

YAKUB MAHOMED  
versus  
ADAM EBRAHIM MOHAMMED DUDHIA  
and  
SOMAYYA MEER

HIGH COURT OF ZIMBABWE  
MUNANGATI-MANONGWA J  
HARARE, 5 March, 7 March & 15 March 2018

### **Opposed matter**

*D Tivadar*, for the applicant  
*E Jera*, for the respondents

MUNANGATI-MANONGWA J: This case has brought to the fore the question “what constitutes a valid court order” in situations where a court order incorporates a deed of settlement. *In casu* the applicant seeks the setting aside of a consent order granted by this court on the 15<sup>th</sup> March 2017 following a deed of settlement entered into by the parties on the 6<sup>th</sup> March 2017. Whilst the draft order refers to other consequential relief, the applicant only seeks the setting aside of the consent order. The application is vehemently opposed.

The order in issue reads as follows:

“IT IS ORDERED BY CONSENT THAT:

1. The defendant shall pay to the plaintiff’s the sum of one million five hundred thousand United States Dollars (US\$ 1 500 000-00) in full and final discharge and settlement of the debt owed to the plaintiffs together with interest at 10% *per annum* effective from 6<sup>th</sup> March 2017 to date of final payment both dates included.
2. The debt and interest shall be paid in accordance with the terms of the deed of settlement signed by the parties on the 6<sup>th</sup> of March 2017 which Deed of Settlement is incorporated as an order of this court.
3. The defendant will pay the costs of this suit on an attorney and client scale.”

Relying on r 56 of the High Court Rules 1971 the applicant seeks the setting aside of the consent order. The brief facts of the case are as follows: applicant borrowed money of various amounts from the respondents over a period exceeding 5 years. In 2017 respondent instituted provisional sentence summons against the applicant under case No HC 775/17 seeking payment of the sum of US\$3 400 000.00, 5% interest per annum together with costs.

Soon thereafter the respondents through an *ex parte* urgent application acquired an order for the attachment of monies due to be paid by a third party to the applicant. The applicant lodged an appeal with the Supreme Court. The respondents in reaction filed an urgent application seeking leave to execute pending appeal and in response the applicant filed a notice of anticipation and the matter was set down for hearing. Prior to the hearing parties were able to negotiate *viz* the summons for provisional sentence resulting in a deed of settlement being signed. This led to the disposal of all the matters that were pending determination then including the appeal in the Supreme Court. The parties then approached this court with the deed of settlement seeking an order by consent which was duly granted by MAKONI J as appears above.

According to payment terms in the deed of settlement the applicant was supposed to pay the first instalment of US\$30 000-00 on 30 September 2017 but he only paid same on 21 October 2017. That being so, the respondent perceiving the applicant to be in default issued a writ of execution to recover from the applicant US\$1 282 151-05 (one million two hundred and eighty two thousand one hundred and fifty one United States Dollars and five cents) the outstanding amount. This ultimately led to the applicant instituting this application challenging the court order.

The respondents had raised several points *in limine* some of which were conceded to by the applicant and the rest were not pursued as the applicants decided to then rely on two grounds in supporting this application. As the ultimate issues that the court was called upon to determine this case do not hinge on the referred points *in limine* it is not necessary to refer to them.

Rule 56 upon which the applicant relies on provides:

“A judgment given by consent under these rules may be set aside by the court and leave may be given to the defendant to defend, or to the plaintiff to prosecute his action. Such leave shall only be given on good and sufficient cause and upon such terms as to costs and otherwise as the court deems fit.”

Mr *Tivadar* for the applicant submitted that in establishing good and sufficient cause for the court to set aside the consent judgment applicant was to rely on two factors which in his belief would satisfy this requirement and these were that:

- (a) The amount reflected in the consent order is incorrectly reflected as \$1 500 000-00 yet the actual balance is \$1 282 151-05.
- (b) The order was improper and invalid by virtue of the fact that it incorporated a contractual document being the deed of settlement.

It was Mr *Tivadar*'s argument that whilst the deed of settlement on p 96 in para 1 referred to the amount outstanding as \$1 500 000-00 (one million five hundred dollars) a perusal of para 5 thereof shows that the debt was reduced by US\$435 697.89. This amount which was in the plaintiff's trust account was to be allocated as follows: US\$217 848.94 to be paid into a prescribed account in terms of clause 5.1 and US\$217 848.95 was to be retained by the plaintiffs (respondents') herein leaving a balance of \$1 282 151.05. Further US\$30 000-00 paid later also had to be considered. As the sum of \$1 282 151.00 only was due, the variance between this amount and what the order reflected constituted good and sufficient cause justifying the granting of the order.

