RIOZIM LIMITED
versus
DIAMOND DRILL (PVT) LTD
and
THE SHERIFF OF ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 8 & 11 June 2015

Urgent Chamber Application

C. Mabhande, for the applicant
P. Chiutsi, for the 1st respondents

CHATUKUTA J: The applicant sought a stay of execution of the judgment in case number HC 13373/12 issued on 24 April 2013.

The background to this application, most of which is common cause, goes back to 10 November 2012 when the 1st respondent issued summons against the applicant in case number HC 13373/12. The applicant entered an appearance to defend the said claim on 26 November 2012. It soon thereafter, on 4 December 2012, filed a request for further particulars. The 1st respondent filed further particulars, the sufficiency of which was put into issue by the applicant. This resulted in the applicant filing an application in case number HC 14492/12 on 20 December 2012 to compel the 1st respondent to furnish further particulars. The 1st respondent opposed the application on 21 December 2012.

The 1st respondent, after filing its opposition to the application in HC 14492/12, served the applicant with a notice to plead issued on 25 January 2013 and before case number HC 14492/12 had been determined. The applicant queried the propriety of the notice to plead and engaged the 1st respondent in order to resolve the dispute. The 1st respondent however, proceeded to file a chamber application on 20 March 2013 seeking a judgment in default. The court instead struck out the applicant's defence and referred the matter to the unopposed roll. The 1st respondent caused the main matter in case number HC 13373/12 to be set down on the unopposed roll of 17 April 2013 on the strength of the order striking out the applicant's defence. The matter was removed from the roll on that date. It appears it was reset down on the unopposed roll of 24 April 2013. The default judgment giving rise to this

application was granted on that date for the payment of US$1 668 593.60 with interest thereon at the prescribed rate and costs of suit.

On 30 April 2013 and in case number HC 3303/13, the applicant filed an application for rescission of the judgment. It was apparent from the application that the applicant was querying the extent of its indebtedness to the 1st respondent. The applicant also filed, on the same date as the application for rescission, an urgent chamber application under case number HC 3307/13 for the stay of execution of the default judgment.

During the hearing of the urgent chamber application in case number HC 3307/13 on 6 May 2013, the parties agreed to settle their dispute amicably. The details of the agreement were captured in an order granted, with the consent of the parties, on the same date. The court granted the following order:

> "Parties agreed as follows
>
> 1. Execution be and is hereby stayed.
> 2. Applicant will pay US$50 000 upon the parties signing of (*sic*) deed of settlement.
> 3. Applicant will make a further payment of US$150 000 upon/before (*sic*) 31/5/2013.
> 4. Applicant will make monthly instalment payment (*sic*) of US$50 000 with effect from end of June 2013 until the whole amount is paid in full.
> 5. Each Party bears its own costs.
>
> -Two outstanding issues which the parties will discuss and conclude relate to:
>
> i) issue or interest (*sic*) on arrear instalments and
> ii) the grace period which applicant is allowed to remedy a breach
>
> -The issues, the parties agree will not settle (*sic*) the settlement which has been reached. (*It is clear from the handwritten order that the word "settle" was a typographical error. The word was supposed to be "scuttle"*).
>
> 6. Parties to reduce their settlement agreement for writing (*sic*) and favour the court with the written deed of settlement."

On the very date the order was granted, the parties signed a deed of settlement. The deed of settlement was filed with the court on 13 May 2013. The following were the terms of the deed of settlement:

"Preamble-Whereas Diamond Drill has instituted proceedings against Riozim and the parties have entered into negotiations in respect of the payment by Riozim of certain amounts to Diamond Drill in settlement of the claim brought by Diamond Drill and all indebtedness of Riozim to Diamond Drill.

And whereas the parties wish to record the terms of the agreement.

Now therefore it is recorded and agreed that:

1. The total indebtedness of Riozim to Diamond Drill is agreed to be $1 400 000 payment of which will be made by payment of:

1.1 $20 000.00 within 24 hours of signature of this agreement.
1.2 $150 000 by 31.5.2013.
1.3 Instalments of $50 000 each on the last day of each month commencing with the first payment on the last day of June 2013.
2. No interest will accrue.
3. In the event of any payment being delayed Riozim will have a period of 30 days from due date to effect the payment.
4. There shall be no acceleration of the debt in the event of a delayed payment."

