

**REPORTABLE** (64)

**SHAILLON CHISWA**  
v  
**(1) CAR RENTAL SERVICES (PRIVATE) LIMITED**  
**t/a AVIS RENT A CAR (2) BERNARD CHISWA**

**SUPREME COURT OF ZIMBABWE**  
**GARWE JA, MAVANGIRA JA & MAKONI JA**  
**HARARE: JULY 11, 2019 & JUNE 12, 2020**

*B. Diza*, for the applicant

*T.S. Manjengwah*, for the first respondent

No appearance for the second respondent

**MAKONI JA:** This is an appeal against the whole judgment of the High Court handed down on 24 September 2018 wherein it granted the first respondent’s claim against the appellant.

**BACKGROUND FACTS**

The following facts are common cause. The second respondent Bernard Chiswa (“Bernard”) entered into a car hire agreement with the first respondent Car Rental Services (Private) Limited (“Car Rental Services”) in October 2015. In terms of the agreement, he was issued with a motor vehicle, a Ford Everest, and was expected to make payments as per the vehicle hire agreement. He failed to do so until the motor vehicle was withdrawn from him.

The first respondent sought the services of the police for the second respondent to return the motor vehicle by laying criminal charges against him.

The appellant, sister to the second respondent, offered to settle the debt and the criminal charges were withdrawn. She signed an acknowledgement of debt and a payment plan. In due course, she withdrew the offer to settle the debt. The first respondent thereafter caused summons to be issued against the appellant and Bernard, jointly and severally claiming the sum of US\$13 868.90.

The appellant applied for the appointment of a *curator ad litem* on behalf of Bernard on the grounds that he was not of sound mind. On 17 March 2017, a provisional order was granted and a *curator ad litem* was appointed. The matter was not prosecuted further. As a result of the provisional appointment of a *curator ad litem*, the first respondent withdrew its claim against Bernard and proceeded against the appellant.

### **PROCEEDINGS BEFORE THE COURT A QUO**

Car Rental Services sued the appellant and Bernard jointly and severally for the payment of US\$13 868.90 for the rental charges due to it. The basis for the claim in respect of Bernard was that he had entered into an agreement with Car Rental Services for the hire of a motor vehicle and had failed to pay in terms of the agreement. In respect of the appellant it was averred that she had agreed” to take over the debt due by the first defendant (Bernard) and had assumed full responsibility of it which undertaking the Plaintiff (Car Rental Services) agreed and accepted. (*sic*)”

In their joint plea the appellant and Bernard disputed liability. Bernard pleaded that he did not have the requisite mental capacity to enter into a contract. The appellant put in issue the validity of the acknowledgement of debt she signed on the basis that the initial agreement, which gave rise to the acknowledgement of debt, was void *ab initio*

**TWO ISSUES WERE REFERRED TO TRIAL NAMELY:**

- 1) Whether or not the agreement entered into between Bernard and Car Rental Services was valid.
- 2) Whether the obligation assumed by the appellant in an acknowledgement of debt and payment plan dated 2 March 2016 is valid and binding.

Regarding the first issue, the court found that the agreement of sale between Car Rental Services and Bernard was invalid for the reason that he was not *compos mentis* at the time he entered into the contract.

In respect of the second issue, the court *a quo* quoted from the declaration the basis of the appellant's liability as follows:

“The second defendant (appellant) herein agreed on 2 March 2016 to take over the debt due by the first defendant (Bernard) and assumed full responsibility of it which undertaking the plaintiff agreed and accepted.”

The court found that the validity or otherwise of the agreement between Car Rental Services and Bernard is irrelevant. The appellant, after being advised of how investigations proceeded in respect of mentally incapacitated persons, offered to pay the debt to avoid the incarceration of her brother. It opined that the debtor was replaced and that it was a case of delegation. It defined delegation as a form of novation in which, by agreement between all

parties concerned, a third party is introduced as a debtor in substitution of the original debtor, who is discharged. It further opined that the new agreement was not dependant on the validity of the agreement between Car Rental Services and Bernard. It, therefore, found the appellant liable and made an order that she pays the respondent the amount due in terms of that agreement. Aggrieved by this decision the appellant noted an appeal to this Court seeking an order reversing the decision of the court *a quo*.