Most pertinent and mind exercising is the second point raised *viz* the order of MAKONI J. Mr *Tivadar* submitted that the consent order is not a valid court order as by incorporating the deed of settlement between the parties, this became just a record of a settlement agreement between parties. It is not a judgment in the true sense of the term and for this proposition he relied on *Thutha v Thutha* 2008 (3) SA 494 Tkh. He submitted that the order does no more and no less incorporate the contract between the parties setting out the capital sum owing and the terms of payment as well as a breach clause indicating that the full amount becomes payable upon breach of certain terms of the agreement. Thus it is invalid as it is not executable, hence it is not a court order.

In response Mr *Jera* for the respondents submitted that there was no error on the court order *viz* the amount due. Clause 1 of the order clearly states that defendant shall pay the plaintiffs US\$1 500 000-00 and the same amount is reflected in the deed of settlement clause 1. The writ of execution seeks recovery of \$1 282 151.05 taking cognizance of the deed of settlement. It is not applicant's case that the sum of \$1 282 151.05 is wrong. He further submitted that even if it were to be considered that the amount is wrong (which is denied) the relief lies in not disregarding the order but seeking a correction of the amount.

On the issue that there is no valid order to execute upon, Mr *Jera* submitted that if clause 2 which refers to the deed of settlement was to be expunged what remains being clause 1 would still constitute an order clearly stipulating what applicant has to pay to the respondents. He submitted that this case can be distinguished from *Thutha v Thutha* cited above where the court declined to enforce terms of a court order couched as follows:

"The Deed of Settlement being exh B annexed hereto be and is hereby made an order of court".

In that case the applicant applied for contempt of court relief arising from failure by respondent to comply with the obligations set in the deed of settlement. In declining the relief sought ALKEMA J found the terms to be contractual obligations which were incapable of enforcement and did not constitute an order. This, Mr *Jera* argued was not the case herein as the judgment debt is clearly spelt in the order as the amount due in full and final settlement of the claim that had been brought before the court. No ambiguity characterises the order. The applicant had thus failed to establish good and sufficient cause to earn him the setting aside of the order. Rather applicant's conduct in bringing the application is abuse of court process given that there is no denial of the amount reflected on the writ of execution, the process that triggered this application.

In considering what is "good and sufficient cause" it was held in *Georgias & Another v Standard Chartered Finance Ltd* 1998 (2) ZLR 488 (SC) that the factors considered by the court in determining whether to grant rescission of a judgment given in default are applicable in applications for rescission of an order by consent. The same were stated as

- a) The reasonableness of the explanation proffered by the applicant of the circumstances in which the consent judgment was entered into.
- b) The *bona fides* of the application for rescission.
- c) The *bona fides* of the defence or the merits of the case which *prima facie* carries some prospects of success. A balance of probability need not be established.

The court went on to caution that too much emphasis should not be placed on any of the factors rather the factors have to be considered in conjunction with each other regard being made to the application as a whole. As the interests of public policy require finality to litigation the granting of rescission of an order is an indulgence, hence, MAKARAU J (as she then was) stated in *Masulani v Masulani & Others* HH 68/03 that the judgment will not be set aside for the mere asking, the applicant has to discharge the onus for the indulgence to be granted.

Mr *Tivadar* submitted that the order in issue is invalid due to its incorporation of the terms of the deed of settlement which in fact is a contractual document. This he says is good and sufficient cause for rescission to be granted. It makes legal sense to deal with this submission first because if there is no valid order before the court that would dispose of the case. In my view "good and sufficient cause" connotes *compelling and well-grounded reasons* which a court feels obliged to take into consideration in exercising its discretion whether or not to grant its indulgence to a litigant seeking rescission of a consent judgment or even a default

judgment. These compelling and well-grounded reasons are the totality of what comes out from employing the three considerations in the *Georgious* case cited *supra*. Two questions arise from the submission raised pertaining to the validity of the order and these are

