PETER KAZINGIZI
and
THERESA MUCHABAIWA KAZINGIZI
versus
EQUITY PROPERTIES (PVT) LTD

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 7 October 2015 and 14 October 2015

Opposed Application

TW Nyamakura, for the applicants
Ms *TJ Magaya*, for the respondent

MATHONSI J: In this summary judgment application, the two plaintiffs, who are husband and wife, seek to recover from the defendant a sum of $31 353-00 being the outstanding balance of the purchase price they paid to the defendant in anticipation of the successful conclusion of a sale agreement involving stand 2073 Salisbury Township of Lot 3 Bannockburn.

On 18 November 2013 the parties signed a written undertaking to enter into a sale agreement. It reads:

> "In consideration of Peter Kazingizi and Theresa Muchabaiwa Kazingizi, of 6185 Rosedeane Drive, Bloomingdale, Harare agreeing to:
>
> a. Purchase a certain piece of land situated in the District of Salisbury called number 2073 Salisbury Township, measuring 2270 square metres being a subdivision of Lot 3 of Bannockburn, held under deed of transfer number 9068/2008. The said subdivision is hereinafter referred to as the 'Golden CT Stand.'
>
> b. Pay US$ 23 495 (twenty three thousand four hundred and ninety five United States Dollars) as deposit and thereafter pay US$ 23 494 (twenty three thousand four hundred and ninety four United States dollars) as further deposit in three equal monthly instalments commencing 31 December 2013 and ending 28 February 2014 plus interest of 12 % *per annum* on the above further deposit on or before 28 February 2014.
>
> We, the under signed, on behalf of Equity Properties (Pvt) Ltd do hereby, undertake to enter into a written agreement of sale between Equity Properties (Private) Limited and Peter Kazingizi and Theresa Muchabaiwa Kazingizi in respect of the above mentioned

> Golden CT Stand upon receipt of the total deposit of US$ 46 989 and the respective interest.
> This undertaking is not an agreement of sale but a commitment to enter into an agreement of sale based on our standard agreement of sale which is signed by two authorised signatories, failure of which Equity Properties (Pvt) Ltd undertakes to refund Peter Kazingizi and Theresa Muchabaiwa the money paid without any delay.
>
> This undertaking is valid until 28 February 2014."
> (The underlining is mine)

As I have said the undertaking was signed by the parties – two representatives of the defendant and the two plaintiffs. It is worded in clear terms which admit of no ambiguity whatsoever amd must therefore be given its ordinary grammatical meaning. As stated by McNally JA in *Chegutu Municipality* v *Manyora* 1996 (1) ZLR 262 (S) 264 D-E:

> "There is no longer magic about interpretation. Words must be taken in their context. The grammatical and ordinary sense of the words is to be adhered to as said in *Grey* v *Pearson* (1957) 10 ER 1216 at 1234, 'unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further.'"

See also *Madoda* v *Tanganda Tea Company Ltd* 1999 (1) ZLR 374 (S); *S* v *Nottingham Estates (Pvt) Ltd* 1995 (1) ZLR 253 (S).

What is clear from that undertaking is that it is the defendant, in the main, which was making an undertaking to enter into "a written agreement of sale." The undertaking was made in consideration of the plaintiffs "agreeing to purchase" the property and to pay the deposit of $46 989-00. The plaintiffs did not really make any undertaking but it was recognised that they had to agree to purchase the property and to pay the deposit. Clearly the undertaking was not an agreement of sale but a mere commitment to enter into one, an invitation to treat. It could therefore not be enforced as a sale agreement.

The plaintiffs duly paid the deposit of $46 989-00 but when the defendant produced its standard sale agreement, they did not agree with the terms. They then decided not to enter into the sale agreement and demanded a refund of the deposit that they had paid. In response the defendant wrote a "without prejudice" letter dated 9 April 2014 which reads in relevant part:

> "By agreeing to the terms of the undertaking letter we did not expect them not to sign the agreement of sale.
>
> In the said undertaking letter we undertake to refund the client without delay and as such are refunding them within 90 days. Your statement those '90 days cannot be said to be without any delay' is a matter of opinion. Furthermore your client paid the US$46 989 over a period of more than 90 days. Your clients have refused to sign the cancellation agreement of

> payments made under the above mentioned undertaking rendering it difficult for us to sell the stand and raise the money to refund them. Furthermore their refusal to sign the said cancellation agreement of payments made under the above mentioned undertaking letter which incorporates a refund makes it difficult to regard the abovementioned undertaking letter as an agreement which expired without performance. Equity Properties (Pvt) Ltd reserves the right to sue your clients for damages for not signing the said cancellation agreement. Equity Properties (Pvt) Ltd is still agreeable to refunding your clients within the 90 days as stated below provided your client signs the said cancelation agreement before the first payment date of
>
> i. US$15 631 on the 24th of April 2014;
> ii. US$ 15 631 on the 24th of May 2014; and
> iii. US$ 15 631 on the 24th of June 2014.
>
> In this regard we kindly request for your client's banking details or for them to call on our offices on the dates mentioned above."

