(1) KASIMBOTI TRADING (PRIVATE) LIMITED (2) ELLIOT KASU (3) PATIENCE KASU (4) TINASHE RICHARD KASU
v
ZB BANK LIMITED

SUPREME COURT OF ZIMBABWE
MAKARAU JA, HLATSWAYO JA & UCHENA JA.
HARARE: 28 MARCH 2019 & 26 NOVEMBER 2019

P. Kawonde, for appellants

O. Mutero, for respondent.

MAKARAU JA:

This is an appeal against the whole judgment of the High court handed down on 11 October 2018, dismissing the appellants' application with costs on the higher scale.

Background facts.

The appellants had a credit facility with the respondent. Alleging that the appellants had defaulted under the facility, the respondent sued the appellants for US$ 151 981.23 being the capital debt, US$24 716.11 interest and US $81.00 for bank charges.

The appellants did not defend the suit as they believed that the respondent had correctly calculated the amount due by them under the facility. A default judgment was duly entered in favour of the respondent in the sums claimed.

Two years later, the appellants formed the opinion that the amount of interest levied on the loan and capitalised, was unduly high. They appointed an interest research bureau to compute and verify the interest due on the loan. The research revealed that interest had been overcharged by an amount of US$25 266.13. Attempts to have the respondent refund the amount were in vain.

Meetings held between the parties resulted in the debt due by the appellants being sold to an asset management company which settled the debt in full. In a letter dated 3 April 2017, the respondent advised the appellants that the loan had been paid in full. It also confirmed in the same letter that it would verify the amount of the interest charged and any overcharges would be credited to the first appellant's account.

I shall advert to this letter in greater detail as this appeal is mainly on whether or not the court *a quo* was correct in ruling that the contents of the letter, which was marked "without prejudice", were inadmissible in evidence.

The promise to verify the interest charged in the loan was not carried through. The respondent advised that upon seeking legal advice, it was not going to recalculate the interest that was levied on the account prior to the grant of the default order. It further advised that it was regarding anything that transpired before the default judgment as *res judicata*. The respondent accordingly refused to credit the first appellant with the amount of the overcharged interest.

Aggrieved by the refusal of the respondent to carry out the verification process and to credit it with the amount of the alleged overcharge, the appellants filed a court application

in the court *a quo*. The application was filed under r 449 of the High Court Rules. In the application, the appellants sought an order with costs, varying or correcting the default judgment entered against it in 2015 or alternatively, ordering the respondent to credit the first appellant's account with the sum of US$25 266.13 failing which the respondent was to render an account to the appellants for debatement.

The respondent opposed the application mainly on the basis that the order granting the respondent the default judgment could not be varied or corrected under r 449 of the High Court Rules. In addition, it also contended that the calculations by the interest research bureau were incorrect. Contending that the application was frivolous and vexatious, the respondent prayed for the dismissal of the application with costs on the higher scale.

At the hearing of the application *a quo*, the appellants abandoned and properly so, their quest to have the default judgement against them varied or corrected under r 449 of the High Court Rules. The sole issue before the court *a quo* was therefore whether or not the appellants were entitled to the alternative relief, namely an order in the sum of US $25 266.13 or an account from the respondent for debatement.

As stated above, the court *a quo* dismissed the application with costs on the client and legal practitioner scale. In a terse judgment, it found that the letter of 3 April 2017, which the appellants relied upon to prove that the parties had agreed to a debatement of the account, was inadmissible. It then concluded by observing that the appellants had failed to apply for the default judgment against them to be rescinded and that the alternative relief sought in the application was an attempt to have the matter determined afresh.

Before this Court, the appellants raised four grounds of appeal. In the main, they challenged the court's finding that the letter of 3 April 2017 was inadmissible. They also challenge the award of costs against them on the higher scale.

In oral argument, the appellants maintained their contention that the letter of 3 April 2017 is admissible to prove that the parties had an agreement to reopen and debate the account. Mr *Kawonde* for the appellants referred to this agreement as a "compromise". He thus argued that the court *a quo* should have acknowledged the compromise that the parties had reached. He further argued that in terms of the compromise, the respondent had agreed to verify the interest that had been levied on the loan and that the order sought was a way of compelling the respondent to comply with the agreement.

I note in passing that the appellant incorrectly used the words "compromise" and "agreement" interchangeably. It is however not necessary for the purposes of this judgment that I advert to the differences between the two. What is clear from the arguments advanced before us is that the appellants are alleging that the respondent agreed to verify the interest that it had charged on the loan account. It is this alleged agreement that the appellants' counsel incorrectly referred to as a compromise.

