

THE HIGH COURT OF SWAZILAND

MARY SEHLEPHI CHIMWAZA

1st Applicant

OSCAR CHIMWAZA

2nd Applicant

And

SWAZILAND NATIONAL HOUSING BOARD

Respondent

Civil Case No. 2868/2001

Coram: S.B. MAPHALALA – J

For the Applicants: MR. Z. MAGAGULA

For the Respondent: Advocate L. MAZIYA (Instructed by Mthembu, Mabuza Attorneys)

RULING

(28th April 2006)

[1] During the course of the cross-examination of the Plaintiff by *Advocate L. Maziya*, Counsel for the Plaintiff *Mr. Z. Magagula* objected to a certain question put to the Plaintiff as being improper. The essence of the said objection was that since the said statement was made on the basis of "without prejudice" when the parties were negotiating in this matter that cannot be used subsequently by either party in litigation. In this regard the court was referred to a number of legal authorities supporting the Plaintiffs case including the cases of *Naidoo vs Marine & Trading Insurance Company 1978 () S.A. 666* at page 677, the case of *Waste-tech (Pty) Ltd vs Van Zyl's Glenville N.N.O. 2002 S.A. 841* at 846 and the textbook by *Van Der Merve et al, The Principles of Evidence, 2nd edition* at page 298. The court was further referred to *Butterworth's, Words and Phrases Judicially Defined Vol. 5* at page 516.

[2] *Mr. Maziya* advanced arguments against the objection also in a lengthy submission where he also cited legal authorities in this case. The essence of his reply, briefly put, is that the legal authorities cited by *Mr. Magagula* are correct on the principles of law that strictly speaking under the said principle the statement given "without prejudice" cannot be used against the maker thereof. However, the maker of the said statement cannot be precluded from divulging what was said to the world. To support his arguments *Mr. Maziya* referred to the textbook by *Hoffmann's Zeffert, The South African Law of Evidence 2nd Edition* at page 155 which states that 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. By the words "without prejudice" it is meant "without prejudice" to the rights of the person making the offer if it should be refused. The court was further referred to the South African case of *Magcoka vs Skilingo 1914 C.P.D. 386*.

[3] After considering the submissions to and fro in this matter it appears to me that *Mr. Magagula* for the Plaintiff is correct in his arguments and therefore I would order that the question be withdrawn. The arguments by *Advocate Maziya* make good common sense, but it does not in my view make legal sense. In view of the authority in *Butterworth (supra)* any statement made in the course of negotiations by parties who are in litigation or anticipate litigation cannot be disclosed in court. I agree with *Mr. Magagula* in this regard that it does not really matter who is disclosing since the rationale to the principle remains that it is to enable the parties to go into negotiations freely and frankly, not the expression that whatever I say may then be used against me. The general rule in civil matters is that an admission will be accepted into evidence provided that it is relevant. However, admissions included in a statement by a person involved in a dispute which are genuinely aimed at achieving a compromise are protected from disclosure. Such admissions may only be accepted into evidence with the consent of both parties. The rationale of the rule is based on public policy which encourages the private settlement of disputes by the parties, (see *Naidoo vs Marine and Trade (supra)* at page 677. Clearly, parties would be reluctant to be frank if what they said might be held against them in the event of negotiating failing, (see *Waste-tech (supra)*).

[4] In the result, for the afore-going reasons the objection is sustained. I make no order as to costs since this was an objection made during the course of trial.

S.B. MAPHALALA
JUDGE