LUSAKA WEST DEVELOPMENT COMPANY LTD AND B. S. K. CHITI (RECEIVER) AND ZAMBIA STATE INSURANCE CORPORATION v TURNKEY PROPERTIES LTD (1990) Z.R. 1 (S.C.)

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

Flynote

Civil procedure - Consent summons - Signing of consent to judgment by counsel - Effect of.
Contract - Ostensible authority - Counsel enters into settlement with ostensible authority - Effect of.
Evidence - 'Without prejudice' correspondence - Admissibility of.

Headnote

This was an appeal against a consent order made by the High Court. When the case came to Court it was adjourned with a view to the parties reaching an out-of-court settlement. Discussions between the parties were then held and correspondence exchanged, some of which was marked ''without prejudice''. An agreement was reached and a consent summons was signed by counsel for the parties. The third appellant then repented of the agreement and wished to withdraw its consent. The Court refused to allow the withdrawal of consent and the appellants appealed.

Counsel for the third appellant argued that his client had only limited authority to settle the case and that he could not exceed that authority when signing a consent to judgment.

Held:

(i) As a general rule 'without prejudice' correspondence is inadmissible, but in the case of a settlement the issue for determination may demand the production of such correspondence.

(ii) In the absence of fraud or mistake when counsel to an agreement has ostensible authority to enter into an agreement the party will be bound by the agreement and the Court is not concerned with any internal arrangement which limits the authority of the person who instructs counsel.

Case referred to:

(1) Rush and Tompkins Ltd v Greater London Council and Another [1989] A.C. 993.

Works referred to:

Halsbury's Laws of England (4th ed.).

For the third appellant: M. M. Mundashi, of Z.S.I.C.
For the respondent: A. M. Hamir, of 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

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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 cause of action between the parties. Contemporaneously with the entering by the parties both the consent agreement referred to or just prior to the formalisation of such an order, the advocates for the third appellant repented the agreement and sought to withdraw their consent.

One issue in this case 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 submitted 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 para. 218 of Halsbury's laws of England, 4th ed., vol. 17, there may be situations - such as in the case of a settlement - where the issue for determination demands the production of 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 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 had 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 litigation 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 insofar 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 grounds upon which the 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 instruction 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.

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