LAWRENCE MUTEMBO
versus
PATIENCE MUNDANDI

HIGH COURT OF ZIMBABWE
MWAYERA and MUZENDA JJ
MUTARE, 15 and 30 May 2019

Civil Appeal

Mr *V Chinzamba*, for the Appellant
Mrs *MM Mandingwa*, for the Respondent

MUZENDA J: On 29 March 2013, appellant and respondent concluded an agreement of cession relating to a certain piece of land situated in the District of Mutasa being Stand Number 729 Tsungure Medium density, Penhalonga measuring 506m^2 for an amount of US$4 500-00. The appellant paid a deposit of $500-00 leaving a balance of $4 000-00 which was agreed to be paid off on or before 29 April 2013. The concrete stones on sight and river sand were included to form part of the purchase price. It is not in dispute that the appellant failed to meet the deadline date and the respondent/seller on 2 September 2014 filed an application for eviction of the appellant from the residential stand.

At the core of her application the respondent contended that the appellant had breached the agreement of sale and respondent was entitled to cancel the agreement. She added in her affidavit that she had properly notified the appellant on 29 July 2014 of her intention to cancel the agreement. The appellant opposed the application for ejectment.

On 25 October 2018 the learned Magistrate granted judgment in favour of the respondent. The appellant then filed an appeal against that judgment on 23 November 2018 and outlined the grounds of appeal as follows:

> "GROUNDS OF APPEAL
> 1. The trial Magistrate grossly misdirected herself and thus erred at law when she ruled that the parties had not agreed that the appellant would pay the balance and will no longer be evicted.
> 2. The trial Magistrate erred at law and misdirected herself when she ordered the eviction of the appellant when evidence abounded that he made useful improvements for which he was never compensated.

3. The trial Magistrate erred at law and misdirected herself when she held that the agreement of sale was cancelled when the amount paid by the appellant was never paid back or tendered in court."

The following aspects are uncontroverted:

(a) the purchase price was to be paid in instalments.

(b) The appellant did not pay the balance by the agreed date.

(c) The appellant took occupation of the property, obtained the building plans, developed the stand up to roof level and also constructed a temporary shelter/ 2 roomed cottage of brick under asbestos.

(d) On one occasion the parties engaged with a view of resolving the dispute and a compromise was reached but not honoured by the respondent.

(e) The appellant has not been compensated of the improvements effected on the stand.

What is in dispute is whether the compromise reached between the parties evolved into a novation and if not whether the respondent is entitled to evict the appellant. Mr *V Chinzamba* for the appellant contends that there was novation of the agreement when the respondent agreed to accept the balance outstanding and abandon the legal suit for eviction. He further argues that the learned trial Magistrate erred in ordering the eviction of the appellant more so when it was apparent on record that useful improvements were made to the property and no compensation paid, tendered. The appellant's view was that the improvements constituted a lien that would form a basis against ejectment of the appellant from the subject property and this would occur even where the occupying appellant did not file a counter claim during the proceedings.

On the other hand, Mrs *M.M. Mandingwa* for the respondent has a totally different legal stance. She disputes the existence of novation and submitted that, there is nothing on record to point that the parties agreed that if the appellant pays the balance he would not be evicted. In principle, respondent goes on to say that the appellant is in breach and the trial Magistrate properly ordered his eviction. She added during oral submissions that the respondent was ready to compensate the appellant if the improvements are qualified. In any case, she added the improvements were illegal. This last point of her submission creates an impasse in the court's view, if at one occasion respondent shows willingness to compensate, why would she reprobate and raise the issue of illegality?

WAS THE ORIGINAL AGREEMENT NOVATED?

A letter written by the then respondent's legal practitioners, Messrs Muringi Kamdefwere Legal Practitioners dated 21 January 2015 addressed to Messrs Mugadza Chinzamba & Partners contained on page 63 of the record needs to be cited in detail.

"Re: Patience Mundandi vs Lawrence Mutembo Case No. 1680/14

The above matter refers. Further to our various correspondences may you please pay the outstanding balance and costs amounting to $2 170-00 as agreed into our Trust Account details of which are:

Account Name: Muringi Kamdefwere Legal Practitioners
Account No. : 6135115560213
Branch : Mutare

Please advise when the amount has been deposited or transferred. We hope that this is going to be done without delay to bring finality to this litigation.

Yours faithfully

MURINGI KAMDEFWERE
LEGAL PRACTITIONERS"

Messrs Mugadza Chinzamba & Partners before 21 January 2015 had written to the respondent's lawyers as follows:

"9th January 2015

Re: Patience Mundandi vs L. Mutembo

We refer to the above matter and to our previous correspondence.

We write to advise that of the outstanding US$1 800-00, US$1 500-00, is in our Trust Account and our client shall pay the balance outstanding inclusive of Messenger of Court costs and your nominal fees by the 5th February 2015.

Yours faithfully

MUGADZA CHINZAMBA & PARTNERS"

Messrs Muringi Kamdefwere Legal Practiioners on 21 January 2015 wrote a letter to Messrs Mugadza Chinzamba & Partners replying the above letter.

