ZIMBABWE CONSOLIDATED DIAMOND CO. P/L
versus
MINEXUS MINERALS RESOURCES P/L
And
SHERIFF OF THE HIGH COURT OF ZIMBABWE N.O.
and
EDGETOP MINING P/L
and
FADI ALI KHATOUN
and
MINISTER OF MINES AND MINING DEVELOPMENT
and
ADVOCATES AMIT PINES
and
URI GIL
(all in their capacities as Joint Foreign Interim Liquidators of
FUSS DIAMONDS LIMITED)

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 25 October 2021 & 12 October 2023

Opposed application

*A*dv *G R J,* for the applicants
Adv *T L Mapuranga*, for the 1st, 3rd and 4th respondents
Prof *W Ncube*, for the 6th, 7th and 8th respondents

CHINAMORA J:

Background facts

The dispute between the parties is a simple debt for the payment of money, but is complicated by the involvement of diamonds to part settle the amount due. Before delving into the factual matrix of the case, I wish to start by housekeeping issues. On 17 January 2020, the applicant herein filed a court application under HC 403/20 seeking a declaratory relief that applicant fully paid, extinguished, amortized and discharged the first respondent's judgment debt, execution costs and legal costs secured under a writ of execution dated 4 October 2017. Furthermore, the applicant

sought relief to interdict the first respondent from instructing the Sheriff of Zimbabwe to attach, execute or remove applicant's goods in execution. This matter was duly opposed. On the following day, 18 January 2020, the applicant approached this court on an urgent basis under HC 404/20. That application sought a provisional order directing the Sheriff to stay execution of an order granted by this court on 20 September 2017 and the writ dated 4 October 2017 pending the outcome of the court application filed under case number HC 403/20. It is this urgent chamber application under HC 404/20 which was placed before me. On 31 January 2020, the fifth, sixth and seventh respondents filed a court application for consolidation in terms of Rule 230 and 92 of the now repealed High Court Rules, 1971. On 4 February 2020, by the consent of the parties I ordered the consolidation of the matters filed under HC 403/20 and HC 404/20. After having consolidated the matters, I directed as follows:

(a) The applicant in HC 404/20 shall file its answering affidavit and notice of opposition to the counter application no later than Friday, 7 February 2020.
(b) The applicant in HC 404/20 shall file its answering affidavit, if any, and its notice of opposition to the counter application no later than Wednesday, 12 February 2020.
(c) The first, second, third and fourth respondents shall file their notices of opposition, if any, to the counter application no later than 14 February 2020.
(d) The sixth, seventh and eighth respondents in case numbers HC 403/20 and HC 404/20 shall file their answering affidavits, if any, by no later than 19 February 2020.
(e) The applicant under HC 403/20 and HC 404/20 shall file consolidated heads of argument no later than Wednesday 26 February 2020 and respondents shall file their consolidated heads of argument no later than the 5 March 2020.
(f) Thereafter, the consolidated matters shall be set down before Justice Chinamora in terms for the High Court Rules.

The applicant's case

It is applicant's case is that the first, third, and fourth respondents filed an application for a declaratory order under HC 3117/17 with this court. By judgment of TAGU J under HH 619-17, the respondents obtained a judgment against the applicant, which ordered the applicant to pay the sum of US$ 1 226 000.00. On 25 February 2019, the first respondent instructed the sheriff to attach

and remove the applicant's assets at its head office, namely, 35-37 Coshman Road, Borrowdale. The applicant avers that, pursuant to the notice of attachment and removal, the applicant and the first respondent engaged and agreed to a payment plan to liquidate the judgment debt, together with interest and the judgment creditors' costs of suit. In essence, the parties agreed that the amount owing was to be paid as follows:

(a) US$ 150 000 to Messrs *Mawadze and Mujaya* legal practitioners and US$ 150 000 to Cobmaster Investments as per the instructions of the first respondent's legal practitioners.
(b) Legal fees amounting to US$ 50 000 were paid on 26 February 2018
(c) The Sheriff's costs amounting to US$ 79 000 as well as the auctioneer's removal and storage charges amounting to US$ 3 330.
(d) The first respondent participated in a diamond tender, on 4 June 2019 and won a diamond parcel worth US$ 937 975.19, which was set-off against the outstanding balance. The parcel was collected on 26 June 2019 by a representative of the first respondent and left a balance of US$ 342 024.81.
(e) The first respondent collected yet again another diamond parcel on 21 August 2019 paying off the outstanding balance.

