IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIV. APPL. CASE NO. 3961/08

In the matter between:

ABNER NDLOVU
Applicant

And

THE MOTOR VEHICLE ACCIDENT FUND
Respondent

Date of hearing: 30 January, 2009.
Date of judgment: 6 February, 2009.

Mr. Attorney B.S Dlamini for the Applicant Mr. Attorney S.M. Masuku for the Respondent

JUDGMENT

MASUKU J.

[1] Although other questions may eventually have to be answered, for present purposes, however, there is one crisp question of law that requires to be answered by this Court in this judgment. That question acuminates to this - is the Applicant herein, entitled to predicate his claim, at least in part, on the contents of a "without prejudice" document addressed to him by the Respondent in the course of *bona fide* settlement negotiations?

[2] Before one can advert to answering the above question, it would no doubt redound to clarity for this Court to place the material facts giving rise to this *lis* in proper historical perspective. These may briefly be chronicled as follows: It is common cause that on 25 December, 2005, in Sidvokodvo, Manzini District, the Applicant sustained certain injuries as a result of a motor vehicle collision. As was his right in terms of the law, the Applicant, through its present attorneys of record, lodged a claim for compensation with the Respondent, which, it must be stated, is a statutory corporation established in terms of the laws of Swaziland and

responsible for *inter alia,* investigating; where appropriate, settling claims; defending or abandoning legal proceedings relating to claims duly lodged against it by claimants.

[3] It would appear that the Respondent eventually made an offer to the Applicant, clearly on a "without prejudice" basis, *vide* a letter dated 7 August, 2008. It would appear further that the parties were not in agreement regarding the offer made to the Applicant, resulting, as it is now apparent, in negotiations for settlement of the matter falling through. The negotiations apparently having reached a *cul de sac,* the Applicant has approached this Court seeking the following relief:

A) That an order be and is hereby issued directing that the sum of E81 400.00 quantified by the Respondent to be payable in relation to future medical expenses to Applicant is payable as a lump sum in cash to the Applicant.

B) Directing the Respondent to pay costs of the application.

C) Further or alternative relief.

[4] It is common cause, from a reading of the contents of the letter by which the Respondent embodied the said offer to the Applicant, that the Applicant largely relies for the relief he seeks, on the letter dated 7 August, 2008. As indicated earlier in the judgment, the Court has to answer the question whether the Applicant is entitled to rely on the contents of the said letter which letter is annexed to the founding affidavit, together with paragraphs 7 and 8 of the Founding Affidavit, as a launching pad as it were, for the relief he now seeks. In this connection, the Respondent filed a notice to strike out the said letter and the paragraphs referred to above for offending against the rule barring the disclosure of settlement negotiations without the parties' consent.

[5] Authority that pertinently deals with the subject of statements made "without

prejudice" is legion. I had occasion to deal with this very subject in the case of *A. S. T. Botswana v The Public Procurement and Asset Disposal Board And Others* [2005] 1 B.L.R. 504, a judgment delivered in the Republic of Botswana. At page 513 of the reported judgment, I pertinently referred to the judgment of Roper J. in *Millward v Glaser* 1950 (3) S.A. 547 at p 554 F-G, where His Lordship had this to say on the subject:

> "There is authority for the proposition that negotiations between parties whether oral or written, which are undertaken with a view to a settlement of their differences, are privileged from disclosure even though there is no express stipulation that they shall be without prejudice."

[6] In answering what may be the lingering question as to what meaning ought to be attached to the words which have become a mantra in this judgment, namely "without prejudice", I referred to the celebrated case of *Gcabashe v Nene* 1975 (3) S.A. 912 (D) at p 914, where the learned James J.P. cited with approval a figurative exposition of the meaning of the words which are the subject of our discourse presently found in the words of Kekewitch J. in *Kurtz & Co. V Spence & Sons* (1887) 57 LJ Ch 238 at p 241, where the learned Judge said:

> "I shall not attempt to define the words Vithout prejudice' -but what I understand by negotiation without prejudice is this: The plaintiff or defendant - a party litigant may say to his opponent:
>
> 'Now you and I are likely to be engaged in severe warfare. If that warfare proceeds, you understand I shall take every advantage of you that the game of war permits; you must expect no mercy, and I shall ask for none; but before bloodshed let us discuss the matter, and let us agree that for the purpose of this discussion we will be more or less frank; we will try to come to terms with and nothing that each of us says shall ever be used against the other so as to interfere with our rights at war, if unfortunately, war results.'
>
> That is what I understand to be the meaning, not the definition of "without prejudice".

