YAKUB MAHOMED
versus
JOHN ARNOLD BREDENKAMP

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 25, 26, 27, January 2016, 17 February 2016

**Civil Trial**

*T. Mpofu*, for the plaintiff
*A. Matinenga*, for the defendant

CHIGUMBA J: If a man is motivated by moral, religious, cultural, or other beliefs to agree to pay a sum of money which is owed to another, can the law enforce such an assumption of liability against this man personally? Should the law allow such a man, many years after the date on which he agreed to pay, to evade liability on the basis that he only agreed to pay because of these beliefs, and that therefore the legal liability to pay remained at all times rooted in the second man? We must determine whether the man's moral obligation was translated into a legal obligation, an assumption of liability, when he agreed to settle the debt on behalf of the second man by a certain date. The court is entitled to look at extrinsic evidence of the behavior of the parties, to determine whether it reveals evidence of an intention to be bound by the agreement. It all boils down to whether there was a meeting of the parties' minds.

We must also determine whether the meeting held by the parties, at which the man agreed to settle the debt, was held on a without prejudice basis and therefore privileged. It is a matter of law whether a plaintiff can found a cause of action on an agreement that was made during the course of a privileged discussion. It is a matter of fact whether both parties clearly understood that the meeting was privileged. This is where we enter the slippery slope of human foibles and ability to remember accurately and without bias in one's favor, events which took place a long time ago. To compound matters, the legal practitioners for the plaintiff and defendant in their wisdom, saw fit to testify on behalf of their respective clients.

On 12 September 2014, the plaintiff issued summons against the defendant for USD$3 872 123-00, (three million eight hundred and seventy two thousand one hundred and twenty three United States dollars), payable in terms of an agreement between the parties dated 12 August 2012, plus interest thereon at the prescribed rate calculated from 28 February 2013 to the date of payment in full, as well as costs of suit on a legal practitioner and client scale. Both parties are businessmen of note, with multimillion dollar empires that span the region and the globe. They used to hold each other in high regard until the money came between them, as it is wont to do.

According to the plaintiff's declaration, on 28 August 2008, the plaintiff and a South African company Sahawi International Pty Limited (Sahawi) issued summons against defendant and a Zimbabwean company, Breco International Private Limited (Breco) under case number HC 4221-08 for the repayment of a loan advanced to them between 1st February 2001 and 9th November 2002 in the sum of USD$3 872-123 (three million eight hundred and seventy two thousand one hundred and twenty three United States dollars), plus interest thereon at six percent per annum capitalized monthly and calculated from 1 February 2001 to the date of payment in full. On 17 August 2012 the parties entered into a verbal agreement in terms of which they settled the dispute by the defendant agreeing to personally pay the plaintiff the amount in question by the 28th of February 2013. On 3 November 2013, the defendant raised a special plea of lis *alibi pendens* that the proceedings in HC 4221-08 were still pending, so litigation was pending between the same parties, on the same cause of action and in respect of the same subject matter. The defendant prayed that the present action be stayed pending determination of HC 4221-08. The defendant's plea on the merits was to deny having entered into an agreement to settle the amount outstanding by 28 February 2013 or at all. The defendant averred that entering into such an agreement would have contravened the Exchange Control regulations and been illegal.

The defendant filed a counterclaim in which he alleged that on 20 January 2011 the plaintiff maliciously and wrongfully set the law in motion by laying false charges against him of fraud and contravening Exchange Control Regulations with the police. In particular the defendant accused the plaintiff of complaining to the police that he had secured a loan of USD4million by means of making a false representation to him, and that defendant had not

obtained Exchange Control authority for the borrowing. The defendant averred that when plaintiff made these complaints he had no reasonable/probable cause for doing so, and he did not have any reasonable belief in the truth of the information that he gave to the police. As a result of plaintiff's conduct, defendant was arrested and arraigned before the magistrate's court, and indicted for trial before the High Court on 1 July 2013. The defendant was detained in custody until his admission to bail on 4 July 2013. He was tried and acquitted by the High Court on 12 September 2013. The defendant's claim for damages for contumelia, deprivation of freedom and discomfort was in the sum of USD$300 00-00. He also claimed a sum of USD$50 000-00 for his legal costs.

On 20 November 2014, the plaintiff filed his replication to the defendant's special plea, in which he denied that the proceedings in HC 4221-08 were currently still pending, and denied that the parties were the same in both matters, or that the cause of action was the same. In the replication to the plea on the merits, the plaintiff denied that the agreement between the parties violated exchange control regulations and joined issue with the defendant. The plaintiff's plea to defendant's counterclaim was an admission that he laid charges against the defendant, and a denial that he maliciously set the law in motion, or that the charges were false, or that the information given was false. The plaintiff prayed that the defendant's counterclaim be dismissed with costs. The parties filed a joint pre-trial conference minute on 5 August 2015 in terms of which four issues were referred to trial in the main matter and three issues in the counterclaim. The following issues were referred to trial in the main matter:

1. Whether the current proceedings can be proceeded with despite the pending nature and the non-conclusion of proceedings in HC4221-08?
2. Did defendant agree on the 17th of August 2012 to personally assume the indebtedness of KMC to the plaintiff?
3. Are there admissions of liability by defendant in legal correspondence between plaintiff and defendant? If so are they admissible?
4. To what extent is defendant liable to the plaintiff?

The following issues were referred to trial in the defendant's counter-claim:

1. Did plaintiff lay fake criminal charges with the police against the defendant?

2. Did the laying of the fake charges by the plaintiff cause the arrest, detention and prosecution of the defendant?
3. What amount of damages, if any, did defendant suffer as a result of his arrest, detention and prosecution?

