ENTERPRISES SWANEPOEL S.A.
versus
RHINE SPORTS INVESTMENTS (PRIVATE LIMITED

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 29 January, 2018 and 23 March, 2018 & 26 March 2018

Opposed Matter

D. Ochieng, for the applicant
T. Mpofu, for the respondent

MANGOTA J: The applicant is a *peregrinus* legal entity. It is incorporated according to the laws of the Democratic Republic of the Congo where it is domiciled. Its principal object is to carry on the business of transport contractors and general merchants, among others.

The father of the deponent to the founding affidavit ("the deponent") founded the applicant during his life time. He left it in the hands of the deponent and the latter's four cousins when he passed on. The four cousins comprise Luc, Franz, Erhard and Paul Swanepoel. These and the deponent assumed the position of directors of the applicant during or about 2009. Luc Swanepoel ("Luc") took control of the day – to –day affairs of the applicant. He was its general manager.

Owing to a dispute which arose between Luc and others, the latter removed him from his position. They replaced him with Paul Swanepoel ("Paul"). Luc joined hands with his other brother John Swanepoel ("John").

Luc and John remained at odds with Franz, Erhard, Paul and the deponent. On 27 April, 2016 Luc was removed from his position of director of the applicant.

Luc, it was alleged, exported some of the applicant's assets to Zimbabwe. He, at the instance of John, concluded a contract with the respondent. He did so on 8 June, 2016.

The contract was for the hire of the applicant's trucks by the respondent. Its contents are contained in Annexure ES5 which the applicant attached to the application. In terms of the contract, Luc agreed to transport for, and on behalf of, the respondent, thermal coal from Makomo Resources (Pvt) Ltd's Mine at Entuba Coal Fields in Hwange and deliver the same to Makomo ZPC Pad or to any other address as directed by the respondent. He charged a fee of

$3.80 per each ton of coal he would have delivered at the agreed delivery address. The fee included value added tax. It was to be paid monthly in arrears.

The contract was for an indefinite duration. It was subject to the right of either party to terminate it upon giving to the other party three (3) months' written notice of intention to terminate.

When the respondent concluded the contract with Luc, it remained of the view that Luc had the authority of the applicant to enter into the same. It only became aware of Luc's dispute with his brothers and the correct circumstances of the matter when Erhard visited its operations in July, 2016. He had come to investigate and establish what of the applicant's assets Luc had delivered at the mine.

Erhard and the deponent to the founding affidavit visited the mine, once again, on 1 August, 2016. It was then that they established that the applicant's equipment was being used at the mine.

The applicant refused to ratify the contract which Luc concluded with the respondent. It, instead, demanded payment for the use of its equipment by the respondent.

Because the respondent did not dispute that it was obliged to compensate the applicant for use of its equipment, the parties commenced negotiations to establish the *quantum* of the respondent's indebtedness to the applicant. It was in the course of such negotiations that the respondent addressed a letter to the applicant on 27 October, 2016. The letter which the respondent wrote through its legal practitioners was attached to this application as Annexure ES 10.

The Annexure precipitated the present application. The applicant submitted that, through the letter, the respondent acknowledged its indebtedness to it in the sum of $147 273-37 in respect of its use of its equipment for the period 8 June, to 4 October, 2016. It averred that it demanded payment of the stated sum from the respondent. It said it delivered its demand for payment on 13 December, 2016. It insisted that the statutory period of three weeks lapsed since it made the demand. It submitted that the respondent should be deemed to be unable to pay its debts in terms of s 205 (a) of the Companies Act [*Chapter 24:03*] ("the Act"). It, accordingly, moved the court to place the respondent under liquidation as contemplated by s 206 (f) and (g) of the Act.

The respondent opposed the application. It denied that it was unable to pay its debts. It said it refused to pay the same because:

‘(a) there was a dispute as to the *quantum* of its indebtedness to the applicant. It insisted that the dispute could only be resolved through a joint reconciliation of the figures.

