T.M PICK 'N' PAY
versus
DAMSON MAWANA
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 24 August 2018, 14 September 2018 & 8 May 2019

Court Application

R. S. Ncube, for the applicant
T.G. Kuchenga, for the respondent

CHATUKUTA J: This is an application for permanent stay of execution of the order of this court under case number HC 1450/17.

The following background to the application is common cause. The applicant was the first respondent's employer. On 5 June 2012 it dismissed the first respondent. The respondent challenged his dismissal and on 16 December 2016, the Honourable Arbitrator Kazembe handed down an award in which he ordered the reinstatement of the first respondent and in the alternative payment of back pay and damages in lieu of the reinstatement. The applicant did not reinstate the first respondent and the parties failed to agree on the quantum of damages. The matter was referred back to the arbitrator for quantification. On 30 January 2017, the honourable arbitrator Kazembe handed down an award in favour of the first respondent in the sum of US36 200.00.

The first respondent filed a chamber application under case number HC 1450/17 for the registration of the arbitral award. The applicant was served with the application on 17 February 2017. It did not oppose the application. The application was granted on

4 April 2017. The applicant had on 8 March 2017 paid the first respondent a sum of US 21 456.00. The order was brought to the attention of the applicant on 15 June 2017 when the first respondent had visited the applicant's office inquiring after the balance of the award.

The applicant in turn brought to the attention of the first respondent a deed of settlement concluded between the applicant and the first respondent on 20 February 2017. The first respondent was represented in that deed by Kimgae Services. The deed provided that the applicant was to pay the respondent a sum of US$21 456.00 in full and final settlement of what was due to the first respondent. It further provided that the deed superseded the award by the Honourable Arbitrator Kazembe. By letter dated 1 December 2017 and received by the applicant on 2 December 2017, the first respondent persisted with his claim for the balance of the award disputing the allegation that he had mandated King Mugabe to sign the deed of settlement on his behalf. The applicant responded to the letter on 2 January 2018 maintaining that the first respondent had authorised Mr. Mugabe to represent him in the deed. It relied on communication by email between the first respondent and Mr. Mugabe in which its offer to pay the first respondent an amount of US$21 456.00 was referred to.

On 18 January 2018 the first respondent obtained a writ of execution. On 9 February 2018, the first respondent executed on the writ and attached property belonging to the applicant. On 12 February 2018, the applicant filed an urgent chamber application seeking a provisional order for the stay of execution of the order under case number HC 1450/17 and in the final relief, a permanent stay of the order claiming that it had discharged its indebtedness to the first respondent as per the deed of settlement. These proceedings are therefore to determine the final relief sought for the permanent stay.

The dispute before the court is therefore centered on the validity and import of the deed of settlement. The applicant contends that the deed was concluded with the 1st respondent's duly authorized agent. In support thereof he attached the emails between 1st respondent and Mr Mugabe. It also attached Mr Mugabe's supporting affidavit wherein the latter attested that he acted on the 1st respondent's instructions. It further contends that the deed of settlement supersedes the order under case number HC 1450/17 as the respondent compromised his claim.

The first respondent contends that the agent was not authorized to conclude the deed as evidenced by the fact that he persisted with the application for the registration of the arbitral award despite having signed the deed of settlement. In the email alluded to by the applicant he was accepting that the applicant pays a deposit of US$21 456.00 with the balance being payable upon registration of the award. He alleges that he did not engage Kimgae Services but Mr

Mugabe to represent him yet the deed states that his representative was Kimgae Services. Further, he suspects that the deed was fraudulently concluded soon after the order under case number HC 1450/17 to deny him the benefits of the order. The order under case number HC 1450/17 remained extant and could not be superseded by a deed of settlement.

It is trite that a contract made by an agent on behalf of his principal with a third party is regarded in law as having been made by the principal himself and ordinarily is binding on the principal. The first issue for determination is who between Mr Mugabe and Kimgae Services was the first respondent's agent.

It appears to me to be common cause that Mr Mugabe and not Kimgae Services was the first respondent's agent. In an email dated 31 January 2017 (and attached to Mr Mugabe's affidavit), the first respondent was clear as to who his agent was. The email reads-

> "Subject: REF: Fee for (*sic*) to be paid to Mr Mugabe as my representative
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> In the matter between Damson Mawana and Tm pick n pay (*sic*) 22% of the net figure to Mr Mugabe as my representative. My I'd (*sic*) no 1146099-S-26. Soon after the funds being transferred to my account I will do also his payment (*sic*)."

Mr Mugabe does not dispute in his affidavit deposed to on 12 February 2018 that he was the 1st respondent's agent although he initially in paragraph 3 avers that the first respondent engaged Kimgae Services during the arbitration. He however confirms in paragraph 7 of his affidavit the contents of the above email. He avers as follows:

> "7. After some discussions, we agreed a fee for my services in the sum of 22% of the amount paid to the first respondent, which agreement was reduced to writing as can be seen from the email attached and marked Annexure "H"."

