FBC BANK LIMITED
versus
SUCCESS AUTO (PRIVATE) LIMITED
and
HONEYPOT INVESTMENTS (PRIVATE) LIMITED
and
DOUGLAS MAKONESE
and
MERCY MAKONESE
and
MUNYARADZI YUJINI MAJONI
and
PAULINA KWADZANAYI MAJONI
and
CLAITOS CHIDHAKWA
and
GIRLIE KANYE

HIGH COURT OF ZIMBABWE
MUSHURE J
HARARE, 11 November 2024 & 21 March 2025

Chamber application for judgment

T. *Magwaliba,* for the applicant
Ms D. *Sanhanga* for the fifth and sixth respondents
E. *Jera* for the seventh and eighth respondents
No appearance for the first to fourth respondents

MUSHURE J:

INTRODUCTION

[1] This is a chamber application for judgment in terms of r148 of the High Court Rules, 1971 (now r 45(14) of the High Court Rules, 2021). The applicant approached the court seeking the following relief:

> "WHEREUPON after reading the papers filed of record,
>
> IT IS HEREBY ORDERED THAT:
> Judgment be and is hereby entered against the 1st, 2nd, 3rd and 4th Respondents, jointly and severally, the one paying the others being absolved, in case number HC361/13, as follows:

1. for payment of the sum of US$454 874-62 together with interest thereon at the rate of 35% per annum from the 1st August 2013 to date of payment.
2. for a declaration that Stand 80 Borrowdale Brook Township of Subdivision H of Borrowdale Brook of Borrowdale Estate measuring 5,0445 hectares in extent and held by 2nd respondent under Deed of Transfer No. 6099/99 dated 30th June 1999 shall be executable; and
3. for payment of costs of suit both in respect of this matter and also in respect of case number HC361/13 on the legal practitioner and client scale."

[2] Paragraph 2 of the relief sought by the applicant is opposed by the fifth, sixth, seventh and the eighth respondents. The first to the fourth respondents have not taken part in these proceedings.

BACKGROUND

[3] Before setting out the factual background of the matter, I digress briefly to express my gratitude to counsel for compiling the chronology of events which assisted the court in putting the matter into its proper perspective.

[4] The matter has a long and chequered history that must be set out at length to give context to the current controversy. It is as follows: On 1 April 2011, the second respondent applied for a US$300 000 loan from the applicant. As security for the loan, the first, third and fourth respondents bound themselves as sureties and co-principal debtors for the repayment of the debt. As further security, a mortgage bond was registered in favour of the applicant over the second respondent's immovable property known as Stand Number 80 Borrowdale Brook Township of Subdivision H of Borrowdale Brook of Borrowdale Estate measuring 5,0445 hectares held under Title Deed No. 6066/1999 ('the immovable property').

[5] However, the first to fourth respondents failed to repay the loan on time and consequently, the applicant instituted action proceedings against them in this court on 16 January 2013 under case number HCH 361/13. The applicant was suing for the recovery of the outstanding sum which at that time stood at US$454 874.62. The applicant further sought for the immovable property to be declared specially executable. The action proceedings culminated in the parties signing a deed of settlement on 13 June 2013.

[6] The material terms of the deed of settlement were as follows:

"**INTRODUCTION**

3.1. The Plaintiff issued summons against the Defendants on the 16th of January 2013 in Case number HC 361/2013 claiming:

a) payment of the sum of US$454 874.62 together with interest thereon at the rate of 35% per annum from the 1st August 2012 to date of payment;
b) an order declaring stand 80 Borrowdale Brook Township of subdivision H of Borrowdale Brook of Borrowdale Estate measuring 5,0445 hectares in extent and held by the 2nd

Defendant under Deed of Transfer No. 6099/1999 dated the 30th June 1999 to be executable; and

c) payment of legal practitioners' collection commission calculated in terms of the Law Society of Zimbabwe by-laws and together with the costs of suit on the legal practitioner and client scale.

NOW THEREFORE the parties in full and final settlement, agree as follows: -

SETTLEMENT

4.1. The Defendants shall pay the said sum of four hundred and fifty-four thousand eight hundred and seventy-four United States Dollars and Sixty-two cents (US$454 874.62) plus interest thereon at the rate of 35% per annum from the 1st August 2012 to date of payment and the Plaintiff's attorney and client scale costs, as follows: -

a) by paying a deposit of two hundred and twenty-seven thousand four hundred and thirty-seven United States Dollars and thirty-one cents (US$227 437-31) on or before the 28th August 2013;

b) by paying the balance of the debt in twelve equal monthly instalments between the 30th September 2013 and the 31st August 2014; and

c) the costs payable to the Plaintiff shall be either agreed upon by the parties or taxed in the event of a disagreement on the amount thereof.

4.2. In the event of the Defendants failing to make any payment on the due date, then the Plaintiff shall be entitled to make a chamber application for judgment to be entered against the Defendants for the entire balance outstanding plus interest and costs as aforesaid. It is hereby agreed that the Defendants will bear the costs of such chamber application on the scale of legal practitioner and client."

