BEAUTY SEBIA
versus
MURAMBI GARDENS CLINIC TRUST

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 19 January 2016 & 10 March 2016

Opposed Application

Applicant in person
T Zhuwarara, for the respondent

MUREMBA J: On 19 January 2016 I heard this matter and delivered an *ex tempore* judgment dismissing the application with costs. Now I have been asked to furnish the written reasons thereof and these are they.

This was an application for lifting the corporate veil and joining the respondent as a co-defendant in the case of *Beauty Sebia* v *Seventh Avenue Surgical Unit (Pvt) Ltd t/a SASU Clinic*. In that case the applicant obtained an arbitral award in the sum of US$269 114-00 in her favour on 10 March 2014, which she registered as an order of this court on 24 June 2014 under case number HC 3657/14. The applicant's prayer was as follows:

> "It is ordered that:
> 1. The corporate veil be and is hereby lifted.
> 2. The respondent be and is hereby ordered to pay the applicant a total sum of US$269 114.00.
> 3. Respondent is hereby ordered to pay costs of suit."

The applicant narrated the history of the case as follows. She used to work for SASU Clinic as a General Manager from 2004. In 2006 she was dismissed from employment upon which she sued SASU (Pvt) Ltd for unfair dismissal. In 2007 she obtained an arbitral award in her favour for reinstatement or damages in the sum of Z$8 409 747.19 in *lieu* of reinstatement. SASU (Pvt) Ltd appealed against the arbitral award and lost the appeal in the Labour Court in 2010. Meanwhile in 2009 SASU Clinic had relocated from Seventh Avenue in Mutare to Murambi Gardens in Mutare and started operating as Murambi Gardens Clinic. In 2013 she went

to Murambi Gardens Clinic for reinstatement, but Murambi Gardens Clinic administrators refused to reinstate her. She went back to the arbitrator for re-quantification of damages in *lieu* of reinstatement and obtained an award of US$269 114.00 on 10 March 2014 which she then came and registered as an order of this court on 24 June 2014 under case number HC 3657/14.

On 20 October 2014 she had a writ of execution issued out pursuant to the registration of the arbitral award. SASU (PVT) Ltd is the respondent on that writ of execution. The return of service by the Sheriff of Zimbabwe dated 24 October 2014 states that when the Sheriff attempted to serve the warrant of execution at 16 Murambi Drive, Mutare he was informed that SASU Clinic was no longer operational and that Murumbi Clinic was the one operating at the given address. The applicant said that the respondent, Murumbi Gardens Clinic Trust, which is the owner of Murumbi Gardens Clinic, has refused to pay this award arguing that it is an entirely separate entity from SASU (Pvt) Ltd.

The applicant then therefore made the present application so that the respondent can be ordered to pay the damages that were awarded to her against SASU (Pvt) Ltd with the argument that there are links between SASU (Pvt) Ltd and the respondent and for that reason the respondent should be joined as a party to the proceedings that she won against SASU (Pvt) Ltd. The applicant averred that the respondent was created by the directors of SASU (Pvt) Ltd. She averred that the idea to form a trust was first mooted as far back as 2004 by the board of directors of SASU (Pvt) Ltd in a meeting that she attended as the then General Manager of SASU (Pvt) Ltd. She said that the proposal to form a trust came about in a bid to deal with going concern problems. She said that the trust was meant to rescue SASU Clinic from collapse and closure. The applicant said that thereafter there were several subsequent board meetings which culminated in the registration of the Trust in 2007. However, it is the applicant's belief that the registration of the trust was fast-tracked in 2007 to evade SASU (Pvt) Ltd's liability to her in respect of the arbitral award.

