STROMSPICE TRADING (PVT) LTD
and
TORMARK INVESTMENTS (PVT) LTD
and
ANNA ELIZBETH PUTTER
and
JOSEPH T. MSIKA
and
IVAN PUTTER
versus
TETRAD INVESTMENT BANK LIMITED
and
SHERIFF OF ZIMBABWE, HARARE N.O

HIGH COURT OF ZIMBABWE
PHIRI J
HARARE, 3 April 2018 & 24 July 2019

Opposed Matter

T.C Hungwe, for the applicants
T. Zhuwarara, for the 1st respondent

PHIRI J: This is an application for confirmation of a provisional order granted by this Honourable Court.

THE FACTUAL BACKGROUND OF THE CASE

The factual background was captured by both parties and most of the facts are common cause.

These will be quoted verbatim as they appear on para 2 of the first respondent's Heads of Argument and they are as follows:

> "2. background facts
>
> 2.1 The background to this matter is as follows:
> 2.1.1 First respondent obtained judgment against the applicants herein under case Number HC 6791/14. The Applicants were directed to pay US$ 476 821.81, interest thereon at 33% per annum, collection commission and costs of suit on an attorney-client scale to the First Respondent. The order was made on 5 November 2014.
> 2.1.2 The court order referred to herein has not been set aside or varied by this Honourable Court.
> 2.1.3 A writ of execution was issued on 19 November 2014.
> 2.1.4 The First Respondent caused the attachment of the First Applicant's property.

2.1.5 As at 31 March 2015, the Applicants owed the First Respondent a sum of US$ 609 128.05 which was accruing interest at 40% per annum.

2.1.6 The parties engaged resulting in them reaching an agreement in terms whereof the Applicants were to pay to the First Respondent a sum of US$ 500 000 in full and final settlement.

2.1.6.1 Key terms of the agreement were that:-

i. The Applicants would pay to the First Respondent a sum of US$ 500 000.

ii. A sum of US$ 390 000 was to be paid by the applicants through a Stanbic mortgage bond within 30 days of receiving a guarantee letter and the Applicants were to clear the remaining balance of the debt by 30 September 2015.

iii. The balance was to attract interest at 33% per annum. A Schedule/plan for the payment was tabulated.

iv. The First Respondent was to register a second mortgage bond over the applicant's property.

2.1.7 The Applicants defaulted. They did not pay the initial sum as agreed. The sum of US$ 390 000 was eventually paid on 4 September, 2015.

2.1.8 The First Applicant paid US$ 390 000 to the First Respondent and the First Respondent accounted to the First Applicant on 10 September 2016.

2.1.9 The Applicants made subsequent payments and First Respondent accounted to the First Applicant after deducting collection commission. This was consistent with the court order and the Applicants did not raise any objection.

2.1.10 A dispute arose as to the outstanding amount. The Applicants contend that the First Respondent compromised on its rights when it accepted a sum of US$ 500 000 in full and final settlement."

The issues for determination presented by the parties are:

"(a) whether the first respondent compromised on its rights arising from the court order issued by this Honourable Court by authority the communication dated 23rd April, 2015?

3.1.1 Whether the first Respondent compromised on its rights arising from the court order issued by this Honourable Court by authorizing the communication dated 23 April 2015.

(b) whether the applicant required leave of this court in order to institute legal proceedings against the first respondent

Whether the applicants have established on a balance of probabilities that execution of the order should be stayed?

It is this courts view, after considering the papers filed of record in this application and, hearing argument from counsel that the applicants have successfully established, on a Balance of Probability that execution of the original order granted by this Honourable Court in

case number HC 6791/14 be stayed pending the final determination of the court application filed under case number HC 290/17.

In the present matter the applicants contended that:

> "the parties had entered into a compromise settlement agreement which had the effect that the 1st respondent abandoned the order and now sought payment in terms of the compromise agreement. The compromise agreement contained the new amount due and the terms of payment."

The applicants referred this court, to its founding affidavit, wherein a series of correspondence between the parties marked as Annexures "D1 to D7" were cited as proof of the existence of this compromise.

The letter of the first respondent to the applicant's legal representatives, marked as Annexure D7, and dated the 23rd April, 2015 was cited as proof of the existence of that compromise agreement.