[7] The first to fourth respondents failed to make the payment as had been agreed in the deed of settlement, prompting the applicant to file the present chamber application for judgment. On 7 October 2013, the applicant obtained a default judgment out of this court under HCH 7402/13 against the first to fourth respondents. The terms of the Order, which was issued by TAKUVA J, were that:

"IT IS ORDERED THAT:

Judgment be and is hereby entered against the 1st, 2nd, 3rd and 4th Respondents, jointly and severally, the one paying the others to be absolved, in case number HC 361/13, as follows;

1. For payment of the sum of US$454 874-62 together with interest thereon at the rate of 35% per annum from the 1st August 2012 to date of payment.
2. For a declaration that Stand 80 Borrowdale Brook Township of Subdivision H of Borrowdale Brook of Borrowdale Estate measuring 5,0445 hectares in extent and held by 2nd respondent under Deed of Transfer No. 6099/99 dated 30th June 1999 shall be executable; and
3. For payment of costs of suit both in respect of this matter and also in respect of case number HC 361/13 on the legal practitioner and client scale."

[8] Subsequently, the immovable property was attached and sold in execution at a public auction by the Sheriff. The applicant, who also participated in the public auction, was the highest bidder

at the sum of US$350 000. The immovable property was transferred into the applicant's name under Deed of Transfer 2757/15 on or about 6 July 2015.

[9] On 24 April 2017, the fifth to the eighth respondents approached this Court under HCH 3564/17 seeking an order declaring the applicant's Deed of Transfer a nullity. They also sought to bar the applicant from carrying out any developments on the immovable property and from evicting the fifth to the eighth respondents from that property.

[10] The litigation instituted by the fifth to the eighth respondents brought to the fore a new dimension to the status of the immovable property. In motivating their application, the fifth to the eighth respondents made the following claims:

i. That portions of the immovable property had previously been sold off to third parties way before the loan agreement.

ii. That sometime in 1997, the second respondent commenced a process of subdividing the immovable property, following which it sold various subdivisions of that property to seven individuals.

iii. That the seventh respondent purchased a portion of the immovable property now known as Stand 775 measuring 8823 square metres on or about 29 July 1997.

iv. That sometime in July 1999, the eighth respondent is said to have purchased another portion now known as stand 778, measuring 8094 square metres.

v. That sometime in 1999, the second respondent applied for a subdivision permit which was granted as permit number SD/963 in 2000. The permit allowed the subdivision of the immovable property into residential stands, creating stand numbers 774 to 779.

vi. That in 2001, a company called Bract Investments purchased stand number 776 measuring 4501 square metres from one, Paul Ali Chindamba. In turn, Bract Investments sold that stand to the fifth and sixth respondents on 21 August 2003. These subdivisions, it turned out, were not immediately transferred to the various purchasers but remained under the parent deed.

vii. That in all these transactions, the second respondent was represented by Kudzai Chirima who was a shareholder and director of the second respondent at that time. Kudzai Chirima then sold his shareholding in the second respondent to the third respondent who consequently took charge of all the assets owned by the second respondent including the immovable property.

viii. That sometime in July 2011, the fifth and sixth respondents had serious problems when the third respondent came and barricaded the whole property with steel angle iron fence, and in the process blocked access to their stand. After engaging him, he indicated that he had purchased the entire shareholding in the second respondent from the said Kudzai Chirima. He further stated that he had been handed the title deed to the whole property by Kudzai Chirima and as far as he was concerned, the subdivisions that the other respondents were holding were of no use as there was nothing on the title deed to show that the piece of land had been subdivided.

ix. That the fifth respondent reported the matter to the police, who called him, the third respondent, the fourth respondent, Kudzai Chirima and one Florence Mutodi of a company named Floburg Property. Kudzai Chirima is said to have confirmed that although the whole property was held under one title deed registered in the name of the second respondent and that he was the holder of all issued shares in the second respondent, the immovable property had been subdivided into various stands. He is also alleged to have stated that he had sold these stands to third parties who included the fifth to the eighth respondents. After disposing of the stands, he remained with stand 777 which he later decided to sell through Floburg Properties.

x. That Floburg Properties flighted an advertisement specifically inviting prospective purchasers to purchase stand 777 of Stand 80 Borrowdale Brook Township of Subdivision H of Borrowdale Brook of Borrowdale Estate measuring 4594 square metres.

xi. That the third respondent and his wife, the fourth respondent herein, responded to this call and as a way of curtailing issues, Kudzai Chirima sold his entire shareholding in the second respondent. Resultantly, the third and fourth respondents assumed control of the second respondent and all its properties. The second respondent was sold for US$85 000, being the value of stand 777.

xii. That Kudzai Chirima then handed the title deed of the whole property to the third respondent who would attend to transferring the subdivisions to the other buyers and remain with the subdivision that was sold to him. Kudzai Chirima is said to have made it clear that the second respondent's interest in the whole property was stand 777 as some subdivisions had been paid for and sold to one Billy Mutoti; the fifth and sixth respondents, the seventh respondent; and the eighth respondent.

xiii. That following that engagement, the third respondent agreed that he could not take the whole property and that his actions were uncalled for. He removed the barricades and undertook to effect the necessary transfers to give effect to the subdivisions. As it turned out, he never did but instead mortgaged the whole immovable property to the applicant and subsequently defaulted payments.

[11] The fifth to eighth respondents' application to declare the Deed of Transfer a nullity was dismissed on the basis that they ought to have sought a rescission of the default judgment issued by TAKUVA J. This they then successfully did under HCH 3727/18.