What was the defendant saying? How would one seek to cancel a non-existent agreement. The undertaking it had made to the plaintiffs was that in the event of them not agreeing to purchase the property they would refund the money without delay. The plaintiffs did not agree to purchase the property but now the defendant wanted to impose new conditions not contained in the initial undertaking and unilaterally for that matter. It could not lawfully do that.

Whatever the case, what is apparent from that letter is that the defendant appreciated that there was no sale agreement between the parties. It undertook to refund the money but on new terms and even set out a payment plan. Even its threat to sue was not to enforce a sale agreement but to seek damages arising out of the plaintiff's refusal to sign a cancellation agreement.

The defendant may have had a change of heart because after refunding only $20 631-00 in drips and drabs, it made an about turn upon receipt of the summons for payment of the balance of $26 353-00. The defendant entered appearance to defend prompting the plaintiffs to make this application for summary judgment which the defendant is opposing. In its opposing affidavit deposed to by its Senior manager, Kumbirai Matimba, the defendant asserts that it is not obliged to refund the balance firstly because its "without prejudice" offer to refund was not accepted, secondly because the plaintiffs refused to sign a cancellation agreement and thirdly because in the undertaking letter, the plaintiffs gave up any right to negotiate the terms of the sale agreement and as such are bound by the standard agreement even though it was never agreed. In my view that is a bogus defence.

Let me first deal with the issue of the "without prejudice" letter of 9 April 2014 addressed by the defendant to the plaintiffs' legal practitioners. It is significant that no direct

claim is made to privilege except what was raised by Ms *Magaya* from the bar. Even if it was, it would not be available to the defendant. The expression "without prejudice" is often written across the face of a document or communicated expressly to convey the message that the party communicating the document will not be prejudiced by the subsequent communications which are conducted with a view to the settlement of a dispute.

Of course even parties who do not know what they are doing or why they are doing it often timidly inscribe the maxim on correspondence out of fear of being held to account for what they would have communicated. I say this because there is no logic whatsoever for a party who accepts liability to refund money paid in anticipation of the conclusion of a sale agreement and is making a payment plan, to then send the payment plan on a "without prejudice" basis. What prejudice is there to talk about?

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.

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.

Summary judgment is an extra ordinary remedy in the sense that it denies a defendant who has shown an interest to defend a claim, the opportunity to do so. It is a procedure conceived so that;

> "a *mala fide* defendant might summarily be denied, except under onerous conditions, the benefit of the fundamental principle of *audi alteram partem* --- when all the proposed defences to the plaintiff's claim are unarguable, both in fact and in law " (*Chrisma* v *Stutchberry* 197 (1) RLR 277)

It has been stated conversely that in order to succeed in defending a summary judgment application, the respondent must set out a *bona fide* defence by alleging facts which, if established at the trial, would entitle him to succeed. As stated by Ziyambi JA in *Kingstons Ltd* v *L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) 458 F-G:

> "Not every defence raised by a defendant will succeed in defending a plaintiff's claim for summary judgment. Thus what the defendant must do to raise a *bona fide* defence – a ' plausible case' – with ' sufficient clarity and completeness' to enable the court to determine whether the affidavit discloses a *bona fide* defence. He must allege facts which, if established, 'would entitle him to succeed.' See *Jena* v *Nechipote* 1986 (1) ZLR 29 (S) ; *Mubayiwa* v *Eastern Highlands Motel (Pvt) Ltd* (S) – 139-86; *Rev* v *Rhodian Investments Trust (Pvt) Ltd* 1957 R&N 273 (SR)".

In my view the defendant does not even begin to set out any defence which, if established, would entitle it to succeed. In fact the defendant has no sale agreement to rely upon in refusing to refund the deposit. It was never entered into. Even the unexplained signature of the second plaintiff pales when considered against what transpired thereafter. In terms of the written undertaking letter of 18 November 2013 in the event that no agreement was entered into, it had to refund the money without delay. In compliance with that undertaking it repaid part of the money.

It is trite that where a person has two courses of action open to him, as the defendant had, to either refuse to refund the money on lawful grounds or refund it, and he unequivocally elects to take one of them, he cannot turn round afterwards and take the other course of action. The point was made in *S* v *Marutsi* 1990 (2) ZLR 370 that:

> "It is trite that a litigant cannot be allowed to approbate and reprobate a step taken in the proceedings. He can only do one or the other not both."

See also *Trinity Engineering* v *Karimazondo & Ors* HH 672/15.

The defendant agreed to repay. It commenced repayments. It must therefore repay and cannot be allowed to twist and turn. It simply has no defence to talk about.

I the result, it is ordered that:

1. Summary judgment be and is hereby entered in favour of the plaintiffs as against the defendant in the sum of $26 353-00 together with interest at the prescribed rate from due date to date of payment in full.
2. Costs of suit on an ordinary scale.

Mtetwa & Nyambirai, plaintiffs' legal practitioners
Magaya – Mandizvidza, defendant's legal practitioners