CENTRAL AFRICA BUILDING SOCIETY
versus
PATIENCE MAGODO

HIGH COURT OF ZIMBABWE
CHITAPI J, 22 May, 2019 and 19 January, 2022

Opposed Court Application

G Madzoka, for the applicant
T Nzombe, for the respondent

CHITAPI J: This is an application for an order setting aside a deed of settlement executed by the applicant and the respondent in Case HC 2810/17. The applicant's prayer as set out in the draft order reads as follows:

> "IT IS ORDERED THAT,
> 1. The Deed of Settlement signed between the applicant and the respondent in case No HC 2810/17 and filed with the Registrar of the High Court on 27 November 2017 be and is hereby set aside.
> 2. The respondent shall pay the applicant's costs on a legal practitioner and client scale."

The background to this application is that in case no HC 10619/13, the applicant obtained judgment HH 331/15 against the respondent for payment of the sum of US$ 162884.01 being the balance due on mortgage bond No 7323/2011 registered in favour of the applicant over the security of the respondent's property called Stand 40 Christon Bank held under Deed of Transfer No. 5965/11. Upon the applicant seeking the sale of the respondent's property in execution to recover the amount on the judgment, the applicant and the respondent executed a deed of settlement dated 17 November, 2017 to amicably resolve the issue of payment in *lieu* of the sale of the property. A material term of the deed of settlement was that the execution on the judgment would be suspended on the conditions *inter-alia* that the respondent would make monthly instalment payments of US$ 2852.00 on or before an agreed date. Upon failure to pay any single instalment, then the balance outstanding would become wholly due whereupon the applicant would be at large to execute the judgment against the respondents property.

The applicant was the former employee of the respondent. The parties were involved in a labour dispute with proceedings relative thereto then pending in the Labour Court under references LC/H/APP/615/17; LC/H/353/16 and LC/H/428/17. The cases featured in the Deed of Settlement aforesaid in para 1. The operative part of that paragraph which also forms the factual basis of this application reads as follows:

> "…..That total amount outstanding; due and payable to the 1st respondent on the applicant's loan account No 1003188354 in terms of the judgment in case No HH 331/2015; as of the 1st of November, 2017 was the sum of US$ 342 374.79 (three hundred and forty two thousand three hundred and seventy four dollars and seventy nine cents) (the judgment debt). The principle of the matter being to move forward and start servicing the mortgage loan account, applicant accepted the aforesaid balance for the time being allowing time to get the final outcome of the labour matter case Ref Number LC/H/A/APP/615/17; LC/H/353/16; LC/H/428/17 as its outcome will be determinant of the final balance of the mortgage when the labour matter is finalized."

The applicant as noted prays that the whole deed of settlement be voided or set aside. The respondent opposed the relief sought and prayed for the dismissal of the application with costs on the higher scale of legal practitioner and client. The applicant in para 5 of the founding affidavit averred as follows:

> "5. The reason for seeking the setting aside of the deed is that the signing was fraudulently procured by the respondent. I will deal with this more in detail later on in this deposition."

Note is made that the applicant was at all material times represented by counsel *Edmore Jori* who passed on before this application was filed. Mr *Jori* would therefore not assist the court in determining whether or not there was a fraud committed by the respondent in relation to the deed of settlement. To plug the gap, the applicant averred that its counsel Mr *Jori* was working with an intern at the offices of the applicant's legal practitioners. The intern, *Yolanda Marumahoko,* deposed to a supporting affidavit which will be dealt with later.

The gravamen of the alleged fraudulent acts by the respondent was that the respondent altered the deed of settlement sent to her by the applicant's legal practitioners by including matters which had not been discussed nor made part of the negotiated terms of the deed of settlement. Crucially the applicant averred in relation to the nature and extent of the respondents acts of fraud that she unilaterally included the following clause in para 5 in the deed of settlement which clause was not agreed to nor discussed with the applicant:

> "…the principle of the matters being to move forward and start servicing the mortagage loan account, applicant accept the aforesaid balance for the time being allowing time to get the final outcome of the labour matters ref case LC/H/APP/615/17; LC/H/38/16; LC/H/428/17 as its outcome will be determinant of the final balance of the mortgage when the labour matter is finalized."

The applicant avers that it never mandated its late legal practitioner Mr *Jori* to include the above term in the deed of settlement and that the respondent included it on her own without reference to the applicant. The applicant averred that the unsanctioned inclusion of the clause was prejudicial to it because it would have the effect of disabling it from executing on the courts judgment in the event of default by the respondent to pay agreed materials since the balance on which execution could be levied was to be premised or predicated upon the outcomes of the labour matters pending in the labour court.