1. Is the order invalid.
2. If so does this constitute good and sufficient cause for the court to set aside the order.

In supporting his submission Mr *Tivadar* relied heavily on the case of *Thutha v Thutha* cited *supra*. No doubt this case brings out very interesting points as regards incorporation of deeds of settlement. I hasten to state that in South Africa different Provincial Divisions have adopted different approaches to incorporation of deeds of settlements into court orders. Apparently most of the cases relate to divorce matters but interesting points emerge thereof irrespective. KwaZulu Natal is averse to the practice, yet rules in Gauteng authorises such incorporation. In the case of *Tshetlo v Tshetlo* 2000 (4) All SA 375 (W) the Witwatersrand Local Division found an order incorporating a deed of settlement to be valid. It read:

1. “It is ordered that the marriage is dissolved
2. The deed of settlement is declared binding.”

Pertinent are the following sentiments of ALKEMA J in the *Thutha v Thutha* cited above at page 494 of that case:

“If a court is asked to enforce its order, the first question is...whether the court is faced with a valid order. If not, and if found that it is merely a recording of a settlement agreement between the litigants, without the element of a court requiring obedience with its terms as a court order, it cannot and should not be treated as a court order. In such a case the remedy of an applicant/plaintiff is to sue on the contract and for the court to decide the matter on contractual principles. If the applicant elects to treat the contract as an order of court and asks for enforcement of the order, the application will fail simply on the ground that “the order” which the applicant seeks to enforce is not an order of court, but a contract. If on the other hand the court is satisfied that the order which is sought to be enforced by committal for contempt is indeed a court order requiring obedience, the matter should be decided on such basis without recourse to contractual principles. However the scenario postulated in the first instance should ideally never arise if our courts, as a matter of practice refuse to incorporate deed of settlements into their orders.”

Whilst the matter before that court pertained to contempt of court proceedings the order under consideration was a consent order incorporating a deed of settlement. These comments bring to the fore the problems that can be created by incorporating deeds of settlements in an

order. However it is the manner in which the deed of settlement is incorporated that will determine the validity of the order. Suffice that the headnote in the *Thutha* case notes that;

“This does not mean that a court should not, in appropriate circumstances embody certain terms of a settlement relating to custody maintenance and the settlement of certain proprietary rights in a court order. However when it does so, those terms must be capable of ready enforcement by execution without redress to further litigation. It is inevitable that a court will from time to time, be asked to enforce a court order which incorporates a deed of settlement. In such event it can only do so if it is satisfied that those terms it is asked to enforce constitute terms of a court order intended to carry the authority of the court. If not, the application should be dismissed.”

In my view, these sentiments speak to one important aspect, a judgment must be clear, unambiguous and capable of enforcement signifying the closure of the dispute and ultimate relief to the successful party. The order should speak to execution. Any difficulties presented by the order’s enforcement should be eliminated. Equally any terms which may call for interpretation by another court or call for further litigation have no place in a judgment. The practical realities of litigation are that some parties will settle and reduce that settlement into writing. Settlements benefit parties and the courts as well. *In Ex Parte Le Grange & Another* 2013 (4) All SA 41 the Eastern Cape High Court in a judgment of the Full Bench of Appeal D VAN ZYL ADJP having considered the principles arising from the *Thutha v Thutha* case stated

“Similarly, the policy underlying the favouring of settlement has as its underlying foundation the benefits it provides to the orderly and effective administration of justice. It not only has the benefit to the litigants of avoiding a costly and acrimonious trial, but it also serves to benefit the judicial administration by reducing over-crowded court rolls, thereby decreasing the burden on the judicial system. By disposing of cases without the need for a trial, the case load is reduced. This gives the court capacity to conserve its limited judicial resources and allows it to function more smoothly and efficiently. To the litigants it has the benefit of reducing expenses and the risks which are associated with litigation.”

The beneficial interest arising from settlements need be balanced by the retention by the courts of the power to decide the contents of their orders. In this regard the sentiments by D Van Zyl ADJP In *Ex Parte Le Grange & Another* are worth noting:

“..it must be accepted that there exists a need for the court to retain a degree of control over agreements and consent orders and for it to scrutinize settlement agreements, the object in each case to ascertain and make a determination whether the terms thereof are appropriate so as to be accorded the status of an order of the court. It is however important to stress that the court’s role is of a discretionary nature which should be exercised in light of all the relevant considerations including the benefits which the granting thereof may hold for the parties, and the general judicial policy favouring settlement. Each matter should be considered on its own merits.

