

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE No: D9264/2018

In the matter between:

UTOPIA TRADE AND INVESTMENTS (PTY) LTD APPLICANT

and

STONERIDGE INVESTMENTS (PTY) LTD FIRST RESPONDENT

MARK TAYLOR SECOND RESPONDENT

GERHARD NEL THIRD RESPONDENT

PENWEL THAMSANQA KAMANGO FOURTH RESPONDENT

GREGORY TAYLOR FIFTH RESPONDENT

ORDER

Order

In the premises the following order is made:

- (a) The first, second, third, fourth and fifth respondents are ordered to pay to the applicant, jointly and severally, one paying the other to be absolved, the amount R4 001 383.53.
- (b) Interest thereon at the rate of 1.4% per month compounded daily as from the 1st of July 2018 to date of final payment, less the payments made to date.
- (c) Costs of the opposed application that was adjourned sine die and costs of this rule 41(4) application on an attorney and client scale.

JUDGMENT

Mathenjwa AJ

[1] This is an application in terms of Uniform rule 41(4) in which the applicant seeks judgement against the first, second, third, fourth and fifth respondents, based on the signed settlement agreement and for an order directing the respondents to pay the applicant, jointly and severally the one paying the other to become absolved the amount of R4 001 383.53. The respondents oppose the application.

Historical background

[2] The applicant loaned an amount of R3 600 000.00 to an entity known as Famous Fun Factory (Pty) Ltd (Famous Fun), which operated a wave house business. Famous Fun was placed in business rescue under the control of a business rescue practitioner, and the applicant was its largest creditor when it was being placed in business rescue. An agreement of sale was entered into between the first respondent, as purchaser, and Famous Fun, as seller in conjunction with the business rescue practitioner and the applicant, whereby the Famous Fun business was sold to the first respondent for an amount of R3 500 000.00. While the agreement of sale was not signed by the business rescue practitioner, it was

sanctioned by him and implemented by the parties when the company came out of business rescue.

[3] On 3 November 2016 a loan agreement was concluded between the applicant and the first respondent in terms of which the applicant loaned to the first respondent the sum of R 2 500 000.00 for the exclusive use of acquiring the wave house business from Famous Fun, which amount would bear the interest rate of 1.41% per month. The second, third, fourth and fifth respondents signed surety ship agreements in terms of which they individually bound themselves to the applicant as sureties and co-principal debtors in solidum with the first respondent. After the respondents failed to repay the amount of loan, the applicant instituted an application in this court for an order directing all the respondents to pay to it the amount of R3 069 369 362.04. The respondents defended the application and the matter was enrolled for hearing. However, prior to the hearing of the matter the parties concluded a settlement agreement. The relevant terms of the agreement were that the respondents, jointly and severally:

- (a) agreed to pay to the applicant an amount of R2 300 000.00 in full and final settlement of the applicant's claim, interest and costs on or before 20 March 2020;

- (b) agreed to pay 21 consecutive monthly instalments of R100 000.00 on or before the last day of each succeeding month commencing on or before the last day of July 2020;

- (c) agreed that should the respondents fail to pay the amount on or before 20 March 2020, or respondents after paying the sum of R230 000.00 default in any of the 21 consecutive instalments, the applicant would be entitled to seek judgment of the full amount of the claim, interest and costs as per notice of motion.

[4] The respondents are in default of their payment obligations under the settlement agreement and the applicant launched this application to claim payment of the amount, interest and costs from the respondents as per the original notice of

motion in the sum of R4 001 383.53. The respondents do not dispute the conclusion of the settlement agreement, nor that have they failed to carry out the terms thereof, but contend that the settlement agreement is invalid and accordingly unenforceable, because the original agreement of sale of the Famous Fun business and the subsequent loan agreement between the applicant and first respondent was invalid. Therefore, the issues for determination in this application is whether or not the settlement agreement amounted to a compromise between the parties, in that the previous cause of action relied upon by the applicant and the previous defences raised by the respondent in the main application fell away upon its conclusion.

The parties' contention

[5] The respondents contend that the settlement agreement is invalid, because the main agreements and the subsequent agreements concluded between the parties, on which the settlement agreement is premised are invalid. It is contended that the agreement to sell the Famous Fun business was concluded by the company which was placed in business rescue contrary to the business rescue plan. The business rescue plan did not make provision for the sale of the Famous Fun business to the first respondent. The respondents refer this court to the Constitutional Court decision in *Shabangu v Land and Agricultural Development Bank of South Africa*¹ as the authority in support of their contention that 'the taint of invalidity of the sale agreement also stretched to taint' the settlement agreement. Therefore, the respondent's counsel argued that the settlement agreement is invalid as it relates to the same indebtedness flowing from the invalid sale of business and loan agreement between the same parties.