The applicant averred that its instructions to the late Mr *Jori* were to finalize a deed of settlement with the respondent on terms set out in the draft deed, annexure "13" to the founding affidavit. The unsigned draft annexure 13 aforesaid, does not contain the disputed excerpt as quoted above. The applicant attached to its founding affidavit a supporting affidavit deposed to by *Yolanda Marumahoko* ("Yolanda") which I indicated that I would deal with later. Yolanda averred that she was assigned as an intern to and worked under the direction of the Mr *Jori*. She stated that the facts of this matter were within her personal knowledge. She was assigned an e-mail address for use by Wintertons legal practitioners the applicants' legal practitioners who dealt with this matter. Her e-mail address was *ejsec@wintertons.co.zw*.

Yolanda deposed that she was the one who was assigned by Mr *Jori* to forward by e-mail to the respondent the draft deed of settlement, annexure 13. She attached a copy of the e-mail message under whose cover annexure 13 was sent to the respondent on 24 November, 2017 at 3:14pm. *Yolanda* also attached copy of the e-mail sent to the respondent by Mr *Jori* on November, 29 2017 at 8.58. The e-mail read as follows:

> "Dear Mrs Magodo
>
> I have been going through the deed of settlement which you executed and returned to our offices and noticed that you amended the Deed of Settlement by adding the six lines after the amounts stated in paragraph 1. You did not draw the changes to our attention and effectively misled us into believing that you had executed the draft forward to you. We are not agreeable to the changes you made as we have always argued that the labour matters and the foreclosure matters are essentially different. There was therefore no agreement on the amendments you mischievously made. In the circumstances we will not be bound by the Deed. Kindly attend at

our offices and sign the original Deed before close of business today failing which we will proceed to execute the writ."

Yolanda also attached copy of a letter dated 22 January 2018 written by another legal practitioner Mr *G Mudzoka* alleged who made a follow up on the deed which the applicant alleged to have unlawfully altered. The letter reads as follows:

"Dear Mrs Magodo
RE: CABS V PATIENCE MAGODO FRAUDULENT DEED OF SETTLEMENT CASE NO HC 2818/17
The above matter and the deed of settlement that you executed and returned to our offices sometime in November 2017 refers.
We noticed that you amended the deed of settlement by introducing some information relating to a labour matter which had nothing to do with the High Court matter to which the deed of settlement related.
Our client is not agreeable to the changes that you made to the deed of settlement. Your liability to our client is not dependent upon whatever matter or causes of action that you have against our client.
We are instructed to demand that you attend at our offices and sign the correct deed of settlement as well as a notice of the fraudulent deed. You are to attend at our offices demanded herein within four days of service of this letter upon you. If you do not attend to signing of the documents mentioned herein, our client will institute proceedings for the setting aside of the fraudulent deed of settlement. Our client also reserves all its rights against you as you are now in breach of the agreed terms of settlement as contained in the deed originally sent to you."

Significantly, *Yolanda* stated in her supporting affidavit that she forwarded by e-mail the unsigned deed of settlement which the applicant stands by: *Yolanda* also stated that the respondent made amendments to the deed of settlement which the respondent signed and dropped at the applicant's offices. *Yolanda* confirmed that the changes made by the respondent pertained to the inclusion and reference made therein to three labour matter which inclusion was not contained in the deed of settlement which *Yolanda* sent to the respondent for signing.

The respondent for her part replied the letter written by Mr *Madzoka* as quotedted. The respondent's response is dated 25 January 2018. It is I think important to reproduce the respondent's letter. It reads as follows:

"25 January 2018
G Madzoka
Wintertons

Dear Sir/ Madam

RE: YOUR ACCUSATION LETTER DATED 22 FEBRUARY REFERS

I write with dismay at the letter received on 24 January wherein you are falsely accusing me of executing a false deed of settlement sometime in November 2017.