[12] On 10 June 2020, NDEWERE J, who presided over the application for rescission, ordered that:

1. "Paragraph 2 of the order granted under case number HC 7402/13 be and is hereby rescinded.
2. The 7th respondent be and is hereby ordered to restore the 3rd respondent's title to stand 80 Borrowdale Brook Township of Subdivision H Borrowdale Brook of Borrowdale Estate as it was prior to the order of HC 7402/13, of 7 October, 2013.
3. The 1st respondent shall pay the applicant's costs of suit on an attorney and client scale."

[13] Aggrieved by NDEWERE J's judgment, the applicant sought leave to appeal against the decision under case number HCH 3251/20. MUSITHU J granted the applicant leave to appeal to the Supreme Court on 24 May 2022. The applicant noted the appeal in the Supreme Court under SC 151/23. By consent of the parties, the appeal was allowed. For completeness, the terms of the Supreme Court order are captured below-

1. "The appeal be and is hereby allowed.
2. Paragraph 2 of the judgment of the High Court per NDEWERE J in case number HC3727/18 be and is hereby set aside.
3. The 1st, 2nd, 3rd and 4th respondents be and are hereby joined to the proceedings under HC7402/13 as the 5th, 6th, 7th and 8th respondents respectively.
4. The 1st, 2nd, 3rd and 4th respondents be and are hereby granted leave to oppose the proceedings under case number HC7402/13 to the extent that the appellant seeks to have stand number 80 of Borrowdale Township declared specially executable.
5. Each party pays its own costs."

[14] It is on the basis of the Supreme Court order that the matter is before me.

SUBMISSIONS BEFORE THIS COURT

[15] The applicant primarily advances that the fifth to the eighth respondents have no business opposing this application for the following reasons. Firstly, their joinder through the Supreme

Court Order did not create a right to oppose the relief sought in the matter. Secondly, the chamber application for judgment is based on a deed of settlement between itself and the first to fourth respondents, arising from the loan agreement. Thirdly, the Rules do not contemplate third parties who are not in breach of any offer or tender in settlement to contest relief which is squarely predicated upon a deed of settlement encapsulating the offer or tender in settlement. Fourthly, on the basis of the principle of privity of contract, the fifth to the eighth respondents cannot be involved in a dispute arising from an agreement they were not part of.

[16] It is the applicant's contention that the fifth to the eighth respondents' joinder does not in itself create a legal interest. The purpose of their joinder was to enable the respondents to demonstrate a defence based on a legally recognisable interest. The applicant submits that the fifth to the eighth respondents have failed to establish any legally protected interest. Their relief lay in contesting the summons matter. The applicant also argues that the fifth and sixth respondents are seeking to enforce an illegal agreement based on a deed of cession executed between them and the second respondents, ignoring that they were "fourth level successive purchasers" of the immovable property. The applicant urges the court not to enforce an illegal agreement.

[17] Further, the applicant argues, the seventh and eighth respondents' agreements violate s 39 of the Regional, Town and Country Planning Act [*Chapter 29:12*] which proscribes the sale of an undivided piece of land without first obtaining a sub-divisional permit.

[18] It is the applicant's submission that it is entitled to have the immovable property declared specially executable on the basis that the mortgage bond registered over the property is still binding. Counsel for the applicant reasons that the Supreme Court order set aside paragraph 2 of NDEWERE J's order directing the Registrar of Deeds to restore the second respondent's title in the property. NDEWERE J's order had rescinded paragraph 2 of TAKUVA J's order, which had declared the immovable property specially executable. The setting aside of NDEWERE J's order, the applicant submits, had the effect of placing it in the position it was prior to the granting of paragraph 2 of that order, essentially that the mortgage bond is registered over the immovable property.

[19] The applicant contends, further, that by virtue of the mortgage bond being binding, it has real rights over the property. It submits that mortgage bonds are meant to provide security of a debt until that debt is paid off. It is common cause that the first to the fourth respondents failed

to repay the loan, so, it is submitted, the immovable property can be deemed specially executable. It is further argued that the relief sought by the fifth to the eighth respondents defeats the essence of the right in a mortgage bond and negatively impacts the mortgage facilities landscape.

[20] Relying on the decision of this Court in *Maphosa & Anor* v *Cook & Ors* 1997 (2) ZLR 314 (H), Mr *Magwaliba*, appearing for the applicant, emphasised that firstly, the fifth to the eight respondents, for the reason that they have agreements of sale in relation to the subdivisions they purchased, have personal rights that they can only enforce against the landowner. Secondly, a judgment creditor is entitled to have the property sold even if a third party has personal rights against the judgment debtor. It is the applicant's position that the fifth to the eighth respondents neglected to effect transfer of the subdivisions at the time they purchased them.

[21] *Per contra*, the fifth to the eighth respondents argue that they have an interest in the matter because the order sought by the applicant will result in the execution of the immovable property, and loss of their rights in their own portions of that property. Additionally, NDEWERE J rescinded TAKUVA J's judgment on the basis that the fifth to the eighth respondents had an interest in the matter. Their joinder to the matter in the Supreme Court is a result of the court noting that they had an interest in the matter. Further, the applicant consented to that joinder.

[22] The fifth to eighth respondents argue, additionally, that it is pertinent for the court to note that there are instances where registration of a real right to an immovable property at the Deeds Registry is only *prima facie* proof of ownership. In *casu*, they submit, there are special circumstances justifying why an order declaring the immovable property specially executable should not be granted.

