LUSAKA WEST DEVELOPMENT COMPANY LIMITED, B.S. K. CHITI (RECEIVER), ZAMBIA STATE INSURANCE CORPORATION v TURNKEY PROPERTIES LIMITED (1990) S.J. (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER, A.J.S. AND SAKALA, J,
5TH JUNE, 1990
S.C.Z. JUDGMENT NO. 1 OF 1990

Flynote
Appeal - Consent Judgment - Withdrawal of Consent - Production of “without prejudice” letters in court as evidence

Headnote
The appellants and respondent entered into a consent judgment after protracted correspondence, some of which was marked “without prejudice”, between both sides. Finally, the advocates of both sides reached an agreement which was embodied in a consent summons for an order to be made by consent for the payment of a sum of money in full and final settlement of the cause of action between the parties**.** Contemporaneously with the entering by the parties into the consent agreement referred to or just prior to the formalisation of such an order, the advocates for the third appellant repented of the agreement and sought to withdraw their consent. The learned trial judge refused to entertain the withdrawal of consent given by the third appellant to the said judgment. On appeal,

Held:
(i) A consent agreement reached in circumstances such as in this case could possibly only have been allowed to be withdrawn if there were proper grounds upon which validity of any contract could be impugned, such as fraud or mistake

Cases referred to:
(1) Rush and Tompkins Ltd v Greater London Council and Another (1989) AC 993 1305 (Part 12 December 1989) at p 1280

For the third appellant: Mr M. M. Mundashi, Z.S.I.C.
For the respondent: Mr A. M. Hamir, Solly Patel, Hamir and Lawrence

Judgment
NGULUBE, D C J.: delivered the judgment of the court.

This is an appeal against a High Court ruling in which a consent order had been made and in which the learned trial judge refused to entertain the withdrawal of consent given by the appellant to the said judgment. For the record, it should be noted that the only appellant with substantial interest in this case and who has been represented is the third appellant, although the consent order related to the second appellant as well. It was not in dispute that, during an adjournment of the trial of the action in which the order was made for the express purpose of attempting a settlement out of court, the advocates for both sides held discussions and exchanged correspondence some of which was marked "without prejudice". Finally the advocates reached an agreement which was embodied in a consent summons for an order to be made by consent for the payment of a sum of money in full and final settlement of the couse of action between the parties.

Contemporaneously with the entering by the parties into the consent agreement referred to or just prior to the formalisation of such an order, the advocates for the third appellant repented

of the agreement and sought to withdraw their consent.

One issue in this appeal concerns the production to the court of "without Prejudice" letters to show that a consent order had been agreed. Mr Mundashi has argued that, as a general rule, such correspondence ought not to be admitted in evidence. We agree and indeed, if we understood him correctly, so does Mr Hamir. As a general rule, therefore, without prejudice communication or correspondence is inadmissible on grounds of public policy to protect genuine negotiations between the parties with a view to reaching a settlement out of court. In this regard we cite the case of *Rush and Tompkins Ltd v Greater London Council and Another* (1). However, that is only a general rule and, as Mr Hamir has correctly pointed out, basing his submissions on paragraph 213 of Halsbury's Laws of England, 4th Edition, Volume 17, there may be situations - such as in the case of a settlement - where the issue for determination demands the production for such without prejudice correspondence. However, it is quite clear that the issue here did not really call for the disclosure of the correspondence complained of since it was capable of being resolved without recourse to such correspondence, the starting point being the consent summons signed by both sides and which document epitomised the agreement reached out of the court. That disposes of the ground concerning the use of without prejudice correspondence which, to summarise, we find it was unnecessary to refer to in this case.

The main issue is whether counsel for the appellant could withdraw the consent of his client when it has already been communicated to the other side and when it had already been signified by their signature on the consent summons. We have listened to the submissions from Mr Mundashi and it transpires that Counsel had, initially and right down to the signing of consent agreement, full instructions and authority from the appellant concerned. Although, quite clearly, the authority of counsel conducting liigation cannot be regarded as limitless when it comes to negotiating a compromise or a settlement and although counsel would in the ordinary course, take instructions from the client, we are satisfied that in this case counsel did have the authority of the Managing Director of the third appellant who equally had ostensible authority on behalf of the third appellant to give instructions to counsel. In turn counsel had ostensible authority to enter into the consent agreement in so far as his dealings affected the litigation with the other side. A consent agreement reached in circumstances such as in this case could possibly only have been allowed to be withdrawn if there were proper grouns upon which validity of any contract could be impugned, such as fraud or mistake. No such factors existed in this case and the whole of the third appellant's argument hinged on some internal regulations of the third appellant which set out limits of financial expenditure which can be committed on the authority of the various officers or authorities in the organisation. Such internal document which was never brought to the attention of the other side can, of course, not affect the validity of the dealings entered into by counsel acting with ostensible authority. In fairness, it should be noted for the record that Mr Mundashi was unable to maintain the proposition that counsel, in this case, had no ostensible authority to settle the matter with the consent and on the instructions of the Managing Director who equally had his own ostensible authority. That being the case, it is so clear that the appeal, to the extent that it was designed to set aside the judgment entered below, cannot be entertained.

The appeal is dismissed and the costs will follow this event.
Appeal dismissed