Because of the foregoing facts, the applicant alleges that it paid the full judgment debt, together with interest, legal costs and sheriff's charges. However, according to the applicant, the first respondent continuously threatens to instruct the second respondent to execute against the applicant pursuant to the same writ of execution dated 4 October 2017. Furthermore, the applicant submits that the threat has since been effected as the second respondent attached applicant's assets on 15 January 2020. Additionally, the applicant takes issue with the instructing letter written by the first respondent to the second respondent, which letter is dated 13 January 2010 and is unsigned. The applicant submits that cumulatively, this renders the letter ineffective and defective and the attachment unlawful. Simply put, the applicant's contention is that as the debt had been fully paid, there was no basis for persisting with execution.

The case for first, third and fourth respondents

The first, third and fourth respondents filed their consent to the order sought on condition that no order as to costs was made against them.

The case for sixth, seventh and eighth respondents

In essence, the sixth to eighth respondents denied that the writ of execution was satisfied. They contended as I will now set out. On 4 December 2018, the sixth, seventh and eighth respondents on one hand, and the first, third and fourth respondents on the other hand entered into a deed of settlement regarding the entitlement of either party to the sums of money that applicant was ordered to pay under HH 619/19. According to the respondents, in terms of the Deed of Settlement, the sixth, seventh and eighth respondents became interested parties in the payment of the judgment debt as if they were stated therein as judgment creditors. The respondents submit that applicant's associate company (Marange Resources (Private) Limited) was notified of this Deed of Settlement. On 25 February 2019, *Mawadze & Mujaya* (as representatives of the first, third and fourth respondents) and *Thompson Stevenson & Associates* (as lawyers for the sixth, seventh and eighth respondents), acting upon the Deed of settlement and notices of attachment caused the removal of property of the applicant. In a bid to settle the debt, the applicant's then CEO wrote a letter to the judgment debtors offering to settle the debt partly in cash, with the balance being paid through diamonds. This offer was accepted by both parties and the applicant became aware that the judgment debt was payable to both the first, third and fourth respondents on one hand, and sixth, seventh and eighth respondents on the other. As a result, the applicant undertook to pay through accounts nominated by *Mawadze & Mujaya* and to another account nominated by *Thompson Stevenson & Associates*.

The sixth, seventh and eighth respondents contend that the applicant failed to settle the outstanding sums in cash or in terms of their undertaking. Arrangements were then made to allow a nominee of the judgment creditors to participate in a diamond auction that was held by the Minerals Marketing Corporation. The first, third and fourth respondent and the sixth, seventh and eighth respondents jointly nominated a firm under the name Montu Diam FCZ to participate in the auction. The respondents allege that the outstanding sums would be settled by purchase of diamonds and the applicant would be fully responsible for all the costs of the conversion of diamonds to cash. This undertaking and liability are acknowledged and confirmed by the applicant.

Between 18 and 28 March 2019, an arrangement was made for the judgment creditors to view and purchase diamonds of Boart quality. A package of 407 815.30 carats was selected and it was agreed between the parties that the package was worth US$937, 975.19. Also agreed was that the package would be released to Montu Diam at the joint instruction of *Mawadze & Mujaya and Thompson Stevenson & Associates*. Subsequent to the sealing of the first package of 407 815.30 carats worth of diamonds, MMCZ facilitated the viewing of another package of 407 815.30 carats worth of diamonds whose value was not agreed.

