2003.

IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE

CASE NO : 2369/00

In the matter between

LUCKY G MAHLALELA **Applicant**

and

GILFILLAN INVESTMENTS (PTY) LTD **Respondent**

CORAM: EBERSOHN J JUDGMENT HANDED DOWN ON 27th OCTOBER 2006

FOR APPLICANT: ATT. M. MABILA

FOR RESPONDENT: ADV. M. VAN DER WALT

JUDGMENT

EBERSOHN J.

[1] In this matter there is a dispute whether the matter was settled between the parties' attorneys or not.

[21 The Applicant sought an order against the Respondent directing payment of E43 250.65 (the "main application"). The Respondent subsequently sought an order to the effect that the main application be dismissed on the ground of innovation by an agreement entered into between the parties' representatives on the 3rd June

[3] The Respondent's application for such dismissal of the Applicant's application was granted by a Judge of this Court but on appeal tie matter was referred back to the High Court by the Court of appeal for the hearing of oral evidence **"on the question as to whether annexures** "C" **and "D" dated 3rd June 2003, and which are annexures to Mr Henwood's founding affidavit, constituted a final agreement between tie parties which novated the applicant's claim.**"The phrasing apears to be incorrect and should have been whether the matter was settled between the attorneys of the parties on the 3rd June 2003 or not.

[4] Annexure **"C"** is a letter by attorney Mr Henwood on behalf of the Respondent. This letter reads as follows:

"4 June 2003

"WITHOUT PREJUDICE"

MBUSO E. SIMELANE & ASSOCIATES
MBABANE

Dear Sirs
RE: GILFILLAN INVESTMENTS (PTY) LTD./LUCKY MAHLALELA

1. We refer to the above matter and in particular the meeting between our Mr Henwood and your Mr Simelane on the 3rd of June 2003.

2. We confirm that in so far as the issue of the respective costs due to our client and Lucky Mahlalela and/or Nomcebo Dlamini has been resolved on the following basis,*

2.1. We shall accept E30,000.00 (Thirty thousand Emalangeni) in full and final settlement of our costs including costs of counsel;

2.2. We shall pay over to yourselves [cheque herein enclosed] the difference between E30,000.00 (Thirty thousand Emalangeni) and E49,074-03 (forty nine thousand and seventy four Emalangeni three cents) which we hold i.e., E19,074-03 (nineteen thousand and seventy four Emalangeni three cents);

2.3. We confirm having already tendered to your client the sum of E8,000-00 (eight thousand Emalangeni) which we transmitted to him via telegraphic transfer on the 11th of March 2003;

2.4. The issue of accrued interest will be resolved by us splitting the said interest into half. We are awaiting payment from the bank where after we will then transmit this interest.

3. For clarity we reconcile the figures as follows:

Capital	**E57,174-03**
Less	**E8,000-00**
Less telegraphic transfer costs	**E100-00**
	E49,074-03
Less agreed costs	**E30,000-00**
Amount due to Mr. Mahlelala	**E19,074-03**

4. In the interim we enclose herewith our cheque in the sum of E19,074-03 (nineteen thousand and seventy-four Emalangeni three cents).

Yours faithfully

ROBINSON BERTRAM
enclosure"

[5] Annexure **"D"** is a letter by attorney Simelane on behalf of the Applicant which letter reads as follows:

"4th June 2003

Robinson Bertram
MBABANE

Dear Sirs,

LUCKY MAHLALELA/GILFILLAN INVESTMENTS (PTY) LTD - HIGH COURT CASE NO. 2369/2000

1. We refer to the above matter.

2. We confirm that on the meeting that the writer had with your Mr. Henwood on the 3rd June 2003 the following was agreed:

2.1. That your costs including counsel fee was negotiated at E30,000-00.

2.2. You are to release the sum of E19 174,03 as per the underlisted schedule:

Capital	**E57 174.03**
Less taken	**E 8 000.00**
	R49 174.03
Less agreed costs	**E30 000.00**
Total due	**E19 174.03**

2.3 Further both parties are to share the interest that was accrued on this account.

3. We shall await your cheque.

Yours faithfully

MBUSO SIMELANE & ASSOCIATES"

[6] Both letters were written pursuant to a meeting between the two attorneys on the 3rd June 2003

[7] Both letters clearly reflect an agreement on payment of a capital sum of E19 0743.03, and that the parties would split the interest which accrued whilst the money was held in a bank account.

