**REPORTABLE (29)**

**FREDSON MUNYARADZI MABHENA**
**v**
**GOLDEN BEAMS DEVEOPMENT (PRIVATE) LIMITED**

**SUPREME COURT OF ZIMBABWE**
**UCHENA JA, CHIWESHE JA & MUSAKWA JA**
**HARARE: 21 JANUARY 2022 & 31 MARCH 2023**

*F. Chinwawadzimba*, for the appellant

*G. Sithole*, for the respondent

**CHIWESHE JA**: This is an appeal against the whole judgment of the High Court, the court *a quo*, sitting at Harare, dated 17 June 2021 granting a declaratur to the effect that the Deed of Settlement signed by the parties on 13 November 2019 compromised the High Court order dated 26 February 2018, thereby creating new obligations between the parties. The court *a quo* also granted consequential relief flowing from the declaratur.

The order of the court *a quo* reads:

1. It is hereby declared that the Deed of Settlement signed between the applicant and the respondent on 13 November 2019 compromised the High Court order of 26 February 2018 thereby creating new obligations between the parties, in terms thereof.
2. Consequently:

(a) The respondent be and is hereby ordered to pay, to the applicant, the sum of USD$145 440 (One hundred and fourty-five thousand and forty United States Dollars) being the balance due and owing by the respondent in terms of Deed of Settlement referred to in para 1 of this order payable at the prevailing interbank rate

(b) The respondent be and is hereby ordered to pay interest on the above sum calculated at the prescribed rate, reckoned from 29 February 2020 to the date of full payment.

(c) A certain piece of land situate in the District of Salisbury called Stand 171 Ardbennie Township 2 of Subdivision A of Ardbennie measuring 631 square metres held under Deed of Transfer Number 4210/95 commonly known as Number 15 Cannock Close, Houghton Park, Waterfalls Harare, Zimbabwe be and is hereby declared specially executable.

(d) Respondent be and is hereby ordered to pay costs of suit.

Aggrieved by the decision of the court *a quo*, the appellant noted the present appeal.

**THE FACTS**

On 26 February 2018, the respondent obtained, in the court *a quo*, a default judgment against the appellant under case number HC 4277/15 in the sum of US$179 000.00 plus interest. A property belonging to the appellant was declared especially executable. The appellant made certain payment proposals but failed to honour the terms thereof. The appellant sought further indulgencies resulting in the parties entering into a Deed of Settlement on 13 November 2019. In terms of the Deed of Settlement, the appellant undertook that his two residential stands in Hatfield would be sold and the proceeds paid to the respondent. The

appellant agreed to settle an outstanding debt amounting to US$155 440.00 and undertook to continue paying US$5 000.00 per month until the debt was extinguished in full.

The respondent submitted before the court *a quo* that the Deed of Settlement compromised the order under HC 4277/15 thereby creating a new obligation rendering the appellant liable for the outstanding debt in terms of the Deed of Settlement.

On the contrary, the appellant's argument was that the original debt under HC 4277/15 fell within the purview of s 4 (1) (d) (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars) Regulations 2019 (S.I 33 of 2019). The effect of these regulations was that all assets and liabilities, including judgment debts, denominated in United States Dollars immediately before 22 February 2019 shall be valued in RTGS dollars at a rate of 1:1. This position had been confirmed by this Court in the case of *Zambezi Gas v NR Barber* SC 3/20. It was thus the appellant's submission that his debt was extinguished by operation of law.

The court *a quo* agreed with the respondent's submissions and ruled that the Deed of Settlement compromised the court order under HC 4277/15 as it created new obligations for the parties. The Deed of Settlement is now the new cause of action superseding that court order. It was for that reason that the court *a quo* granted the declaratur sought by the respondent, including consequential relief.

The appellant appeals that determination on the following grounds.