The applicant commenced making payments to the 1st respondent on the same date as the consent order and the agreement (i.e. on 6 May 2013). It appears that the last payment was effected on 8 June 2015.

On 2 June 2015 the 1st respondent advised the applicant that a balance of $388 593.60 was outstanding. As of that date, the applicant had paid $1 390 000. On 12 June 2015, the 1st respondent advised the applicant that it was instructing the 2nd respondent to proceed with the execution of the 2012 default judgment.

It is this intended execution that prompted the applicant to file this application.

In the main, the applicant contended that the 1st respondent had compromised any rights that it had to the payment of the sum of $1 668 593.60 when it voluntarily agreed on 6 May 2013 to a payment of $1400 000. It therefore had abandoned its entitled to receive the sum of $1 668 593.60. As the applicant had paid the full amount of $1 400 000, it had extinguished its indebtedness to the 1st respondent. The 1st respondent could not therefore persist with the execution pursuant to a judgment that had been abandoned. The applicant referred me to

Georgias & Anor v Standard Chartered Finance Zimbabwe Ltd 1998 (2) ZLR 488 (S) in support of its proposition.

The application was opposed. The 1st respondent did not deny reaching a conclusive settlement on 6 May 2013. It contended that the settlement was incomplete as the parties still had to agree on the amount owed by the applicant. The agreement dated 6 May 2013 was still open to further negotiations hence the subsequent communication between the parties on the issues raised after the signature of the deed of settlement. It was submitted that, in any event, the applicant had not strictly complied with the repayment terms of the deed of settlement and therefore could not seek to rely on a settlement that it had not honoured.

The 1st respondent further contended that the judgment in case number HC 13373/12 was extant. The agreement of 6 May 2013 did, and could, not override the default judgment. The 1st respondent further submitted that the applicant had defaulted in its repayments pursuant to the deed of settlement. The applicant could therefore not seek to rely on an agreement that it was not honouring. The 1st respondent was entitled, because of non-compliance with the terms of the agreement by the applicant, to revert to the default judgment of 24 April 2012.

It is common cause that the parties had commenced negotiations before the urgent chamber application in case number 3307/13. They had reached an agreement before then. It is further common cause that the parties consented to the order of 6 May 2013. They met after the order by consent was granted. They filed a deed of settlement soon after the order by consent

The first issue for determination is whether there was a binding agreement was reached on 6 May 2013. The second issue, if the answer to the first issue in in the positive, is whether the effect of that agreement was to supersede the obligations and rights pronounced in the default judgment. In other words, the issue is whether or not the 1st respondent compromised its right awarded in the default judgment.

The first issue is easy to dispose of. A signature was affixed to the deed of settlement on behalf of the 1st respondent. The tested principle *caveat subscripto* applies. The 1st respondent cannot submit that it is not bound by the agreement. The 1st respondent had not been aware of the contents of the agreement for the first time on 6 May 2013. As alluded to earlier, there had been prior negotiations which had culminated in a draft agreement containing almost identical terms. The draft was signed by the applicant on 25 April 2013 and is part of the 1st respondent's opposing papers in case number HC 3303/13. However, the 1st respondent had not signed the agreement. There was only one difference between the

draft and the final agreements. In clause 1.2 of the draft, the applicant was required to pay $180 000 by 31 May 2013. The agreement of 6 May 2013 provided for a payment of $150 000 by the same date. It appears the draft agreement is the arrangement that is referred to in the consent order of 6 May 2013 that the parties agreed not "to scuttle".

What is striking about the agreement of 6 May 2013 is that it was signed soon after the consent order in case number HC 3307/13. It is therefore perplexing that soon after affixing a signature to the agreement and on the very same date of such affixing, the 1st respondent's counsel wrote a letter implying that the parties were still to agree on some of the terms of the agreement and more particularly that the amount due was not $1 400 000. What is apparent is that the agreement, duly signed on behalf of the parties, does not in any way indicate that negotiations were still open and the terms of the agreement were subject to change. It is my view that there would not have been a need to sign the agreement and assent to terms that one intended to alter the very same day.