[23] They contend that the mortgage bond was registered fraudulently because the applicant's representatives, prior to the registration of the mortgage bond, inspected the property and saw or at least ought to have seen that there were people in occupation. It is contended further that after purchasing the property, the applicant sought to have the subdivisions cancelled showing that it was aware of those subdivisions. In any event, the subdivision was a matter of public record. They submit that the mortgage bond was registered over a property that had already been subdivided. They allege that the third respondent has always maintained a position that the only property available to it is stand 777 and that there were other people with rights over

the other subdivisions. The mortgaging of the entire immovable property had been done for convenience only with all the parties involved being fully cognisant of the true state of affairs.

[24] It is the fifth to eighth respondents' further argument that there is no mortgage bond registered over the immovable property because the mortgage bond was cancelled and an application to have the mortgage bond reinstated in this court was dismissed by CHILIMBE J. That application had been motivated by the cancellation of the applicant's deed of transfer number 2757/15 by the Registrar of Deeds on 13 May 2020 at the instance of the second respondent in this matter. On the same day, the second respondent's deed of transfer number 6066/99 was revived. The fifth to eighth respondents argue that by virtue of the cancellation of the applicant's deed of transfer, revival of the second respondent's deed and dismissal of the application to reinstate the applicant's deed, title in the immovable property reverted to the second respondent.

[25] They further argue that CHILIMBE J's judgment has not been set aside and remains extant. It is the fifth to the eighth respondents' contention that since there is no mortgage bond over the immovable property, there is no basis upon which the applicant can seek an order to declare the immovable property specially executable.

[26] The fifth to eighth respondents make the point that the relief sought by the applicant to have the immovable property declared specially executable cannot be granted because the moment the applicant and the first to the fourth respondents entered into a deed of settlement, they entered into a compromise agreement and that created an entirely new agreement. They contend that clause 5.1.2 of the deed of settlement states that the deed constitutes the entire agreement between the parties so the applicant's remedy should be in terms of the deed of settlement. Clause 4.2 of the same deed was argued to be specific on what has to be done in the event of a breach of its terms. Critically, they argue that the deed of settlement does not at all relate to a declaration of the immovable property as specially executable in the event of such a breach.

[27] The fifth to eighth respondents make a further point that the applicant has not pleaded the facts upon which they seek the immovable property to be declared specially executable. They argue that the applicant has to satisfy the court that the first to fourth respondents do not have executable movables which are sufficient to satisfy the judgment debt before an immovable property can be executed. It is their argument that taking into account the monetary policy

changes that have occurred since the loan agreement, and specifically by operation of Statutory Instruments 33 of 2019 and 60 of 2024, the outstanding amount is no longer significant to warrant execution of the immovable property.

[28] On the alleged violation of the Deeds and Registries Act [*Chapter 20:05*], the fifth and sixth respondents have drawn the attention of the court to s11 thereof which provides that

> "(1) Save as otherwise provided in this Act or as directed by the court—
> (*a*) transfers of land and cessions of real rights therein shall follow the sequence of the successive transactions in pursuance of which they are made, and if made in pursuance of testamentary disposition or intestate succession they shall follow the sequence in which the right to ownership or other real right in the land accrued to the persons successively becoming vested with such right;"

[29] They argue that no transfer of title has been done yet in the transaction involving them so there is no basis for the applicant to raise issues concerning s 11 of the Deeds and Registries Act.

[30] With regards the violation of the Regional, Town and Country Planning Act, the seventh to eighth respondents contend that s39(1)(b) of that Act prohibits the entering into an agreement of sale in the absence of a subdivision permit for certain instances listed in the Act. They contend, further, that the seventh respondent produced a share certificate which was issued by the second respondent entitling him to shares in the assets of the second respondent, namely the immovable property. It is argued that there is no law that prohibits the holding of shares and the share certificate did not entitle him to do any of the things that are prohibited by s 39 of the Regional, Town and Country Planning Act.

[31] The fifth to eighth respondents argue that the rights they allege entitlement to have been consistently confirmed by the second respondent, including their particular subdivisions and the full payment thereof. They argue, further, that the applicant cannot allege that rights which the parties to the agreement are acknowledging are a nullity.

ISSUES FOR DETERMINATION

[32] From the Supreme Court order, the papers filed of record and the oral submissions by the parties, I deduce the issues to be determined by this Court for the disposal of this matter to be:

(i) Whether or not the fifth to the eighth respondents have an interest in the matter, and

(ii) Whether or not there is any legal or factual basis for the immovable property to be declared specially executable?

[33] I relate to each of these issues in turn.

WHETHER OR NOT THE FIFTH TO THE EIGHTH RESPONDENTS HAVE AN INTEREST IN THE MATTER

[34] The applicant's argument is that the fifth to the eighth respondents have no interest in the present matter because firstly, they were not party to the main matter whose judgment is being sought through this application and secondly, they were not privy to the contract between the applicant and the first to the fourth respondents.

[35] In my view, an aspect of vital importance is that the fifth to the eighth respondents were joined to the proceedings on the strength of a Supreme Court order under SC 151/23. They were also, in the same order, granted leave to oppose the current proceedings on the issue whether the immovable property should be declared specially executable. It is my view that the Supreme Court order is binding on this court. If the respondents were allowed to participate in the proceedings by the Supreme Court, I find no basis why this court ought to proceed in a contrary fashion.