The applicant said that it is only fair that the respondent be ordered to settle the debt of SASU (Pvt) Ltd because after its formation it took over the entire operations of SASU (Pvt) Ltd. She said that in a circular dated 1 November 2010 which was circulated to all members of the respondent's staff especially those who had been with SASU (Pvt) Ltd, the respondent said with effect from 1 April 2009, it (the trust) had taken over from SASU (Pvt) Ltd the running of SASU

Clinic which was now Murambi Garden Clinic. The applicant also said that the members' salaries, benefits and employment continued unaffected, the only change being their employer which was now the Trust (respondent). The applicant attached the circular to her application. The applicant argued that in the same vein the trust (respondent) had therefore taken over the liabilities of SASU (Pvt) Ltd which included the arbitral award which was granted in her favour. She said that when she commenced arbitration proceedings SASU (Pvt) Ltd was her employer but it changed to a trust during the course of the arbitration proceedings. She said that SASU Clinic is now Murambi Gardens Clinic. She further said that SASU Clinic moved its location from Seventh Avenue on 27 February 2009 to 16 Murambi Drive, Murambi Garden, Mutare and started operating as Murambi Garden Clinic. The applicant said that the telephone numbers are still the same. She said that her file as an employee of SASU (Pvt) Ltd is with the respondent. She said that the respondent took over SASU's assets such as motor vehicles, computers and everything SASU (Pvt) Ltd had including employees.

In opposing the application the respondent raised 4 points in *limine* which are as follows.

(a) **Jurisdiction**

The respondent said that this application for joinder should have been made at the Labour Court in terms of s 89 of the Labour Court Act and rule 27 of the Labour Court Rules Zimbabwe SI 59/2006. The respondent said this court has no jurisdiction to deal with the matter since it is essentially a labour matter. It said that this same dispute was pending in the Labour Court under case number LC/H/APP815/14 and the issues raised therein are essentially the same as the ones raised in the present application. It said that, however, that matter was later withdrawn pursuant to the deed of settlement that the parties later entered into.

(b) **The issues between the parties were settled**

The respondent said that the arbitral award that the applicant obtained against her former employer, SASU (Pvt) Ltd, on 29 January 2007 was in the sum of Z$8 409 174.00, but despite that award being extant the applicant had it re-quantified in United States dollars after our adoption of the multi-currency system, without disclosing to the arbitrator the earlier quantification in Zimbabwean dollars. The respondent stated that this is what resulted in the

award of US$ 268 114.00 on 10 March 2014. The respondent averred that, that was irregular. It argued that the applicant should have applied to convert the award from Zimbabwean dollar to the United States dollar.

The respondent stated that after the applicant had obtained the arbitral award against her former employer, SASU (Pvt) Ltd, she sought to enforce it against it (the respondent) without due process. The respondent said that without admitting liability it decided to settle the matter in order to save itself time and costs in defending the action. It said that it then made an offer to settle all claims the applicant might have had against either SASU (Pvt) Ltd or itself. The respondent said that it offered US$10 000.00 which the applicant accepted freely and voluntarily. The respondent said that as a result the parties signed a deed of settlement on 23 December 2014. The respondent stated that, that deed of settlement settled or disposed of the matter fully and finally. The respondent said that as a result of the deed of settlement that the parties signed on 23 December 2014, it then filed a notice of withdrawal of case no. LC/H/APP/815/14 which was pending in the Labour Court. The respondent attached the deed of settlement which the parties entered into and proof that that amount was paid to the applicant. The respondent's counsel argued in the heads of argument that when the applicant signed the deed of settlement she novated and abandoned her arbitral award of US$268 114.00.

In her answering affidavit the applicant did not dispute that she signed the deed of settlement and that she was indeed paid US$10 000.00 by the respondent. She however, argued that the deed of settlement did not settle or finalise matters between them. She said that the deed of settlement was defective as it was calculated to cheat her and the law. She said that while it was a treacherous thing on one hand, on the other hand it is "proof that the respondent is a corporate veil of SASU (Pvt) Ltd." She said if the respondent was not trading on behalf of SASU (Pvt) Ltd it would not have made the offer to pay her the US$10 000.00 that it paid her. The applicant said that on that basis the respondent should be made to pay her the full arbitral award of US$268 114.00. The applicant said that the respondent had no right to insult her 'with a dangling deformed carrot at Christmas' and then demand that she withdraws 'a legally registered debt.'