[8] Whether this agreement was final or not is the main dispute in this matter.

[9] The following facts appear to be common cause:

a) The sum of E 57 174.03 was held in an interest bearing account under the control of the Respondent's attorneys pending the resolution of certain issues and the Applicant, in the main application, sought payment of the sum of E43 250.65 therefrom.

b) On the 3rd June 2006 there was a meeting between Messrs Henwood and Simelane in an attempt to settle the main application, which culminated in the two letters which I have referred to supra being written. (It is irrelevant at whose instance this meeting took place.)

c) Both these letters reflect an unequivocal acceptance of payment of E30 000.00 as costs by the Applicant, and agreed acceptance of payment of E19 074.03 by the Respondent (E8 000.00 already having been transferred to the Respondent at a cost of E100.00), interest accrued on the said interest bearing account to be split later between the parties.

d) Mr Henwood's said letter refers to the matter having been **"resolved"** on the above basis, and Mr Simelane's letter **"confirms"** that same was **"agreed."**

e) Mr Henwood attached a cheque for E19 0743.03 to his letter, and Mr Simelane concluded his letter with **"We shall await your cheque."** (It appears that the letters crossed each other in the post or during delivery.)

f) Mr Simelane's in his letter did not state that the agreement reflected therein was subject to his client's instructions or that it was without prejudice and had to be ratified at some later stage by somebody.

g) Mr Simelane on the same day namely the 4th June 2003 accepted and banked the cheque forwarded to him by Mr Henwood without any further reference to either Mr Henwood or Mr Simelane's client, the Applicant.

h) On the 10th June 2003 Mr Simelane wrote a letter to Mr Henwood now **"confirming"** that the agreement was on a without prejudice basis and that full and further instructions from

the Applicant still had to be obtained.

i) On the 16th July 2004 Mr Simelane wrote another letter to Mr Henwood to the effect that the Applicant believed that Messrs Simelane and Henwood connived to cheat him. This letter is annexure "E" to Mr Henwood's affidavit. It is not necessary to quote the contents thereof. It needs be noted that in neither letter is there an allegation to the effect that any agreement reached had been without prejudice or subject to the instructions of the Applicant or was of a provisional nature only, or that he had not been mandated by his client to agree to those terms.

j) The interest referred to above was subsequently calculated and a cheque for full settlement thereof was forwarded by Mr. Henwood per annexure G dated 24th May 2004 to the Applicant's attorneys then attending to his matters namely Maphanga Howe Masuku Nsibande who received and accepted it.

k) The Applicant himself never deposed to any affidavit to confirm or deny whether Mr Simelane had proper instructions to enter into any settlement with Mr Henwood as the Respondent's attorney. The Applicant's failure to file such an affidavit was not explained either in the papers filed of record or by Mr Simelane during the course of his oral evidence before me.

[10] Mr. Henwood was the first witness before me. He conceded that the meeting initially was without prejudice but, as things often happen, a binding settlement agreement was reached and concluded between him and Mr. Simelane which he confirmed in his said letter annexure C, on the basis set out in the letter, and he testified that at no stage Mr Simelane disclosed or stated or even suggested that the settlement eventually reached at the meeting would be subject to confirmation by his client.

[11] Mr. Henwood added that had no proper agreement been reached, that he would not have issued the cheque or made any other payment to Mr Simelane because one could not pay over moneys held in trust for a client unless there was a proper and valid cause, in this instance the agreement.

[12] Mr. Henwood testified that he first became aware of the alleged need for confirmation by the Applicant when he received Mr Simelane's letter of the 10th June 2003.

