SHONGWE HOLDINGS (PVT) LTD
versus
CHEGUTU MUNICIPALITY

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 16 July 2019 & 24 September 2019

Court Application

M. Chipetiwa, for the applicant
C. Warara, for the respondent

MUSAKWA J: Having dismissed with costs the application for condonation of late application for rescission of judgment in an *ex tempore* judgment a request for the full judgment was subsequently made.

The background is that the respondent issued summons against the applicant in July 2017. The matter was first set down for pre-trial conference on an unspecified date from which it was postponed to 15 June 2018. On 15 June 2018 the applicant defaulted. Consequently, a default judgment was granted. A writ of execution was subsequently issued. The applicant only filed an application for rescission of judgment on 16 April 2019.

In the present application the founding affidavit was deposed to on behalf of the applicant by Tinashe Mhanza. He averred that the applicant's erstwhile legal practitioner, Tafadzwa Madzingira of Madzingira & Nhokwara Legal Practitioners did not attend the pre-trial conference in time. It was further averred that the applicant's then employee, Tafadzwa Gomwe withdrew the mandate given to Madzingira & Nhokwara Legal Practitioners. Tafadzwa Gomwe subsequently left employment without handing over the file. It is further averred that Tafadzwa Gomwe was the only employee of the applicant who had knowledge of the default judgment.

On the merits it was contended that the applicant has a good defence to the claim. The applicant disputes owning the property (stand number 4001 Chegutu Township) from which the rates being claimed arose. The applicant used to own the property but subsequently sold it to Regal Insurance Company (Pvt) Ltd in 2012. By virtue of the sale, transfer of title would not have been effected without the issuance of a rates clearance certificate from the local authority. Therefore, there was no question of arrear rates as claimed by the respondent. The respondent

then omitted to delete the applicant's name from the account relating to stand number 4001 Chegutu Township. A copy of deed of transfer number 5737/12 was attached to the application.

A supporting affidavit was deposed to by Tafadzwa Madzingira. He attended the pre-trial conference with Tafadzwa Gomwe and they arrived late at court. He was not given instructions to seek rescission of judgment. The applicant through Tafadzwa Gomwe withdrew its mandate. However, the law firm did not renounce agency because it was believed that their services would be required.

In its opposition the respondent contended that the applicant and Regal Insurance Company (Pvt) Ltd operate from the same premises. In other litigation (HC 6307/17) the applicant never pleaded that it no longer owned 4001 Chegutu Township. On 18 June 2018 after the granting of default judgment the applicant's legal practitioners offered to settle. A letter to that effect was written by Madzingira & Nhokwara Legal Practitioners.

Submissions by Counsel

Mr *Chipetiwa* raised a preliminary point in which he objected to the respondent's reliance on communication termed 'Strictly Without Prejudice' which was addressed to the respondent's legal practitioners by Madzingira & Nhokwara Legal Practitioners on 18 June 2018. The letter in question made some settlement proposals in which the debt would be paid over nine months. Thus, Mr *Chipetiwa* argued that the letter was inadmissible. He placed reliance on the cases of *Naidoo* v *Marine and Trade Insurance Co. Ltd* 1978 (3) SA 666, *Kazingizi and Another* v *Equity Properties (Pvt) Ltd* HH 797-15 and *Mvududu* v *ARDA* SC 58/15. Mr *Chipetiwa* did concede that the inadmissibility of 'without prejudice' communication is not absolute and he gave one of the exceptions as cases involving insolvency. He also submitted that the judgment that was granted was not final as the applicant could always seek rescission.

Apart from adopting his heads of argument Mr *Warara* submitted that the letter of 18 June 2018 was written pursuant to default judgment. As such the respondent was entitled to execute the judgment. Therefore, there was no privilege that could derive from the communication.

On the merits Mr *Chipetiwa* submitted that the delay in seeking rescission was not inordinate. He buttressed this with another submission that condonation has been granted in some cases after a lapse of many years. As regards the explanation for delay he submitted that the applicant's legal practitioner had no instructions to seek rescission as the file had been taken away. Having been pressed on the issue he explained that the mandate to represent the applicant

had been withdrawn. The legal officer who took away the file then left employment without handing over the file. Therefore, effectively the applicant was not aware of the default judgment. Regarding the fact that the applicant could only have become aware of the default judgment through its agents, Mr *Chipetiwa* submitted that only the applicant's legal officer and legal practitioner were aware of the default judgment. The court also asked Mr *Chipetiwa* why there was no supporting affidavit from the erstwhile legal officer and he said his whereabouts are unknown. He conceded that this however is not explained in the founding affidavit. After much probing Mr *Chipetiwa* eventually conceded that the applicant became aware of the default judgment on the day it was granted. He was later to contradict himself and claim the contrary.

On the merits of the defence Mr *Chipetiwa* submitted that the respondent is claiming rates relating to a property that does not belong to the applicant. When Mr *Chipetiwa* was asked whether this was pleaded as a defence he conceded that it was not.