Novation occurs when parties to an original contract agree that the original obligations are extinguished and new obligations created in their stead[1]. In other words the parties replace an old contract with a new one. Novation involves a waiver of existing rights.

In *casu*, as a way of disposing of the matter without going through litigation the respondent offered to pay the applicant some money in full and final settlement. At law when a party or a debtor offers to pay less '*in full and final settlement,'* this is regarded as an offer to compromise. If the other party or the creditor accepts the offer then the parties are regarded to have entered into what is called a compromise or settlement agreement[2]. Once the other party accepts, he or she will be precluded or barred from claiming the rest of the performance[3]. Compromise is a form of novation, as the disputed obligations are replaced by the obligations created by the agreement of compromise[4]. In *Georgias & Anor* v *Standard Chartered Bank Zimbabwe Ltd* 1998 (2) ZLR 488 (SC) @ 496 D-H it was said,

> "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- E 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.** (My emphasis) See *Gollach & Gomperts (1967) (Pty) Ltd* v *Universal Mills & Produce Co Ltd & Ors* 1978 (1) SA 914 (A) at 922 H."

In *Majora* v *Kuwirirana Bus Service (Pvt) Ltd* 1990 (1) ZLR 87 (S) it was held that an agreement of compromise is binding on the parties and has the same effect as res judicata and

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[1] *Innocent Maja* The Law of Contract in Zimbabwe p140
[2] *Innocent Maja* The Law of Contract in Zimbabwe p140.
[3] *Innocent Maja* The Law of Contract in Zimbabwe p138; *Be Bop A Lula Manufacturing & Printing v Kingtex Marketing (Pty*) 2006 (6) SA 379 (C).
[4] *R H Christie* Business Law in Zimbabwe 2nd Ed p108.

consequently excludes an action on the original cause of action. In other words a party sued on a compromise is not entitled to raise defences to the original cause of action[5].

In *casu,* the deed of settlement that the parties entered into reads as follows.

"IT IS AGREED AS FOLLOWS:

1. That MGCT will pay Beauty Sebia the sum of Ten Thousand United States Dollars (US$10 000.00) in full and final settlement for whatever claims Beauty Sebia had against Seventh Avenue Surgical Unit (Private) Ltd and may have against MGCT.

2. Full and final settlement
   Beauty Sebia accepts payment of the said sum of US$10 000.00 from MGCT in full and final settlement of all claims she had against Seventh Avenue Surgical Unit (Private) Ltd and against MGCT and acknowledges that she has no further claim whatsoever arising out of her former employment with Seventh Avenue Surgical Unit (Private) Ltd whether against Seventh Avenue Surgical Unit (Private) Ltd or MGCT.

3. Beauty Sebia acknowledges that this agreement and acceptance has been made by her freely and voluntarily and without any undue influence.

4. All parties agree that all legal proceedings in both the High Court and Labour Court are to be withdrawn on condition that each party meets its own costs for the said proceedings and any existing writs of execution /arbitration awards are hereby settled finally.

5. By signing this agreement Beauty Sebia accepts this final settlement and acknowledges receipt of the sum of US$10 000.00 in full and final settlement of her claim and agrees that this concludes the matter finally whether against both Seventh Avenue Surgical and MGCT."

It is clear from the deed of settlement that the parties entered into a full and final settlement agreement. All claims that were pending between the parties were settled upon the acceptance of the sum of US$10 00.00 by the applicant. The arbitral award that the applicant obtained in the sum of US$268 114.00 and the writ of execution that was sued out pursuant to the registration of the arbitral award were also settled by the acceptance of the money that was made by the applicant on 23 December 2014. The applicant signed the deed of settlement acknowledging that she had entered into the agreement and accepted the money freely and voluntarily. In the present application she did not show that she was induced by fraud, duress, *justus* error, misrepresentation, or some other good ground to accept the offer. While she stated that she was cheated into accepting 'a dangling deformed carrot at Christmas' she did not explain how she was cheated. A bald averment that she was cheated cannot render the settlement agreement void. There is need for a satisfactory explanation of fraud, duress, or *justus* error for