[6] The applicant contends that the settlement agreement amounts to a compromise and as such, the respondents are not entitled to raise a new defence in this application, the applicant's counsel further argued that the business rescue plan does not exclude the sale of business, therefore the sale of business is not invalid.

Legal principles.

¹ *Shabangu v Land and Agricultural Development Bank of South Africa* [2019] ZACC 42, 2020 (1) SA 305 (CC), 2020 (1) BCLR 110 (CC).

[7] Uniform rule 41(4) provides that:

‘Unless such proceedings have been withdrawn, any party to a settlement which has been reduced to writing and signed by the parties or their legal representatives but which has not been carried out, may apply for judgment in terms thereof at least five days’ notice to all interested parties’.

The application for judgment in terms of a settlement agreement has received judicial attention in case law.

[8] A compromise was defined in *Georgias and another v Standard Bank Chartered Finance Zimbabwe*.² At 138I-J Gubbay CJ stated as follows:

‘Compromise, or *transactio*, is the settlement by agreement of disputed obligations, or of a lawsuit the issue of which is uncertain. The parties agree to regulate their intention in a particular way, each receding from his previous position and conceding something - either diminishing his claim or increasing his liability.’

[9] In *Hamilton v Van Zyl*,³ Mullins J defined a compromise as follows:

‘It is clear therefore that a compromise, like novation, is a substantive contract which exists independently of the causa which gave rise to the compromise, and which can be enforced without the necessity of proving a prior cause of action or establishing a legal right pre existing the compromise. Like any other contract, defences to an action based on such compromise may be raised. Such defences may, for example, be that the compromise was induced by fraud, or duress, or mutual error, but the defendant is not entitled to raise defences relating to the motives which induced him to agree to the compromise, or to the merits of the dispute which it was the very purpose of the parties to compromise.’

² *Georgias and another v Standard Bank Chartered Finance Zimbabwe* 2000 (1) SA 126 (ZS) at 138I-J.

³ *Hamilton v Van Zyl* 1983 (4) SA 379 (E) at 383H – 384B.

[10] The validity of a subsequent settlement agreement was defined in *Panamo Properties 103 (Pty) Ltd v Land and Agricultural Development Bank of South Africa*.⁴ The Land Bank acted beyond the scope of its empowering legislation, and entered into a loan agreement and advanced money to Panamo Properties (the company) and thereafter registered a mortgage bond in its favour to secure the loan amount. The loan agreement was invalid since the bank did not have the power to enter into the transaction. The question for determination was whether a mortgage bond which secured the loan agreement that was invalid, was also invalid and void. At para 47 Gorven AJA stated as follows:

‘There is no basis for an order declaring that the bond is not enforceable due to the invalidity of the loan if the Bank has a claim against Panamo for unjustified enrichment’.

[11] In *Shabangu v Land and Agricultural Development Bank of South Africa*,⁵ the appellant stood surety for indebtedness of a company with the first respondent, the Land Bank. After it transpired that the first respondent acted beyond the scope of its enabling statute when it made the loan and that the loan agreement was therefore invalid, the company signed an acknowledgement of debt accepting liability for a lesser amount in full and final settlement of its indebtedness. In the acknowledgement of debt it was recorded that the first respondent has informed the company that the loan advanced to it fell outside of the first respondent’s mandate. In that case both the company and the first respondent were aware that the original loan agreement was invalid when they entered into the acknowledgment of debt. The Constitutional Court found that the settlement of an admittedly undisputed invalid earlier loan agreement by way of the acknowledgement of debt in effect perpetuated the original invalidity and was therefore also invalidated.⁶

Analysis

⁴ *Panamo Properties 103 (Pty) Ltd v Land and Agricultural Development Bank of South Africa* [2015] ZASCA 70, 2016 (1) SA 202 (SCA).

⁵ *Shabangu v Land and Agricultural Development Bank of South Africa* [2019] ZACC 42, 2020 (1) SA 305 (CC), 2020 (1) BCLR 110 (CC).