The issue that arises for determination in the main matter is whether the defendant assumed liability to settle the sum of USD$3 872-123, to the plaintiff, in his personal capacity, and if he did so during the course of privileged negotiations, such an assumption can be used against him to recover that sum in court. With regards to the defendant's counterclaim, the issue that falls for determination is whether the complaint raised by the plaintiff to the police against the defendant was deliberately and intentionally based on falsehoods, the aim being to cause the arrest, detention and prosecution of the defendant, knowing full well that such arrest, detention and prosecution was unjustified. At the hearing of the matter, a notice of withdrawal was tendered, dated 25 January 2016, in terms of which the plaintiff withdrew its action in case HC 4221-08 and tendered wasted costs. The parties agreed that the notice of withdrawal was properly drawn and filed in terms of the rules of this court, and that this effectively disposed of the special plea and of the first issue that had been referred to trail.

The plaintiff opened its case by leading the evidence of Mr Yakub Mahomed, who told the court that: - he is an accountant by profession, and a businessman who has had business interests in Zimbabwe for the last twenty five years. His claim was based on the agreement entered into by the parties on 17 August 2012, at a meeting convened by the former Attorney General (AG) Mr Tomana. The meeting had been convened in order to see if the parties could not resolve their differences out of court after the AG had refused to prosecute the defendant in the criminal court. The AG had told the plaintiff that he was under political pressure not to prosecute the defendant, who was allegedly involved in assisting the military with the war in the Democratic Republic of Congo (DRC), and had been placed on the sanctions list for assisting our government.

The plaintiff referred to a letter dated 8 March 2011, on p105 of the record as proof of the AG's refusal to prosecute the defendant and the reasons why. The letter is apparently from the defendant to the Ministry of Defence. In paragraph three of the letter, the defendant writes that he; - ".borrowed USD$3.5 million from Mahomed. At no time was my company Breco

International involved in any way whatsoever, or the other applicant Sahawi International who alleges that meetings were held between them and Breco International, which is simply not true. The dealings in this matter were entirely between me and Mahomed". The defendant acknowledged owing the money to the plaintiff in his personal capacity in this letter. The letter was given to the plaintiff by Mr. Chris Mutangadura a Chief law Officer in the AG's office. The defendant made an undertaking to settle the amount outstanding at the meeting with the AG. He promised to pay by 28 February 2012. He needed time to dispose of some assets as he was experiencing cash flow problems due to being placed on the sanctions list.

The defendant did not pay by 28 February 2012. In the letter dated 1 November 2012 at record p 113, it was confirmed that a meeting had taken place before the AG. Letter from the defendant's legal practitioners Atherstone & Cook at record p 117 dated 14 December 2012 advised that the defendant was causing the sale of property in Mozambique in efforts to settle his indebtedness to the plaintiff. In a letter dated 18 February 2013, from Venturas & Samkange, which appears at record p 118 payment details were given so that the plaintiff could deposit the money into a trust account. The defendant did not write back to dispute liability but by 15 March 2013 no payment had been made (see letter from Venturas & Samkange rp120). In para 3 of the letter to the AG dated 27 March 2013 (rp125), the defendant's legal practitioner made an undertaking to make good the prejudice 'without admission of liability'. He said that the defendant was in the process of selling his house in the United Kingdom.

The defendant had admitted liability and acknowledged indebtedness in his personal capacity to Shortie Mahomed, Haji Kalil, Ayoub Doud, and Shingai Mutasa up to the day before trial. The defendant never intended to pay back the money which he borrowed so he misrepresented himself giving rise to the criminal charges. He did not mention where the funds were going or what he would use them for. He paid a total of USD$ 400 000-00. At one stage he tried to pay USD$3 500 000-00 by depositing it into an offshore account in Jersey but the payment was returned by the bank because the source of the funds was not clear at a time when the defendant was under investigation by the Serious Frauds Squad. Thereafter defendant said that all his funds were blocked because he had been placed on the sanctions list. The defendant's trustees then wrote a letter in which they said that he had instructed them that the payment had been made in error (rp104, par 5). When the trustees confirmed that the defendant had no

intention to pay, that played apart in the consideration of pressing criminal complaint. The criminal complaint was placed after legal advice from Mr *Samkange* (rp128, par 4). The defendant was only detained or one or two days at the most.

During cross examination, the plaintiff said that he knew nothing about the defendant being denied bail and confirmed that he never asked for proof of the legal costs. He reiterated that nothing was said about the meeting at the AG's office being without prejudice. On the criminal prosecution of the defendant, the witness confirmed that the plaintiff took money from him with no intention of paying, based on the misrepresentation that he needed a loan and that he was willing to re-pay. He disputed the assertion that the e-mail from the Maitland Trustees, which he relies on as proof that the defendant did not intend to pay, was written well after he had already laid the criminal complaint. He denied that the police advised him that this was a civil matter or that they had refused to prosecute the defendant for this reason. He denied that he had pursued a civil matter using the criminal process.

Mr *Jonathan Samkange* testified on behalf of the plaintiff. He told the court that;- he is a senior partner with Venturas & Samkange, a legal practitioner, a member of Parliament for Mudzi South constituency, chairman of the parliamentary legal committee, and has been admitted to practice law in Namibia from 2003 to date. He was present at a meeting held on 17 August 2012 which was convened by Mr Tomana the AG, for the express purpose of settling the dispute between the plaintiff and the defendant. The AG had declined to prosecute the defendant because it was not in the national interest to do so. He believed that the defendant was helping our army with the war in the DRC. He had refused to issue a certificate of no intention to prosecute to enable the plaintiff to mount a private prosecution. He decided to bring the parties together at a round table conference to facilitate an out of court settlement. The defendant was willing to pay but not what plaintiff was asking for. The plaintiff agreed to forgo interest. A figure of USD$3.8 million was agreed on. The defendant shook the witnesses hand to seal the deal. The defendant was happy that interest had not been charged to his personal liability he advised the plaintiff to pursue interest payments from his company. There was no discussion or mention of the privileged nature of the meeting at the outset or at any other stage or during any of the preliminary meetings held by the parties.