On 15 August 20219, the respondents' legal practitioners wrote to the MMCZ regarding the export of diamonds. No communication was received from any of the parties until a plea was filed in case number HC 4389/19 in which the applicant pleaded to have paid the sum of US$ 1 280 000 to the first respondent. It is respondents' case that the applicant never produced any proof that the said money was paid. It is on this basis that the respondents claim that the applicant has not paid what it owes to the sixth, seventh and eighth respondents in terms of the compromise agreement that it entered into and which it has acknowledged, and in terms of the deed of settlement between the parties, which was meant to facilitate the execution of the writ of execution issued in pursuant to HH 619/17. The respondents took note of the fact that the first, third and fourth respondents consented to the judgment demonstrating that they had been paid the alleged sums. It was submitted that the respondents kept the money they received, yet they knew that 50 percent of the money should have been paid to the sixth, seventh and eighth respondent.

Together with their opposing papers, the respondents filed a counter application against the applicant and the first, third and fourth and ninth respondents. Their contention was that they signed a deed of settlement with the first, third and fourth respondents on 4 December 2018. It was submitted that the parties agreed to share equally the proceeds of the judgment debt under HC 3117/17. The respondents submit that the deed of settlement created two groups of creditors of the applicant. In addition, the respondents aver that the applicant was informed of the rationale behind the compromise. In the result, the respondents counter-claimed for damages suffered in the sum of US$ 790 000.00 calculated as follows:

(a) 50% of the US$ 1 580.000; plus
(b) Interest on the sum of US$ 790 000at 5% from 1 June 2019 to date of payment; and

(c) Costs on a legal practitioner client scale.

The applicant maintained its position that it paid the debt in full. Furthermore, the applicant argued that the judgment which formed the basis of the instant matter (i.e., the principal debt) was to be paid to the first, third and fourth respondents or any of them. In opposing the counter-application, the applicant denied the tripartite compromise agreement alleged by the sixth, seventh and eighth respondent. It maintained that the documents referred to by the sixth, seventh and eighth respondents do not give rise to an inference that parties subsequently decided to go against the court order. Further, the applicant noted that, even assuming that a compromise agreement was reached, the agreement was illegal since it went against the directions given by the court on was to receive payment. On the question of the deed of settlement, the applicant states that the deed was between the respondents, and the applicant was not a party to it.

The first, third, and fourth respondent opposed the counter-application on the basis that it is not permissible in terms of the rules of this court for one respondent to counter-claim against another respondent. I agree with the first, third, and fourth respondents' observations. Rule 229A of the repealed High Court Rules, 1971 provided as follows:

> "(1) Where a respondent files a notice of opposition and opposing affidavit, he may file, together with those documents, a counter-application against the applicant in the form, *mutatis mutandis*, of a court application or a chamber application, whichever is appropriate."

The above Rule is clear and unambiguous as it provides that a counter-claim lies against the applicant and not against a fellow respondent. It is settled law that an opposition to an application on motion is a shield of defence and not a sword of attack against the applicant. See (*Mwayera* v *Chivizhe and Ors* SC 16/16). Putting this in context, if a respondent wishes to claim against the applicant, he/she/it must file a counter-application in terms of the High Court Rules.

As this matter is factually convoluted, I directed the registrar of this court to issue a subpoena requiring the presence of Mr Obert David *Mawadze* in terms of Rule 246 (1) (a) of the old High Court Rules. In *Balasore Alloys* v *Zimbabwe Alloys Ltd* HH 228-18 this court held that:

> "In *stricto sensu*, it is in the discretion of the Judge to require parties, and deponents to affidavits or any person who may assist in resolving an application to appear before the judge to provide further information as the Judge may require."

See also *Lake Harvest Aquaculture (Pvt) Ltd* v *Revesai* HH 242-17.

Consequent to the directions I made, Mr *Mawadze* appeared before me. In his oral statement in court, he maintained the first, third, and fourth respondents' position. In fact, he confirmed that the first, third, and fourth respondent were paid their part of the money and have no quarrels with the applicant. Besides, Mr *Mawadze* stated that the first, third and fourth respondents were the only legitimate judgment creditors in terms of the judgment of this court in HC 3117/17.

Analysis of the case

As I see it, the only issue for determination in this application is whether in the circumstances, the applicant settled the judgment debt obtained against it, which ordered the applicant to pay the sum of US$1 226 000. In order to resolve this question, the following corollary issues arise:

(a) Whether the sixth, seventh, and eighth respondents were judgment creditors.
(b) Whether there was a compromise agreement entered into by the parties.
(c) Whether the applicant by its own actions, express and implied, admitted that the sixth, seventh, and eighth respondents were joint creditors.
(d) If it did, whether the applicant should be estopped from claiming that the payment made to the first, third, and fourth respondent extinguished the judgment debt.