Given the foregoing can incorporation *per se* render a judgment invalid. In my mind no, although the practice should be discouraged in instances where inclusion of a deed of settlement will render compliance with an order problematic, incorporation should depend on the nature of the case. Definitive and properly couched terms in a deed of settlement can after due scrutiny be carefully incorporated.

Divorce matters are by their very nature of the kind that often get settled between the parties whereupon a consent paper is then incorporated into the order. Issues of custody, access, maintenance and proprietary rights when agreed to by the parties resulting in the settlement of the matter can as is practice be incorporated into an order without much difficulties arising.

It is in my view, commercial disputes mostly involving payments that often present problems when the debtor fails to meet their obligations as *per* the settlement terms. In such instance, it is my view that an order should not incorporate a deed of settlement. This is because settlement terms reflected in a deed of settlement become an indulgency where payment terms provide the manner of liquidation of the outstanding amounts where money is involved. Courts should not be party to “mercy extensions” granted to parties who have acknowledged their indebtedness as translated and recorded in a court order. The court’s dignity and honour is predicated upon the force of law that its judgments or orders carry. Debate and dispute should in my view never arise upon the execution of an order by virtue of lack of clarity or simply because the order has to be read in conjunction with some other document entered into by the parties. If incorporation of a deed of settlement has to be made extreme caution should be taken as it is generally legally undesirable to subject the operation of court orders to a document entered into by parties. An order should be the ultimate document, the knell signifying the finalisation of a dispute that brought parties before the courts. In view of the above sentiments, the issue needs be addressed whether the order in this case is valid or not.

The contents of Clause 1 of the order complained of states that the applicant is liable to the respondent in the sum of \$1 500 000-00 together with interest at 10% *per* annum effective from the 6<sup>th</sup> March 2017 to date of final payment both dates included. It specifically reads:

1. The defendant shall pay to the plaintiff’s the sum of one million five hundred thousand United States Dollars (US\$ 1 500 000-00) in full and final discharge and settlement of the debt owed to the plaintiffs together with interest at 10% *per* annum effective from 6<sup>th</sup> March 2017 to date of final payment both dates included.

This clause constitutes a final determination of the dispute between the parties, it is the operative part. The applicant was brought before the court for payment of over \$3 000 000-00 and the court ordered payment of \$1 500 000-00, that was the court's determination of the dispute as guided by the admission by the applicant after settlement negotiations. The determination or order marks the end of the dispute which had brought the parties before the court. If the second clause which incorporates the deed of settlement is expunged, clause 1 can still stand alone and is capable of enforcement.

The court thus agrees with Mr *Jera* that the order is valid as is. In any case the order *in casu* is distinct from the one in the *Thuta* case cited above. The order in that case had no substantive terms rather it had a blanket clause which simply incorporated a deed of settlement. That became problematic in the execution of the order as many issues were left open ended or unclear in the deed of settlement to an extent that an application for contempt of court could not succeed.

Upon examining clause 2 of the order in issue which reads as follows:

“The debt and interest shall be paid in accordance with the terms of the deed of settlement signed by the parties on the 6<sup>th</sup> March 2017 which deed of settlement is incorporated as an order of this court.’

The court notes that this clause has nothing to do with liability but has everything to do with the discharge of the debt, the payment terms.

In my mind, the manner of payment has everything to do with the parties. The pronouncement by the court is the crucial aspect pertaining to the determination of the dispute. I find that the court made the pronouncement as contained in clause 1 and that brought the dispute to closure. In that regard, I dismiss the argument that the order is invalid. Even if the court were to find that the order is invalid, the relief would not lie in the setting aside of the order because such can only be done to a valid order. Such a finding would simply result in the nullification of the writ by virtue of the fact that nothing emanates from a nullity. There would therefore be no need for the setting aside of the order.

The other ground raised by applicant pertains to the order reflecting a wrong or incorrect amount and he seeks that the order be set aside on that basis. Against this background, the court noted that Mr *Tivadar* submitted that the deed of settlement signed by the parties is valid.

The reasonableness of the explanation

The onus lies on the applicant to provide a reasonable and satisfactory explanation as to why and how the judgment was entered against him by consent.

