JOINA DEVELOPMENT COMPANY (PVT) LTD
versus
NEWGALE INVESTMENTS (PRIVATE) LIMITED
and
THE REGISTRAR OF DEEDS N.O.

HIGH COURT OF ZIMBABWE
KAMOCHA J
HARARE, 4 October and 3 November 2005

Opposed Court Application

A. Moyo, for the applicant
E.T. Matinenga, for the 1st respondent
No appearance from 2nd respondent

KAMOCHA J: The applicant company, in its amended draft order, is seeking for an order in the following terms:-

"1. The 1st Respondent shall do all such acts an sign all such documents as are necessary to pass transfer of certain piece of land called a certain piece of land situate in the District of Salisbury called subdivision D of subdivision C of Lot 15 Block C of Avondale, (the property) to the applicant within (7) days of service of this order on it, failing which the Deputy Sheriff Harare is hereby empowered and directed to do all such acts and sign all such documents on behalf of the 1st Respondent;

2. The 2nd Respondent shall approve and register the transfer in accordance with paragraph 1 above;

3. The 1st Respondent pays costs of suit;

4. ALTERNATIVE RELIEF

In the event of the 1st Respondent being unable for whatever reason to transfer the property to the applicant in accordance with the foregoing, then and in such event, 1st respondent be and is hereby ordered to pay to the applicant the sum of $2 500 000 000-00 being the market value of the property sold together with interest thereon at the prescribed

> rate reckoned from 13th September 2004, to date of final payment together with costs of suit."

The circumstances giving rise to the launching of this application by the applicant are briefly these. On 29 May 2003 the parties entered into an agreement in terms whereof the first respondent sold and the applicant purchased from first respondent the property for an agreed sum of $206 million payable in full on or before 30 June 2003. The applicant failed to pay the purchase price by 30 June 2003. As a result of the failure by applicant to pay by due date the parties held a meeting at which it was agreed that the purchase price would then be paid in full on 30 September 2003. The applicant still failed to meet its obligation by 30 September 2003.

The parties, however, continued to have negotiations until they agreed to novate the original agreement by converting it into a Deed of Sale in terms of which the purchase price was increased to $400 million. The conversion of the original agreement into a Deed of Sale was agreed at meeting held on 9 March 2004. The Deed of Sale showed the terms of payment of the outstanding purchase price thus:-

(a) The first instalment on the outstanding purchase price was due and payable on 15 March 2004; and

(b) The final payment was to be effected on or before 16 April 2004.

The applicant was again unable to pay the first instalment of the outstanding amount on 15 March 2004. A meeting was held by the parties on 23 March 2004. The meeting did not seem to remedy the situation since the applicant's failure to meet its obligation continued unabated.

The result was that the respondent's legal practitioners ended up writing to the applicant's legal practitioners on 14 April 2004 informing them that the first respondent was withdrawing the proposed sale. Despite the purported cancellation

of the sale on 14 April 2004 the parties still continued with their negotiations. The applicant finally paid the full purchase price in May 2004.

What follows hereunder was hotly contested. According to the applicant trouble started when it sought to have the first respondent transfer the property into its name as the first respondent began to raise the issue of late payments. The first respondent did not end there it also sought to have the price increased for a second time from $400 million to $3 billion. The suggestion was rejected by the applicant. However, the parties still continued with negotiations and held various meetings. The meetings were fruitless leading to the collapse of the negotiations.

Thereafter the first respondent sought to resile from the agreement by refunding the sum of $400 million paid to it by applicant pursuant to the agreement. But the refund cheques were dishonoured on presentation to the first respondent's bankers. The first respondent then forwarded another cheque drawn on Century Bank in the sum of $400 million but the applicant through its legal practitioners refused to accept it and did not bank it. That was the applicant's story.

The first respondent had this to say. It averred that indeed negotiations continued after payment of $400 million. The negotiations resulted in the parties holding a meeting on 31 August 2004 where the first respondent made a new offer of $2.5 billion which was allegedly accepted by the applicant.

Since the applicant had already paid $400 million it undertook to settle the outstanding $2.1 billion by paying $1.9 billion by Tuesday 7 September 2004 and the remaining $200 million in two instalments.

Needless to say the applicant, once more, failed to pay as agreed. It then addressed a letter of cancellation of agreement on 3 September 2004 which it marked "**Without Prejudice**". The letter is reproduced in part below.

