THE HIGH COURT OF SWAZILAND

LUCKY G. MAHLALELA

Applicant

GILFILLAN INVESTMENTS (PTY) LTD

Respondent

In Re:

LUCKY G. MAHLALELA

Applicant

And

SWAZILAND ROYAL INSURANCE CORPORATION

Garnishee

GILFILLAN INVESTMENTS (PTY) LTD

Judgment Creditor

TAXING MASTER

Garnishee

Civil Case No. 2369/2000

Coram: S.B. MAPHALALA - J

For the Applicant: MR. M. SIMELANE

For the Respondents: ADVOCATE J.M. VAN DER

WALT (Instructed by Cloete/ Henwood/Dlamini and Associates)

RULING

(On a point of law in limine) (15th July 2005)

[1]The Applicant, by way of motion proceedings filed on 30 April 2004, seeks payment of the sum of E43, 250-65.

[2] The Respondent on the 22nd May 2003, filed a Notice to raise points of law formulated in the following terms:

a) The application dated 25th of November 2004 moved by the Respondent contains information made on a "without prejudice" basis thus falling foul of Rule 35 (10) and (13) of the Honourable High Court Rules 1954 as amended.

[3] It is common cause between the parties that in June 2003, i.e. in the month following the filing by the Respondent of its points of law, there was a meeting between the relevant attorneys and correspondence issued between the parties being annexure "C" and "D" to the Founding affidavit which reflected that a settlement agreement had been reached.

[4] On the 25th November 2004, more than a year and a half later, the Respondent filed an application for dismissal of the Applicant's application on the basis that the said application had been novated on the 3rd June 2003, by the above said agreement between the parties.

[5] The crux of the matter is a determination of whether the application dated 25 November 2004 moved by the Respondent is properly before court which inter alia, discloses an agreement reached by the parties attorneys on the 3rd June 2003. It is the Respondent's case that the Applicant's application has been overtaken by a subsequent binding agreement. Applicant however, persists in pursuing his application.

[6] Before dealing with the issue at hand it is necessary at this stage to first determine whether Rule 35 (10) and (13) as cited in Applicant's point of law raised by way of notice (at page 147 of the Book of Pleadings) is the proper Rule. It appears it is not. Rule 35 (10) thereof pertain to inspections and related matters to discovery in action proceedings, and are irrelevant to this application.

[7] As far as the Applicant's argument about the "without prejudice" information Mr. Simelane filed very comprehensive Heads of Argument, the essence of his arguments is that in casu it cannot be said that the letter from the Applicant's attorney dated 7th June 2003, settled the matter or it was part-payment of a debt. He contended that Applicant's attorney when writing the letter the words "without prejudice" were not inserted in the letter but the confirmation of the meeting held on a without prejudice thereof did not render the agreement as binding. It is contended in this regard that High Court matters are settled in terms of Rule 34 which basically is a form of contract. In the present case the said Rule has not been complied with is so far as no agreement to settle has been registered in court in terms of the provisions of the said Rule.

[8] Rule 34 thereof reads as follows:

"(I) In any action in which a sum of money is claimed, either alone or with any other relief, the Defendant may at any time unconditionally or without prejudice make a written offer to settle the Plaintiffs claim, and such offer shall be signed either by the Defendant himself or by his attorney if the latter has been authorised thereto in writing (5) Notice of any offer or tender in terms of this Rule shall be given to all parties to the action and shall state:

a) whether the same is unconditional or without prejudice ->s an nfOr settlement;

b) whether it is accompanied by an offer to pay all or only part of the costs of the party to whom the offer or tender is made, and further that it shall be subject to such conditions as may be stated therein;

c) whether the offer or tender is made by way of settlement of both claim and costs of the claim only

d) whether the Defendant disclaims liability for the payment of cists or for part thereof, in which case the reasons for such disclaimer shall be given, and the action may then be set down on the question of costs alone.

(10) No offer or tender in terms of this Rule made without prejudice shall be disclosed to the court at any time before judgment has been given, and no reference to such offer or tender shall appear on any file in the offence of the Registrar containing the papers in connection with the case.