[7] On the same subject, the learned authors Zeffert, Paizes and St. Q Skeen, <u>The South African Law of Evidence</u>, (Formerly Hoffman & Zeffert), Lexis Nexis, 2003, at p 616, say the following regarding the meaning of the said words:

> "The words 'without prejudice' mean without prejudice to the rights of the person making the offer if it should be refused, but this condition carries with it the consequence that the offer cannot subsequently be relied upon as a tender entitling the party who made it to subsequent costs. The exclusion of statements made without prejudice is based upon the tacit consent of the parties and as has been said, the public policy of allowing people to try to settle their disputes without the fear that what they said will be held against them if the negotiations should break down. It has also been described as deriving from the principle of 'free disposition' - the adversary freedom of the parties to determine whether to commence or to continue formal enforcement of their rights and obligations."

Now that the meaning attaching to the phrase has been given in the above cases, I proceed to quote further relevant authority, in order to place all the material aspects of this statement on the table and from

which one may be properly placed to bring a judgment to bear on the facts in the instant case.

In *Gcabashe {op cit)* at p 914 H, the learned Judge President proceeded to make this further point:

> "Negotiations conducted without prejudice, are, of course, designed to resolve disputes between the parties and if negotiations result in settlement then logically evidence about the settlement and the negotiations leading up to it should be available to the trial Court because the whole basis for non-disclosure has fallen away."

Yet in *Eskom v Rini Town Council* 1992 (4) S.A. 96 (E) at p 99 H, Ludorf J said:

> "It is a well established principle that prior negotiations should in the absence of agreement between the parties not be revealed to the Court and that evidence thereof is inadmissible. In the present matter the applicant, in my judgment, clearly fell foul of that principle and the respondent was entitled to bring the application to strike out." See also generally the following in relation to the principle, Zeffert *et al,* South African Law of Evidence, (*op cit)* at p *6\6i_Naidoo v Marine & Trade Insurance Co.Ltd* 1978 (3) S.A. 667 (A.D.) *Sabelo Mabuza v The Motor Vehicle Accident Fund* Civil Case No. 2630/07 (H.C), Mweli v Seme 1982 - 1986 SLR[II] 410.

What does emerge from the authorities cited above are two major principles. First, it is clear from the *Millward* case *(op cit)* that the rule in question applies even in cases where there is no express stipulation that the negotiations are without prejudice. It follows therefore that what brings the negotiations within the ambit of the rule is not an express provision to the effect that they are without prejudice but the very fact that they are negotiations in a genuine attempt to settle a dispute. The fact that the letter of offer (if written) is not marked "without prejudice" counts for nothing. In this regard, I said the following in the *A.S.T.* case *(op cit)* at p 513 G:

> "It is however clear from the *Glazer* case *(supra)* that the fact that the negotiations bear no express title of being without prejudice does not render them amenable to disclosure."

Zeffert *et al (op cit)* say the following in this regard still at p 617-617:

> "There is no particular magic in the use of the words ^without prejudice' as introduction to a statement or as a heading to a letter. If the statement forms part of genuine negotiations for the compromise of a dispute it will be 'privileged' even if the words have not been used. . . Conversely, a letter headed ^without prejudice' will not be privileged if it is not a bona fide part of negotiations or if there was no dispute between the parties."

[10] Second, the fact of negotiations and the resultant settlement may be made known to the Court only after the fact i.e. after the parties have settled the matter finally. See Grabashe. If, however, the negotiations do not eventually result in an agreement, then, without an agreement between the parties, the fact of such negotiations and the nature of the offer made may not be disclosed to the Court. This position would appear to find support in the Motor Vehicle Accident Act No. 13 of 1991, especial regard being had to the provisions of section 10 (3), which reads as follows:

> "In issuing any order as to costs on making such award, the court may take into consideration any written offer in settlement of the relevant claim made by the MVA Fund before the relevant summons was served on it."

[11] It becomes apparent from the foregoing that the offer of settlement made by the Fund to the claimant and which did not fructify, is not disclosed to the Court until the matter has actually served before the Court and an adverse order for liability against the Fund has been made by the Court. It is only at that stage that the Court may have recourse to the record of any offer previously made by the Fund.