The aforesaid letter by the first respondent is instructive and it is necessary to quote it verbatim. It was addressed to the first respondent as follows:

> "23 April 2015
>
> Matizanadzo & Warhurst
> 7 Van Praagh Avenue
> Milton Park
> HARARE
>
> Dear Mr D.A. Whatman
>
> REF: TETRAD INVESTMENT BANK LIMITED v STROMPSICE TRADING (PVT) LTD, TORMARK INVESTMENTS (PVT) LTD, ANNA ELIZABETH PUTTER & IVAN PUTTER
>
> Your letter dated 20 April 2015 refers.
>
> We write to advise that the bank is agreeable to Stromspice Trading's payment plan. The following are the conditions:

- The full and final payment of the loan is $500,000. A repayment of $390,000 shall be received from Stanbic Bank. The balance of $110,000 shall be payable by Stromspice Trading at a rate of 33% as follows:

Month	Opening Balance	Total Monthly Repayment	Interest Repayment	Principal Repayment	Closing Balance
May-15	110,000.00	23,847.82	3,025.00	20,822.82	89,177.18
June-15	89,117.18	23,847.82	2 452.37	21 395.44	67,781.74
July – 15	67,781.74	23,847.82	1,864.00	21,983.82	45,797.92
Aug -15	45,797.92	23,847.82	1,259.44	22,588.37	23,209.55

Sept – 15	23,209.55	23,847.82	638.26	23,209.55	0.00

- Stanbic shall an undertaking through our lawyers to pay the $390,000 directly into Stromspice's account with Tetrad within 30 days of receiving this letter,
- Security shall only be released when the letter of undertaking has been satisfactorily received,
- Tetrad Investment Bank shall register a second mortgage bond of $220,000 over the Greendale property as security for the remaining loan balance. The bond registration fees shall be deducted from the $390,000 received from Stanbic Bank. These fees will also be paid in equal installments over the period from May 2015 to September 2015 at the agreed rate of 33%

Please note that the bank will not accept any other repayment re-negotiations and failure to stick to the above schedule will result in legal proceedings being instituted with no further recourse to Stromspice Trading.

For and on behalf of Tetrad Investments Bank Limited

……
……

Clifford Mtemeri
Head – Credit Management

Winsley Militala
Judicial Manager"

It is this court's view that indeed this letter amounted to and supports the applicant's contention that there was a compromise settlement agreement between the parties. This court agrees that the first respondent abandoned the original order of the court sought payment in terms of this new agreement which contained the new amount due.

The purpose of a compromise between the parties is intended to prevent or avoid litigation. In *Estate* v *Church* 1927 TPD 20 it was stated at p 24 that:

> "A *transactio* as an agreement between two or more persons, who, for preventing or ending a …… adjust their differences by mutual consent in the manner which they agreed on, and which every one of them prefers to the hopes of gaining joined with the danger of losing."

Prior to this citation, CHATUKUTA J had observed, at p 3 to 4 of the same cyclostyled judgment that:

<u>The issue of Compromise</u>

The issue of Compromise is dealt with in the cited case of *Riozim Limited* v *Diamond Drill (Pvt) Ltd and The Sheriff of Zimbabwe N.O* case no. HH 800/15.

At p 6 of the cyclostyled judgment of CHATUKUTA J she cited the case of *Georgius & Anor* v *Standard Chartered Finance Zimbabwe Ltd* 1998 (2) ZLR 488 (S) dealt with the definition of Compromise.

That cited case at 496 (D-6) stated:

> "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)).

The learned Judge upheld the contention by the applicant that first respondent, in that case, could not therefore persist with the execution pursuant to the judgment that had been abandoned.

The facts of the present matter are similar, as, "Applicant argued that applicant had paid the full and final settlement in terms of the compromise agreement" to the extent that "there is no longer any cause of the issuing of the writ of execution…"

In the words CHATUKUTA J in the aforesaid case of *Riozim Limited* v *Diamond Drill (Pvt) Ltd and the Sheriff of Zimbabwe* (NO) (supra) at p 8:

> "…… but a defendant is not entitled to go behind the comprise and raise defences to the original cause of action when sued on the comprise."

It is this court's view that the facts of this case must be distinguished from those in the case of *Godza* v *Sibanda & Anor* 2013 (2) ZLR 175 (H) where the learned judge in defining "novation" held that "the parties must apply for an Amendment to, or variation of, the Court Order if they want to depart from its terms."

In the present matter the applicants allege that they have effected payment in full and final settlement in terms of the compromise agreement to the extent that the writ should be set aside.

This court agrees with the applicant's submission that:

> "What is clear from the above and the heads of argument filed in the main matter HC 290/17 is that the applicant has an arguable case, which is not manifestly doomed for failure…..The applicants have prospects of success on the issue that the judgment was abandoned as a result of the subsequent agreement."

WHETHER LEAVE REQUIRED IN ORDER TO INSTITUTE LEGAL PROCEEDINGS AGAINST 1ST RESPONDENT

First respondent raised a preliminary point that applicants should have sought leave of this Honourable Court to commence legal proceedings against it because it is under Judicial Management.