[36] In any event, from my reading of the Supreme Court order, the order was granted by consent of all the parties. Our jurisprudence dictates that where a party has consented to the judgment of a court, the order granted is in essence, merely a record of the agreement of the parties. It is for this reason that a party does not enjoy the same right of appeal as he or she would in any other judgment. See *Chivero & Ors* v *Mudzimu Unoyera Apostolic Church* 1994 (2) ZLR 371 (S) at p373D. In the case of *Technoimpex JSC* v *Ranjendrakumar Jog & 4 Ors* SC29-22, the Supreme Court remarked at p. 8 of the cyclostyled judgment that:

> "Consent to a court order by the parties, leading to the granting of a consent order is a decision consciously made by the parties fully appreciating the facts and the law applicable to the dispute between them. The consent cannot be based on facts which were not in the contemplation of the parties. It is an order granted by the court at the instance of the parties."

[37] It is common cause that the applicant consented to not only the joinder of the fifth to the eighth respondents, but also to them being granted leave to oppose the proceedings under this matter to the extent that the applicant is seeking to have the immovable property declared specially executable. I am of the firm view that because the applicant consented to the joinder as well as the opposition of the issue of whether or not the immovable property should be declared specially executable, it is disingenuous for the applicant to turn around and argue that

the same respondents whom it consented to their joinder and opposition of the matter have no interest in the matter.

[38] I have not been given any reason to believe that the applicant, in consenting to the joinder, worked in ignorance of the legally laid down requirements for a joinder and consciously consented to a joinder which was unmeritorious. I also do not have any reason to believe that the applicant did not fully appreciate the facts and the law applicable to this dispute and it could have consented to the Supreme Court order on the basis of facts which it did not contemplate. When it consented to the order of the Supreme Court, it was fully aware of the facts and the law upon which the fifth to the eighth respondents were seeking to be joined to the proceedings, and armed with that information, it consented to the joinder.

[39] Even if I were to accept the applicant's argument that the joinder was only to the extent of the fifth to the eighth respondents establishing their legal interest in the matter before me, I would have found that these respondents have a legal interest in the matter on another basis.

[40] It is trite that generally, parties are joined to proceedings either as a matter of convenience or necessity. The scholars Cilliers AC, Loots C and Nel HC in *Herbstein and van Winsen, The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa,* state that the principle of joinder of convenience means that when there is a reasonable prospect of overlap of factual issues in different trials, it would be inappropriate to run the risk of having conflicting judgments from different judges on issues common to all the actions.[1] In such circumstances, joinder would be appropriate. On the other hand, joinder of necessity is based on a party having a direct and substantial interest in any court order or where such an order cannot be sustained and carried into effect without prejudicing that party.

[41] In keeping with the settled position of the law, the yardstick that has been set out by the courts in a plethora of cases is that for a party to participate in a suit as a matter of necessity, they must show that they have a 'direct and substantial interest' in the matter. In the case of *Bhamu* v *Mwonzora & 4 Ors* CCZ–14–23 the apex court observed that:-

> "……a direct and substantial interest in the subject matter and outcome of pending proceedings is the *sui generis* characteristic necessitating the joinder of a third–party to ongoing proceedings. It is an interest specifically recognised by the law in accordance with considerations of procedural justice and fairness to ensure that all parties who may potentially be prejudiced by the outcome of litigation are given an opportunity to be heard.

[1] Cilliers AC, Loots C and Nel HC, *Herbstein and van Winsen, The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, 5th Ed., (Juta & Co. Ltd, Cape Town, 2009) Vol. 1 p. 211 & p. 215.

> It accords with good law and common sense that a party exhibiting such an interest in pending proceedings must be joined as such. …" (at p12 of the cyclostyled judgment).

[42] The learned authors, Cilliers AC *et al* on p. 217, define a 'direct and substantial interest' as follows:

> "A 'direct and substantial interest' has been held to be an 'interest in the right which is the subject-matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation.' It is 'a legal interest in the subject matter of the litigation, excluding an indirect commercial interest only'. The possibility of such an interest is sufficient, and it is not necessary for the court to determine that it in fact exists. *For joinder to be essential, the parties to be joined must have a direct and substantial interest not only in the subject-matter of the litigation, but also in the outcome of it."* (emphasis added).

See also *Matsvimbo* v *Stevenson & Ors* S–123–20.

[43] What constitutes a direct and substantial interest has also been extensively considered in this jurisdiction. In the case of *Zimbabwe Teachers Association & Ors* v *Minister of Education* 1990 (2) ZLR 48 (HC) at p. 52F and the court concluded that in order for a party to justify its participation in a suit, it has to show that it has a direct and substantial interest in the subject matter and outcome of the litigation, not merely a financial interest which is only an indirect interest in such litigation.

[44] In *casu*, while the applicant questions the legality of the circumstances surrounding the acquisition of the portions of the immovable property, it does not dispute that the fifth to the eighth respondents hold subdivisions of the land which cumulatively constitute the immovable property. It is also not in dispute that the fifth and sixth respondents have settled on their piece of land and have established it as their home.

[45] It is pertinent in my view to note that on record are letters exchanged between the applicant and the fifth and sixth respondents wherein an argument is made that the applicant was aware that it had no right to stands created after the subdivision of the immovable property. In addition, on record there is also an affidavit deposed to in the matter under HCH 3564/17 by the second and third respondents herein stating that when they engaged the applicant, they highlighted that there had been an attempt to subdivide the immovable property and that there had been people who bought pieces of land from the second respondent before the third respondent took control of the company. It is stated in that affidavit that there was a portion of the land which remained to the second respondent and could cover the value of the loan the third respondent intended to get from the applicant. It is further stated that at the time the

second respondent took the loan in question, there was no way of alienating the portion of land hence the whole title deed had to be used. Notwithstanding this, it was alleged that the applicant was aware of the subdivision which had been initiated but not fully completed. Stand 777 is what was available as a surety but could only be mortgaged using the whole title deed, which registers title going beyond the stand in question.