(13) Any party who, contrary to this Rule, personally or though any person representing him, discloses such an offer or tender, to the Judge or the Court shall be liable to have costs given against him even if he is successful in the action.

(14) The offer must be (a) lawful (b) be made with the limits of the efferors contractual capacity (c) be made serious with the intention that a binding contract shall result on acceptable (d) be communicated to the other party (e) be sufficiently certain (f) be possible of performance and (g) comply with any of the prescribed formalities".

[9] The thrust of Mr. Simelane's arguments is that the meeting of the 3rd June 2003 and the subsequent letters of the 4th June 2003, fell short of complying with Rule 34 (5) and that it is clear that these were negotiations that

would have led to the conclusion of a contract once ratified by his client. He contended further in this regard that it is worth noting that the Respondent's attorney did not demand a Power of Attorney when the meeting took place but when Applicant's attorneys pursued the balance, the Respondent's attorney demanded a Power of Attorney which was filed in the High Court. Mr. Simelane cited a plethora of decided cases both in this country and in South Africa including the Appeal Court case of Andile Nkosi and another vs The Attorney General No. 51/99 (unreported); Odendaal vs Du Plessis 1918 A.D. 470; Burt NO. vs National Bank ofS.A. (LTD) 1921 AD 59; Harris vs Pieters 1920 A.D. 644; Ditout vs North Cape Livestock Co-Operative Ltd 1977 (4) S.A. 842 (A); OK Bazaar vs Bloch 1929 WLD 37; Blackie Swart Argitekte vs Van Heerden 1986 (1) S.A. 249 (A); Steenkarnp vs Orion Government 1947 (1) S.A. 91; Foord vs Lake & others NNO 1968 (4) S.A. 395 W a t 399 F-H; Van Zyl vs Niemann 1964 (4) S.A. 661 (A) and the textbooks by Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4' Edition at page 485 - 6 and Gibson, South African Merchantile and Company Law, 7th Edition at page 32.

[1.0] Advocate Van Der Walt advanced per contra argument premised on what is stated by the authors Hoffmann and Zeffert, South African Law of Evidence, 3rd Edition at page 170 where the following principle is discussed:

"Statements which are made expressly or impliedly without prejudice in the course of bona fide negotiations for the settlement of a dispute cannot be disclosed in evidence without the consent of both parties. The words "without prejudice" mean without prejudice to the rights of the person making the offer it is should be refused. The exclusion of statements made without prejudice is based upon the tacit consent of the parties and the public policy of af to wing people to try to settle their disputes without the fear that what they have said would be held against them if the negotiations should break down".

[11] The nub of the Respondent's case is that the parties had reached a binding agreement' i.e. an offer had been

made and accepted. The negotiations did not break down, on the contrary, they succeeded and correspondence between the relevant attorneys confirmed the agreement reached. Annexures "C" and "D" are self-explanatory and the Applicant's attorney in annexure "D" unequivocally confirms the agreement reached. This point raised by the Applicant, is frivolous and legally inaccurate, and therefore stands to be dismissed with costs.

[12] It appears to me that the argument advanced by Miss Van Der Walt is more sound that the one raised by the Applicant when one looks at annexure "C" and "D" at page 79 and 81 of the Book of Pleadings, respectively. These letters are self-explanatory and Applicant's attorney in annexure "D" unequivocally confirms the agreement. An offer had been made and accepted. The negotiation did not break down, (see Hoffmann & Zeffert (op cit) at page 170 cited with approval in Sibeko and another vs Minister of Police and other 1985 (I) S.A. 151 (W) at 164).

[13] In the result, I have come to the conclusion that the point of law raised by the Applicant to the Respondent's application for dismissal of the Applicant's application on the basis that the said application had been novated on 3rd June 2003, by the agreement between the parties, cannot succeed and it is accordingly dismissed. Costs to follow the event including costs of Counsel taxed in terms of Rule 68 of the High Court Rules.

S.B. MAPHALALA

JUDGE