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Judgment No. 60/07
Civil Appeal No 371/05

(1) EDWIN MOYO (2) CHADWICK INVESTMENTS (PRIVATE) LIMITED v INTERMARKET DISCOUNT HOUSE LIMITED

SUPREME COURT OF ZIMBABWE
CHEDA JA, ZIYAMBI JA & GARWE JA
HARARE, NOVEMBER 19, 2007 & APRIL 9, 2008

E T Matinenga, for the appellants

J C Andersen SC, for the respondent

ZIYAMBI JA: The respondent instituted proceedings in the High Court for payment of the sum of $18 382 120 596,74 with interest at the rate of 210% per annum from 2 March 2004 to the date of payment and costs of suit on an attorney and client scale. The basis of the claim was an acknowledgement of debt which came about in the following manner.

On 26 August 2003 the respondent lent and advanced to the second appellant the sum of Z$4 billion to facilitate the acquisition of a controlling interest in a public company called Trans Zimbabwe Industries Ltd (TZI). The shares were held by the respondent as security for the loan. In addition the first appellant signed as surety for the due payment of the loan.

On the maturity date, the appellants were unable to pay the amount due and the debt was rolled over to 29 February 2004 but the respondent indicated to the appellants

that it would not roll the debt over again. Payment was not made and the amount due increased to in excess of Z$32 billion. Demand by the respondent produced no result causing the respondent to request further security from the appellants. In addition, the shares were to be placed on the market and, in the absence of satisfactory arrangements for payment, the respondent was to institute proceedings for the recovery of the debt and liquidate the second appellant.

Negotiations then took place between the appellants and the respondent through its curator, regarding the settlement of the debt. After a number of meetings and discussions the respondent agreed to a reduction of the amount claimed. A figure of Z$24 billion was suggested by the curator but this was rejected and the parties finally agreed on the figure of Z$18 billion. So it was that on 2 March 2004 the second appellant, represented by the first appellant, signed an acknowledgement of debt for "the due and proper payment, being capital plus interest, in the sum of $18 382 120 596.74 ('the principal debt') by reason of a loan made and advanced to the company and any interest thereon specified below …" and, on 16 March 2004 the first appellant signed a personal guarantee for the payment to the respondent of all amounts owed to the respondent by the second appellant.

The appellants, at the pre-trial conference, admitted liability for the capital debt of Z$4 billion as well as interest up to the double and an order was given by consent in favour of the respondent for the sum of Z$8billion. As to the balance of the claim in the sum of $10 382 120 596.74, the appellants pleaded that this was illegal interest in

excess of the double which offended against the *in duplum* rule[1] and which was accordingly not recoverable. The respondent in turn replicated that the parties had entered into a new loan agreement in terms of which the principal debt was novated on terms and conditions particularised in the acknowledgement of debt annexed to the declaration.

At the trial, counsel for the respondent advised the court that he would be relying not on the principle of novation but on that of compromise, it being the respondent's stance that the principal debt had been compromised and was therefore recoverable. The learned Judge found, upon an examination of the facts, that indeed a compromise had been arrived at. He accordingly gave judgment in favour of the respondent.

The appellants appealed to this Court on the following grounds:

"1. The court *a quo* erred in finding that the respondent's claim against the appellants' was based on a compromise when in fact in the summons and particulars of claim, the respondent has not based its claim on a compromise but on the contrary, had based its claim on the basis of an alleged novation.

2. The court *a quo* erred in proceeding to determine that there existed a compromise when in fact the respondent had not amended its claim so as to plead a compromise and therefore enable the court to determine that there was a compromise."

Mr Matinenga, for the appellants, did not take issue with the fact that a compromise had in fact been arrived at. His contention was that the court *a quo* ought not to have based its decision on an issue which was not pleaded.

[1] *Commercial Bank of Zimbabwe Ltd v MM Builders and Suppliers (Pvt) Ltd & Ors* 1996 (2) ZLR 420 (H); 1997 (2) SA 285 (ZH)

The learned Judge in the court *a quo* approached the matter as follows:

> "As a general and tried proposition pleadings are restricted to averments of factual matters and do not afford the opportunity to a party to expound on the law or legal principles.
>
> Counsel for the defendant, with some justification complained about the apparent shift in stance resorted to by the plaintiff's legal practitioners [namely] between the stance taken in their pleadings and the position at the trial. This court will endeavour to consider all the factual evidence with a view to arriving at a just and proper decision on this matter by regard to the relevant legal principles applicable."