[12] That, having been established, there are two issues to be determined presently. First, is whether there were genuine negotiations that were undertaken by the parties and which did not fructify. Secondly, and only if it is found that there were such negotiations and which were disclosed to the Court much against the rule in question, is there any reason why these should not be declared inadmissible?

[12] On the first question, it is entirely clear on first principles that the publication for the consumption of the Court of the letter in question does inexorably constitute a disclosure of prior negotiations towards settlement which, however, did not result in a settlement. This much is common cause and I did not understand *Mr. Dlamini* to be arguing otherwise. For that reason, I come to what I consider to be an ineluctable conclusion that the disclosure of the said letter violates the principles set out earlier in this judgment. That being the case, there is no gainsaying that the disclosure is for that reason entirely wrong and reliance on the contents thereof is inadmissible.

[13] This conclusion is however subject to the argument raised by *Mr. Dlamini* in support of his argument that the present case constitutes an exceptional situation in which the rule set out above should not apply. The gravamen of his argument as I understood him was that the rule in question is not applicable in the instant case for the reason that the Fund, in attempting to settle a claim against it and later failing to come to an settlement is *ultra vires* the enabling Act.

[14] In support of his argument, *Mr. Dlamini* placed reliance on the provisions

of section 4 (a) of the Act, which spells out the powers of the Fund. The said section provides the following:

> "The MVA Fund -
> (a) shall have power to investigate or settle referred to in section 10 arising from the driving of a motor vehicle or commence, conduct, defend or abandon legal proceedings in connection with such claims;

Mr. Dlamini argued that the Fund does not, in terms of the provisions of section 4 (a) of the Act have power to negotiate and try to settle claims. He monotonously harped upon the point that the Fund is required to "investigate and settle claims" and that where the Fund has, on investigation found that it is liable, it should not, without further ado attempt to negotiate with the claimant but that it should proceed to "settle" the claim, negotiations expressly excluded. Is this argument tenable?

In my view, this argument cannot be allowed to stand. I say so for the reason that the Fund is not and should not be a Santa Claus at any time, the Christmas season included. It is a body set up to ensure that *bona fide* claims are properly settled on terms that will be fair and adequate for the victim in the Fund's view. At the same time, the Fund should be alive to the fact that it has to act responsibly and in the interests of the contributors to the Fund and for that reason, should not make offers without a thorough investigation and analysis of all the material issues and facts that affect the quantum.

Furthermore, it should be remembered that settlement involves the participation of two parties, the offeror and the offeree. In the instant case, the Fund is the offeror and the claimant, the offeree. There is no guarantee that whatever amount the Fund determines is condign in any case, will be accepted without question by the offeree. Claimants will in some cases try to obtain as much money as possible from the Fund, with the Fund trying to limit such amount payable to the bare minimum, the circumstances of the case being taken into account. To allow the argument to stand would be tantamount to the Court acting in total oblivion to the practical scenario

that unfolds in such matters that settlement may and does in many cases involve the making of offers and counter-offers, sometimes back and forth a few times.

There is, in my view, a further and compelling reason why the argument on the Applicant's behalf ought to be dismissed and it is this. The provisions of section 4 (e) of the Act consist of an omnibus clause the nomenclature of which is reproduced below: The MVA Fund:

> "may do all such other things as are incidental or conducive to the exercise of its powers or the performance of its duties."

There can be no gainsaying the fact that negotiations, whether successful or not in the end, clearly fall within those matters that are "incidental" to its power to settle claims lodges against it. It is for that reason and in many cases, where the negotiations have proved unfruitful that it may "conduct, defend or abandon legal proceedings in connection with such claims" as recorded in the latter part of section 4 (a) of the Act. It would, in view of the foregoing be absurd for Parliament to be said to have intended that the Fund should just settle claims without seeking to invoke the medium of possible negotiations in order to curtail as far as practically possible, the costs associated with legal proceedings. In point of fact, section 10 (3) *(op cit)* clearly acknowledges and actually envisages that the Fund may have to enter into negotiations with a view to settle claims lodged with it.

I am of the view that the Applicant's argument is entirely without merit. For that reason, I issue the following Order:

1 The Respondent's application to strike out the contents of paragraphs 7, and 8 and annexure "AN 1" to the Applicant's affidavit be and is hereby upheld.

2 The Applicant be and is hereby ordered to pay costs on the scale between parly and party.

T.S MASUKU

JUDGE

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 5™ DAY OF FEBRUARY, 2009.