The 1st respondent was being represented by the same legal practitioner from the inception of this matter. It must have been advised of the import of signing the agreement. It appears that the 1st respondent's representative had either signed the agreement blindly or had a sudden change of heart. However, that does not mean the 1st respondent ceased to be bound by the agreement.

I have no doubt in my mind that the parties were in agreement on 6 May 2013. I am fortified in my view by the argument proffered by the 1st respondent that the applicant cannot seek to rely on an agreement that it had not been honouring. That argument clearly presupposes the existence of a valid agreement. The essence of that agreement was that the amount due to the 1st respondent was $1 400 000 and not $1 668 593.60. Even assuming that the parties were still to negotiate some of the terms, the agreement would and did remain binding on both parties until the parties agreed on the new terms. As is apparent from the applicant's response dated 14 May 2013, the parties were not in agreement over the 1st respondent's proposals of 6 May 2013. Until an agreement had been reached on the amendments, the agreement was therefore binding on the parties.

The second issue is whether or not the 1st respondent compromised its rights to receive $1 668 593.60 as awarded in the default judgment of 24 April 2012. As stated in *Georgias & Anor v Standard Chartered Finance Zimbabwe Ltd* (*supra*) @ 496D-G

> "A compromise, or *transactio*, is the settlement by agreement of disputed obligations, or of a lawsuit the issue of which is uncertain. The parties agree to regulate their intention in a particular way, each receding from his previous position and conceding something-either diminishing his claim or increasing his liability. *See Cashalia v Herberer & Co* 1905 TS 457 at 462 *in fine*; *Tauber v von Abo* 1984 (4) SA 482 (E) at 485G-I; *Karson v Minister of Public Works* 1996 (1) SA 887 (E) at 893F-G. The purpose of compromise is to end doubt and to avoid the inconvenience and risk inherent in resorting to the methods of resolving disputes. Its effect is the same as *res judicata* on a judgment by consent. It extinguishes *ipso jure* any cause of action that previously may have existed between the parties, unless the right to rely thereon was reserved. *See Nagar v Nagar* 1982 (2) SA 263 (ZH) at 268E-H. As it brings legal proceedings already instituted to an end, a party sued on a compromise is not entitled to raise defences to the original cause of action. See *Hamilton v van Zyl* 1983 (4) SA 379 (E) at 383H. But a compromise induced by fraud, duress, *Justus error*, misrepresentation, or some other ground for rescission, is voidable at the instance of the aggrieved party, even if made an order of court….. Unlike novation, a compromise is binding on the parties even though the original contract was invalid or even illegal." (See also (See *Majora v Kuwirirana Bus Service (Pvt) Ltd* 1990 (1) ZLR 87 (SC)).

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

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

The question of whether or not there was an abandonment of the default judgment by the 1st respondent can best be answered when reference is had to the facts pertaining to this matter. The parties had outstanding issues to resolve arising from the applicant's applications in case number HC 1442/12 (application to compel the 1st respondent to furnish further particulars) and in case number HC 3303/13 (application for rescission of the judgment in case number HC 13373/12). I can safely speculate that the 1st respondent may not have been confident of its rights in this regard following the application for rescission in case number HC 3303/13. The parties met before and after the judgment in case number HC

3307/13. The meetings culminated in the deed of settlement of 6 May 2013, which deed was duly signed by the applicant's and 1st respondent's representatives.

The agreement between parties of 6 May 2013 points to the indisputable fact that the 1st respondent agreed to abandon the judgment in case number HC 13373/12. The preamble to the agreement reads as follows:

> "Whereas Diamond Drill has instituted proceedings against Riozim and the parties have entered into negotiations in respect of the payment by Riozim of certain amounts to Diamond Drill **in settlement of the claim brought by Diamond Drill and all indebtedness of Riozim to Diamond Drill.**
>
> And whereas the parties wish to record the terms of the agreement.
>
> Now therefore it is recorded and agreed that……."