(b) it offered to the applicant the sum which it considered to be due in full and final settlement of the dispute between the applicant and it;

(c) the applicant disputed its offer and made a very huge demand in the form of a counter-claim;

(d) persistence on judicial determination of the extent of its indebtedness to the applicant did not equate to inability to pay as provided for in s 205 of the Act;

(e) the applicant reported the matter to the police whom it said were investigating the same. It stated that further engagements with the applicant would be construed as interfering with investigations;

(f) refusal to settle an illiquid debt did not constitute inability to pay;

(g) refusal to communicate with a complainant and state witnesses in criminal investigations did not amount to inability to pay.

It submitted that the application stood on nothing. It moved the court to dismiss it with costs on a higher scale.

Sections 205 and 206 of the Act upon which the application is anchored spells out two very critical matters. Section 205 defines the phrase inability to pay debts. Section 206 states the circumstances under which a company, such as the respondent, may be wound up by the court.

The applicant’s narration of events shows that it based its application on s 205 (a) as read with s 206 (f) and (g) of the Act. Section 205 (a) reads:

“A company shall be deemed to be unable to pay its debts –

(a) If a creditor, by cession or otherwise, to whom the company is indebted in a sum exceeding one hundred dollars then due, has served on the company a demand requiring it to pay the sum so due by leaving the demand at its registered office and if the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b) ……; or

(c) ……”.

Section 206 (f) and (g) of the Act reads:

“A company may be wound up by the court

(a) – (e) ……;

(f) if the company is unable to pay its debts;

> (g) if the court is of the opinion that it is just and equitable that the company should be wound up."

Section 207 of the Act confers a right on the applicant to apply as it did. That the applicant is the creditor of the respondent requires little, if any, debate. It asserted as much and the respondent acknowledged that fact. It is by virtue of the stated matter that the applicant correctly filed the application.

The applicant made a demand for payment of $147 273.37. It served the same on the respondent on 13 December, 2016. Three weeks which are stated in section 205 (a) have come and gone bye without the respondent paying the sum demanded. The sum which the applicant demanded from the respondent is well in excess of the one hundred dollar threshold which is required for the application to be mounted.

The applicant met all the requirements which are set out in section 205 (a) of the Act. Its application under section 206 (f) and (g) of the Act would, therefore, appear to be justified.

Whether or not it is so justified does, in a large measure, depend on two matters. These are what the respondent's intention was when it wrote as it did on 27 October, 2016 and what the applicant understood the letter to mean. The parties' minds, as viewed from the context of the letter, are a *sine qua non* aspect of this application.

The first observation which l make is that annexure 10 was written on a *without prejudice* basis. The phrase *without prejudice* is more often than not used by parties who want to settle their disputes out of court. *Business Dicitionary.com* defines the phrase to mean without implying an admission of liability. It states that, when used in a document or letter, without prejudice means that what follows:

(a) cannot be used as evidence in a court case.

(b) cannot be taken as the signatory's last word on the subject matter – and

(c) cannot be used as a precedent.

It states, further, that the contents of such documents normally cannot be disclosed to the courts …**.** *LegalVision.com* says of the phrase:

> "Without prejudice encourages parties to a dispute to try and reach a settlement. It allows parties and / or their legal advisors to speak freely and openly. This way parties can make concessions or compromises without the risk that what they say can be used against them later in court if the negotiations fail …. any communication between the disputing parties during negotiations cannot be used in court as evidence. Without prejudice can apply to written or oral communication between parties."

In *Casteno* v *Gabriel*, 302 NYS 2d, 943 at 946 (1969) WAHL J of the civil court of New York made the following remarks in regard to the phrase:

> "The words *without prejudice*, when added to letters, only mean that, in the event of negotiations carried on by those letters not resulting in any agreement, nothing in them is taken as an admission."

