IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 1878/05

In the matter between:

THE ONE FRANCHISE OPPORTUNITY
APPLICANT

and

M.T.N. SWAZILAND LIMITED **PLAINTIFF**

In re:

M.T.N. SWAZILAND LIMITED **PLAINTIFF**

and

THE ONE FRANCHISE OPPORTUNITY
DEFENDANT

CORAM: Q.M. MABUZA -AJ

FOR APPLICANT: MS. T. HLABANGANA

FOR RESPONDENT: ADV. FLYNN INSTRUCTED BY MR. MDLADLA

RULING 27/01/06

This matter came before me on the 26/01/06.

The attorney for the applicant Ms Hlabangane raised two technical points. I shall deal with them in the order they were raised:

1. The confirmatory affidavit:

Applicant's attorney submitted that she received the confirmatory affidavit at 15.47 p.m. on the 25/01/06 and she had filed her client's replying affidavit at 3.06 p.m. on the 25/01/06.

Both counsel first appeared before me in the morning of the 24/01/06 in my chambers.

Attorney Mdladla handed me his client's answering affidavit then. It had no confirmatory affidavit.

Both counsel agreed to postpone the matter to 26.01.06 at 9.30 a.m. This was to enable counsel for the applicant to file replying affidavits by Wednesday afternoon on the 25th January 2006. When I left my chambers at 2 p.m. on the 25th January 2006 the confirmatory affidavit was not in the file. When I arrived in the morning of the 26th January 2006 the confirmatory affidavit stamped 23rd January 2006 was in the file together with the original MTN contract. The latter had not been in the file either on the previous day.

I agree with the applicants attorney that the confirmatory affidavit was late and have no hesitation in ordering the striking out of the paragraphs complained of as being fraught with hearsay.

2. Annexure "M.T.N. 3".

Applicant's attorney has submitted that this letter was ^written on a "without prejudice" basis and that it should be removed from respondents papers.

Mr. Flynn who represented the respondent referred me to page 197 of Hoffman's "Law of Evidence" 4th Edition. He added that there was no substance to this submission and that the applicant's attorney should show that the letter was privileged or forms part of bona fide negotiations.

I disagree. The whole matter centres around negotiations which seem bona fide to me. This is apparent *ex facie* the papers of both parties.

I refer to page 196 of The Law of Evidence of South Africa by Hoffman 4th Edition -C. Statements without prejudice - "***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.*"**

In a more recent work by Schwikkard and Van der Merwe. "Principles of Evidence" 2nd Edition on p. 298, 16.6. Statements without prejudice the learned authors have this to say: **"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 enourages the private settlement of disputes by the parties themselves. Clearly, parties would be reluctant to be frank if what they said might be held against them in the event of negotiations failing.

It is the habit of legal representatives to preface such statements with the words "without prejudice", meaning that the statement is made without prejudice to the rights of the person making the offer in the event of the offer being refused".

For the reasons above, I find that "Annexure MTN 3" is priviledged and must therefore be removed as requested.

Costs will be costs in the cause.

Q.M. MABUZA
ACTING JUDGE