VICTORIA FOODS (PRIVATE)

LIMITED

versus

TRINPAC INVESTMENTS

(PRIVATE) LIMITED

and

MEDWORTHS PROPERTIES

(PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE

CHIWESHE JP

HARARE, 10 March 2011

*R Matsikidze*, for the applicant

*N Bvekwa*, for the respondent

CHIWESHE JP: According to the applicant the background facts to this matter are as follows: On 21 June 2010 the first respondent, represented by its chief executive officer, signed an acknowledgment of debt in favour of the applicant in the sum of US$418 400-00. The debt had arisen on account of the supplies of the applicant’s products at the request of the first and second respondents. During the period 6 June 2010 and 1 September 2010 a further debt of US$267 260-00 was similarly incurred. The total debt then became US$685 659-98 (inclusive of the amount secured under the acknowledgment of debt). The respondents made payments to the tune of US$195 494-00 leaving a balance of US$490 165-00. A surety mortgage bond was then created to cover this debt in which the second respondent was the mortgagor and the applicant the mortgage. In terms of clause 11 of the surety mortgage, should the mortgagor fail to pay the amount when due after demand and after seven days, the amount shall immediately become due and payable. It was also provided in the bond that any debt that would arise in future would still be subject to the security of the bond.

The debt has remained largely unpaid and, despite demand, the respondent has failed to pay the money owed to the applicant. For this reason the applicant has lodged this application seeking an order compelling the respondent to pay the sum of US$490 165-00 failing which the mortgaged property be declared specially executable. Further, the applicant seeks that the respondent be ordered to pay interest at the prescribed rate plus costs on the legal practitioner-client scale, including 10% collection commission.

The respondents agree that the facts are largely common cause. They do not dispute the fact and extent of their indebtedness. The first respondent runs a bakery business. They aver that on 21 July 2010 it was agreed by the parties that the applicant would start providing the first respondent with flour so that it would be able to service its debt. The first respondent was expected, in terms of that agreement, to make weekly repayments of US$30 000-00. The applicants then started supplying the first respondent with flour, confirmation, according to the respondents, that the parties had entered an acceptable arrangement. By this arrangement the first respondent was servicing both the old debt and the new debt. However, the applicant stopped supplying flour as from 1 September 2010. As a result the first respondent’s weekly payments stopped on 14 September 2010. No explanation was proffered by the applicant as to why the flour supplies had been stopped. For this reason, argue the respondents, it was the applicant that breached the compromise and therefore the first respondent is not obliged to pay this claim until such time as the applicant would have purged its breach.

In its answering affidavit the applicant denies any breach of any agreement with the respondents. It avers that it reached a compromise with the respondents in order to assist the respondents out of sympathy and the need to recover the debt by supplying the first respondent with flour with which to make its products. The compromise was made on condition the first respondent would repay the old and the new debts at the acceptable rate of US$30 000-00 per week. When the applicant made the first flour supply, the respondent did not pay anything within the agreed fourteen days period. That was a breach of the new agreement. The applicant avers that the respondents are not being truthful in their narration of the events leading to the cessation of flour supplies.

It is common cause that the parties entered into a compromise agreement in which the applicant would supply flour to the respondents and they would in turn repay their debts at the rate of US$30 000-00 per week. The US$30 000-00 was to be paid at any rate within fourteen days of delivery of each batch of flour. It is also common cause that although the offer of compromise was made in writing by the respondents the applicant’s acceptance is implied by way of its conduct in resuming flour supplies along the lines and terms proposed by the respondents. The applicant does not contend that it did not enter into a compromise arrangement – rather it argues that the respondents breached the compromise arrangement.

According to Farlam & Hathaway“A Case Book on the *South African Law of* *Contract*” at p 334:

“A compromise agreement, once entered into, precludes an action on the original debt, except where the compromise specifically and by clear implication provides that the original claim shall revive in the event of the non-performance of the terms of the compromise.”

See also *Hamilton* v *Standard Chartered Finance* 1998 (2) ZLR 488 (S).

It follows from the above that the parties are bound by the terms of the compromise agreement. Neither of them can resile from that agreement as the applicant tries to do by arguing that the compromise agreement was merely for the purposes of enabling the respondent to meet its commitments under a previous agreement and that, in doing so, the applicant acted out of sympathy with the respondent. If that was what the applicant had in mind it should have responded to the applicant’s offer of compromise accordingly. Instead, the applicant’s conduct in resuming flour supplies as proposed by the respondent in return for the US$30 000-00 per week repayment plan, bound itself to the compromise agreement. As a result the applicant can only sue in terms of the compromise agreement and not in terms of the acknowledgement of debt or any other previous arrangement.

**Did the respondents breach the compromise agreement?**

The respondents say they failed to meet the repayment plan because the applicants had stopped (without notice) the flour supplies. The applicant says it stopped supplies after the respondents had failed to repay the US$30 000-00 which they were obliged to repay in terms of the compromise. Whether the applicant or the respondents breached the compromise is a question of fact. There is a dispute as to whether it was the applicant who breached the agreement by failing to supply flour or the respondents by failing to make repayments timeously. The respondents say that supplies of flour ended on 1 September 2010 and payments stopped on 14 September 2010, implying that it was the applicant who was in breach. The respondent states that they had been paying at the rate of US$6 000-00 per day every five day week, making a total of US$30 000-00 per week. These figures are reflected in the reconciliation prepared by the respondents and filed of record as Annexure “F”. The reconciliation indicates both the new debts (after compromise) and the old debts. The respondent says both the old and the new debts were being serviced together.

The factual dispute between the parties is one that cannot be resolved without hearing *viva voce* evidence. The applicant ought to have foreseen the emergence of this factual dispute. I am inclined to dismiss this application for this and other reasons outlined above.

Accordingly it is hereby ordered as follows:

1. That the application be and is hereby dismissed.
2. That the applicant pays the costs.

*Matsikidze & Mucheche*, applicant’s legal practitioners

*Bvekwa Legal Practice*, respondents’ legal practitioners