In his article entitled "*Over-riding Priviledge*", New Law Journal, London, England solicitor David Burrows made some incisive comments on the phrase. The learned author wrote:

> "The without prejudice privilege rule enables a party to claim privilege from disclosure to the court of documents covered by the privilege. The privilege rests first, upon the express or implied agreement of the parties themselves that communications in the course of the negotiations should not be admissible in evidence. Second, it derives from a public policy that rests upon the desirability of preventing statements or offers made in the course of negotiations being brought before the court on trial as admissions of liability."

Tapper, Colin, Cross & Tapper on Evidence, 10th Edition, London: Lexis – Nexis, 2004 p 497 describe the phrase without prejudice in these words:

> "As part of an attempt to settle a dispute, the parties frequently make statements without prejudice. When this is done, the contents of the statement cannot be put in evidence without the consent of both parties….. The statements often relate to the offer of a compromise and, were it not for the privilege, they would constitute significant items of evidence on the ground that they were admissions. Obviously, it is in the public interest that disputes should be settled and litigation reduced to a minimum so the policy of the law has been in favour of enlarging the cloak under which negotiations may be concluded without prejudice."

The above mentioned statements are relevant to the resolution of the current application. They lay emphasis on a number of important matters. The first is that parties have the freedom to engage each other outside the court with a view to reaching settlements of their disputes. To enable them to do so in a free, frank and open manner, they enjoy the privilege of speaking to each other freely when they state in clear and categorical terms that their discussions are on a *without prejudice* basis. Under the stated circumstances, they can ventilate the issues which relate to their respective cases without the apprehension that what they say to each other during negotiations would be used by one party as evidence which shows the other's liability when their case eventually finds its way to the doors of a court-room.

It is, in my view, in the context of the above cited texts that the current application must be examined and determined. The question which begs the answer is was the respondent making an unequivocal and unconditional acknowledgment of the debt when it wrote as it did. The answer is definitely in the negative. If it was, it would not have marked its letter the phrase *without prejudice*. It would, in other words, have simply written making a firm offer to the

applicant. The letter which it wrote was privileged. Statements have already been made that such a privileged letter as the respondent wrote cannot be used as evidence of its admission of liability.

I reiterate that, if a letter is written *without prejudice,* as the respondent's letter showed, the rule of thumb is that it is privileged. It cannot, therefore, be used in court as evidence. A *fortiori* when the letter's aim and object are, as *in casu*, to advance the respondent's intention to settle its indebtedness to the applicant out of court.

What the applicant did was against the entire meaning and import of the privilege which the respondent was inviting it to operate within. It placed the privileged letter which the respondent addressed to it in the course of negotiations before the court. Not only did it do so, it also based its entire application on the contents of that letter.

It is pertinent for me to examine and analyse the relevant portion of the letter. The portion reads:

> "In the interim, Rhine Sport has computed the amounts due and payable to your client as at 4 October 2016. Please find attached hereto the computation prepared by our client for consideration by yours. In preparing the computation, Rhine Sport used the rate stated in the contract dated 8 June 2016. A further reconciliation will be conducted on the last operational day, expected to be during the week beginning 14 November 2016, for the payment due for the period 5 October 2016 todate," (emphasis added).

Two matters stand out clearly from the above cited statement. The first is that the respondent invited the applicant to consider what it had computed. The second is that the respondent envisaged only two payments for its use of the applicant's equipment. The first relates to the sum which it computed and forwarded to the applicant for the latter's consideration. The second relates to the *quantum* of what it would pay for its future use of the applicant's equipment for the period 5 October 2016 to any date the parties would have agreed between themselves as the cut-off date for the same.

The record is silent on whether or not the applicant responded to the respondent's letter of 27 October 2016. However, on 16 November, 2016 the applicant's legal practitioners addressed a letter to the respondent's legal practitioners. The applicant's letter was in response to the respondent's letter of 3 November 2016. The relevant portion of the applicant's letter of 16 November 2016 makes reference to the respondent's computed sum of $147 273.37. It reads, in the relevant part, as follows:

> "8. Our client also takes the view that your client's reconciliation statements are an unequivocal admission of their indebtedness to our client in the amount stated herein. Our instructions are therefore to demand, as we hereby do, that

your client pays the acknowledged amount into our client's nominated account forthwith.