The contents of his letters were correct, (rp113, 114-5) and a summary of what was agreed that is why the letters were marked without prejudice. The defendant made many promises to pay after the deadline expired in February 2013. Mr *Chagonda* wrote several letters in which assets were said to be in the process of liquidation to settle the debt. When it became clear that the defendant was not a man of his words, and the AG now had evidence that defendant had not told the truth about his involvement with our army in the DRC, he recommended that plaintiff lodge a criminal complaint for fraud against the defendant (see rp128, par 4). The AG was now prepared to prosecute. The basis of the criminal complaint was that the defendant had misrepresented to the plaintiff that he wanted a loan when he never had any intention of paying back the money. The parties' transaction also violated exchange control regulations which were in force at the time. The defendant was making offers to settle the matter out of court the day before this trial commenced.

During cross examination Mr *Samkange* refused to accept that the substance of out of court settlement negotiations which took place a few days before trial commenced were privileged, or that they had been conducted on a without prejudice basis. He said the discussion was immaterial it was the substance of the discussion which was material to a determination of the privileged nature. On the criminal prosecution, Mr *Samukange* said his recommendation that plaintiff place criminal charges was based on the contents of the letter from the trustees, not on plaintiff's instructions. He said that defendant could have made alternative arrangements to pay the USD$3.5million that was returned by plaintiff's bank if he was sincere in his intention to re-pay the money.

Mr *Samkange* denied that he was instrumental in using the criminal route to recover money from the defendant He said he disagreed with the judgment of the criminal court which expressed misgivings at the use of the criminal sanction in what it described as a purely civil matter. The plaintiff closed its case. The court did not formulate the impression that the two plaintiff's witnesses were being economical with the truth or attempting to mislead it. There were some unsavory aspects of the testimonies given but these aspects go to certain legalities and need not necessarily have any bearing on the question of whether the defendant is liable to the plaintiff for the sum claimed. The court accepts that a lot of time has passed since the meeting of 17 August 2012 which was convened by the AG.

The plaintiff's testimony was clear. He had some difficulty with questions put to him regarding the maliciousness of bringing criminal charges against the defendant. He could not explain why the criminal complaint was made when he was still being represented by Mr. Mhiribidi, yet in his testimony he told the court that he had brought the criminal complaint on Mr *Samkange*'s advice. Perhaps more care should have been taken to elicit information about the criminal sanctions by separating them into two, 2009 and 2011. Mr *Samkange*'s evidence was clearly calculated to buttress his client's case to the greatest extent possible. His evidence of his recollection of whether the AG classified the meeting of 17 August 2012 as without prejudice was a bare denial of that fact. He buttressed his client's bare denial. His evidence as to the basis on which criminal charges were brought against the defendant was not time sensitive in that there appears to be an anomaly between the date the charges were brought and the date when he assumed agency in the matter.

The defendant opened his case by taking the witness stand in his own defence. The defendant told the court that; - the money which was borrowed from the plaintiff between 2000-2001 was borrowed not by him personally, but by him on behalf of a company called KMC which was operating in the DRC at that time. The plaintiff was aware of this as evidenced by his admission to that effect in the e-mail at rp103, par 2, to Mr. Cassell, a trustee of the Maitland Trust. Tromult Private Limited was the company which was handling operations in the DRC. The plaintiff was not a director of Tromult. He had been placed on the sanctions list and consequently was removed as a beneficiary of the Maitlands Trust. On 3 May 2009 criminal charges were put to him and a warned and cautioned statement recorded, see rp107. In that statement plaintiff denied that he borrowed the money in his personal capacity and told the police that the money was lent to KMC which was based in the DRC. See also rp108-11 where the same defence appears. At the meeting convened by the AG in 2012, no personal liability to re-pay the money was assumed. He agreed to pay USD$3.8 million by 28 February 2013 because he felt morally obligated to do so. He denied that he penned the letter of 8 March 2011 which appears at rp105-106 in which he admitted to owing the money.

He was prosecuted and acquitted in 2013 after being arrested and taken to prison. He was put in a cell with one toilet and 79 people who were smoking all night and some of whom behaved aggressively towards him. He was in custody for 3-4 days. He had had double bypass

heart surgery and was denied his medication which he should take every morning and evening. During cross examination the witness denied having accepted personal liability to settle the debt. He said that he is 76 years old and has a short spasm memory so he forgets things. He accepted that he has a moral obligation to pay the plaintiff. He admitted to having agreed to pay by 28 February 2013. He has no recollection of shaking hands with Mr *Samkange* to seal the deal in 2012. He said his inability to pay by the agreed date was because of sanctions, not unwillingness to pay. He said that he tried to sell assets to pay and failed but he cannot recall the details due to his faulty memory. He denied that when he instructed the trustees of the Maitland trust to deposit money into the plaintiff's account in Jersey he already knew that he was on the sanctions list and under investigations and that the money would be returned to the trust.