"**GROUNDS OF APPEAL**

1. The court *a quo* grossly misdirected itself and erred at law when it failed to find as it ought to have, that the compromise agreement between the parties was null and void ab initio and illegal as at the date of signing in that the performance of the terms of the deed of settlement by the appellant required contravention of **s 2 S.I 142 as read together with S.I 213 of 2019 and S.I 33 of 2019**, which outlawed the use of foreign currency to settle domestic transactions/obligations and judgment debts.

2. The court *a quo* erred at law and grossly misdirected itself when it failed to find as it ought to have that the deed of settlement entered into on 13 November 2019 was void ab initio for want of *consensus ad idem* between the parties as to the correct amount due to the respondent, upon a correct interpretation and application of the provisions of S.I 33 to the facts before the court *a quo.*

3. The court *a quo* erred at law and grossly misdirected itself in failing to find as it ought to have done that the compromise agreement of 13 November 2019, was void ab initio, as its effectuation or performance thereof effectively perpetuated illegal conduct on the part of the parties to the deed of settlement."

**RELIEF SOUGHT**

The appellant seeks the following relief:

"1. That the instant appeal succeeds with costs.

2. That the judgment of the court *a quo* be set aside and be substituted with the following:

"The application is hereby dismissed with costs on a legal practitioner and client scale."

**ISSUES FOR DETERMINATION**

The grounds of appeal raise two issues for determination. These are:

(a) Whether or not the Deed of Settlement entered into by the parties on 13 November 2019 was void ab initio for want of compliance with the provisions of S.I 142/19 as read with S.I 213/19 and S.I 33/19?

(b) Whether or not there was a common mistake when the parties entered into a Deed of Settlement dated 13 November 2019 which vitiated the contract?

**ANALYSIS**

This appeal has no merit. Firstly, the Deed of Settlement was executed on 13 November 2019, well after the cut-off date of 22 February 2019. The statutory provisions referred to earlier required that all assets and liabilities, including judgment debts, denominated in United States Dollars immediately before 22 February 2019 be valued in RTGS dollars at the rate of 1:1.

It is common cause that initially the parties' obligations had been determined in the court *a quo* under HC 4277/15. Judgment in that case was given on 26 February 2018, well before the cut-off date referred to above. The judgment debt though sounding in US dollars, would have qualified for payment in RTGS currency at the rate of 1:1. However, the appellant defaulted in his payments. He proposed a more flexible payment plan which the respondent accepted. It was for that reason that the parties entered into the Deed of Settlement dated 13 November 2019. The Deed of Settlement was a novation, creating new obligations and a new cause of action that eclipsed the court order of 26 February 2018. More importantly, the

Deed of Settlement fell outside the cut-off date of 22 February 2019 and the obligations thereof could not have been the subject of the provisions of S.I 142/19 as read with S.I 213/19 and S.I 33/19, in terms of which the debt could have been extinguished in the RTGS currency at the rate of 1:1. See *Zambezi Gas v N.R. Barber SC 3/20.*

It is trite that parties have the latitude to vary a court order by way of a Deed of Settlement. Once a Deed of Settlement is at hand its effect is to compromise the court order which ceases to regulate the relationship between the parties. In other words, the court order falls away. See *Kempen v Kempen* SC 14/16.

We conclude therefore that the Deed of Settlement entered into after the cut-off date does not fall within the purview of the statutory provisions under consideration. The deed cannot therefore be held to have been void *ab initio* for contravening the provisions of S.I 33 of 2019.

Further, s 2 of S.I 142/2019 provides:

> "(1) Subject to s 3, with effect from the 24th June 2019, the British pound, United States dollar, South African rand and any other foreign currency whatsoever shall no longer be legal tender alongside the Zimbabwean dollar in any transactions in Zimbabwe.
>
> (2) Accordingly, the Zimbabwe dollar shall, with effect from the 24th June 2019, but subject to s 3, be the sole legal tender in Zimbabwe in all transactions."

