BLOSSOM VIEW HOLDINGS LIMITED

Versus

NU AERO (PVT) LIMITED t/a Fly Africa Zimbabwe

And

HOPALONG CASSIDY CHITARIRISO MUGWAGWA

HIGH COURT OF ZIMBABWE

CHIRAWU-MUGOMBA J

HARARE, 17 March 2023

OPPOSED MATTER

D. Sheshe, for the Applicant

J. Makanda, for the 1st and 2nd Respondents

CHIRAWU-MUGOMBA J

[1] On the 17th day of March 2023, I handed down judgment *ex tempore* as follows

1. The respondents shall, jointly and severally with the one paying the other to be absolved pay applicant the total sum of US$ 2,500,000 (Two Million Five Hundred Thousand United States Dollars only.
2. The 1st respondent's 2 Zimbabwean registered aircrafts namely, Boeing 737-500 Z FAA and Boeing -500-Z-FAB be and are hereby declared specially executable.
3. The respondents shall pay costs of suit.

[2] The history of the matter is as follows. On the 21st of February 2021, the parties entered into a deed of settlement in respect of case number HC5255/20. The salient terms of the deed were to the effect that the respondents would pay the applicant the sum of US$2,500,000 in six equal instalments, the last such payable on or before the 22nd of August 2022. In the event of default of any instalment, the whole sum outstanding would become due and payable. Further that the two aircraft as captured in paragraph two of the order tendered as security would become specially executable. Further, that applicant would become entitled to register the deed as a court order, without notice to the respondents.

[3] The respondents in breach of the deed of settlement have failed to pay any instalment. Consequently, the applicant is entitled to file the chamber application without notice to the respondents.

[4] The 1st and 2nd respondents filed a notice of opposition and an opposing affidavit. They contended as follows. They do not deny that a deed of settlement was entered into. However, sometime in early 2021 the parties agreed that the debt that was owed be converted into equity. This resulted in a debt swap agreement. Pursuant to these discussions, the applicant became and accepted to become a 30% shareholder in 1st respondent. Consequently, a shareholder's agreement was signed by the parties. As a result, the deed of settlement could no longer be relied on as it had been overtaken by events. The $2,500,000 debt was extinguished by the shareholders agreement. The deed of settlement was therefore compromised and could no longer be relied on.

[5] The applicant filed an answering affidavit denying the respondents' contention of a debt swap. It pointed out to the fact that the initial debt was US$2,914,978.12 as evidenced by the claim under HC5255/20. That the deed of settlement is for the sum of US$2,500,000. That the difference of US$414 978.12 is the amount that was converted to 30% shareholding in the 1st respondent. That when the deed of settlement was entered into, the said sum of US$414,978.12 had already been dealt with. This is supported by clause 2.1 of the deed of settlement.

[6] Further, that at the time of executing the deed of settlement, applicant was already a shareholder in the 1st respondent. In support, the applicant attached to the answering affidavit a shareholding certificate issued on the 23rd of March 2020 representing the 30% shareholding. Also attached was 1st respondent's financial statement as of the 31st of May 2022 showing the amount of US$2,500,000 as due and owing.

[7] At the hearing, the respondents' counsel raised the issue of attaching of annexures to the answering affidavit. This is not a new issue as the court has had occasion to deal with it- see *Nashe Family Trust vs. Chiwara and anor*, 2018(2) ZLR 212. The counsel for the applicant conceded that the attachment of annexures to the answering affidavit was improper and therefore by consent, these were expunged from the record.

[8] On the merits, Mr *Sheshe* made the following submissions. Regard being had to clause 2.1 of the deed of settlement, the respondents are arguing that there was a compromise reached. Such was reached well before the deed was entered into. It is clear that the applicant is seeking

payment of US$2,500,000. With reference to clause 4.1 of the shareholders agreement, it is clear that there is an acknowledgement and awareness on the part of the applicant as well as that of the respondents that what remains owing is the sum of US$2 500 000. Initially, it was the sum of US$2,914,978.12. At the time of entering into the deed of settlement, what remained owing is what was compromised. He further sought the deletion of paragraph 2 of the draft order.