[13] He testified that despite Mr Simelane's later protestations of lack of mandate, all subsequent events were completely in accordance with a duly reached agreement in that payments of the capital sum as well as the interest were made and accepted, without any demur, on behalf of the Applicant.

[14] Under cross-examination Mr Henwood denied that he was aware thereof that anything was subject to confirmation by the Applicant, and had it been, he would not have acted in the way he did and that he would not have paid over any funds.

[15] He also stated that as an attorney he would not, as Mr Simelane did, have accepted a cheque for a lesser amount than the amount claimed by his client, thereby binding himself to something his client did not agree to. On the contrary, he would have advised the sender of the cheque that he was still awaiting instructions, and return the cheque and not summarily bank it as Mr. Simelane did.

[16] Mr. Henwood confirmed that the issue whether the respective attorneys were specifically mandated, was never discussed at the meeting on the 3rd June 2003 and that he did not challenge Mr Simelane about it or asked him to produce a power of attorney or some proof that he could settle the matter. He stated that Mr. Simelane was the Applicant's attorney of record and had dealt with the matter in the Court and Mr Henwood under the circumstances accepted, as he stated that he was entitled to do under the circumstances, that Mr Simelane was properly mandated.

[17] Mr. Henwood rejected a statement put to him to the effect that he made payment because the money was in Robinson Bertram Attorneys's trust account and, since he was leaving that firm, that he did not want the money to be "stuck" with that firm. Mr Henwood testified that he had agreed with Robinson Bertram that the files he would be taking along with him, would be accompanied by any trust money belonging to the client whose file he took with him. The Respondent's file was one of the files he was to take with him when he would leave Robinson Bertram. This reply by Mr Henwood was not disputed.

[18] Mr. Henwood repeated that the typist inserting the words "Without prejudice" in his letter, was a mistake and that he didn't even notice it.

[19] In re-examination Mr Henwood estimated that, at the time, he would have dispatched 20 to 30 letters per day.

[20] Mr. Simelane, who was the next and only other witness, in chief maintained that Mr Henwood had been aware that he, Mr Simelane, still had to obtain instructions from his client about a possible settlement. He also maintained that he made an error by not marking his letter quoted supra "without prejudice".

[21] He in fact made the startling allegation that there was a letter from Mr Henwood dated the 9th

June 2003 wherein Mr Henwood "reiterated" that the meeting was without prejudice. **Firstly,** this alleged letter was never mentioned in Mr Simelane's affidavit in the motion proceedings whereas it would have constituted a vital piece of evidence in support of his case. No explanation was offered for this. **Secondly,** the existence and contents of the alleged letter was not put to Mr Henwood in cross-examination. **Thirdly,** Mr Simelane in his evidence alleged that this letter had "disappeared". When and under which circumstances this happened was also not disclosed. I find these three aspects very unsatisfactory.

[22] At the conclusion of his evidence Mr. Simelane told the Court that he would look for the letter in his files but none was forthcoming subsequently. The proper time to have looked for the letter was before the hearing of oral evidence started.

[23] The following in his evidence was also not put to Mr. Henwood in cross-examination:

That he told Mr Henwood that the Applicant was in Johannesburg and that he could not take instructions about a settlement.

b) That Mr Henwood offered to settle the matter and said the offer was not binding because the meeting was held on a without prejudice basis.

[24] Mr. Simelane did not at all address the issue of the absence of any affidavit, letter or similar indication by the Applicant himself to the effect that the Applicant never mandated him to accept or enter into any agreement.

[25] Mr. Simelane was then cross-examined.

[26] His response to the questions why his evidence referred to in paragraph 23 of this judgment was not put to Mr Henwood, was to the effect that he did not know why.

[27] He offered the same response to the fact that it was never put to Mr Henwood, as is alleged by Mr Simelane in Paragraph 19 of his Answering Affidavit in the papers, that Mr Henwood released the payment of E19 074.03 as a show of "bona fides"." It is to be noted that this allegation was contradictory to the statement put to Mr Henwood during cross-examination namely that he made payment to Mr. Simelane because the money was in Robinson Bertram Attorneys's trust account, and as he was leaving that firm and did not want the money to remain behind he paid it over.