Let me begin by examining the concept of a compromise. Prof R H Christie in his book, *Business Law in Zimbabwe* at p. 108 defines a compromise in these terms:

> "Compromise is the settlement by agreement of disputed obligations and is a form of novation, replacing the disputed obligations by the obligations created by the agreement of compromise."

In this context, it is worth noting that in *Taruva* v *Deven Engineering (Pvt) Ltd and Ors* HH 08-09 MAKARAU JP (as she then was) explained what a compromise means as follows:

> "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 behind a compromise and raise defences to the original cause of

> action when sued for a compromise. (See *Road Accident Fund* v *Ngulube* 2008 (1) SA 432 (SCA), *Lieberman* v *Santam Ltd* 2000 (4) SA 321 (SCA) para 11-12, *Hamilton* v *Van Zyl* 1983 (4) SA 379 (E) and *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 been moved on to hold that a compromise need not necessarily, however, follow a disputed contractual claim. Any kind of doubtful right can be the subject of a compromise. A compromise may even be entered into 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 Lul Manufacturing and Printing CC v Kingtex Marketing (Pvt) Ltd* 2008 (20 SA 327) (SCA)".

See also *Georgias and Anor* v *Standard Chartered Bank* SC 183-98.

Similarly, in *Golden Beams Development (Pvt) Ltd* v *Mabhena* HH 296-21, DUBE J appositely stated:

> "A compromise enables the parties to settle the dispute outside court. The compromise agreement has the effect of creating new rights and obligations between the parties separate from the original cause of action. It extinguishes the original cause of action which becomes *res judicata* thereby creating new obligations. Once a compromise agreement has been entered into, the defendant has no entitlement to raise defences to the original cause of action."

A common thread from the above case authorities is that a compromise is an agreement by the parties to abandon their previous rights and obligations. Thus, following a compromise the parties' contractual relationship is governed by the terms set out in the compromise. Any previous cause of action is extinguished except where the parties expressly agree that it is not. Let me relate the law to the law to the facts. It can be recalled that, after the sixth, seventh and eighth respondents appeal under SC 163-18 was struck off the roll, the sixth, seventh, and eighth respondents on one hand, and the first, third and fourth respondents entered into a deed of settlement. The material terms of the compromise were that the sum US$ 478 600 and any interest thereon was to be deposited into eighth respondent's account; the sum US$ 134 000 and any interest thereon shall be paid to Cobmaster Investments (Pty) Ltd and the sum of US$ 613 000 and any interest payable thereon shall be deposited in PTY Holding GYH Ltd's account. It was further agreed that should the applicant offer to compromise with the parties, the parties undertook to jointly consider the offer before acceptance. It is important to note that the compromise in this case was between the first, third, and fourth respondents on one hand and the sixth, seventh, and eighth respondents on the other. On 11 December 2018, the sixth, seventh and eighth legal practitioners wrote to their then legal practitioners. The relevant part of the letter reads:

> "2. We have been instructed to inform you that, whereas our clients have been at loggerheads with Messrs *Fadi Ali Khatoun*, Minexus Minerals (Pvt) Ltd and Edgetop Mining (Pvt) Ltd, the parties have eventually agreed to settle the dispute between themselves and to share the funds held by yourselves. To this extent, we refer you to the deed of settlement attached hereto."

Various correspondences were exchanged between the parties. However, of importance is a letter dated 25 April 2019 by the applicant to the sixth, seventh, and eighth respondents, which reads:

> "We apologize for the delays in implementing the settlement agreed between the parties on this matter, and humbly request your further indulgences to 26 April 2019 mid-day to enable MMCZ to obtain the principals' approvals for a private viewing by your clients' representative."