To support their contention that such an agreement had been reached, the appellants sought to rely on the letter of 3 April 2017, the relevant part of which reads:

> "We confirm that the Bank is in the process of verifying interest charged on your account prior to the Bank obtaining judgment as you requested. Should there be any interest overcharge, you will be advised accordingly and the Bank will credit your account held with us. In the interim, the Bank will proceed to transfer the entire debt to ZAMCO, to meet the deadline …."

In its judgment, the court *a quo* observed that as a general rule, "documents" exchanged between parties on a without prejudice basis are inadmissible. It then held that the letter was one such document that fell under the general rule and was inadmissible. It did not give any further explanation or reason why the contents of the latter were inadmissible.

Apart from the discussion that follows below, it was quite inadequate for the court *a quo* to rule against the admissibility of the letter in a single sentence. This was the point upon which the application before it turned. This was the *ratio* of its judgment. It was therefore important for the court to give its reasons for agreeing with the respondent and not with the appellants on the admissibility of the letter. This would have entailed at least some reference to the applicable law and a demonstration of how that law is against the position adopted by the appellants.

The court *a quo* was correct in holding that as a general rule, statements made "without prejudice' are protected from disclosure and are therefore inadmissible as evidence of admissions made therein. However, as aptly observed by PATEL JA in *Mvududu v ARDA* SC 58/15, the ambit of protection from the admissibility of evidence conferred by the "without prejudice" rule is not unqualified.

Not every statement that is made without prejudice will enjoy the protection of the law against admissibility. For a statement to enjoy such protection it must contain an admission that is made in a genuine attempt to settle a legal dispute. It must contain an offer to settle the dispute. The admission and offer made in the statement must be adverse to the interests of the maker and to the position that the maker has adopted in the legal dispute. It must be a genuine attempt by the maker to buy his or her peace without prejudice to him or her if the offer is not

accepted. (See *Naidoo* v *Marine & Trade Insurance Co Ltd* 1978 (3) SA 666 (A) and *Kazingizi and Another v Equity Properties (Private) limited* HH 797/15).

It is admitted that when the letter of 3 April 2017 was written, the parties were discussing the alleged overpayment of interest by the appellants. To that extent, one may accept that there was a dispute between the parties regarding the alleged overpayment. But even viewed in that light, the letter of 3 April 2017 was neither an admission of liability nor an offer to settle the claimed amount. As correctly stated by Mr *Mutero* for the respondent, the letter simply recorded an agreed course of action to be taken.

The letter of 3 April 2017, being neither an admission of liability nor an attempt to buy its peace by the respondent, did not enjoy protection as a privileged statement. It was a mere promise to adhere to a given course of conduct.

In this regard, the court *a quo* erred in dismissing its admission into evidence.

In any event and more importantly, the contents of the letter of 3 April 2017 are repeated in the opposing affidavit filed on behalf of the respondent. In paragraph 4 of the opposing affidavit, the respondent's representative testifies on oath that the respondent did verify its interest calculations and found these to be correct. This is repeated in paragraphs 5 and 7 of the same affidavit where the stance is maintained that the parties held meetings whereat the appellants and the research bureau were advised that the respondent's calculations were correct whilst those done by the research bureau were incorrect in several respects.

It is therefore my finding that the court *a quo* erred in holding that the letter of 3 April 2017 was inadmissible. The contents of the letter were not privileged and were in any event, repeated in the opposing affidavit.

The court *a quo* further held that the relief sought by the appellants was an attempt to revisit the default judgment that had been granted in favour of the respondent. In holding as such, it failed with respect, to appreciate that the appellants were raising a new cause of action, based on an agreement between the parties allegedly concluded in April 2017. The appellants were alleging breach of this agreement and were seeking an order compelling the respondents to abide by the terms of the agreement. In the circumstances, the court *a quo* had to make a finding firstly on whether the appellants had established this new cause of action and if so, whether the appellants were entitled to the relief that they sought. This, the court *a quo* did not do.

The judgment of the court *a quo* cannot stand. It must be set aside and the matter remitted to the court *a quo* for determination as detailed above.

This was a contested appeal in which each party prayed that costs follow the cause. I see no reason why this should not be ordered.

In the result, I make the following order:

1. The appeal is allowed with costs.
2. The judgment of the court *a quo* is set aside.
3. The matter is remitted to the court *a quo* for determination by a different judge.

HLATSHWAYO JA: I agree

UCHENA JA: I agree

Kawonde Legal Services, appellants' legal practitioners.

Sawyer & Mkushi, respondent's legal practitioners.