He throughout the affidavit avers that he, and not Kigmae Services had instructions to act for the first respondent. He further deposed to another affidavit on 14 February where he continued with his averments that he was the first respondent's agent. As will be discussed later, the 1st respondent contends that he paid directly Mr Mugabe an amount of $420 as sheriff's fees for the execution of the order under HC 1450/17. Mr Mugabe does not explain his relationship with Kimgae Services neither does he explain why the $420 was paid directly to him and not to Kimgae Services. In the absence of the explanation the first respondent's submission that the person who concluded the deed of settlement on his behalf was not his agent is sustained. The deed of settlement is therefore invalid.

Even assuming that I am wrong, the question of the validity of the deed of settlement still remains. The first respondent accepts that he authorized the court process under case number HC 1450/17. He however, disputes authorizing the wilting of his benefits as *per* the award to US$21 456.00 and suspects that his agent fraudulently connived with the applicant to come up with the deed of settlement. Where fraud is perpetrated by an agent of one of the parties, and particularly with the connivance of the other party, such fraud will affect the contract. Christie in *The Law of Contract in South Africa*, 5 ed at p 271 observed that:

> "In a straightforward case where two parties are involved there is no difficulty about permitting the innocent party to rescind the contract as a result of a misrepresentation made by him to another. The only one to suffer will be the maker of the misrepresentation. But if the misrepresentation was made by a third party the matter is not so simple, as rescission would leave the maker of the misrepresentation unaffected but would adversely affect the other party to the contract, who is entirely innocent. In accordance with the general principle that when no one is to blame the loss must lie where it falls, no rescission is permitted in these circumstances. In *Karabus Motors (1959) Ltd van Eck* 1962 (1) SA 452 (C) 453 WATERMAYER J said:
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> > "It is a general rule of our law that if the fraud which induces a contract does not proceed from one of the parties, but from an independent third person, it will have no effect upon the contract. **The fraud must be the fraud of one of the parties or of a third party acting in collusion with, or as the agent of, one of the parties (see Wessels Law).**"(own emphasis.)

(See also *Contract: General Principles*, van der Merwe & Ors 4 ed at p 224)

The deed of settlement smacks of fraud by the agent, if not in connivance with the applicant, for the following reasons. The agent, acting on instructions from the 1st respondent, filed an application for the registration of the arbitral award and served same on the applicant on 17 February 2018. The deed of settlement was concluded on 20 February 2018 three days later. The applicant alleges that the deed curtailed proceedings and resolved the 1st respondent's claim. (I shall later deal with the question whether there was still a claim to be resolved.) The applicant was required to have filed a notice of opposition within 10 days of service of the application upon it. Despite the deed having been intended to curtail proceedings and having been concluded after the filing and service of the chamber application under HC 1450/17, it does not refer to the application neither was it filed with the High Court before which the arbitral award was to be registered. It is inexplicable that the deed of settlement does not explain what would become of the application. The applicant had ample time to file the notice of opposition or file the deed of settlement with the Court as the application was only granted on 4 April 2017. Once an application is filed before the court it does not suffer a stillbirth. The applicant either prosecutes the application to its conclusion or withdraws it. It can also be deemed abandoned for inaction on the part of the applicant. The applicant in the present case

prosecuted the application to its conclusion. The applicant became aware of the order in June 2017 and up to the date of filing of this application, 8 months later, had not taken any action to challenge the order.

As rightly noted by the 1st respondent, the prosecution of the application by the agent notwithstanding the deed of settlement, leads to the conclusion that the mandate of the agent was not to settle with the applicant. Had the mandate been to settle, the agent would also have ensured that reference was made in the deed of settlement to the application he had launched before this court and withdrawn the application. He did not do so. He does not explain in his supporting affidavit to the application why he allowed the lawyers, Kanokanga and Partners, whom he had engaged on behalf on the respondent, to proceed with the registration of the award. The email on 23 February 2017 from to Mr Mugabe to the 1st respondent that is referred to as authority for the acceptance of the offer for the payment of the $21 456.00 in full and final settlement of what was due to the 1st respondent does not shed any light on the discussions leading to that email. It reads:

> "As per our cellphone conversation I reconfirm that Mr Chigwedere enhanced the proposal to USD 21 456.00. I took your instructions to accept this and the TM guys have sent the papers for tax directive which may be out any day from now. I will let you know if they are any challenges and shall advise you of the progress.
> Hon Kazembe confirm that someone who has awarded USD$36 000.00 was left in the range of USD 18 000 after tax."