Only one claim was brought by the 1st respondent against the respondent and that is the claim in case number HC 13373/12. The preamble to the deed of settlement therefore acknowledges the existence of a dispute between the parties. The dispute is identified as the extent of the applicant's total indebtedness to the 1st respondent. An attending issue is how that indebtedness was going to be discharged. The parties were engaged in negotiating in order to resolve that dispute.

The parties then agreed on the extent of the indebtedness. In paragraph 1 of the agreement the parties agreed as follows:

> "1. The total indebtedness of Riozim to Diamond Drill is agreed to be $1 400 000 payment of which will be made by payment of:……."

The above amount is not no longer the sum of $1 668 593.60 awarded by in the judgment in case number HC 13373/12. This was a clear compromise of the amount awarded in the judgment. Despite the fact that the 1st respondent had a judgment in its favour, it acceded to an out of court settlement and hence abandoned a judgment granted in its favour for a settlement. The 1st respondent therefore unequivocally surrendered its entitlement under the default judgment.

The judgment in case number HC 3307/13 does not specifically order a rescission of the judgment in HC 13373/12. This does not mean that it is not mute as to the status of that

judgment. Whilst the order is not elegantly drafted, it acknowledges that the parties had agreed to what amount was due to the 1st respondent in three respects. Firstly, execution of the judgment in case number HC 13373/12 was stayed. Secondly, it provides repayment terms implying that there was an agreed amount that the parties had agreed was due and was to be acquitted on the terms stated in the judgment. This is the agreement that the parties had earlier agreed on and which they were enjoined not "to scuttle". It further identifies that there were only two outstanding issues that the parties were required to resolve, being interest payable on arrear instalments and the period within which the applicant was to remedy a breach. The repayment terms of the amount that they parties were presumed to have agreed to be due to the 1st respondent are stipulated in the judgment. The terms are identical to those in the deed of settlement. In other words, the settlement is consistent with the judgment in HC 3307/13.

Our law of contract has for long recognized that a new agreement that settles a dispute operates as *res judicata* in respect of the old agreement and in itself becomes a valid and binding contract between the parties. Not only can the original cause of action no longer be relied upon, but a defendant is not entitled to go behind the compromise and raise defences to the original cause of action when sued on the compromise. (See *Georgias & Anor v Standard Chartered Finance Zimbabwe Ltd* (*supra*).

The effect of the compromise by the parties was to discharge the prior rights of the 1st respondent embodied in the default judgment. The applicant acknowledged its indebtedness in the amount of $1 400 000. At the same time, the 1st respondent acknowledged that that was what the applicant owed it and as a consequence abandoned its rights to the sum of $1 668 593.60.

The contention by the 1st respondent that the applicant agreed in numerous ccommunications to be owing a balance of $1 668 593.60 and not $1 400 000 was unsubstantiated. Despite having filed with the opposing affidavit a number of letters exchanged between the parties, none of the letters alluded to by the 1st respondent was produced. The applicant paid the amount agreed upon in the deed of settlement. It therefore discharged its indebtedness in full. The 1st respondent is no longer entitled to resort to the judgment in case number HC 13373/12.

The parties agreed that I grant a final order in order to curtail proceedings. Consequently, the applicant prayed for costs *de bonis*. I am of the view that the issue advanced by the 1st respondent, whether or not the consent order and the agreement both of 6 May 2013

superseded the judgment in case number HC 13373/12 was arguable. The 1st respondent was entitled to have its day in court to have the issue resolved and cannot be penalized for doing so. In any event, the applicant did not pray for the punitive costs in its application. It intended to pray for costs on a legal practitioner and client scale. The prayer for costs on a legal practitioner and client was not even justified.

It is accordingly ordered that:

1. All writs of execution issued in case number HC 13373/12 be and are hereby set aside.
2. The 1st respondent be and is hereby ordered to pay the applicant's costs.

Gill, Godlonton & Gerrans, legal practitioner for the applicant
P. Chiutsi Legal Practitioners, legal practitioner for the 1st respondent