*In casu* the question begs; has the applicant given a reasonable explanation on the circumstances in which the consent judgement was entered. The applicants simply indicated that the amount on the order is not what is due, what is due being US\$1 282 151.05 and not US\$1 500 000-00. This does not present the circumstances in which the consent order was made. There are no allegations of duress or undue influence. The applicant was represented at all times therefore having the benefit of legal advice. In fact the applicant does not dispute that he consented to the order. In any case the respondent is pursuing payment of US\$1 282 151.05 the agreed balance. For want of repeating the same point when the court considers the aspect of prospects of success, the very amount the applicant says is due is the amount being pursued by the respondents in the writ that was issued. The summons for provisional sentence sought payment of US\$3 400 000-00 yet the judgment/order reflects \$1 500 000-00 which means this was a compromise figure. Having limited themselves to the issue of amount the applicants have not provided to the satisfaction of the court any circumstances which constitute a reasonable explanation that would convince the court that the consent judgment was mistakenly entered into.

Even if it were to be considered that the figure of \$1 500 000-00 is wrong, relief would lie in the correction of the figure rather than rescinding the full order as liability is not being denied.

The *bona fides* of the application for rescission of the judgment

It is not in contention that this application only came after the issuance of the writ of execution same being dated 9 October 2017 and the application bearing a date of the 1 December 2017. After the granting of the order, the applicant had proceeded to make a payment on 18 October 2017 well after the deadline of the 30<sup>th</sup> September 2017 and after the writ had been issued. To then seek to challenge the validity of an order granted on the 15<sup>th</sup> March 2017, 9 months later and after defaulting *viz* payments does not in the court's view portray a *bona fide* intention on the part of the judgment debtor.

Whether the applicant has a *bona fide* defence on the merits which carries some prospects of success.

On the evidence before the court, I find otherwise. The writ of execution issued out as a consequence of the order seeks recovery of \$1 282 151-05. This amount is not being denied as owing by the applicant. In fact the applicant's argument is that where \$1 500 000-00 appears the correct figure should be \$1 282 151-05. If that is the case what is the applicant's defence?

The deed of settlement before the court starts by acknowledging that \$1500 000-00 is outstanding and acknowledged however, that some funds belonging to the applicant were held in trust by the respondent. Such funds to the tune of \$435 697-89 were to be applied towards the debt in a certain manner resulting in the outstanding amount being US\$1 282 151-05. Mr *Tivadar* even referred to the clauses being 5 and 6 of the Deed of Settlement on pp 96-97. The applicant has no defence at all to the claim given the above facts. Suffice that the applicant has at all material times been legally represented and there is no evidence of any confusion, he entered into the consent order well informed and he seeks to frustrate execution by bringing up an application which has no merit. The application is not *bona fide* and he has no *bona fide* defence which carries any prospects of success, in fact there is no defence to talk about. I am satisfied beyond doubt that the applicant has failed to establish good and sufficient cause to justify setting aside of the order. Public policy demands that there be finality to litigation. There is no need to give applicant another chance as he has nothing to establish further given that the sum of \$1 282 151.05 is acknowledged as owing and this is what respondents seek to recover all be it less \$30 000.00 paid after the writ had been issued.

The respondents had applied for costs on a higher scale. I find these proceedings should never have been instituted. The applicant has not denied his indebtedness and it is only upon failure to pay that he seeks to delay the day of reckoning by bringing this frivolous and vexatious application. Serious litigants are robbed of the opportunity of having their matters heard timeously by people of applicant's kind who think they can use the court room to pass time whilst thinking of how best to evade meeting their legal obligations. The courts' displeasure and indignation can only be expressed through digging deep into an errant party's pocket. The court's dignity and reputation as the forum for determining serious disputes for aggrieved parties must be protected against such conduct. Equally a warning goes out to legal practitioners who take up "dead cases" upon promising miracles to litigants of how dead horses can be "flogged" to life. Soon courts will be disposed to frequently issue orders for costs *de*

*bonis propriis*, for legal practitioners cannot be seen to be aiding and abetting would be clowns to come for shows using the court as a performance stage.

In the result it is ordered as follows:

1. The application be and is hereby dismissed.
2. The applicant to pay costs on a client–attorney scale.

*Devittie, Rudolph and Timba*, applicant’s legal practitioners  
*Moyo and Jera*, defendant’s legal practitioners