I further bring your attention that I am not voluntarily in breach of the repayment plan as your client has been rejecting RTGS to my CABS account and any attempts to have transfers to my mortgages are being rejected by your client's as the system is giving back a response – no universal account. Even mobile banking transfers are giving the same response (see attached screen shots)

The deed of settlement was agreed upon on the principle that CABS is owed by Patience Magodo an amount in respect of funds advanced to buy a property in Christon Bank and since the debt is acknowledged Patience Magodo should service the mortgage account. Your client has however abused their office of having access to my mortgage account and have been posting legal fees for the labour case together with other legal fees as they have three cases they have taken to court. Worse still wrong interest figures are being posted as this statement is not from the system and is being manufactured at the back office. The legal fees are not part of the mortgage hence should be reversed out of the mortgage account. Collins Chikukwa a CABS representative agreed to look into the matter and correct the anomaly so the figure of $227 000 as reflected at the top part of the statement as due is the amount that should be accruing interest for now until the issue of true balances is sorted out. The opening balance on the attached statement is not correct and your client has failed to give me my mortgage statement from inception. Follow ups with Collins have yielded no results as the Head of Operations is refusing to have the anomaly corrected. Talk of abuse of office.

I am attaching the statement reflecting the numerous charges and entries which you client is refusing to correct so that we deal with a correct and un-adulterated account. The late Mr Jori had tasked Collins to look into the matter and correct the anomaly in the spirit of the deed of settlement.

As things stand the amount for January 2018 instalment is in my transaction account whilst the December 2017 instalment has been floating between Stanchart and CABS as the latter was giving flimsy excuses so that they would cause me to appear to be in default. Your client has no right to behave the way they have been doing and to save precious time, they should sort their mess and allow people to move on with their lives, I am sure there is no place for corruption in the new Zimbabwe, even abuse of office will not be condoned so your client must be warned.

Patience Magodo
(Attachments, screen shots and the mortgage account statement)"

In the letter aforesaid, the respondent did not address the accusation that she unilaterally altered the deed of settlement in the ways set out in the letters from the applicants' legal practitioners. The letter essentially address the respondent's concerns which *inter alia* included rejection of deposits made into her mortgage account, the posting of legal fees for labour cases to the mortgage account and posting of wrong figures. The respondent by not addressing the accusations made against her by the applicant must be taken as having admitted that she made

the alterations to the deed of settlement unilaterally. The implied admission in any event was confirmed in the respondent's opposing affidavit.

The respondent's position as deposed to by her in the opposing affidavit was to admit that she made the unilateral alterations as detailed by the applicant. She did not deny that she did not bring the alterations to the attention of the applicant's legal practitioner before or after making them. The respondent therefore signed a differently worded deed of settlement to the one sent to her. The respondent averred that she did not commit any act of fraud because the addition of a new term in the deed of settlement could not amount to fraud since the applicant's representatives accepted the new terms in that the legal practitioner for the applicant signed the altered deed of settlement. The respondent averred that the preparation of the deed prior to signature by either party was part of negotiations and that there was nothing to stop either party from making additions, subtractions or other changes to the deed of settlement. According to the respondent, the deed of settlement would only come into effect and be binding on the parties upon both parties signing the deed of settlement.

The respondent also averred that the applicant was bound by the signature of its agent, who was in this case its legal practitioner and was senior and had repute. The respondent averred that the signature of the agent was affixed to every page of the deed of settlement. The respondent stated that a signature on a written contract binds the signatories thereto. In para 11.3 of the opposing affidavit, the respondent stated:

> "11.3 It is true that a signature on a written contract binds the signatory to the terms of the contract. I am advised that this rule known as the caveat subscriptor which means that a party to a contract is bound by this signature whether or not he has read or understood the terms of the contract."

The respondent further averred that she has been making the monthly instalments to the applicant in terms of the deed of the settlement. She attached proof four payments made respectively on 23 November 2017 for ZW$2 852; 29 January 2018 for ZW$2 852; 5 January 2018 for US$1 600 and 9 March 2018 for US$1 300. The respondent averred that the amendments which she made to the deed of settlement were inconsequential because the respondent was making payments as shown in the deed of settlement. The amendment was according to the respondent not one which should vitiate the whole deed of settlement. The respondent did not however call for the excision of the added part. The respondent did not

counter claim for an order that the amended deed of settlement be declared to be the binding deed.

The respondent also averred that the fact that the applicant's legal practitioner blindly signed the agreement or had a change of heart was immaterial because public policy dictated that the courts should not re-write contracts for the parties who have voluntarily covenanted on a contract. The respondent also averred that the applicant's legal practitioner was deemed to have full authority to contract on behalf of the applicant. The applicant was resultantly stopped from resiling from the contract on the basis of the negligence of its legal representative.