## THE APPEAL

The appellant attacks the judgment of the court *a quo* on the following grounds: I quote these *verbatim*.

1. “The honourable court *a quo* erred when it found as it did that the second defendant was liable to the plaintiff in the sum of US\$13 868.90 with interest at the rate of 3.5 percent from 1 April 2016. After having made the finding as she did that the agreement between the plaintiff and the first defendant was invalid due to his mental incapacity to contract.
  - 1.1 For the stronger reason that once a finding was made that the initial agreement was null and void, the subsequent agreement which purported to replace the non-existent agreement was itself null and void, it being premised on a nullity.
2. The honourable *court a quo* erred at law when it found as it did that the parties had novated the initial agreement by delegation.
  - 2.1 For the stronger reason that novation by delegation requires agreement of all parties to the initial agreement, which the first defendant in his mental state could not possibly give. To that end there was no novation to talk about.
3. The honourable court *a quo* erred at law when it concluded as it did that the plaintiff had sued the second defendant based on the novated agreement when the summons and

declaration clearly show that the defendants were sued jointly and severally with one paying the other to be absolved.

- 3.1 For the stronger reason that if the plaintiff was suing the second defendant based on the subsequent agreement, it would not have sued the first defendant or demanded judgment against them jointly and severally and more important, it would have been apparent from the pleadings.
4. The *court a quo* erred when it found as it did that the second defendant was liable for payment of anything or at all when regard is had to the fact that she unilaterally offered to pay the debt and subsequently unilaterally withdrew the offer which fact was not disputed by the plaintiff?.

#### **SUBMISSIONS BEFORE THIS COURT.**

Mr *Diza*, for the appellant, submitted as follows. The *court a quo* could not competently come to the conclusion that there was a delegation. Delegation is a novation which pre-supposes that there is a pre-existing agreement which is binding which was not the case in this matter. It found that the agreement between the respondent and Bernard was not binding. No rights or obligations could be transferred from the agreement. It could not be novated. In any event, for delegation to take place, all the parties have to agree. This could not competently take place as when the acknowledgement of debt was signed, Bernard was admitted into a mental institution. The acknowledgement of debt is a unilateral document. It cannot be an agreement which falls in the confines of delegation.

Mr *Manjengwah* for the respondent filed extensive heads of argument where he advanced argument that there was a compromise in the circumstances of this matter. In the last paragraphs of the heads of argument, under the heading: “Whether the court order can be

supported on grounds which were rejected by the trial court” he advanced argument that when the second respondent signed the Acknowledgement of Debt an *expromissio* occurred. He concluded by submitting that the doctrine of compromise was applicable in the circumstances of the present matter. Alternatively, the judgment of the court can be supported on the basis of *expromissio*.

In his submissions before this Court, he totally abandoned the argument in respect of the doctrine of compromise. His submissions were as follows: The Appellant interposed herself as between the first and second respondents. This is where an outsider intervenes between two parties and undertakes to satisfy that which is demanded by one party from the other party. Such an undertaking is independent of the underlying obligations or issues between the parties. He relied on the authority of *Baker NO vs Total South Africa (Pvt) Ltd* 1990 (3) SA 159, for this proposition. It is a step through which a novation can be achieved. The one who originally owed can plead that the debt was extinguished by the interceder. This arrangement does not depend on whether the underlying agreement was valid or not.

On being engaged by the court regarding the issue of the doctrine of compromise, he conceded that there was no involvement of Bernard when the new agreement was entered into. He could not, therefore, argue, with confidence, that a proper compromise was concluded when the original debtor was not involved. He could not argue that the acknowledgement of debt was a compromise but rather that it was an *expromissio*.

In rebuttal, Mr *Diza* took note of the concession made that there was no compromise in the circumstances of this matter.