On the malicious prosecution allegations, defendant said that because he was put in jail and plaintiff has approached his friends and family and bad mouthed him and continues to do so he should be paid damages. He admitted that the police arrested and incarcerated him not the plaintiff, but insisted that the plaintiff instructed his lawyers to set the criminal sanction in motion. The witness was hazy on the details of what actually happened or how many days he was incarcerated for due to his faulty memory. He referred question on the legal fees incurred to his legal practitioners of record. The defendant said that he has not paid the plaintiff because he has no access to cash. He is cash poor because he has remained on the sanctions list and lost significant assets in the United States. He admitted that he sold his mine in the DRC for USD$35 million and denied that in light of this fact his failure to pay the plaintiff was criminal. The letter on rp105 may have been written by him he cannot recall whether he wrote it or he didn't

Mr *Innocent Chagonda* testified on the defendant's behalf. He told the court that; - he is the defendant's legal practitioner of record and a partner at Messrs Atherstone & Cook. He confirmed that he was present when warned and cautioned statements which appear at r pp107, 108-111 were recorded from the defendant in 2009 in connection with fraud and contravening exchange control regulations charges were put to him. In 2009 the docket was closed because the police view was that the matter was civil, not criminal. In 2011 the AG again declined to prosecute as set out in the letter at rp131. Several meetings were held from 26 July 2012. On 27 July 2012 Mr Tomana said that the meeting was without prejudice. From the letter on rp131 the agenda was set and the impression created was that the meeting would be without prejudice. On

17 August 2012 the meeting was said to be without prejudice. Defendant felt morally obligated to pay the money owed to the plaintiff by the company in the DRC.

The defendant was placed in a difficult position by the sanctions imposed on him and his companies. He felt responsible for the prejudice suffered by the plaintiff. The defendant made it clear that his offer to pay was made without an admission of liability on his part. The witness could not recall details of who suggested which figure or whether defendant shook Mr *Samkange*'s hand but could testify that eventually an agreement was reached. The defendant refused to pay interest and the plaintiff agreed to that. The defendant would cause payment to be made on the basis of morality. He needed six months to raise the money because he was on the sanctions list. The draft agreement at rp113-115 was not an accurate reflection of what the parties agreed and for that reason it was never shown to the defendant, or signed by him. The witness was taken aback at the suggestion that he dictated the letter at rp118 to himself and he denied doing so.

During cross examination the witness said that at the time when the meeting was held before the AG, he was not aware of the fresh pending criminal charges against the defendant. He said that the dispute between the parties emanated from the circumstances in which the meeting was held before the AG, that the discussions were held without prejudice and are therefore privileged, and should not be relied on to found a cause of action. He insisted that the defendant's intention was 'to cause money to be availed to the plaintiff'. The witness denied ever having made an undertaking to chase up payment or to ensure that defendant paid. He said that only two letters were marked without prejudice because the agenda for the meeting set by the AG made it clear that all discussions were to be without prejudice. The letter which appears at rp105 came as a surprise to the witness who only saw it last week. The defendant closed its case.

The defendant was not a good witness because when he was asked a difficult question he simply said that he was old, that he was on medication for his heart condition, and that he had no recollection of the event that he was being asked about. At some stage during cross examination be became belligerent and the court had to task counsel for the plaintiff to elicit proper responses to the questions asked which he was responding to with the answer 'if you say so'. The court felt that a clear yes, or no, or an "I don't recall", gave a clear indication as to the evidentiary value to be placed on the answer. Mr *Chagonda* was a good witness who gave evidence in a clear and

unequivocal manner. He too however appeared to suffer from the disease of being unable to remember the littlest things such as who suggested which figure to use for settlement or who shook whose hand. His memory was remarkably clear on two aspects, that the meeting before the AG was understood by all parties to be on a without prejudice basis, and that, the defendant made himself clear at the meeting that he was not assuming liability, rather he was giving an undertaking to cause funds to be availed to the plaintiff.

The court must determine whether there was a compromise agreement whereby the defendant agreed to pay the amount in question to the plaintiff in his personal capacity, whether the compromise agreement is privileged information which cannot be used to found a cause of action against the defendant, and whether the plaintiff caused the malicious prosecution of the defendant giving rise to a claim for damages in the sum claimed by the defendant. It was submitted on behalf of the plaintiff that the defendant accepted the existence of the agreement sued upon both expressly and through conduct. The court was referred to the case of *Sullivan* v *Constable*[1], where it was held that:

> "It seems to me that the defendant, by his conduct and that of his agent, has so acted that the plaintiff was reasonably entitled to believe that the defendant was assenting to the position which he so plainly asserted in the correspondence; and consequently that the rule in Freeman v Cooke, 2Ex.254, governs this case. This rule is stated in *Smith v Hughes, L.R. 6 Q.B. 597, @p607*, as follows;-
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> If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms".

It is arguable that the defendant's conduct of:

(a) attempting to sell assets

(b) Causing payment of USD3.5 million be forwarded to the plaintiff's Jersey account makes him bound as if he intended to be legally bound by his undertaking to cause funds to be availed to the plaintiff

[1] 48 T.L.R. 267

The court was also referred to *S.A. Railways & Harbours* v *National Bank of SA Ltd*[2] where it was held that:

> "The law does not concern itself with the workings of the minds of parties to a contract, but with the external manifestation of their minds. Even therefore if from a philosophical standpoint the minds of the parties do not meet, the law will, when fraud is not alleged, look at their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which courts of law can determine the terms of a contract".

It was submitted on behalf of the plaintiff that the meeting before the AG resulted in a resolution that the defendant was to pay the plaintiff an agreed sum by the 28th of February 2013. The defendant has not disputed this, he accepted that he was to pay and set out to liquidate his assets and conducted himself in a manner consistent with diligent efforts to pay. He was disappointed when the plaintiff seemed to distrust him. He felt morally obliged to pay. Was his moral obligation irrelevant to his obligation to pay after agreeing to do so? The defendant, on the question of whether an agreement was reached on 17 August 2012 before the AG, submitted that a compromise is described as a settlement agreement of disputed obligations whether contractual and otherwise, and referred to; *The Law of Contract in South Africa*[3]*, and Georgias & Anor* v *Standard Chartered Finance Zimbabwe Ltd*[4]. It was submitted further, that for a compromise to be valid, there must be offer and acceptance, the hallmarks of a contract. The court was referred to *PG Industries (Zim) Ltd* v *Machawira*[5], which quoted with approval from *R.H.Christie, Business law in Zimbabwe*[6], as follows:

> "To be effective in creating a contract, acceptance must be so clear and unequivocal as to leave no reasonable doubt in the offeror's mind that his offer has been affected: *Selected Mines & Marketing (Rhodesia) Ltd* v *Trees Asbestos Mining Co. Ltd 1952 SR5.* The reason for requiring a higher degree of certainty than the standard proof on the preponderance of probability that is universally accepted in civil as opposed to criminal cases is that the offeror is entitled to expect an answer on which he can immediately act, without interrupting his business while he weighs up

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[2] 1924 AD 704 @ 715

[3] 6th ed p423

[4] 1998 (2) ZLR 488 (S) @ 496 D-G

[5] 2012 (1) ZLR 552 (H)

[6] 2nd ed-p39

> conflicting probabilities in order to decide whether he has a contract or not. A purported acceptance in the form of 'Yes, but… will not do, because by seeking to add or subtract from the terms of the offer it does not create the necessary agreement but leaves negotiations open". (Underlining for emphasis)

The defendant submitted that the plaintiff failed to discharge the onus of proving that a contract existed between the parties, for the reason that even though the defendant agreed to pay before the AG, his acquiescence was qualified by his reference to a moral obligation to pay and to his reference to the fact that he was not assuming legal liability to pay, he was assuming a moral obligation to pay because the DRC Company was on the sanctions list and incapable of fulfilling its obligation to the plaintiff. We must decide if in effect that qualification left negotiations open, whether it added or subtracted from the terms of the offer resulting in there not being any legally binding agreement. In other words was the defendant's acceptance of the plaintiff's offer clear and unequivocal leaving no doubt in the plaintiff's mind that the offer had been accepted? It was submitted on behalf of the plaintiff, on the law of compromise, that:

> "Our law of contract has for long recognized that a new agreement that settles a dispute operated 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 beyond a compromise and raise defences to the original cause of action when sued on compromise(see *Road accident Fund* v *Ngulube 2008 (1) Sa 432 (SCA), Lieberman* v *Santam Ltd @000 (4) SA 321 (SCA) pa 11-12, Hamilton* v *Van Zyl; 1983 (4) SA 379 (E), Majora* v *Kuwirirana Bus Service (Pvt) Ltd 1990 (1) ZLR 87 (SC).*
> This in our law is referred to as a compromise. The Courts in South Africa have moved on to hold that a compromise need not necessarily however, follow a disputed contractual claim. Any kind of a doubtful right can be the subject of a compromise. A valid compromise may even be entered to avoid a spurious claim. In establishing whether a claim has been compromised one is concerned simply with the principles of offer and acceptance. See *E Bob A Lula Manufacturing & printing CC Kingtex Marketing (Pvt) Ltd 2008 (2) SA 327 (SCA)* (underlining for emphasis).

The court was also referred to the case of *Georgias* v *Standard Chartered Bank supra* on the principles that govern a valid compromise agreement. It was held 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@462, Tauber* v *Von Abo 1984 (4) Sa 482 (E) @ 485 G-I, Karson* v *Minister of Public Works 1996 (1) SA 887 (E) @ 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) @ 268 E-H.*As it brings legal proceedings already instituted to an end, a party sued on a compromise is not entitled to raise defences to the original cause of action".

I accept the submissions made on behalf of the plaintiff that these authorities set out the following principles;-

1. Parties to a dispute can agree to resolve that dispute for whatever reason.
2. The resolution of the dispute under such circumstances results in the setting out of the parties' intention and it extinguishes the old cause of action.
3. The parties are involved in a give and take where each part abandons its old position and makes a concession which may diminish his claim or increase his liability.
4. A compromise creates a new liability. Once a compromise is reached a party sued may not raise defences to the original cause of action.
5. Once a compromise is reached issues become *res judicata*.
6. The court must ask itself whether there was an offer and an acceptance in determining whether a compromise was reached.

The defendant addressed two scenarios on offer and acceptance, the first in which the plaintiff is the offeror and averred that the plaintiff's negative offer was that the defendant accepts personal liability to pay or in the alternative be prosecuted privately in a criminal suit if the state declined to prosecute. Both the defendant and Mr *Chagonda* denied that he agreed to be bound personally, which is why he claims to have refused to sign the draft agreement which was prepared by Mr *Samkange*. It was submitted on behalf of the defendant that the sum of USD$3.8 million was not a compromise figure because the same sum was claimed in the original summons under HC4221-08. The second scenario, in which the defendant was the offeror, was to offer to cause payment to be made. The differences in the letters of 1 November 2012, and 14 December 2012, was submitted to exhibit evidence that there was no meeting of the minds regarding the issue of personal liability. It was submitted that defendant denied personal liability in para(s) 2.4 and 2.5 of his plea in HC 4021-08 filed on 20 January 2009 and in his warned and cautioned statements of 3rd May 2009, and 17 June 2011.

The failure by the plaintiff to withdraw criminal charges against the defendant was submitted to be further evidence that there was no meeting of the minds between the parties,

because that term of the compromise was not complied with. The defendant cited the case of *Pioneer Transport (Pvt) (Ltd)* v *Delta Corporation & Anor*[7], where it was held that;-

> "The nature of a contract is that two or more parties thereto reciprocally promise, or one of them promises to the other or others, to give some particular thing to do or to refrain from doing some particular act. There is consequently a presumption that in every bilateral or synallagmatic contract the common intention is that neither should be entitled to enforce the contract unless he has performed or is ready to perform his own obligations".