The applicant did not file an answering affidavit. This was understandable because with the respondent having admitted making the unilateral changes to the deed of settlement, the bulk of the respondent averments raised matters of law which would not merit a replication since, as with the founding affidavit, the answering defendant should address facts arising for answer and not law. It is not proper for a party in application proceedings to plead and argue matters of law. It does not matter that a party avers that he or she has pleaded law on advice of legal practitioners. It is wrong practice for a legal practitioner to advise a party to plead and argue or extrapolate the law in application proceedings. Affidavits in application proceedings are there to outline the evidence of the parties. Contentions of law are reserved for argument in heads of argument and in oral submissions of the parties. The applicant in the founding affidavit in para 2 stated:

> "2. I have personal knowledge of the facts deposed to herein, somewhere specifically stated to the contrary, and I believe the same to be true and correct. Where I make reference to the law, I do so on the advise of the applicant's legal practitioners."

The applicant did not however plead the law or make reference to any specific law. The respondent for her part stated in the opposing affidavit;

> "I am the respondent in this matter, and the facts I depose to herein are true and correct to the best of my knowledge, information and belief. Where I make conclusions of law, I do so on the advise of my legal practitioners of record, which advise I take to be correct and fully embrace without reservations."

It is not for a party to reach conclusions of law for the court. It is equally not acceptable that the legal practitioner pronounces upon a conclusion of law in a matter which falls for determination by the court. It is the duty of the court to assess the facts presented by the parties and to reach a decision on both the facts and the law. The fact that a party is required to plead

facts and where appropriate to attach documents which verify the facts is provided for in rule 58(4) of the High Court rules SI 202/21 as follows:

> "(4) An affidavit filed with a written application:-
> (a) shall be made by the applicant or respondent as the case maybe, or by a person who can swear to the facts or averment set out therein; and
> (b) may be accompanied by documents verifying the facts averments set out in the affidavit and any reference in this past to an affidavit shall be construed as including such documents."

The old High Court rules 1971 which were in force when the application in *casu* was filed provided in rule 230 as follows:

> "230 Form of Court Application –
>
> A court application shall be in form no. 29 and shall be supported by one or more affidavits setting out the facts upon which the party relies ……."

The applicant and respondent as indeed any other deponent to an affidavit in application proceedings is required to depose the facts which support the cause of action or defence as the case maybe. The respondents' affidavit contains averments of both facts and largely law and to that extent is not r 58(4) complaint. I will however not strike it off but will take this opportunity to warn litigants and legal practitioners that r 58(4) must be strictly followed as it is couched in peremptory terms. The court will be acting within its jurisdiction if it strikes off an affidavit which does not comply with the requirements of r 58(4). Many a time parties make long and winding affidavits pregnant with legal arguments and contentions which are not always correct. It is not acceptable to do so. Applications tend to be bulky unnecessarily. They inconvenience the court since the judge must go through the affidavit and pick out the facts from the mixed grill of facts, arguments and contentions. The non-observance of the provisions of rule 58(4) by parties and legal practitioners must stop. The time is nigh for the court to penalize errant parties by striking out affidavits which offend r 58(4). Legal practitioners are offside when they draft affidavits which is not in strict compliance with rule 58 (4)

Reverting to the issues for determination, it appears to me that the principal issue may be identified upon a consideration of the following common cause facts:

(a) Following agreement between the parties to dispose the chamber application, case number HC 2810/17 for suspension of the sale of the respondent property to satisfy the writ of execution issued in case number HC 331/15 at the instance of the applicant, the applicant's legal practitioners drafted a deed of settlement which they forwarded

by e-mail to the respondent who received it. The deed was therefore still in draft form and would become binding on the parties upon their signing.

(b) The respondent upon receipt of e-mailed draft deed of settlement made alterations which are now common cause. In particular the respondent included an additional term to the agreement wherein, the calculation are determination of the actual balance due would be subject to the discussions reached in three pending labour cases between her and the applicant.

(c) The applicant' legal practitioners received the altered signed deed of settlement. The signed it and filed a copy thereof with the Registrar. The signing of the deed of settlement and its filing meant that case number HC 2810/17 was resolved by deed of settlement whose cancellation is now sought by the applicant.

(d) The applicant's legal practitioners subsequently discovered that they had signed and filed a deed which had been altered. They stated that they realized after signing and filing that there were additions made to the deed of settlement. They signed the deed of settlement on 27 November 2017, the same date on which the respondent had signed it. They initialed each of the three pages of the deed of settlement.