[46] While the applicant questions the third respondent's credibility on the basis that he once put barricades on the fifth and sixth respondents' property, it states that it should not be baffling that the second and third respondents would defraud the fifth to the eighth respondents by mortgaging the entire piece of land without their knowledge and without disclosing the same to the applicant given that the title deed does not show that the land had been subdivided. This is a subtle acknowledgement of the allegation that the second and third respondent may have "pulled a fast one" not only on the fifth to the eighth respondents, but the applicant as well in obtaining the loan from the applicant.

[47] In the circumstances, it is my view that the respondents in question have a direct and substantial interest in that declaration because they have an interest in three of the stands that make up the immovable property. In my view, it cannot by any stretch of imagination, be said that the fifth to the eighth respondents will not be affected by the order of this court. Quite to the contrary, such an order declaring the immovable property specially executable would substantially affect the fifth to the eighth respondents. Their properties, one of which is now an established place of residence, are at the verge of being taken away from them. The fifth and sixth respondents stand to be rendered homeless by any declaration that the immovable property is specially executable. Surely, that interest cannot be downplayed as a frivolity.

[48] It is also my view that the doctrine of privity of contract argument is not available to the applicant for the sole reason that from my understanding, the fifth to the eighth respondents are not seeking to enforce a contract to which they are third parties. Rather, they are questioning the propriety of the applicant seeking to enforce that contract to the extent that the enforcement would prejudice their direct and substantial interest in the immovable property that the applicant wants to be declared specially executable.

[49] For the foregoing reasons, and as parties who be stand to be prejudicially affected by the order of the court, I find that the fifth to the eighth respondents have a direct and substantial interest in this matter and are thus entitled to participate in the current proceedings.

WHETHER OR NOT THERE IS ANY LEGAL OR FACTUAL BASIS FOR THE IMMOVABLE PROPERTY TO BE DECLARED SPECIALLY EXECUTABLE?

[50] The fifth to the eighth respondents have strongly contended that by entering into a deed of settlement, the applicant and the first to the fourth respondents entered into a compromise agreement. I take the robust view that this issue is dispositive of the matter before me and puts the whole dispute at rest[2].

[51] A compromise is defined by RH Christie in *Business Law in Zimbabwe*[3] at p. 108 as follows:

> "Compromise is the settlement by agreement of disputed obligations and is a form of novation, replacing the disputed obligations by the obligations created by the agreement of compromise."

[52] A settlement or compromise is in itself a contract which has as its object the prevention, avoidance or termination of litigation: See *Amler's Precedents of Pleadings*,[4] and *Christie's Law of Contract in South Africa*.[5]

[53] The case of *Georgias and Anor* v *Standard Chartered Bank* 1998 (2) ZLR 488 at 496D-H is authority for the proposition that:

> "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 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 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 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. See *Gollach & Gomperts (1967) (Pty) Ltd* v *Universal Mills & Produce Co Ltd and Ors* 1978 (1) SA 914 (A) at 922H. Unlike novation, a compromise is binding on the parties even though the

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[2] In the case of *Gwaradzimba N.O* v *C J Petron and Co (Pty) Ltd* 2016 (1) ZLR 28 (S), at p 32 B, the Supreme Court pronounced that a court must generally determine all the issues raised by the parties "unless the issue so determined can put the whole matter to rest." In my view, the determination of the question of the effect of the settlement in question is dispositive of the dispute.

[3] RH Christie, *Business Law in Zimbabwe* 1st edn, Juta & Co Ltd, Cape Town, 1998.

[4] L T C Harms *Amler's Precedents of Pleadings* 9th edn, LexisNexis, Durban, 2018 at p 338.

[5] G B Bradfield *Christie's Law of Contract in South Africa* 7th edn, LexisNexis, Durban, 2016 at p. 528.

> original contract was invalid or even illegal. See *Hamilton* v *van Zyl supra* at 383D-E; *Syfrets Mortgage Nominees Ltd* v *Cape St Francis Hotels (Pty) Ltd* 1991 (3) SA 276 (SEC) at 288E-F." [Underlining is for emphasis]

[54] In *Knowles* v *Roberts* (1888) 38 Ch.D 263 at p. 272. BOWEN L.J. made the following remarks which have stood the test of time:

> "as soon as you have ended a dispute by a compromise you have disposed of it."

[55] The learned author David Foskett, in the text *The Law and Practice of Compromise*,[6] makes the point that once parties enter into a compromise, such cause or causes of action each had, or may have had, prior to the conclusion of the agreement are discharged. He makes the further point that the principal effect in law of an unimpeached compromise is that it represents a new situation giving rise to new causes of action.