I am persuaded by the submissions made on behalf of the plaintiff that what is material to the resolution of the issue of offer and acceptance is that the defendant said he would pay the agreed sum by an agreed date at the meeting with the AG. His reasons for agreeing to pay are irrelevant, that fact that he does do is material. A compromise can result in an increase in liability or in a diminution of a claim. There is no reason why a compromise cannot result in an assumption of liability to pay. The evidence supports the finding that the defendant assumed liability to settle the debt. With all due respect to counsel for the defendant, it is trite that when a compromise is reached, defences to the original claim can no longer be relied upon. There was not much evidence adduced before the court as to existence of the company based in the DRC, KMC. No documents were placed before the court to show whether this is a duly registered company and whether the defendant had a resolution authorizing him to borrow money from the plaintiff on its behalf at the material time. The defendant admitted to using 'some' of the money in the DRC and did not take the court into his confidence as to whether he was authorized by KMC to utilize the loan elsewhere or for other business not related to KMC.

In my considered view, the defendant is hiding behind a finger when he stipulates that the money was borrowed on behalf of KMC. When the trustees of the Maitland Trust sent payment to plaintiff's account in Jersey, which payment was subsequently rejected by plaintiff's bank, there was no mention of KMC. When the trustees advised plaintiff that defendant had instructed them not to make another attempt to send the money, there was no mention of KMC. In each letter when defendant has admitted that he agreed to pay the money there is no mention of KMC. The company in my view was used by the defendant as a shield to evade liability for exchange control violations, which formed part of his defence in the original claim and may not be used by him as a defence in these proceedings, after extinguishing the old cause of action and creating a

[7] 2012 (1) ZLR 58 (H) @ 72E

new one when he agreed to pay. There was an offer. There was an acceptance by the defendant. The fact that plaintiff subsequently failed to withdraw the criminal charges against the defendant as promised may give rise to a cause of action of failure to fulfill the compromise terms. It does not, on its own, support the assertion that there was no meeting of the minds, or an offer and acceptance, because one of the terms was subsequently not complied with. Similarly the defendant failed to pay by the agreed date. That does not mean there was no compromise agreement. It is the finding of this court that the parties entered into a compromise agreement on 17 August 2012, in terms of which the defendant assumed liability to pay to the plaintiff the sum of USD$3 872-123 by 28 February 2013. The fact that he agreed to pay because of a perceived moral liability, because he and his companies had been placed on the sanctions list, because his attempt to deposit plaintiff's money into an account in Jersey had failed, because he was a gentleman and a man of honor, a man of his word, became irrelevant as soon as he agreed to extinguish the old cause of action and to create a new one.

I am further persuaded by the submissions made on behalf of the plaintiff that the defendant has no defence in terms of the pleadings filed of record. It is trite that the 'object of pleadings is to define the issues'. It is also trite that ', the parties will be kept strictly to their pleas where any departure would cause prejudice. See *Robinson* v *Randfontein Estate GM Co. Ltd AD @198, and Shill* v *Millner*[8]. It was submitted on behalf of the defendant that '…a court will not enslave itself to the pleadings in complete disregard to its duty to decide the real dispute between the parties. As long as there no likelihood of prejudice being occasioned to one or other of the parties, the court should not lightly disregard a point which has been thoroughly been investigated". See *Musadikwa* v *Minister of Home Affairs & Anor*[9]. I do not find this submission persuasive. The defendant did not plead a defence. His bare denial that an agreement was not entered into was not supported by the evidence in terms of the pleadings or *viva voce* evidence. No witness contradicted the core averments made on behalf of the plaintiff that a compromise was reached and the parties agreed that defendant would pay the agreed sum by 28 February 2013. The exchange control defence is not available to the defendant as it was a defence based on the original cause of action which had been extinguished when the compromise was reached.

[8] 1937 AD 101 @ 105

[9] 2000 (1) ZLR 405 (H) @ 406A

Plaintiff would clearly be prejudiced by the admission of a defence that was not specifically pleaded, at this stage. In any event, there was no application made to the court for the plea to be amended.

The next issue to be determined by the court is the 'without prejudice' principle. It was submitted on behalf of the defendant that the undated letter from the then Chief Law Officer in the AG's office, Chris Mutangadura, set the agenda for the meeting. The evidence of Mr *Chagonda* for the defendant was that the AG was not aware of the civil proceedings pending in HC 4221-08. The court was told that all the parties to the meeting understood it to be on a without prejudice basis. The negotiations were said to be 'negotiations between the parties with a view to settlement of their differences'. The court was referred to two cases; *Millward v Glasser*[10], *Naidoo* v *Mariner Tade Insurance Co. Ltd*[11]. The plaintiff's first submission, in relation to this issue, is that this issue does not arise from the pleadings. It is not a defence which was averred in the defendant's plea, nor was there an application made to the court to amend the plea. The second point advanced is that there are some letters which were exchanged by the parties in which the agreement between the parties was set out and the undertaking to pay recorded which were not marked 'without prejudice'. The third point is that once an agreement is reached the court cannot inquire into the negotiations preceding it.

Finally, it was submitted on behalf of the plaintiff that the defendant has misunderstood the application of the without prejudice principle. The principle was discussed in the case of *Kazingizi & Anor* v *Equity Properties (Pvt) Ltd*[12], which was cited as authority for the proposition that parties can only rely on the inscription 'without prejudice' if the matter is not resolved. Here is what the court in that matter said;-

> "The expression 'without prejudice' is often written on the face of a document or communicated expressly to convey the message that the party communicating the document will not be prejudiced by the subsequent communications which are conducted with a view to the settlement of the dispute.