What is lacking from the email is what the proposal by the applicant was exactly all about. The question whether or not the proposal was that the payment of US$21 456.00 was in full and final settlement of the first respondent's "claim" remain unanswered. It is further confusing why Mr Mugabe would have sought confirmation from the arbitrator on the benefits due after taxation of USD $36 000.00 when the parties had now agreed to US$21 456.00. One would have expected that the 1st respondent would have been interested on what was due after tax on US$21 456.00. The impression created is that the two were still discussing the taxation of the award of USD 36 000.00.

The other email dated 31 January 2017 from the first respondent to Mr Mugabe still does not shed any light on the question. It is simply a confirmation of the fees due to Mr Mugabe as the first respondent's agent. The email may in fact be read in favour of the first respondent as it raises inconsistences between Mr Mugabe's affidavit and the agreement between the first respondent and Mr Mugabe as agent and principal. According to the email, the payment to the first respondent was supposed to be made directly to the first respondent.

Mr Mugabe (would then be paid) by the first respondent. However, according to paragraph 7 of Mr Mugabe's affidavit, payment was made to Mr Mugabe. He then retained his fees and transferred the balance to the first respondent. The action of transferring the finds through his account first can be read to further illustrate Mr Mugabe's nefarious intentions as this was in direct contravention of the terms of his agent/principal relationship with the first respondent The payment was made by the applicant on 8 March 2017. On 19 April 2017 the first respondent transferred a sum of US$ 420.00 into King Mugabe's account. The reason for the payment is endorsed on the transfer document as payment to the sheriff despite Mr Mugabe's refutal in the affidavit of 14 February 2018. The first respondent explains that this was payment for the execution of the order under case number HC 1450/17. He certainly would not have known of the amount for the Sheriff's fees unless he was advised by Mr Mugabe. Whilst Mr Mugabe had purported to have entered into a deed of settlement on behalf of the first respondent he was still receiving payment of fees for the execution of the order he had obtained for the first respondent. The payment by the first respondent of the fees is not consistent with a party who had authorized his agent to settle for a lesser amount.

Once an award has been registered with this court, it becomes an order of the High Court and remains extant unless interfered with by the High Court. (See *Dhlodhlo* v *Deputy Sheriff, Marondera & Ors* 2011 (2) ZLR 416 at 422E-423A). I am mindful of the applicant's contention that the order by the court was granted after the conclusion of the deed of settlement.

This raises the question of the import of the deed of settlement. The applicant contends that it is a compromise of the first respondent's claim. As stated in *Georgias & Anor* v *Standard Chartered Finance Zimbabwe Ltd* (*supra*) at 496D-G

> "A 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 Cashalia* v *Herberer & Co* 1905 TS 457 at 462 *in fine*; *Tauber* v *von Abo* 1984 (4) SA 482 (E) at 485G-I; *Karson v Minister of Public Works* 1996 (1) SA 887 (E) at 893F-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 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 268E-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….. Unlike novation, a compromise is binding on the parties even though the original

> contract was invalid or even illegal." (See also (See *Majora* v *Kuwirirana Bus Service (Pvt) Ltd* 1990 (1) ZLR 87 (SC)).

It is clear from the above observations that a compromise is a settlement of a claim that is disputed and not yet determined. The first respondent's claim had been determined in favour of the first respondent by the Honourable Arbitrator Kazembe arbitration being a recognized mechanism of resolution of disputes under the Labour Act [*Chapter 28:01*]. Lovemore Madhuku, citing ILO (1980) remarked at p 358 in *Labour Law in Zimbabwe* that:

> "Arbitration is 'a procedure whereby a third party (individual arbitrator, board of arbitrators or arbitration court) not acting as a court of law, is empowered to take a decision which disposes of the dispute' it 'usually involves a contested hearing at which the parties present evidence and argument to a third party, followed by the arbitrator's decision or award, which is usually binding on the parties'."

In fact, an arbitrator shall in terms of s 98 (9) have the same powers as the Labour Court which provides:

> "(9) In hearing and determining any dispute an arbitrator shall have the same powers as the Labour Court."

The Honourable Arbitrator Kazembe was seized with the dispute between the applicant and first respondent after the first respondent had filed a claim. According to his award, he heard both parties and thereafter determined the dispute between the two resulting in the award. It is this award that was registered under case number HC 1450/17 in terms of s 98 (14) of the Labour Act. It is trite that the award is registered with the High Court only for purposes of enforcement the dispute having already been resolved by the arbitrator.

After the award was handed down, there ceased to be a dispute to be compromised. The deed of settlement can therefore not be said to supersede a decision taken by an arbitrator with the same powers as the Labour Court. The applicant cannot therefore be said to have acquitted its full indebtedness to the first respondent.

The order under case number HC 1450/17 remains extant and executable.

The application is accordingly dismissed with costs.

Honey & Blankenberg, appellant's legal practitioners
W.O.M Simango & Associates, respondent's legal practitioners