[5] *Moyo & Anor v Intermarket Discount House Ltd* 2008 (1) ZLR 268 (SC).

the court to nullify the settlement or compromise agreement. What the applicant said in her answering affidavit shows that when she signed the deed of settlement and accepted the money she knew what she was doing. She even thought that she was being smart by doing so. She thought that she would then use that as evidence or proof to show that the respondent is liable for the debt or the total amount of the arbitral award that she obtained against SASU (Pvt) Ltd. She did not realise that she was trapping herself, not the respondent. The settlement agreement that the applicant entered into is binding upon her. As such she no longer has any claim in respect of the balance of the arbitral award. I thus upheld this point in *limine*.

(C) **Material non-disclosure**

The respondent said that there was material non-disclosure by the applicant in her founding affidavit in this application which was filed on 6 May 2015 about the parties having signed a deed of settlement on 23 December 2014, which deed of settlement had the effect of finalising all the matters that were pending between her and SASU (Pvt) Ltd and between her and the respondent. The respondent said that, that deed of settlement covers the claim the applicant is making in the present application. As correctly argued by the respondent, the non-disclosure was clearly *mala fide*. I upheld this point.

(d) **The relief being sought is ambiguous and incompetent.**

The applicant said that she wants an order for the lifting of the respondent's corporate veil and that the respondent be ordered to pay US$ 268 114.00 to her. As correctly argued by the respondent, it is incompetent for the applicant to seek post-judgment joinder of party that was never a participant to the original proceedings. Execution of a judgment order can only be done against the person identified in the judgment. Just because parties have a relationship or are linked does not permit the abrogation of the rule that execution can only be levied against the person identified in the judgment. In *Smith* v *Dendey Brother* (1884) 4 EDC 21 execution against the spouse of a judgment debtor was held to be invalid. In *casu,* the respondent's counsel correctly argued that post judgment joinder violates the *audi alteram patem* rule as well as the respondent's constitutional entitlement to a fair hearing as espoused in s 69 (2) of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013. In terms of that provision a party

has a right to be heard before any judgment can be entered against it. In *casu*, the respondent is a trust and is a different entity from SASU (Pvt) Ltd against whom the applicant obtained an arbitral award and judgment. It was therefore improper for the applicant to seek to join it in the proceedings that were between her and SASU (Pvt) Ltd just for the purpose of enforcing the judgment she obtained against SASU (Pvt) Ltd without the respondent having been given an opportunity to defend the proceedings which gave rise to the arbitral award and the judgment.

About the corporate veil, the cardinal principle of company law is that a company is a separate entity distinct from its members[6]. The distinction is what is called the corporate veil. A request to lift the corporate veil is therefore a request to remove the legal divide between the company and its members. That is different from the nature of the application in the present case whereby the applicant was seeking to substitute one legal entity for another for the purposes of execution of a judgment. As correctly argued by the respondent, in the present application the applicant was seeking to lift the distinction between a trust and a company. She was not seeking to lift or remove the distinction between SASU (Pvt) Ltd and its members. Lifting the corporate veil is an action which is restricted to the relationship between a company and its members. In *casu*, no relief was being sought against the members or directors of SASU (Pvt) Ltd. There was no contention that SASU (Pvt) Ltd was insolvent, and had no assets to execute on. There was no allegation that its shareholders or directors could not pay the alleged debt. As correctly argued by the respondent, any application to lift the corporate veil in the circumstances of the applicant would be an application to lift the corporate veil of SASU (Pvt) Ltd because the arbitral award that she obtained was against SASU (Pvt) Ltd and not the respondent. I upheld this point in *limine* too.

It must be noted that any one of the points in *limine* could have disposed of the matter, but I decided to deal with all the points in *limine* for completeness. Having upheld the points in *limine* that the respondent raised, I dismissed the application with costs.

Henning Lock, respondent's legal practitioners

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[6] *Salomon* v *Salomon Company Ltd* [1897] AC 22 (HL); *Dadoo Ltd & Others* v *Krugersdorp Municipal Council* 1920 AD 530 at 550.