[56] Against the background of the foregoing principles of law on compromise, I must now consider the question of whether or not an original claim can be revived in the face of a compromise entered into between the parties. On this aspect, I can do no better than cite the apt comments of the same learned author to the effect that:

> "Given the normal meaning, purpose and effect of a compromise, the natural inference is that the common intention of the parties was that the compromise would henceforth govern their legal relationship in connection with the disputes they had been engaged in and that, accordingly, *those disputes would be regarded as 'dead' even in the event of breach of the compromise. In these circumstances, it is submitted that recourse to the original claims will not be permitted unless, upon the true construction of the compromise, it is clear that this is what the parties intended*…" at (p. 105) (my emphasis)

[57] This position of the law finds support in the jurisprudence coming out of the courts. In the South African case of *Road Accident Fund* v *Taylor and other matters* 2023 (5) SA 147 (SCA) at para 36, VAN DER MERWE JA said:

> "The essence of a compromise (*transactio*) is the final settlement of disputed or uncertain rights or obligations by agreement. Save to the extent that the compromise provides otherwise, it extinguishes the disputed rights or obligations. The purpose of a compromise is to prevent or put an end to litigation. Our Courts have for more than a century held that, irrespective of whether it is made an order of Court, a compromise has the effect of *res judicata* (a compromise is not itself *res judicata* (literally a matter judged) but has that effect) …"

[6] David Foskett, *The Law and Practice of Compromise*, 3rd Edn, Sweet and Maxwell, p3 and p81

[58] Closer to home, in *Victoria Foods (Private) Limited* v *Investments (Private) Limited and Anor* HH 175-12 this court held that:

> "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."(at p2-3 of the cyclostyled judgment)

[59] Put differently, once a compromise is entered into, the cause of action that one had prior the conclusion of the deed of settlement is discharged. Essentially, the deed of settlement becomes the new cause of action unless stated otherwise. The compromise agreement has the effect of rendering the original cause of action *res judicata*, as it were, thereby creating new obligations: See generally *Golden Beams Development (Pvt) Ltd* v *Mabhena* HH–296-21.

[60] Turning to the facts of this case, I analyse and make a finding as to whether or not the parties entered into a compromise. The material facts of the loan agreement and the ensuing developments have been alluded to earlier in this judgment. It is not necessary to rehash them, suffice to state that after the first to fourth respondents failed to repay the loan advanced to them by the applicant, the applicant instituted action proceedings under HCH 361/13 to recover the outstanding debt and for the immovable property to be declared specially executable. The parties subsequently entered into a deed of settlement.

[61] On the authority of the cases cited above, my view is that when the parties entered into the deed of settlement, they created new rights and obligations between them. The rights and obligations of the parties became contractual, whose terms and conditions were defined and stood to be determined only in terms of the deed of settlement. The entering into a deed of settlement thus became a compromise agreement between the parties.

[62] Once entered into by the applicant and the first to fourth respondents, the deed of settlement precluded an action on the original debt, except where the compromise specifically and by clear implication provided that the original claim shall revive in the event of the non-performance of the terms of the compromise. There is no such clause in the deed of settlement before me. In fact, clause 5.1.2. of the deed of settlement clearly states that the deed constitutes the entire settlement between the parties, and that and no provisions, terms and conditions,

stipulations, warranties or representations of whatsoever nature, whether express or implied have been made by any of the parties or on their behalf except as may be recorded in the deed.

[63] In my view, this clause ousts any alterations to the terms of the deed of settlement unless recorded in that deed. The deed does not in any way specifically state that the original claim shall revive in the event of non-performance. The first to fourth respondents, having failed to effect payment as per the deed of settlement, the applicant was, by operation of the law on compromise agreements, precluded from reviving the original claim under HCH 361/12, which included a declaration that the immovable property as specially executable. The compromise or settlement, had the effect of rendering the original claim *res judicata*. The original claim became "dead," and any subsequent cause of action would have to be in terms of the deed of settlement.

[64] According to the deed of settlement, the agreement constituted the full and final settlement of the claim under HCH 361/13, providing time frames within which the first to fourth respondents would make specific payments to the applicant. If the first to fourth respondents failed to make any payments on the due date, the applicant would, in terms of clause 4.2 thereof, be entitled to make a chamber application for judgment to be entered against the first to the fourth defendants for the entire outstanding balance, interest and costs of suit. My reading of this clause leads me to conclude that the deed of settlement, in clear and unambiguous language, gave the applicant the right to make a chamber application for judgment to be entered for the outstanding balance due to it plus interest and costs of suit, nothing else.

[65] The provisions of r 148 of the High Court Rules, 1971 (now r 45(14) of the High Court Rules, 2021) are also clear in this respect. The relevant clause was and is couched as follows:

> If a person who has made an offer or tender that has been accepted in terms of rule 147 fails to pay or perform in accordance with the offer or tender within ten days of such acceptance, or within such later period as may be specified in the offer or tender, the person who accepted the offer or tender may make a chamber application, on not less than ten days' notice, for judgment in accordance with the offer or tender as well as for the costs of the application."

[66] From my reading of the above provision, a chamber application made in terms of r 148 of the repealed High Court Rules, 1971, (now r 45(14) has to be in accordance with the offer or tender. In my view, if an applicant makes an application seeking judgment otherwise than in

terms of the offer or tender, they will be embarking on a frolic of their own and that application cannot be successfully argued to be in accordance with the offer or tender. In *casu*, and in accordance with the deed of settlement, the chamber application for judgment was only to be made for the entire outstanding balance, interest and the costs of suit. Thus, the claim for the declaration of the immovable property as specially executable was not in accordance with the offer or tender.