⁶ *Shabangu v Land and Agricultural Development Bank of South Africa* [2019] ZACC 42, 2020 (1) SA 305 (CC), 2020 (1) BCLR 110 (CC) para 31.

[12] The only defence relied upon by the respondents' counsel during submissions before me was narrowed down to the submission that the main and subsequent agreements that were concluded between the parties were concluded contrary to the express provisions of section 152(4) of the Companies Act 71 of 2008, which states that: 'A business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company's securities...' I agree with the applicant's counsel's contention that the adopted business rescue plan does not exclude the sale of Famous Fun's business. The business rescue plan recorded that the applicant agreed to accept transfer of the shares in Famous Fun; to pay an amount to be distributed amongst concurrent creditors so they would receive a dividend; to secure the landlord, to pay all commencement finance debts and to pay employees claims; the applicant would take shares of the business with the intention of finding a buyer to recover its claim and costs. Consequently the applicant, the first respondent and Famous Fun, with the consent of the business rescue practitioner, concluded a sale of business agreement in terms of which the business of Famous Fun was transferred to the first respondent. Therefore, it is apparent from the business rescue plan itself that the sale of the business was part of the purpose for the business rescue and Famous Fun was not prohibited from selling its business as a going concern. I am inclined to hold that where, as here, there is no reservation of the right to proceed on the original agreement, the settlement agreement constitutes a compromise which bars the respondents from raising defences based on the original agreement.

[13] In the event I am wrong in my conclusion, then I continue and consider whether if the original agreement was invalid, and that such invalidity would taint the settlement agreement in the present case. In the *Shabangu* decision the court posed the question whether that decision overruled the conventional principle that a subsequent agreement entered into between the same parties following upon an earlier invalid agreement constitutes a compromise. Both counsels representing the parties correctly agree that the *Shabangu* decision does not have the effect of

overruling the conventional principle. This view is supported by the contents of the decision itself. Froneman J stated as follows:⁷

‘This matter concerns the so-called settlement of an admittedly undisputed invalid earlier loan agreement by way of the acknowledgment of debt. We hold that the terms of the acknowledgement of debt in effect perpetuated the original invalidity and must therefore also be invalidated. To that extent it follows the conventional notion of a novation that remains tainted’.

It was pointed out that the judgement does not deal with compromises where the validity of the original agreement remains disputed.⁸ The court also held that:⁹

‘Where, as here, there is no dispute that the subject-matter of the original loan agreement — financing urban, not rural development — was invalid, there is no scope for arguing that the mere acknowledgement of a lesser sum owing transforms the nature of the original invalid agreement into something new and valid. In logic, and on first principles, the subsequent agreement may only be valid if the original invalidity may be overcome in one way or another.’

[14] The present case is distinguishable from the *Shabangu* decision in that the invalidity of the original agreement is disputed, whereas *Shabangu* deals with the settlement agreement entered into following an admittedly undisputed invalid earlier loan agreement. When the parties entered into the acknowledgment of debt, in the present case, they were not aware of the alleged invalidity of the original agreement. It is instructive to point out that in their answering affidavit the respondents did not raise the defence based on the invalidity of the original agreement in the main application. The respondents raised the defence on the invalidity of the original agreement for the first time in their answering affidavit to the applicant’s claim for judgement based on the settlement agreement signed by the parties. It stands to

⁷ *Shabangu v Land and Agricultural Development Bank of South Africa* [2019] ZACC 42, 2020 (1) SA 305 (CC), 2020 (1) BCLR 110 (CC) para 31.

⁸ *Shabangu v Land and Agricultural Development Bank of South Africa* [2019] ZACC 42, 2020 (1) SA 305 (CC), 2020 (1) BCLR 110 (CC) para 33.

⁹ *Shabangu v Land and Agricultural Development Bank of South Africa* [2019] ZACC 42, 2020 (1) SA 305 (CC), 2020 (1) BCLR 110 (CC) para 24.

reason that the conventional principle is applicable, and therefore, the alleged invalidity of the original agreement would not taint the subsequent settlement agreement.

Order

[15] In the premises the following order is made:

- (a) The first, second, third, fourth and fifth respondents are ordered to pay to the applicant, jointly and severally, one paying the other to be absolved, the amount R4 001 383.53.
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- (c) Costs of the opposed application that was adjourned sine die and costs of this rule 41(4) application on an attorney and client scale.

Mathenjwa AJ

Date of hearing: 5 August 2022
Date of judgment: 30 August 2022

Appearances:

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Judgment duly handed down electronically