"Re: PATIENCE MUNDANDI VS LAWRENCE MUTEMBO CASE NO. 1680/14

> We refer to the above matter and in particular your letter dated 9 January 2015. Please note that whilst our client generally accepts the settlement she is requesting you to pay the outstanding US$1 820-00, the messenger of Court fees of which US$150-00 was deposited beforehand and is payable to us and US$200-00 as costs awarded by the court on or before the 5th of February 2015 as suggested by yourself. Because of previous unfulfilled promises our client is unwilling to get partial payment. So your client should ensure that a total of US$2 170-00 is paid to us on or before the 5th of February 2015. He should also clear the Messenger of Court bill.
>
> Yours faithfully
>
> MURINGI KAMDEFWERE
> LEGAL PRACTITIONERS (my own emphasis)"

The appellant urges this court based upon these three letters (cited above) to conclude that when the matter was work in progress, before the court, the parties reached a compromise and the appellant genuinely believed that the respondent was intent to resolve the dispute and settle. He paid the money into his lawyer's trust account and was surprised by the action of the respondent when she disowned the compromise.

> "Novation means the replacing of an existing obligation by a new one, the existing obligation being discharged…. Because novation involves a waiver of existing rights it follows that it will not be presumed and, as held in Ballender v Salisbury City Council 1945 SR 269 273 (or 1949 (1) SA 240 246) it must be strictly proved."[1]

The appellant submitted that there was a compromise between the parties in the midst of the court action. The compromise was done in writing as exhibited through the letters between the parties legal practitioners cited in *extenso* herein.

> "A compromise is the settlement by agreement of disputed obligations and is a form of novation, replacing the disputed obligation by the obligations created by the agreement of compromise."[2]

The learned author goes on to cite *Nagar v Nagar* [3] where MCNALLY JC as he then was observed that a compromise may be sought to a resolutive condition subject to a suspensive condition or be a compromise pure and simple. The difference becomes significant when one party fails to fulfil his or her obligations under the compromise agreement. May the other party revert to his original claim? The answer is that he may not if it is a compromise pure and simple[4] but if, as visualised in *Markides v Ashe abs Ashby*,[5] the compromise is subject to the resolutive condition that the parties' previous rights revive if the terms of the compromise

[1] Business Law in Zimbabwe, RHC Christie Juta & Co 2014 ed p 107-108
[2] Business Law in Zimbabwe, *Supra* at p 108.
[3] 1982 (2) SA 263 (Z)
[4] Manyora v Kuwirirana Bus Service (Pvt) Ltd 1990 (1) ZLR
[5] 1932 SR 8

agreement are not fulfilled, or to the suspensive condition that the previous rights are not replaced until the terms of the compromise agreement are fulfilled, then the other party may revert to his original claim.

In this case before us, the respondent does not deny the correspondence between her erstwhile legal practitioners and the appellants. Her argument is that these letters were written without her blessing, she never gave her lawyers, Mr *Mareanadzo*, instructions to write the letters. The lay interpretation of the letters cited herein is unambiguous purely in the spirit of dispute resolution, the respondent initiated the noble idea of resolving the dispute upon the appellant paying the balance outstanding together with costs of suit. Appellant agreed and paid the amount into his lawyers trust account. Before the appellants' legal practitioners released the money to the respondent's lawyers trust account, the respondent disowned the compromise. The question for decision is whether respondent can be allowed by this court to do that?

We are satisfied that a novation occurred between the parties premised upon the letters exchanged between the parties' legal practitioners whereupon the appellant was to settle the amount outstanding and the respondent's legal practitioners agreed to the settlement. A compromise was created and the parties' obligations arose from the letters. The respondent was not and is not entitled to revoke the compromise. It is trite law that a party is bound by the intentions of its legal practitioners[6] the letters from the respondent's legal practitioners to the appellant's were clear, they were not qualified with "a without" prejudice caveat, they precisely mean what they contained, respondent intended to settle and even terminate the court proceedings.

The respondent did not call Mr *Mareanadzo* to appear before the court *a quo* to inform the court that he did not get his client's instructions when he wrote the letters. In any case if the respondent has any complainant with her previous lawyers she is at liberty to take appropriate corrective action against the lawyers but should not be allowed to compromise appellant's rights arising out of the compromise. She ought to abide by the terms of the agreement/compromise, accept the balance outstanding and abandon court proceedings. Consequently the court *a quo* misdirected itself in reverting to the old agreement of sale and further by failing to acknowledge the modern advantages of alternative dispute resolution. The latter enhances speedy and informal resolution of disputes in a generally less stressful and confidential manner encouraging communication between parties thereby preserving and

[6] Saloojee and Another Now Minister of Community Development (1965 (2) SA 135 (a). 141 C-E

enhancing relationship between the parties. Further it enhances high degree of party control, the parties create their own process and craft own agreements, with flexibility enabling the parties to reach resolutions tailored to their needs and underlying concerns and can address legal and non-legal issues as well as providing for remedies unavailable through adjudicative process. Clause 6 of the agreement of sale outlined the rights of the parties in the event of breach by either party, our observation of the court *a quo*'s judgment as well as, either parties' heads does not show that the clause was reverted to. In any case the compromise does not provide that either party can resort to the agreement of sale in the event of a dispute. In our view therefore once a compromise was reached between the parties, the respondent was bound by it and could not have proceeded with the court action seeking the eviction of the appellant.

In the result it is ordered as follows:

(i) the appeal succeeds with costs.

(ii) the judgment of the court *a quo* is set aside and is substituted by the following:

"Applicant's application for respondent's eviction is hereby dismissed with costs."

MWAYERA J agrees_____

Mugadza Chinzamba & Partners, appellant's legal practitioners
Mhungu & Associates, respondent's legal practitioners