On the doctrine of *expromissio*, he relied on Black's Law Dictionary, 2<sup>nd</sup> ed, where it was defined as an act in which a creditor accepts a new debtor who becomes bound instead of the old debtor with the latter being released. It is a species of novation. The underlying agreement has to be valid. The creditor must accept the new debtor. Nothing was advanced in this matter to show that the new debtor was accepted by the creditor. The first respondent went on to sue both the old and the new debtor jointly and severally.

## ISSUE

With the argument regarding the doctrine of compromise having been abandoned, the issue for determination is whether the doctrine of *expromissio* applied to the circumstances of this matter.

## THE LAW:

An *expromissio* is a type of novation by which a creditor accepts a new debtor in place of a former one, who is then released. [Black's Law Dictionary (8th ed. 2004), Page 1752]. The new debtor, known as an *expromissor*, becomes solely liable for the original debtor's debt. Thus, an *expromissio* has been described as an assumption of liability for the debt of another. See *Total South Africa (Pty) Limited v Bekker NO* 1992(1) SA 617.

An *expromissio* has the following characteristics:-

- (i) It occurs with the consent of the creditor,
- (ii) At the instance of the new debtor,
- (iii) The effect being that the old debtor is released from the obligation.

An *expromissor* differs from a surety in that a surety is bound together with his principal to the creditor. See *Bouvier Law Dictionary* (6<sup>th</sup> ed, Childs & Peterson, Philadelphia, 1856) at page 597. Since an *expromissio* is a form of novation, it is dependent on the validity of the principal agreement.

An *expromissio* was defined in *Total South Africa (Pty) Limited v Bekker NO supra* where the court in contextualizing the concept of *intercessio* quoted with approval the following extract from Wessels' Law of Contract in South Africa, 2nd edition at 968:

"3778. There are several ways in which a person, without being compelled to do so by law, may intervene in a contract between two parties *ob maiorem creditoris securitatem*. The Roman jurists called this intervention an *intercessio* on the part of the stranger to the contract (*'per intercessionem aes alienum suscipiens'* (D. 14.3.19.3). *'Se medium inter debitorem et creditorem interponere'* (Voet, 16.1.8)).3779.

3779. The term intercession is a convenient one to denote the intervention of one person (intercessor) in the obligation of another either by way of substituting or adding a new debtor (Nov., 4.1; C.8.40 (41).19).

3780. The stranger may either intervene by contracting with the creditor in such a way that the original debtor is completely liberated, or else he may promise the creditor to become liable for the debt, the original debtor continuing to remain bound. In the former case, called *expromissio* by the glossators, there is a complete novation -the old debtor and intercessor are liable, they may either both be principally bound to the creditor or else the debtor may be principally liable, whilst the intercessor is only bound *in subsidium*, ie., in case the creditor cannot obtain payment from the principal debtor." (Emphasis added)

An *expromissio* is, therefore, a form of *intercessio*. *Intercessio* is the general act of assuming liability for another person's debt by contract with his creditor. It can either be privative or cumulative depending on the extent of intervention. With privative *intercessio*, the intercessor takes upon himself an existing obligation of a debtor thereby liberating the debtor of his obligations in the principal agreement. Thereafter the debtor can if sued plead that the debt was extinguished by the intercession of the third party. Such is the case of an *expromissio*. While with cumulative *intercessio*, the intercessor together with original debtor become principally bound to the creditor as in cases of suretyship. (See Smith et al, A Dictionary of Greek and Roman Antiquities, 1890).

Since an *expromissio* is a species of novation, the principles applicable to novation are apposite in determining the fate of an *expromissio* where the original agreement is invalid. In *Mupotola v Southern African Development Community SC 7/06 ZIYAMBI JA* made the following pertinent remarks regarding novation on p 5 of the judgment:



“Novation means replacing an existing obligation by a new one, the existing obligation being thereby discharged. See *The Law of Contract in South Africa Third Ed* by R.H Christie at p498.

The above definition presupposes that both the existing obligation and the new one arise out of valid contracts. “When parties novate they intend to replace a valid contract by another valid contract.” See *Swadif (Pvt) Ltd v Dyke 1978(1) SA 928 (A)* at 940 quoted by Christie in *The Law of Contract in South Africa*, supra.