[67] The applicant has also argued that the relief sought by the fifth to the eighth respondents defeats the essence of the right in a mortgage bond and negatively impacts the mortgage facilities landscape. I hold a different view for the reason that by entering into a deed of settlement, the parties entered into a compromise agreement. The effect of that compromise, in the absence of a reservation of the right to proceed on the original cause of action, was to do away with the original claim. The compromise bars any proceedings against the original cause. My view is that by virtue of entering into the compromise agreement, the applicant cannot seek to go behind the compromise and raise issues emanating from the original cause of action. See generally *FBC Bank Ltd* v *Hwenga & Ors* 2016 (1) ZLR 451 (H).

[68] In the case of *Mashoko & 5 Ors* v *Mashoko & 2 Ors* S-114-22 the Supreme Court held that:

> "It is settled in this jurisdiction that a party is not allowed to approbate and reprobate a step in the proceedings. In other words, our law does not allow a party to have his or her cake and eat it at the same time. The basis of the doctrine is the principle that no person can be allowed to take up two positions which are inconsistent with one another, or to blow both hot and cold. See *Hlatswayo v Mare & Deas* 1912 AD 242 at 259." (at p10)

[69] I find that the applicant cannot approbate and reprobate a step it has taken in the proceedings. The applicant cannot be allowed to take up two positions which are inconsistent with one another. Put differently, the applicant cannot seek to rely on both the compromise and the original claim. It cannot have it both ways.

[70] I find that the compromise created a new contract between the parties. The court ought to give effect to that contract. The Supreme Court has already pronounced in many cases including the case of *Grandwell Holdings (Pvt) Ltd* v *Zimbabwe Mining Development Corporation & Ors* 2020 (1) ZLR 108 (S) on the fact that:

> "Generally the policy of the law is to give effect to the contracts of the parties because it is salutary in our jurisdiction to uphold the freedom of the parties to contract lawfully. This notion is embodied in the principle of sanctity of contract. Once the parties have contracted,

> it is not open to the courts to rewrite the contract they have entered into. In addition, the court will not excuse any of the parties from the consequences of the contract that they freely and voluntarily entered into with their eyes wide open. This is so even if the consequences are onerous or oppressive." (at p112C-D)

[71] I am alive to the essence of the right in a mortgage bond and the corresponding right of a mortgagee to retain his hold or security over the mortgaged property until the obligation is discharged when due, and his entitlement to attach and have the property sold in execution to satisfy his claim where a mortgagor fails to honour his obligation. I am also alive to the fact that the parties, when the first to fourth defendants failed to service the loan, the applicant issued summons claiming the payment of the debt or that the immovable property be declared specially executable. Following this summons, the parties entered into a compromise agreement. A new contract was born. That contract did not relate at all to the immovable property. The case of *Magodora & Ors v Care International Zimbabwe* 2014 (1) ZLR 397 (S) is authority for the proposition that courts cannot rewrite valid contracts between the parties. Similarly, the court cannot read into the contract what is not there simply because the first to fourth defendants have failed to meet their side of the bargain and the applicant now finds it convenient to revert to the original claim.

[72] I do not see any reason why, by giving effect to the consequences of the compromise agreement which the parties entered into freely and voluntarily with their eyes wide open, the applicant should argue that this would upset the mortgage facilities landscape. It was up to the applicant to ensure that all of its interests were covered in the deed of settlement. It did not and unfortunately, the applicant has to contend with the consequences of the compromise agreement.

[73] In any event, I did not hear Mr *Magwaliba* to argue that the applicant has been left without any option to recover its debt through the attachment of the first to the fourth respondents' movable property. I am convinced by the fifth to eighth respondents' counsel argument that the proper sequence would have been to have judgment entered for the remaining debt and in executing that debt, the movable property would be attached first before attaching immovable property. This option remains open to the applicant as it is still entitled to recover what is due to it.

DISPOSITION

[74] For the foregoing reasons, I conclude that the applicant, in the face of the compromise agreement, has no basis to seek the declaration that the immovable property is specially executable. The chamber application for judgment is predicated on the deed of settlement, and in my view, the plaintiff remains entitled to judgment for the outstanding balance in terms of the deed of settlement. However, this application, in as far as it seeks to declare the immovable property specially executable, cannot succeed as it exceeds the scope of the deed of settlement.

[75] Regarding costs, the deed of settlement explicitly provides for costs to be awarded on a legal practitioner and client scale. In the absence of any misconduct proven, I see no reason why I should deviate from the position agreed to between the parties. In respect of the fifth to the eighth respondents, while I appreciate that costs usually follow the outcome, given the circumstances of this case, I find it equitable that there be no order as to costs.

[76] In the result, I make the following order:

1. The chamber application for judgment succeeds in part.
2. Judgment be and is hereby entered against the 1st, 2nd, 3rd and 4th Respondents, jointly and severally, the one paying the others being absolved, in case number HC361/13, as follows:
    i. for payment of the sum of US$454 874-62 together with interest thereon at the rate of 35% per annum from the 1st August 2013 to date of payment; and
    ii. for payment of costs of suit both in respect of this matter and also in respect of case number HC361/13 on the legal practitioner and client scale.
3. Stand 80 Borrowdale Brook Township of Subdivision H of Borrowdale Brook of Borrowdale Estate measuring 5, 0445 hectares in extent and held by 2nd respondent under Deed of Transfer No. 6099/99 dated 30th June 1999 be and is hereby declared not specially executable.
4. In respect of the fifth to the eighth respondents, there shall be no order as to costs.

MUSHURE J: .....

Dube, Manikai & Hwacha, applicant's legal practitioners
Moyo & Jera, fifth to eighth respondents' legal practitioners