The first respondent, among other cases relied on, the case of the European Centre for Constitutional & Human Rights ZW HHC 341/2016 wherein this court 4ruled that applicants had failed to seek leave of this court to file an application in respect of which a company has been placed under Judicial Management.

Respondents also relied on:

> "Section 301 (1) of the Companies Act which states that a provincial Judicial Management order may contain directions while the company is under Judicial Management, all actions and proceedings and the execution of all writs, summons and other processes against the company be stayed and be not proce3eded with without leave of the court."

The applicants submitted that application of proceedings in this case where instituted after the Judicial Management order was granted. It was not stayed by the Judicial Management Order.

In this regard applicants relied on the case of *ZFC Ltd* v *K.M. Financial Solutions (Pvt) Ltd & Anor* HH 47/2015 which was, on all fours, with the facts of the present matter.

The learned judge in that case observed that:

> "(a) …..the staying of actions, applications and execution of writs and summonses in terms of s 301 (1) is not an automatic or inevitable consequence of an order of provisional Judicial Management. Rather it is relief which the court in its discretion may grant…..This was because s 301 (1) (of the Companies' Act) uses the word "my" which is p4ermisive and not peremptory."
>
> (b) The second point was that ZHOU J :held that the use of the words "be stayed and not proceeded with" in s 301 (1) means that the section applies to actions, proceedings, writs, summonses and other processes already in existence at the time that the provincial order is granted. It is only action proceedings, applications or writs that are already in existence at the time of granting the order which are stayed. If it is not yet in existence then there is nothing to stay."

> The first point that the learned Judge made was that the staying of actions, applications and executions of writs and summons in terms of s 301 (1) is not an automatic or inevitable consequence of an order of provisional judicial management. Rather, it is

> relief which the court in its discretion may grant **at 3**. This was because section 301 (1) uses the word "may" which is permissive and not peremptory.
>
> The second point that Justice Zhou held was that the use of words "be stayed and be not proceeded with" in s 302 (1) means that the section applies to actions, proceedings, writs, summonses and other processes already in existence at the time that the provisional order is granted. It is only action proceedings, applications or writs that are already in existence at the time of granting the order which are stayed. If it is not yet in existence then there would be nothing to stay.
>
> "If the legislature had intended that once an order or provisional judicial management has been granted the instituting of proceedings against the affected company should be prohibited then it would have expressed the provision in the appropriate language. The language used in ss 209 and 213 of the Companies Act which relate to the winding up of a company illustrates the distinction between "staying" of proceedings and prohibition of commencement of proceedings shall be proceeded with or commenced against the company except by leave of the court……" In that section the expression "proceeded with" would apply to actions or proceedings already in motion at the time that the winding up process is instituted, while the term "commenced" would apply to actions and proceedings which have not yet been instituted. In light of the above analysis of the meaning of s 301 (1) of the Act and para 1 (e) of the order given in HC 8479/13, the application in *casu* is not invalid. The application is not defective. The point *in limine* taken on behalf of the second respondent is therefore dismissed **at 3-4."** These application proceedings were instituted after the judicial management order was granted. It was therefore, not stayed by the judicial management order. It is on the above reasoning that the preliminary point should be dismissed."

STAY OF EXECUTION PROCEEDINGS PENDING DETERMINATION OF THE MAIN APPLICATRION IN CASE NO. HC 290/17

The requirements for stay of execution were aptly stated in the cases of *Mupini* v *Makoni* 1993 (1) ZLR 80 (SC) and *Zimbabwe Open University* v *Magaramombe & Anor* SC 20/2012 and these are:

(a) Whether the applicant has good prospects of success in the Main Matter which establish a clear right.

(b) Whether the applicant will suffer irreparable harm if execution is not stayed; and

(c) The balance of convenience.

As per CHIDYAUSIKU J, as he then was (*supra*).

In the *Mupini* v *Mupini* matter GUBBAY CJ observed that where stay of execution is sought pending the determination of the Main Matter, the applicant does not need to prove his

min matter at the stage of execution. That is for determination of the Judge in the main matter. What had to be shown is that the applicant enjoys prospects of succession in the main matter.

PROSPECTS OF SUCCESS IN THE MAIN MATTER

The aforesaid observations on the compromise agreement and allegations that applicants have effected full and final settlement in terms of the Compromised Agreement, are in the view of this court, arguable.

This court also shares the view that the applicants would suffer irreparable harm if execution is not stayed. The first respondent is under Judicial Management and should execution proceed and the applicants are successful then applicants may not be able to recover, from first respondent's inability to meet its current debts.

The balance of convenience therefore favours stay of execution pending determination of the main matter.

Accordingly this court orders confirmation of the Provincial Order as set out in the draft order with costs.

Venturas & Samukange, legal practitioners for the applicants
Kantor & Immerman, legal practitioners for the respondents