Besides, an email dated 22 January 2020 sent by the late Mr. Tongai Muzenda, an official of the applicant to Mr Julius Chikomwe, a legal practitioner representing the sixth, seventh, and eighth respondent's reads:

> "Reference our conversation a few minutes ago.
> May I request for an extension to end of day today to give me time to discuss with my principals …I am having final meetings here in Bulawayo to map the way forward. I hope a green light will be given.
> Kind Regards
> Tongai Muzenda"

It would seem from the above extracts that the applicant had incurred some form of obligation to act in terms of the deed of settlement. However, on close analysis the applicant was not legally obligated to do so. I say so because, as correctly pointed out by the applicant in its opposing papers, it was not a party to the deed of settlement. It remained clear from the deed of settlement that no obligations accrued to anyone except in terms of the deed of settlement. I have seen Annexures D1 to D6 and E, which are evidence of payments made to the first, third, and fourth respondents by the applicant representing full payment of the judgment debt. There is no doubt that full payment was made to the first, third, and fourth respondents albeit not in terms of the deed of settlement entered into by the first, third, and fourth respondents and sixth, seventh, and eighth respondents. In my view, the sixth, seventh, and eighth appear to be right when they say that some of the applicant's officials took advantage of the circumstances, and for unknown

reasons circumvented sixth, seventh, and eighth respondents claim with their full knowledge and acquiescence.

The papers filed before me clearly show that the first, third, and fourth respondents received the total amount due in terms of the judgment debt but did not pay what was agreed to be paid to the sixth, seventh, and eighth respondents. It is settled law that an application for a declaratory is made in terms of s 14 of the High Court Act [*Chapter 7:06*] which provides that:

> "The High Court may in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

The requirements of such a declaratory order are settled in this jurisdiction, and in *Johnsen* v *Agricultural Finance Corporation* 1995 (1) ZLR 65 restating the position as follows:

> "The condition precedent to the grant of a declaratory order under s 14 of the High Court Act of Zimbabwe, 1981 is that the applicant must be an "interested person", in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto. But the presence of an actual dispute or controversy between the parties is not a pre-requisite to the exercise of jurisdiction. See *Ex P Chief Immigration Officer* 1993 (1) ZLR 122 (S) at 129 F-G; 1994 (1) SA 370 (25) at 376G-H; *Munn Publishing (Pvt) Ltd* v *ZBC* 1994 (1) ZLR 337 (S) and the cases cited…".

In *casu*, it seems to me that the applicant is an interested party and has a direct and substantial interest in the subject matter of the suit, namely, whether the judgment debt was paid in full. The applicant, in my view, satisfies the first rung of the test for a declaratory order. The existing rights and obligations of the parties are as already described in the preceding paragraphs. The applicant demonstrated that it paid the judgment debt in full to the first, third, and fourth respondents in term of the judgment under HH 619/17. The view I take is that the failure by the first, third, and fourth respondents to pay the sixth, seventh, and eighth respondents what was due to them is not applicant's fault. The applicant therefore discharged its obligations in terms of the judgment under HH 619/17 in HC 3117/17. There is no reason, in my view, why a counter claim was filed against a declarater, more so, in circumstances where payment had been made to a person other than the applicant. For this reason, I find no merit in the counter application and I am disposed to dismiss it. In the exercise of my discretion, I am satisfied that the applicant has established a

case for the grant of a declarater, and dismissal of the counter claim. The issue of costs is always at the discretion of the court and usually. However, from the opposition by the sixth, seventh, and eighth respondent, it is apparent that it an official of the applicant and the first, third, and fourth respondents, for an unknown reason, did not pay the sixth, seventh and eighth respondents as set out in the deed of transfer. In the circumstances, while the applicant has been successful, I will not order costs against the sixth, seventh, and eighth respondents.

Disposition

Accordingly, I grant the following order:

1. The applicant's goods attached in execution of a writ dated 4 October 2017 under HC 3117/17 be and are removed from execution.
2. The counter application by the sixth, seventh and eighth respondents be and is hereby dismissed.
3. Each party shall bear its own costs.

Caleb Mucheche Law Chambers, the applicant's legal practitioners
Rubaya & Chatambudza, first, third and fourth respondents' legal practitioners
Thompson Stevenson & Associates, sixth, seventh and eighth respondents' legal practitioners