[10] 1950 (3) SA 547 (W)

[11] 1978 (3) SA 666 (A)

[12] HH 797-15

> Of course even parties who do not know what they are doing or why they are doing it often timidly inscribe the maxim on correspondence out of fear of being held to account for what they would have communicated. I say this because there is no logic whatsoever for a party who accepts liability to refund money paid in anticipation of the conclusion of a sale agreement and is making a payment plan, to then send the payment plan on a 'without prejudice' basis. What prejudice is there to talk about?
>
> In our law, documents do not necessarily have to be marked 'without prejudice', for them to be protected. *Gbashe* v *Nene 1975 (3) SA 941 E.* Inversely, merely labeling a document 'without prejudice' does not necessarily confer privilege on the contents. What is important is whether the communication is considered privileged from an objective point of view. *Crawford* v *Roset & Cornale (1992) 69 B.C.L.R. 2nd Ed 349; Podovinikoff* v *Montgomery (1984), 59 B.C.L.R. 204.*
>
> As a general rule, statements that are made expressly or impliedly on a 'without prejudice' basis in the course of bona fide negotiations for the settlement of a dispute will not be allowed into evidence. *Naidoo* v *Marine & Trade Insurance Co Ltd 1978 (3) SA 666.* The resolution of a dispute with a genuine view to settlement appears to be the main consideration. If the settlement is thereafter reached, the negotiations leading up to it should be available to the court since the whole basis of the non-disclosure would have fallen away. *Gcabashe* v *Nene (supra).* (Underlined for emphasis)

Applying the above to the facts of this matter, I am persuaded that the details of the meeting before the AG on 17 August 2012 are not privileged because the matter was resolved. The details would be privileged if the meeting did not result in a resolution of the dispute. Coupled with the fact that the objection to disclosing what took place at this meeting was not raised as a part of the pleadings, the inevitable conclusion is that the details of the meeting held on 17 August 2012 are not privileged and disclosing them to the court is not prejudicial to the defendant because the meeting resulted in the dispute being settled. I also find persuasive the submission made on behalf of the plaintiff that an agreement cannot be without prejudice or privileged, only the negotiations can. Having found that there was a valid compromise entered into by the parties, and that, such an agreement cannot be held to be privileged in the sense of being precluded from being relied on, it follows that the plaintiff has established that defendant is liable to him in the sum claimed.

The last issue for determination is that of the claim in reconvention. In determining this claim it has been submitted that the court should consider whether the evidence before it establishes a cause of action. A cause of action has been defined as;-

> "…the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all the plaintiff must set out in his declaration in order to disclose a cause of action". See *Abrahamse & Sons* v *SA Railways & Harbours 1933 CPD626, Peebles* v *Dairiboard Zimbabwe (Pvt) Ltd, Patel* v

> *Controller of Customs & Excise 1982 (2) ZLR 82(H), Denton* v *Director of Customs & Excise HH216-89, Hodgson* v *Granger & Anor HH133-91, Dube V Banana 1998 (2) ZLR 92 (H).* See *Mukahlera* v *Clerk of Parliament & Ors*[13], where the court relied on the case of *Dube* v *Banana supra,* in which it was held that; "….the cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed…"

So, in order for there to be a 'cause of action', every fact which gives rise to a successful claim must be present. Every act which is relevant to the plaintiff's claim, if the plaintiff is to succeed in its claim, must be present before it can be said that there is a 'cause of action'. See also *Peebles* v *Dairiboard Zimbabwe supra.*

The cause of action in an action for a claim of damages caused by malicious criminal or civil proceedings is the *actio iniuriarum.* The plaintiff bears the onus in respect of all the elements of the delict, including that of *animus iniuriandi.* See Amler's *Precedents of Pleadings* 7th ed, Harms, pp 273-274, *Van der Merwe* v *Strydom* [1967] 3 All SA 281 (A), *Beckenstrator* v *Rottcher Theunissen* [1955] 1 All SA 146 (A), *Rudolph* v *Minister of Safety & Security* [2007] 3 All SA 271 (T). To succeed with a claim for malicious prosecution, a claimant must allege and prove that:

(a) The defendant set the law in motion-instigated or instituted the proceedings;
(b) The defendant acted without reasonable or probable cause;
(c) The defendant acted with malice, or (*animo iniuriandi);* and
(d) The prosecution has failed. See *Minister for Justice and Constitutional Development* v *Moleko* [2008] 3 All SA 47 (SCA) , *Bande* v *Muchinguri* 1999 (1) ZLR 476 (H) See also *Econet Wireless & Ors* v *Sanangura* [14]*,and Luke davies* v *Premier Finance Limited*[15]

The plaintiff must allege and prove that the defendant instituted the proceedings, that the defendant actually instigated or instituted them. The mere placing of information or facts before the police, as a result of which proceedings are instituted, is insufficient. See *Lederman* v *Moharal Investments (Pty) Ltd* [1969] 1 All SA 297 (A). The test is whether the defendant did more than tell the detective the facts and leave him to act on his own judgment. At pp197, the court stated that:

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[13] 2005 (2) ZLR 365 (SC)

[14] SC 53-2013

[15] HH235-10

> "Inherent in the concept 'set the law in motion', 'instigate or institute the proceedings', is the causing of a certain result, i.e. a prosecution, which involves the vexed question of causality. This is especially a problem where, as in most instances, the necessary formal steps to set the law in motion have been taken by the police and it is sought to hold someone else responsible for the prosecution. Amerasinghe, Aspects of the *Actio Injuriarum* in Roman-Dutch law, recognises that 'the problem is essentially one of causation' and suggests (at p. 20):
>
> > 'The principle is that where a person acts in such a way that a reasonable person would conclude that he' (i.e. the defendant) 'is acting clearly with a specific view to a prosecution of the plaintiff and such prosecution is the direct consequence of that action, that person is responsible for the prosecution.'"

