

PETER FREDERICK RENNIE
versus
ELIZABETH KHAKA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 3 & 19 July 2017

Opposed application

PC Paul, for applicant
A Mugandiwa, for respondent

TSANGA J: This is an application for rescission of judgment which in effect seeks to set aside the registration of a deed of settlement as an order of court using the mechanism of rescission. At a pre-trial conference the applicant as defendant entered into a deed of settlement with the respondent as plaintiff regarding the transfer and purchase of shares from Old Mutual Limited in lieu of applicant's failure to transfer property purchased by the respondent. The deed of settlement was entered into on the 1st of July 2008. The shares were to have been purchased and transferred within fourteen days from the 4th of July 2008 as fully captured in the deed of settlement.

The Deed was worded as follows:

"It is ordered that:

1. The defendant shall purchase and transfer to the plaintiff Old Mutual Limited shares within fourteen working (14) days from 4 July 2008. The number of shares to be transferred to the plaintiff shall be arrived at as set out below:
 - 1.1 The defendant at his cost shall cause the property purchased by the plaintiff being Lot 5 of the Remainder of Subdivision "A" of Lichfied of Wilksden Farm together with all permanent improvements constructed thereupon to be valued by Tony West Real Estate and Fox & Carney Estate Agents within (5) days of today's date. (4 July 2008)
 - 1.2 The average value of the two evaluations shall be taken as the open market value of the property.
 - 1.3 The number of Old Mutual Limited shares to be transferred by the Defendant to the plaintiff shall be arrived at by dividing the value of the property as set out above by the value of one (1) old Mutual share as at the date of valuation.

- 1.4 The defendant shall meet the cost of transferring the shares into Plaintiff's name.
2. The defendant shall pay the costs of suit."

Contingencies in the event of breach of agreement were however not spelt out in the settlement agreement which clearly had time frames for compliance. The applicant did not comply. However, in 2012 an application was made by the respondent seeking to turn the terms of the settlement into an order of court. The application was served at applicant's last known place of residence and was received by his then domestic worker one Winnie Guzuzu. Applicant, however, says he did not receive the application as he had ceased to reside at that residence having separated from his wife who remained staying there. He said neither his wife nor Winnie Guzuzu had informed him of the application. He was at the time still paying Winnie Guzuzu her wages pending permission to terminate her employment. He however averred that she had no authority to receive court process on his behalf.

As a result of his failure to respond to the application, the deed of settlement was registered on the 29th of November 2012 as an order of the court in the exact same words as captured in the agreement. The applicant seeks rescission of its registration on the grounds that he had a reasonable explanation for why he failed to oppose the registration of the settlement agreement. In particular, he argued that there are prospects of success if the registration is rescinded particularly in that the order as registered could not be given effect to as the time frame and date mentioned in the order had long since passed. Moreover, it had become impossible to perform due to inflation. He further argued that the respondent's claim had prescribed by the time of registration. He also averred that he only became aware of the order on the 10th of November 2015 some three years later when an application for contempt was served on his legal practitioners. He had contacted his current practitioners upon learning from his sister of an effort to serve papers on him. He had not known at that time what the matter was about.

At the hearing of this matter I raised my concern as to whether the application was proper given the fact that the parties had entered into a deed of settlement and that what was registered was as per their deed of settlement. The issue in my view is whether the court has power to set aside through rescission an order that stems from settlement agreement made with full knowledge by the parties when the contract between the parties is not void or voidable. Like any contract the grounds upon which a settlement agreement can be challenged include duress or incapacity, mistake, fraud bad faith or misleading conduct,

failure to pay consideration, illegality or impossibility of performance. Absent evidence that can impeach such settlement agreement as enunciated in these grounds a settlement agreement is binding. Applicant argued that the settlement agreement had become impossible to perform due to inflation but clearly at the time that it was entered into with very definite time frames it was not impossible to perform. It is still not impossible to perform.

What I have before me is an application to rescind an order which in essence embodies the signed contract to deliver shares in lieu of property. This court is not aware of what was within the knowledge of the parties at the time that they agreed to the time frames set in the deed of settlement. *See Nel v Cloete* 1972 (2) SA 150 (A). It is also not aware of what happened in between. It is equally not privy to the reason that the judge who registered the deed took into account in registering the deed with its stipulated time frames. It seems to me highly improper to seek rescission of a deed settlement which the applicant was fully aware of. The explanation that he did not receive the application under the circumstances explained is at best unlikely. It appears there was never any intention to fulfil. The impossibility argument is also not bona fide as this would have been within his knowledge at the time that he entered the agreement. Changed circumstances are not necessarily a bar. *See Ncube v Mpofu* 2006 (2) ZLR p 41; *Field NO & Anor v Compuserve (Pvt) Ltd* 1990 (2) ZLR 253 (HC). There is no merit in this application.

Accordingly the application is dismissed with costs.

Kantor & Immerman, respondent's legal practitioners
Wintertons, applicant's legal practitioners