The appellant's contention is that the Deed of Settlement, expressed in United States dollars, runs foul of the above provisions, rendering it null and void. The respondent argues to the contrary and submits that S.I 142/2019 does not prohibit individuals from entering contracts expressed in other currencies. For that reason, it was submitted that the Deed of Settlement does not violate any fiscal regulations.

We agree with the position taken by the respondent. Indeed, this Court has previously pronounced itself on this point in *Breastplate Service (Pvt) Ltd v Cambria Africa PLC* SC 66/20. In that case this Court had this to say:

> "To conclude on this aspect, the concept of 'legal tender', in its ordinary signification, denotes money or currency in official circulation that must be accepted if offered in payment of a debt. In the realm of contractual relations, what this means is that the debtor is entitled to settle his debt through the medium of legal tender and, conversely, the creditor is obliged to accept that tender. On the other hand, unless explicitly proscribed by statute (as discussed below), there is nothing under the common law to preclude the debtor from discharging his debt in any currency or medium of exchange other than the officially designated legal tender, including any foreign currency, so long as the creditor is prepared to accept such payment in settlement of the debt. This arises by virtue of the time-honoured doctrine of freedom of contract, which, in my view, remains intact and unimpaired by the provisions of S.I 142 of 2019."

There being no statutory provision explicitly prohibiting the kind of contract that the parties freely and voluntarily engaged in, the Deed of Settlement must be upheld.

The appellant contends that there was a common mistake when the parties entered into the Deed of Settlement, which common mistake vitiated the contract. It identified the mistake as the lack of understanding of the legal implications of s 4 (1) (d) – (e) of S.I 33/2019. Such mistake, it is argued, led to the wrong computation of the outstanding balance in terms of the Deed of Settlement. What the appellant is saying, in simple terms, is that if the parties had been aware of the import of those provisions and the decision in the *Zambezi Gas* case *supra*, the parties would have calculated the outstanding balance on the rate of 1:1 as between the United States dollars and the local currency.

The respondent denies that it was party to that mistake and for that reason avers that the mistake was not common between the parties. In any event, the appellant had been paying as per the Deed of Settlement until it got wind of the decision in the *Zambezi Gas* case

supra. It was then that the appellant sought to align its debt with that decision. As already stated, that debt does not fall within the ambit of the fiscal regulations cited by the appellants and consequently cannot be protected under the decision in the *Zambezi Gas* case.

In any event the mistake that the appellant alluded to is one of law. It is trite, and the authorities are clear on this, that a mistake as to what the law is, cannot be the basis upon which a contract may be voided. That is so because ignorance of the law is no defence. See *S v Blom* 1973 SA 513, *Ncube v Ndlovu* 1985 (2) ZLR 281.

The circumstances of this case show that there was no common mistake as to the facts as further alleged by the appellant. The terms of the Deed of Settlement were as proposed by the appellant. The parties' obligations were clearly spelt out and need no further interpretation. The appellants made payments in terms thereof without reservation. What the appellant seems to mean by a mistake on the facts is the fact that he is now of the view that his debt should be settled in Zimbabwean dollars and not in foreign currency. That stance follows not from a mistake of fact but a mistake of law. As already indicated a mistake as to the law cannot be a defence.

We conclude therefore that there was no mistake of fact afflicting the parties when they executed the Deed of Settlement.

**DISPOSITION**

We are of the view that this appeal has no merit whatsoever. The Deed of Settlement was properly executed. It does not run foul of any fiscal law nor is it vitiated by

any mistake of fact or law. It is binding on the parties. The decision of the court *a quo* cannot be faulted.

Costs shall follow the result.

It is accordingly ordered as follows:

1. The appeal be and is hereby dismissed in its entirety.
2. The appellant shall pay the costs of suit.

**UCHENA JA:** I agree

**MUSAKWA JA:** I agree

*Muvirimi Law Chambers*, appellant's legal practitioners.

*Dube, Manikai & Hwacha*, respondent's legal practitioners.