The starting point, therefore, in determining this issue is to consider whether the first agreement constituted a valid contract.

This being so, the first agreement was a non-event and there could be no novation of a contract which did not exist...” (Own emphasis)

It is evident that the validity of the former obligation determines the validity of an *expromissio*. In line with the reasoning adopted by the court in the *Mupotola* case *supra*, it would mean that the original agreement has to be valid for an enforceable *expromissio* to come into existence.

An *expromissio* cannot, therefore, stand on an invalid principal agreement. The court in *Hamilton v van Zyl 1983 (4) SA 379 (ECD)* at 383D-E, in distinguishing between novation and compromise stated:

“In pointing out the difference between novation and compromise (*transactio*) Wessels on *The Law of Contract in South Africa 2<sup>nd</sup> ed.* vol. II para. 2458 states:

‘There is a great similarity between *transactio* and novation and as a rule the principles which apply to the latter apply to the former. (*Voet* 46.2.3). There is however this difference between the two. When parties novate they intend to replace a valid contract by another valid contract, and if therefore the novated contract is invalid, the novating contract is, as a general rule, of no effect. If, however, a claim is made upon a contract, about the validity of which the defendant has a doubt, and a *transactio* follows, the defendant cannot upset the compromise on the ground that the agreement which was compromised was in fact invalid.’” (Emphasis added)

Consequently, the principal agreement has to be valid for a legally enforceable *expromissio* to ensue. Where the initial agreement is invalid, the subsequent contract is of no force and effect. The remarks of LORD DENNING in *MacFoy v United Africa Co Ltd [1961] 3 All ER 1169 (PC)* at 1172I to the effect that nothing can ensue from a nullity apply.

## ANALYSIS

The first respondent in paragraph 36 of the Heads of Argument sought to argue as follows:

“The undertaking by the Appellant was based on the appreciation that second Respondent was liable to first Respondent such liability exposed the second Respondent to a potential detention. On the Appellant’s part the undertaking was an overture to the first respondent to stop the process that might lead to the second Respondent detention. Rather, the undertaking was made on the basis of the Appellant’s belief that second Respondent might not survive detention in a mental institution. It was motivated by the desire to protect the second Respondent, it cannot be invalidated by the same condition that motivated its being made. What the Appellant did in her undertaking, was to independently assume an obligation for the payment of money in favour of the Plaintiff. It therefore is of no consequence if the second Respondent was under a mental incapacity when he took the Plaintiff’s vehicle in terms of the rental agreement”.

All he has succeeded in doing is clouding an otherwise very clear issue. Once the court *a quo* made a finding that the agreement between the first respondent and Bernard was void, no *expromissio* can ensue. *Expromissio* is a species of novation which entails the replacing of an existing obligation by a new one. In *casu*, the court *a quo* having found that the original agreement was void, there was no obligation in existence and therefore the appellant could not intervene or intercede in a non-existent obligation.

Further, as is clear from the summons, the second respondent was not released as a debtor by the alleged intercession by the appellant. The first respondent sued both the original debtor and the intercessor jointly and severally in terms of the original agreement and in terms of the new agreement. In an *expromissio*, the debtor is liberated of his obligations in terms of the original agreement. The debt is extinguished by the intercession and he cannot, therefore, be sued on the basis of that debt. The suit against both the intercessor and original debtor also demonstrates that the creditor, the first respondent had not accepted the new debtor in the place of the former one.

As is clear from the above, the first respondent did not manage to establish that an *expromissio* ensued. He abandoned the argument regarding compromise. The appeal has merit and must succeed. There is no basis why costs should not follow the cause.

In the result I will make the following order:

- 1) The appeal succeeds with costs.
- 2) The judgment of the court *a quo* be and is hereby set aside and substituted with the following:

“The plaintiff’s claim be and is hereby dismissed with costs”.

**GARWE JA**

I agree

**MAVANGIRA JA**

I agree

*Mhishi Legal Practice*, appellants’ legal practitioners

*Wintertons*, 1<sup>st</sup> respondent’s legal practitioners