9. Our client has done reconciliation on the amount due to it for services rendered. Please find attached our client's breakdown of the amount due to it."

The breakdown which the applicant made showed that it was claiming a total $2 648 273 from the respondent. The counter-claim which the applicant made compelled the respondent to alter its position on the issue of the sum of $147 272.37 which it had computed and forwarded to the applicant for its consideration.

The respondent's altered position comes out in a clear and categorical manner in the letter which its legal practitioners addressed to the applicant's legal practitioners on 28 November 2016. The relevant part of the letter reads:

"7. DEMAND OF PAYMENT

A reading of paragraphs 8 and 9 of your letter dated 16 November 2016 clearly shows that the parties are not in agreement on the *quantum* of the debt owed to your client or the methodology for computation of same. In the interests of resolving the dispute, our client's accountant is willing to meet your clients to conduct a joint reconciliation of the amounts payable. Please take note that our client will only settle its indebtedness to yours once the *quantum* of its indebtedness has been agreed upon" (emphasis added).

The counter-claim which the applicant made caused the respondent to withdraw the offer which it had put forward to it for its consideration. It made its position loud and clear that it would pay nothing to the applicant until the issue which related to the *quantum* it owed had been conclusively resolved by the parties.

That matter having been communicated to the applicant in the manner that it appears in the respondent's letter of 28 November 2016, the two letters which the applicant addressed to the respondent on 12 December 2016 (in Annexures ES11 and ES17) did not serve any meaningful purpose. They, in effect, show the *mala fides* of the applicant which, so it would appear, was intent upon complying with s 205 of the Act for no purpose other than to file this application. The fact that the letters were written on the same day and served upon the respondent on the following day says it all.

The applicant did not give any reason as to why it did not sue to recover the sum which it said the respondent acknowledged as owing to it. It, for its unstated but hard to understand reasons, proceeded to file this application. It did so when it was fully aware that the respondent had refused to pay the sum which it owed to it in bits and pieces. Nothing prevented the respondent from filing a court action against the respondent for the sum and, at some later

stage, apply for summary judgment if such was its intention to recover what it said the respondent had acknowledged as having been due to it.

The fact that the applicant entertained a serious intention to sell its equipment to the respondent displays nothing but its *mala fides* when it applied as it did. It knew that the respondent had the capacity to purchase the equipment. It, in the same breadth, proceeded to assert, as it did, that the respondent did not have the means to pay its debts.

The application was not a genuine intent on the part of the applicant to show that the respondent was/is a legal entity with no means. Its aim and object were to punish the respondent for having associated itself with Luc and John Swanepoel. If that is not an abuse of the court and its process then one wonders what that is.

The respondent stated, and correctly so, that the court should refuse to be used as a weapon of attack in the dispute of family members who are shareholders and directors of the applicant. It was with some measure of disquiet that the situation which the respondent portrayed was not difficult to see.

A person who uses the court to settle scores with another receives no sympathy from the courts. Litigation is serious business which enjoins courts to deal with genuine cases where the pursuit of justice remains a matter of paramount importance. Where, as *in casu*, a party makes a deliberate effort to abuse the process of the court for its undefined, but very clearly *mala fides* intentions, the court will not unnaturally be justified to express its very serious displeasure in a more pronounced manner than otherwise.

The defences which the respondent raised are not without merit. It is, therefore, not in the interests of justice that the respondent should be wound up.

The applicant failed to establish its case on a balance of probabilities. The application cannot stand. It is, accordingly, dismissed with costs on a legal practitioner and client scale

Coghlan, Welsh & Guest, applicant's legal practitioners
Wintertons Legal Practitioners, respondent's legal practitioners