[28] Mr Simelane then testified that he had in fact told Mr Henwood at the meeting that he had to

get instructions or ratification from the Applicant. Again, he was unable to explain why this was not put to Mr Henwood.

[29] He also failed to offer an explanation as to why he could not, and did not, telephonically contact his client in South Africa, since his client had both a cellular phone and a land line phone.

[30] Asked on what basis in law he, as an attorney, was entitled to appropriate to his trust account a payment which was not authorized by his client, his vague and unconvincing response was that it was a "debt collection" and that he normally put such payments into his trust account and besides, that the payment in question was accompanied by Mr Henwood's "without prejudice" letter.

[31] Mr Simelane made matters worse when, after stating that he never received authority from the Applicant to accept the payment and when asked why he then never returned the payment, he averred that it was a part payment in a "debt collection". Realising his predicament he changed his version, contradicting himself, by stating that it was not a part payment but that it was a payment "pending acceptance" by the Applicant.

[32] The Court must now examine the legal principles regarding statements made **"without prejudice".**

[33] Any statement 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.

[34] The words **"without prejudice"** mean without prejudice to the rights of the person making the offer if it should be refused. The exclusion of statements made without prejudice is based upon the tacit consent of the parties and the public policy of allowing 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."

[35] 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."

[36] It therefore is an objective question of fact whether or not, in certain given circumstances, a statement or letter was made without prejudice or not.

[37] The concept of ostensible authority also comes into play. The ostensible authority of an attorney to enter into an agreement on behalf of his client is a question of fact with reference, inter

alia, to the capacity in which he was employed and the surrounding circumstances. (See: **Inter-Continental Finance and Leasing Corporation (Pty) Ltd v Stands 56 and 57 Industria Ltd and Another** 1979 (3) **SA** 740 **(W)** where at 747 - 748 the learned judge is reported to have stated the following:

> '**Implied authority, apparent authority and ostensible authority are slippery concepts.... (I)t is clear from them [authorities and cases cited by counsel to the Court, and others referred to by Botha J] that in practice expressions such as "apparent authority" or "ostensible authority" are used in a number of quite different senses. In particular, they are often applied in three different types of situations:**
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> 1.**Where there is no authority in fact but the principal is estopped from denying the existence of authority, according to the ordinary principles of estoppel. This situation is frequently referred to as one of agency by estoppel, which is in itself, notionally, a misnomer.**
>
> 2.**Where there is no direct evidence of express authority but the existence of authority is inferred from the conduct of the principal.**
>
> 3.**Where there is no direct evidence of express authority in respect of the particular authority in question but the existence of such authority is inferred from the particular capacity in which the agent has been employed by the principal or from the usual or customary powers that are found to pertain to such an agent as belonging to that particular category of agents.**'

Reed, No v Sager's Motors (Pvt) Ltd. 1970 (1) **SA** 521 (RA) approved inter alia in **South African Eagle Insurance Co. Ltd. v NBS Bank Ltd** 2002 (1) **SA** 560 (SCA) at 574 where the Court ruled that if a principal employs a servant or agent in a certain capacity, and it is generally recognised that servants or agents employed in this capacity have authority to do certain acts, then any of those acts performed by such servant or agent will bind the principal because they are within the scope of his 'apparent' authority. The principal is bound even though he never expressly or impliedly authorised the servant or agent to do these acts, nor had he by any special act (other than the act of appointing him in his capacity) held the servant or agent out as having this authority. The agent's authority flows from the fact that persons employed in the particular capacity in which he is employed normally have authority to do what he did. Whether an act is $_{or}$ is not within the scope of the apparent authority of an agent $_{1S}$ essentially a question of fact; Glofmco v Absa Bank Ltd t/a United Bank 2001 (2) SA 1048 (W) where the court stated at 1057;