The plaintiff must allege and prove that the defendant instituted the proceedings without reasonable or probable cause, a phrase which means 'an honest belief founded on reasonable grounds that the institution of proceedings is justified. The concept involves an objective and a subjective element. See *Beckenstrater* v *Theunisen* [1955] 1 All SA 146 (A). In the context of *animus iniuriandi* malice means *animus inuiriandi* and is not a separate element of the delict. See *Moaki* v *Reckitt & Coleman (Africa) Ltd* [1968] 3 All SA 242 (A). Malice in this context does not mean ill will or a spirit of vengeance; it has a wider connotation. It includes any motive different from that which is proper for the institution of criminal proceedings, which is to bring an offender to justice and thereby aid in the enforcement of the law. See a Guide to the Zimbabwean Law of Delict (2006), Feltoe; *Bande* v *Muchinguri* supra.

The plaintiff testified that he had received advise from his legal practitioners that defendant had perpetrated a fraud on him and that he made a report to the police based on this advice. Mr *Samukange* confirmed that the plaintiff had acted on his advice. In this case, it is common cause that the proceedings in *S* v *Bredenkamp 2013 (2) ZLR 288(H)* were terminated when the now defendant was discharged at the close of the state case. Did the plaintiff do more than give the police information and leave them to decide whether to prosecute the defendant? The defendant argues that there is no doubt that plaintiff instigated the criminal proceedings against him and was malicious. The defendant relies on the letter from the plaintiff's legal; practitioners dated 25 March 2013 in which it is observed that defendant's conduct of borrowing the money with no intention of returning it fits the definition of fraud in the Criminal Code and establishes all the elements of fraud. The defendant relies further on the finding made in *S* v *Bredenkamp supra,* p 239F-H, that defendant had made two payments of USD$200 000-00 in 2001 and a further payment of USD$3, 5 million in 2006 after he had sold his mine in the DRC.

There was also a finding made at p 229E that 'the driving force behind the prosecution was the complainant (Plaintiff). The Prosecutor General succumbed to the pressure from the complainant to prosecute an apparently civil matter and therefore act in complicity with the complainant to use a criminal court to put pressure on the accused in order to collect a civil debt'. See also *Ngonidzashe Sanangura* v *Econet Wireless* HH 398-12. It was submitted that these findings pointed to a motive different from that which is proper for the institution of criminal proceedings, which is to bring an offender to justice and thereby aid in the enforcement of the law.

It was submitted on behalf of the plaintiff that a person who has not been paid for ten years cannot be said to abuse court process in seeking the prosecution of the fraudster, that this was plaintiff's motivation and that this does not exhibit any malice at all, in the sense of pushing the police. The plaintiff maintains that he acted on Mr *Samukange*'s advice at the time and it was only when defendant breached the undertaking that he had made to pay that a police report of fraud was made. The plaintiff had knowledge that the defendant had the money after the attempt to pay USD$3.5 to his account in Jersey was made. The e-mail from the Maitland Trustees confirmed that defendant no longer intended to pay the plaintiff after the money was returned because of his instructions to the trustees that he had authorized them to pay in error. I accept that this evidence was not placed before my sister Judge Chatukuta in *S* v *Bredenkamp supra.* The criminal court did not hear the evidence of defendant or verify it through cross examination since the matter was dismissed at the close of the state case. I am unable to accept that the plaintiff caused the prosecution of the defendant in the sense of doing more than merely report that a crime had been committed.

There was no evidence placed before this court to prove that the USD$50 000-00 claimed by the defendant for legal costs, not a fee note, or a bill of costs. The defendant referred the question to his legal counsel and Mr *Chagonda* gave no evidence on that aspect during his examination in chief. There was also no serious attempt made to adduce sufficient evidence to enable the court to assess the damages suffered by the defendant as a result of his detention and prosecution, if any. The court was left with an unclear picture as to the extent of the trauma suffered by the defendant, whose evidence to the effect that this was his first arrest was discredited during cross examination. The defendant's version of his arrest and incarceration was

sketchy and garbled, and in some instances clearly fabricated, by a witness who told the court that he cannot remember events which took place last week because of his high blood pressure medications, let alone events which took place years ago. His account of being detained in a cell together with over 70 men who smoked like chimneys all night and some of whom behaved 'aggressively' towards him was quite frankly, incredible. The defendant had no memory of the number of days he was incarcerated, the number of days spent in police cells, or of the process of applying for bail, whether that was done at the magistrates court or before this court.

We find that the report made to the police by the plaintiff was not fake, as in based on false information. We find that the plaintiff did not do anything more than what is required to cause a perceived perpetrator of a crime to be brought to book. We find that the plaintiff could not have been motivated by malice, as in motivated by the desire to induce the defendant to pay, alone The defendant had already caused USD$3.5 million to be deposited into plaintiff's bank account in Jersey. It was defendant's counter instructions to the Maitland Trustees not to make any further attempts to pay that triggered the report of fraud, not an intention to induce the defendant to pay. The claim in reconvention must fail because it is this court's view that the evidence does not support the assertion that the plaintiff caused the prosecution of the defendant without reasonable or probable cause. We find that the plaintiff had 'an honest belief founded on reasonable grounds that the institution of proceedings was justified, when he saw the e-mail from the trustees which his lawyer advised him was evidence that defendant no longer wished to re-pay the money borrowed after undertaking to do so.

In the result it be and is hereby ordered that:

1. Judgment in favor of the plaintiff, as against the defendant be entered in the sum of USD$3 872 123-00, (three million and seventy two thousand one hundred and twenty three United States dollars).
2. Plus interest thereon at the prescribed rate calculated from 28 February 2013 to the date of payment in full,
3. As well as costs of suit on a legal practitioner and client scale.
4. The claim in reconvention is dismissed with costs on legal practitioner and client scale.

5. The claim for legal costs attendant on defendant's criminal prosecution, in the sum of USD$50 000-00 be and is hereby dismissed with costs on a legal practitioner and client scale.

*Venturas & Samkange,* plaintiff's legal practitioners
*Atherstone & Cook,* defendant's legal practitioners