"2 September, 2004

WITHOUT PREJUDICE

Dear Sir

TERMINATION OF AGREEMENT IN RESPECT OF THE SALE OF THE GT BAIN CENTRE

Further to the meeting held at your offices on a without prejudice basis on 31 August, 2004, we regret to advise that our clients have not been able to finalise funding to meet your client's revised offer. Therefore the parties need to abandon the transaction and resolve the monetary issues arising accordingly …"

The applicant did not deny the above averments by the first respondent in its replying affidavit. They, therefore, stand uncontroverted. What comes out from the above averments is that the parties novated the Deed of Sale agreement on 31 August 2004. The applicant accepted first respondent's offer at a purchase price of $2.5 billion payable as reflected above. The parties were therefore governed by the 31 August agreement. The applicant's suggestion that the parties were still governed by the 9 March, 2004 Deed of Sale cannot be correct in the light of the undisputed averments of the first respondent. The applicant in fact made an effort to implement the terms of the agreement of 31 August, 2004 but failed hence the admission that it had "not been able to finalise funding to meet your clients revised offer." It, therefore, seems to me that the parties were acting in terms of the 31 August 2004 agreement which novated the 9 March 2004 Deed of Sale.

Having arrived at the above conclusion it seems to me that I should also find as a fact that after the letter of cancellation of 14 April 2004 the parties continued to negotiate and held various meetings culminating in the agreement of 31 August 2004. That being the case the need for me to deal with the issue of whether or not the Deed of Sale concluded between the parties falls within the purview of section 8

of the Contractual Penalties Act [*Chapter 8:04*] does not arise at all as the parties novated it and concluded a fresh agreement.

While the first respondent, on the one hand, submitted that this new agreement was cancelled by applicant by its letter of 3 September 2004 headed "without prejudice" at page 4 above. The applicant, on the other hand, objected to the production of the document being put in evidence on the basis that it has the tag "Without prejudice".

The rule relating to letters headed "Without Prejudice" was discussed in 1893 in the case of *IN Re Daintrey. Ex Parte Holt* [1893] 2 QB 116. It was stated at page 117 that the rule was founded on the view that unnecessary litigation was an evil, and that the privilege ought to apply where one party makes statements in the course of negations in order to prevent the litigation going on. This is a matter of public policy.

At page 119 VANGHAN WILLIAMS and BRUCE JJ opined thus:-

> "…. In our opinion the rule which excludes documents marked "Without prejudice" has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation, and it seems to us that the judge must necessarily be entitled to look at the document in order to determine whether the conditions, under which alone the rule applies, exist.
>
> The rule is a rule adopted to enable disputants without prejudice to engage in discussion for the purpose of arriving at terms of peace, and unless there is a dispute or negotiations and an offer the rule has no application …."
> (emphasis added)

Nearer home, the South African Courts endorsed the above statements of law by the Queens Bench Division in *Merry v Machin* 1926 NPD 236. LATHAM J had this to say at 237 –

> "Letters written "Without prejudice" cannot in general be admitted in evidence without the consent of both parties, but the rule is strictly confined to cases where there is a dispute or negotiations and terms are offered for settlement."

What emerges from the above case authorities is that the requirements a document should meet in order to qualify under the rule are that –

(a) there is a dispute or negotiations in the case; and

(b) terms are offered for settlement.

In casu the applicant's letter does not reveal that there was a dispute over the revised offer. Instead it clearly expresses its inability to raise the sufficient and necessary funds for the new contract price. In the result applicant proposed that the agreement be abandoned. It, therefore, seems to me that the parties had gone beyond the stage of negotiations and an agreement had come into fruition.

Further, the applicant's letter did not offer any terms for settlement apart from confessing its inability to pay the purchase price in terms of the contract and its proposal to cancel it.

In my view, the proposal to abandon the agreement was going to be prejudicial to the first respondent. That is so because it is clear from the history of this case that the applicant was incapable of paying the purchase price timeously. It fundamentally breached the terms of the two previous agreements through its failure to pay the purchase price as had been agreed. It, therefore, seems to me, that the applicant would have suffered no prejudice if the suggested cancellation did not find favour with the first respondent.

The rule relating to letters headed "Without prejudice" has no application where prejudice would affect the person to whom it is addressed. It only applies where the prejudice would affect the writer in the event of the rejection of the

proposal. The learned judges *In Re Daintrey. Ex Parte Holt supra* at page 120 had this to say –

> "Moreover, we think that the rule has no application to a document which, in its nature, may prejudice the person to whom it is addressed. It may be that the words "Without prejudice" are intended to mean without prejudice to the writer if the offer is rejected; but in our opinion, the writer is not entitled to make this reservation in respect of a document which, from its character, may prejudice the person to whom it is addressed if he should reject the offer …."

In the light of the foregoing I hold that the letter of 3 September 2004 is not a "without prejudice" document as it does not meet the requirements laid down for such documents.

Consequently, the application must fail and is hereby dismissed with costs.

Kantor & Immerman, applicant's legal practitioners.

Costa & Madzonga, 1st respondent's legal practitioners.