The issue that arises therefore is whether the applicant should be granted the relief of cancellation of the deed of settlement on the basis of a fraud allegedly committed by the respondent in inserting the additional qualification as already detailed. A fraud in contract law exists if a party commits an act with the intention to deceive another party or his agent to enter into the contract. Where the deceptive act is proved, the party who has been induced to enter into the contract through the deceptive or misrepresented act or fact may validly terminate or rescind the contract on the basis of the fraudulent misrepresentation. Christie in his book, Law of Contract in South Africa, 4th Edition, [*Chapter 7*] para 313 states:

> "The general effect of a misrepresentation and fraud on a contract can be shortly stated. A party who has been induced to enter into a contract by misrepresentation of an existing fact is entitled to rescind the contract provided that the misrepresentation was material, was intended to induce him to enter into the contradict and did so induce him."

The question arises therefore, whether there was an act of deception or misrepresentation committed by the respondent. The act must be identified and the aggrieved party must allege and show on the balance of probabilities that he or she entered into or committed to the contract because of being induced to do so by the alleged misrepresentation or fact. The evidence as revealed by the parties depositions is clear that the applicant was not induced to sign the deed of settlement through the alleged act of the applicant to insert the

additional clause. The applicant's legal practitioner was not circumspect in signing and initiating the deed of settlement. He noted after signing that he had signed the amended deed of settlement without noticing the amendment. On this analysis, the applicant's legal practitioners signed the deed of settlement in error. The error was that he assumed that the deed of settlement which he had prepared and sent to the respondent was the same one which he signed. The legal practitioner signed the deed of settlement blindly. The applicant's legal practitioner was not induced by any fraud allegedly committed by the respondent. At best the applicant's legal practitioner signed the deed in error or in the mistaken belief that the draft deed was the same one in content with the one that he had prepared and sent to the respondent for signature. The applicant did not base its cause of action on mistake which is a competent ground for voiding a contract or makes the contract or agreement voidable.

In the case of *SPF and Anor* v *EBCCT/ALB and Anor* 2016 ZAGPPHC 378, LEQODI J stated as follows:

> "14. A party wishing to rely on fraud must not only plead it, but also prove it clearly and distinctly. The onus is the ordinary civil onus bearing in mind that fraud is not easily inferred. The essential elements for a claim or defence based on fraud are the following:
> (a) There must be a representation by the other party or by that party's agent. In the present case K who represented the plaintiffs during the negotiations (3) (*Feinstein* v *Niggli* 1981 (2) SA 684 (A). Representation may consist of non-disclosure [4] My emphasis (*Stainer* v *Palmer – Pilgrim* 1982 (4) SA 205 (0))
> (b) It must be alleged that the fraud or misrepresentation was false and or international or negligent [5] (*Rato Flour Mills (Pty) Ltd* v *Moriates* 1957 (3) *AII SA* 28 (T))
> (c) It must be alleged and proved that the representation induced the representative or innocent party to act [6] (*Bill Harvey Investments Trust (Pty) Ltd* v *Oranjegezicht Citrus Estate (Pty) Ltd* 1958 (2) AII SA 12 (A); 1958 (1) SA 479 (A).
> (d) If damages are claimed, it must be alleged that the representee suffered damages as a result of the fraud [7] (*Truth and Reconciliation Commission* v *Mplumalanga* 2001 (3) AII SA 58 (CK))." ***Note*: Case names inserted by myself.**

The extrapolation of the concept of fraud and its effect on contracts as set out in the above judgement reflects the position in this jurisdiction. Given the facts which I have set out as proved, the applicant's cause of action based on fraud has not been proved. The applicant was not induced to act by any act of fraud on the part of the respondent. The applicant's legal practitioner perfunctorily signed the agreement. He was dilatory in executing his duty. I do not find it necessary to interrogate the issue of caveat *subscriptur* because the fraud has not been proved.

I lastly deal with the issue of costs. The costs are in the discretion of the court. The applicant's claim may have been genuine and sounds so when it claims that the signed deed of

settlement does not reflect what the applicant had agreed to and given its legal practitioner a mandate to sign for. Clearly, if the legal practitioner did not intimately check the deed of settlement before he signed it, the signing was a mistake or error. This would be the cause of action, not fraud. The respondent in such circumstances was called to court to answer a claim which was doomed to predictable dismissal. The respondent is entitled to her costs.

Resultantly, I determine the application as follows:

"The application be and is hereby dismissed with costs."

Wintertons, applicant's legal practitioners
Sawyer & Mkushi, respondent's legal practitioners