In my view, the approach of the learned Judge was correct. To begin with, the rules relating to pleadings require that a party pleads the facts on which his case is based and not the law applicable or the evidence by which he intends to establish those facts. The learned author of *Beck's Theory and Principles of Pleading in Civil Actions*[2] put it this way:

> "Pleadings should state facts and facts only, that is to say, they should not contain a statement of either law or the evidence required to establish the facts."

It is true, as *Mr Matinenga* submitted, that the object of pleadings is to define the issues. In this regard, the courts have held that parties will be bound by their pleadings where any departure would be prejudicial to the other party or prevent a full enquiry. However, as INNES CJ remarked in *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at p 198 :

> "… within those limits the court has a wide discretion, for pleadings are made for the court, not the court for the pleadings, and where a party has had every facility to place all the facts before the trial court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been."

[2] 5 ed by I.Isaacs at p 35

See also *Medisa (Pty) Limited v Kroebel Tools & Products (Pty) Limited* 1988 (4) SA 415(W) at 421-2; and *Collen v Rietfontein Engineering Works* 1948 (1) SA 411 (AD) where, at 433, CENTLIVRES JA remarked:

> "This was not the contract relied on by the defendant in his pleadings, and the position should have been regularised by an appropriate amendment. But in this case, where the contractual relationship between the parties arose partly through the interchange of letters and partly through their conduct, all the material letters (excepting one in respect of which secondary evidence, which was rightly accepted by the magistrate, was led) were produced in evidence and the conduct of the parties was examined in *viva* voce evidence. This Court, therefore, has before it all the materials on which it is able to form an opinion, and this being the position it would be idle for it not to determine the real issue which emerged during the course of the trial…."

In a similar vein, it was said in *Middleton v Carr* 1949 (2) SA 374 (AD) at pp 385-6 of the judgment:

> "… as has often been pointed out, where there has been full investigation of a matter, that is, where there is no reasonable ground for thinking that further examination of the facts might lead to a different conclusion, the Court is entitled to, and generally should, treat the issue as if it had been expressly and timeously raised. But unless the Court is satisfied that the investigation has been full, in the above sense, injustice may easily be done if the issue is treated as being before the Court."

As *Mr Andersen* submitted, it was clear on the record that there were no further facts requiring investigation and that the issue of the legality or otherwise of the acknowledgement of debt was fully canvassed in the court *a quo*. Indeed, there was no suggestion by the appellants that there were any further facts which required investigation. Thus the court *a quo* had before it all the facts which were necessary to determine the real issue which arose before it, which was, whether the agreement amounted to a compromise or a novation. See also the following passage in *The Law of Contract in South Africa* 3 ed by *R H Christie* at p 505 where the author says:

> "Compromise, or *transactio,* is the settlement by agreement of disputed obligations, whether contractual or otherwise. If there is no such dispute there can be no compromise. It is a form of novation differing from ordinary novation in that the

> obligations novated by the compromise must previously have been disputed or uncertain, the essence of compromise being the final settlement of the dispute or uncertainty. The fact that a claim compromised subsequently turns out to have been invalid does not affect the validity of the compromise, but an illegal claim or a claim unenforceable on grounds of public policy cannot be validly compromised any more than it can be validly novated. However the contract may be described by the parties, the court will look at the substance rather than the form in order to decide whether a particular obligation or dispute has been compromised." (My underlining).

As I indicated above, *Mr Matinenga* did not dispute the finding of the learned Judge that on the facts there was a compromise reached by the parties. In view of that finding, which is supported by the evidence, the *in duplum* rule was of no assistance to the appellants as any cause of action which they may have had before the new agreement of compromise was extinguished by that agreement. They are bound by the acknowledgement of debt. See *Georgias & Anor v Standard Chartered Bank Zimbabwe Limited 1998* (2)*)* ZLR 488 (S) at 496 D-H where GUBBAY CJ 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-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 & Ors* 1978 (1) SA 914 (A) at 922H. Unlike novation, a compromise is binding on the parties even though the original contract was invalid or even illegal. See *Hamilton v Zyl supra* at 383D-E; *Syfrets Mortgage Nominees Ltd v Cape St Francis Hotels (Pty) Ltd* 1991 (3) SA 276 (SEC) at 288E-F."

Accordingly it is my view that the judgment of the court *a quo* is unassailable and the appeal is dismissed with costs.

CHEDA JA: I agree

GARWE JA: I agree

Atherstone & Cook, appellants' legal practitioners

Dube, Manikai & Hwacha, respondent's legal practitioners