial stance that the applicant had taken delivery, it turned out that according to them, it was not possible at the time to effect change of ownership because it was a cession agreement. Change of ownership could not be effected because one of the conditions for the processing of the title deeds was that the stands had to be developed.

(6) The applicant therefore seeks the following order.

(a) That the compromise agreement which was entered into by the parties in relation to the judgment debt which was issued against the respondent in case number HC 412/2013 be and is hereby confirmed.

(b) That the respondents be and are hereby directed to take all such necessary steps and to sign all such documents are necessary to effect the cession and/or transfer of the immovable properties to the applicant within seven days of this order, failing which the Sheriff be and is hereby authorised to take all such steps and sign all such documents on the respondents' behalf.

(c) The first respondent be and is hereby ordered to pay costs of suit on the legal practitioner to client scale.

(7) The first respondent opposed the application and raised the following. That the compromise agreement was concluded in April 2016. A period of more than five years has elapsed. Accordingly, the claim has prescribed. The claim is also frivolous and vexatious as the first respondent settled the debt in full on the 15th of October 2021. A bank statement showing proof of payment was attached.

(8) At the hearing, after exchanges between the court and Mr. *Matandire*, for the 1st respondent, he abandoned the preliminary issue of prescription.

(9) Ms. *Mlambo* for the first respondent on the merits made the following submissions. That the first respondent confirmed delivery of the stands to the applicant through a letter from its legal practitioners. In determining the agreement between the parties, it is critical to look at their conduct. She referred the court to the case of *ILASHA MINING (PVT) LTD vs YATAKALA TRADING (PVT) LTDt/a VIKING HARDWARE DISTRIBUTORS,* HB-03-18. Although there had been a compromise, no delivery had taken place and the process was never completed. On being asked by the court on the competency of the order sought, she submitted that the relevant parties can be compelled to take all the necessary steps to compel cession.

(10) Mr. *Matandire* on the other hand made the following submissions. It is open to the first respondent to take whatever steps it deems appropriate to satisfy the judgment debt. In *casu*, there was never a compromise. The first respondent made an offer of seven stands. The applicant made a counter offer of eight stands. The draft order does not even enumerate the stands. If the stands are given to the applicant, the principle of double jeopardy will arise in the sense that the judgment debt has been paid off.

(11) The court is therefore enjoined to deal with the issue of whether or not there was a compromise and if so its legal implications. The *locus classicus* on the definition of a compromise is found in the oft cited case of *Georgias and Anor v Standard Chartered Bank*, 1998(2) ZLR 488 @496 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).

(12) In this matter however, the salient issue is that of compromise of a judgment debt. Dealing with a compromise of a court order, DUBE J (as she then was, in *Gold Beams Development (pvt) Ltd vs Mabhena,* HH-296-21, had this to say.

"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. ……. 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. …….. 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".

(13) My understanding is that the deed of settlement need not be in writing and that the parties who enter into such have a new contract which becomes the cause of action.

(14) In *casu*, the defendant offered seven stands each measuring 200 square metres. The plaintiff's response was that the stands should be eight each measuring 200 square metres to tally with the amount owed. The defendant ignored the aspect of eight stands and gave stand numbers to the plaintiff for seven stands as per its offer. Unlike the initial offer, these stands were now said to measure 300 square metres each. The plaintiff did not protest.

(15) In my view and as rightly submitted by Mr *Matandire*, the conduct of the applicant amounts to a counter offer that resulted in the nullification of the original offer. In *General Principles of Commercial Law* 6th ed by Peter Harenga and Michelle Harenga at p 57n the authors highlighted as follows.

> "If the offeree does not accept the offer exactly as it was made but makes a counter offer, the offeree by implication rejects the offer and the offer is extinguished. The counter-offer is also the making of a new offer."

R H Christie's *The Law of Contract in South Africa* 2nd ed p 69 on acceptance corresponding with the offer states as follows.

> "One aspect of the rule that acceptance must be clear and unequivocal or unambiguous is that the acceptance must exactly correspond with the offer. Yes but

> ….. does not signify agreement, so any attempt to vary the terms of an offer while purporting to accept it will destroy the validity of the acceptance which will normally best be interpreted as a counter-offer." See *Joubert* v *Enslin* 1910 AD 6 at 29.

(16) In *casu,* the counter offer for 8 stands was rejected by the first respondent. In its undated response, annexure H3, it simply ignored the issue of the eight stands and went on to give details of seven stands each measuring 300square metres. In other words, the new offer in the form of a counter offer was rejected.

(17) What is critical to note is that after rejecting the counter offer, the first respondent went on to make a new offer in the sense that the seven stands were now measuring 300 square metres unlike the 200 square metres in the original offer. In my view, the applicant accepted the new offer of seven stands each measuring 300 square metres. The correspondence between the legal practitioners reflects that the first respondent was of the view that the applicant had already taken delivery of the stands. In addition, a site visit had been conducted and the applicant's representatives were shown the stands.

(18) In my view, the offer and acceptance of the seven stands each measuring 300 square metres falls under the real of a tacit contract- See Christie, *Business Law in Zimbabwe*, 2016 ed, at page 44.

(19) The inescapable conclusion is that there was a compromise between the parties. The next issue to decide is whether or not payment by the first respondent of the judgment debt discharged its obligation. Having compromised the judgment debt, it was not open to the first respondent to chose how to discharge it. The compromise constituted a new contract and extinguished the judgment debt.

(20) On costs, it is trite that they follow the cause. However, in *casu*, the applicant sat on its laurels without ensuring that the compromise came to fruition. Accordingly, I will order that each party shall meet its own costs. I will also amend the order sought to include the specific stands. I do not perceive that any prejudice will be suffered by the first respondent.

DISPOSITION

IT IS ORDERED AS FOLLOWS:

1. The offer of the following stands each measuring 300 square metres to the applicant by the first respondent constitutes a compromise of the court order of the 20th of July 2015 in

case number HC 412/13.

a. Stand number 5344
b. Stand number 5345
c. Stand number 5346
d. Stand number 5347
e. Stand number 5348
f. Stand number 5349
g. Stand number 5350

2. Consequently
    a. The respondents be and are hereby ordered to take all necessary steps to sign all relevant documents to effect cession and/or transfer of the immovable properties described in paragraph one above within a period of 30 days from the date of the service of this order.
    b. Should the respondents fail, refuse or neglect to sign such documents, the Sheriff of the High Court be and is hereby authorised to sign them.
3. Each party shall bear its own costs.

Wintertons, applicant's legal practitioners
Jon Mugogo Attorneys, First respondent's legal practitioners