[9] Mr *Makanda*, for the respondents made the following submissions. That there was no evidence placed before the court that a compromise agreement was reached before the deed of settlement was signed. He conceded that the deed of settlement was indeed a compromise. However, this compromise was in a manner of speaking 'compromised' through a shareholder's agreement. The deed of settlement was signed on the 5th of February 2021 and the shareholders agreement was signed on the 21st of April 2021. That shows that the parties compromised further for a 30% equity share swap. The interpretation of the respondents to clause 4:1 of the shareholders agreement is that there was a reduction in the debt but the purpose of this agreement was to extinguish the debt. Clause 2:1 of the deed reflects that the applicant and the 1st respondent are about to become shareholders of the company. The purpose of giving 30% shareholding to the applicant was for the purposes of extinguishing the debt.

[10] In exchanges that took place between the court and Mr *Makanda*, he conceded that clause 4.1 shows that there was a share equity of 30% then a compromise on the remaining amount of US$2,500,000.

[11] It is common cause that the parties indeed entered into a deed of settlement and a shareholder's agreement. The legal issue that arises is whether or not the deed of settlement was further compromised by the shareholders agreement.

[12] The deed of settlement is indeed a compromise and I can do no better than rely on the words of DUBE J (as she then was) in, *Golden Beams Development (Pvt) Ltd -vs- Mabhena*, HH-296-21 as follows: -

> ''A compromise is defined by RH Christie in *Business Law in Zimbabwe* at p 108 as follows,
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> "Compromise is the settlement by agreement of disputed obligations and is a form on novation, replacing the disputed obligations by the obligations created by the agreement of compromise''.
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> In *Georgias and Anor v Standard Chartered Bank* SC 183/98 as follows;
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> "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).
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> A compromise agreement is an agreement of the parties to amicably settle a dispute. A compromise agreement is a contract and is governed by the general principles of contract law. The formalities of a compromise are, offer and acceptance, consideration and capacity to enter into the contract. There must be mutual intent to settle the dispute and bring it to an end and reciprocal concessions in settlement of the dispute.
> A compromise enables the parties to settle the dispute outside court. The compromise agreement has the effect of creating new rights and obligations between the parties separate from the original cause of action. It extinguishes the original cause of action which becomes *res judicata* thereby creating new obligations. Once a compromise agreement has been entered into, the defendant has no entitlement to raise defences to the original cause of action".

[13] Having regard to the deed of settlement signed between the parties and the shareholders agreement, in my view, the latter agreement actually supports the contention by the applicant that the 30% shareholding was only in relation to the discounted amount. This is constituted by the difference between what was initially claimed and the amount that they finally agreed upon.

[14] A reading of clause 4:1 of the shareholders agreement shows the following: -

a. The 1st respondent was indebted to the applicant in the sum of US$ 2,914,978.12
b. That the applicant discounted this amount to US$2,500,000 after swapping US$414,978,12 in return for 30% shareholding in the 1st respondent.

It is not surprising that Mr *Makanda* properly conceded clause 4;1 means exactly what it states that there was an original debt, it was reduced for 30% shareholding and the remainder was compromised through a deed of settlement. The respondents can therefore not be allowed to renege from it as it constituted a novation and created new rights and obligations between the parties. These were in respect to the debt still owing of US$2,500,000, the payment of such in instalments, the security provided in the form of two planes and the effect of non-payment of one instalment. The cause of action as pleaded by the applicant is very clear, that the respondents remain bound by the deed of settlement and that they have failed to pay.

[15] The court therefore rejects the assertion by the respondents that the debt was expunged in exchange for the 30% as they allege. The shareholder's agreement does not support the assertion by the respondents that the debt has been paid in full through an equity swap.

[16] Mr *Sheshe,* sought an order that paragraph two of the draft order be expunged and an order of costs on a legal practitioner to client scale. No submissions were made on costs. I also do not perceive of any reason why the 1st and 2nd respondents should be made to pay costs on a higher scale.

Accordingly, an order was granted in terms of the draft as amended.

Masiya- Sheshe and Associates, Applicant's Legal Practitioners.
Kantor and Immerman, Respondent's Legal Practitioners.