Mr *Warara* submitted that the delay of ten months in seeking rescission is not well explained. He further submitted that summons was served at the premises which the applicant now claims it does not own. The applicant itself never acknowledged being served with the process or how it got to know of the litigation. He was of the firm view that there is no basis for granting condonation.

Analysis

As was held in *Naidoo* v *Marine and Trade Insurance Co. Ltd supra* 'without prejudice' correspondence is generally not admissible. In that case it was held among other reasons, that the purpose of 'without prejudice' correspondence is to facilitate parties to a dispute to settle without compromising their interests. However, such correspondence is admissible in exceptional circumstances such as where there is need to prove a threat or to prove insolvency or where in situations where public policy would dictate so.

In *Kazingizi And Another* v *Equity Properties (Pvt) Ltd supra* and at p 4 MATHONSI J elucidated the issue as follows:

> "In our law, documents do not necessarily have to be marked "without prejudice" for them to be protected: *Gcabashe* v *Nene* 1975 (3) SA 912 at 941 E. Inversely, merely labelling a document "without prejudice" does not necessarily confer any privilege on the contents. What is important is whether the communication is considered privileged from an objective point of view: *Crowford* v *Roset and Cornale* (1992) 69 B.C.L.R (2d) 349; *Podovinikoff v Montgomery* (1984), 59 B.C.L.R 204.
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> As a general rule, statements that are made expressly or impliedly on a without prejudice basis in the course of *bona fide* negotiations for the settlement of a dispute will not be allowed in as evidence: *Naidoo* v *Marine & Trade Insurance Co Ltd* 1978 (3) SA 666. The resolution of a

> dispute with a genuine view to settlement appears to be the main consideration. If the settlement is thereafter reached, the negotiations leading up to it should be available to the court since the whole basis of the non-disclosure would have fallen away: *Gcabashe* v *Nene* (*supra*).
> I must also add that the parties to negotiations may also consent to the admission of without prejudice communications. Exceptional circumstances, such as the use of without prejudice communications to prove certain things, e.g., that it contains a threat, may permit a departure from the general rule: *Naidoo* v *Marine & Trade Insurance Co Ltd* (*supra*), at 667 F: *Hoffend* v *Elgetu* 1949 (3) SA 91 (AD). In *Hirschfeldt* v *Standard Charted Bank of Botswana* [1996] BLR 640 (CA) the document concerned was admitted into evidence because its only use was to prove the credibility of the defendant.
> In the final analysis, it is always in the discretion of the court to determine whether to admit or not to admit without prejudice communications. In exercising its discretion the court may remove the privilege attaching to such communication if it deems that the admissibility of such communication is essential in proving certain things, such as the credibility of a witness, or if it considers that the upholding of the privilege would be contrary to public policy, for instance where the communication contains a threat or an act of insolvency.
> In my view there was nothing privileged in a payment plan. It presents a classical case for the removal of the privilege attaching to letter as I proceed to do in the exercise of my discretion."

In my view the letter that was written on a 'without prejudice' basis offering to settle the debt on the day of default judgment was admissible. There was no privilege to protect when the letter was written after default judgment had been passed. The parties were not in any negotiations. The applicant was effectively admitting liability *ex post facto*.

As for the requirements for condonation, the authorities cited by counsel in their heads of argument suffice. I need not augment that.

In the present case the delay in seeking rescission was ten months. The applicant's counsel preferred to view it as not a long delay. In my view such delay was inordinate. This is because the applicant became aware of the default judgment on the day it was granted. This is irrespective of the attempt to claim that the applicant's former legal officer and legal practitioner did not bring this to the attention of the applicant's directors. On the very day of default judgment communication was made to the respondent's legal practitioners with an offer to settle the debt.

As for the reasons for the delay in seeking rescission, the explanations are inadequate and unconvincing. Instead of engaging the respondent with a view to seeking consent to rescission on the very day of default judgment, the applicant instead offered settlement terms. The applicant's former legal officer and legal practitioner are said not to have brought the issue of default judgment to the attention of its directors. And yet the erstwhile legal practitioner proposed settlement terms on behalf of the applicant. As if that is not enough contradiction already, the applicant's former legal officer is said to have withdrawn mandate and yet the former legal practitioners did not renounce agency. In his supporting affidavit, Tafadzwa

Madzingira averred that he was not given instructions to seek rescission of judgment. However, he did not explain why he would have been given instructions to seek terms of payment in the wake of default judgment. In fact he did not explain who instructed him to propose payment terms when the mandate had been withdrawn. He also did not explain why he did not renounce agency despite the withdrawal of mandate. To make matters worse for the applicant, there was no supporting affidavit from its former legal officer, Tafadzwa Gomwe. One has no idea when he left employment. It was also imperative for him to explain the circumstances of the default judgment and the withdrawal of the mandate.

As regards the defence on the merits, there are no prospects of success. The applicant never pleaded that it did not own the property relating to the rates that were claimed. This, coupled with the bid to pay off the debt in instalments after default judgment had been passed deflates the applicant's prospects on the merits of the defence.

It was for these reasons that the application was dismissed with costs.

Chigwnanda Legal Practitioners, applicant's legal practitioners
Warara & Associates, respondent's legal practitioners