> "It applies also to the situation where A had appointed **B** as a particular kind of agent and the question is whether B in his particular capacity, as being in a special category of agents, was vested with authority to enter into the agreement in question on A's G behalf. In this situation, too, the decisive question is: does the evidence justify an inference on a balance of probabilities that B had A's authority to enter into that agreement? The manner and the circumstances of B's appointment by A, the particular kind of business or professional activities carried on by B, his position and functions, and the usual or customary powers of such a kind of agent as may be H proved in evidence, are all but part of the totality of facts from which the further fact of the existence of authority to enter into the agreement in question may or may not be properly inferred':

Ivoral Properties (Pty) Ltd v Sheriff, Cape Town, and Other 2005 (6) SA 96 (C) where the f1y note reads as follows:

> ".Attorney - Rights and duties - Authority to conclude settlement of action -Instructing attorney of record, like instructed counsel, having Implied authority to conclude settlement of litigation on behalf of client (provided he acts bona fide in interest of client and not contrary to specific instructions) -Such authority subject to caveat that settlement must not involve any matter collateral or extraneous to action.

At 119 the Court is reported to have stated:

> "It appears to be self-evident that any attorney's mandate may be so wide! formulated that it includes, either expressly or by implication, authority to enter inf a settlement agreement on behalf of his client (see Goosen v Van Zyl **1980** (1) SA 7((O) at **709F).** South African courts have followed a well-established D approach English law, namely, that counsel properly instructed to appear on behalf of a litiga has jmplied^uitoit^ on behaSf ofMs or h client, provided that he or she acts bona fide in the interests of the client and *r* contrary to specific instructions (see Dlamini v Minister of Law and Order a Another **1986** (4) SA 342 (D) and the authorities referred to therein). An instruct? 3&fiOieiL0fjT^ at any stage prior to tne assum t) of. control of the matter by counsel (see Hlobo v Multilateral Motor Vehicle Accide Fund 2001 (2) SA 59 (SCA) at *65B* - E), but subject to the *c^TtteUM^* does not involve any matter collateral or extraneous to the action (see Waugh , Others v H **B** Clifford and Sons Ltd and Others [1982] 1 All EM F 1095 (CA
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> **1104j - 1105a; 1106c - d). (Own underlining)**

Hlobo v Multilateral Motor Vehicle Accidents Fund 2001 (2) SA 59 (SCA) where the Court stated at p. 65

> **"[11] What all this shows is that in his dealings with Mr De la Harpe, Mr Lowe would have had no reason to question his (De la Harpe's) authority. He in fact did not do so. From Mr Lowe's point of view De la Harpe had at least ostensible authority to conclude the settlement. G All the requirements which must be satisfied before reliance upon ostensible authority can succeed were satisfied. Respondent had appointed Mr De la Harpe as its attorney. It was known to it that he was conducting settlement negotiations on its behalf. It allowed him to do so and in so doing clothed him with apparent authority to settle on its behalf. The appellant, through her attorney, relied upon the apparent existence of authority and compromised the claim on the strength of its existence. Absent any other defence, the settlement is binding upon the respondent. In fact, of course, he had express authority which it is now sought to repudiate. I**
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> **[12] Respondent's case was that Mr Short made an error. This gives rise to the question of whether a mistake, such as that asserted by it, can entitle a party to repudiate its apparent assent to the settlement. The case of George v Fairmead (Pty) Ltd 1958 (2) SA 465 (A) at 471A - D shows J that the proper approach to this question is to take into account the fact that there is another party involved and to A consider his position. As Fagan CJ said at 471B:**
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> > **'They [that is our Courts] have, in effect said: Has the first party - the one who is trying to resile - been to blame in the sense that by his conduct he has led the other party, as a reasonable man to believe he was binding himself.'**

If the question is so posed in the present case it is clear that respondent cannot resile from the settlement. An exception noted in B the authorities (upon which the Court a quo seems to have focused its attention), namely that a party in the position of the respondent will not be bound if 'his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party', does not arise in this case."

[38] In evaluating the evidence of the two witnesses the following observations were made: a)

a) Mr. Henwood was at ease and was clear and consistent in his evidence.

b) Mr. Simelane at some stages was evasive and at some stages he really had difficulties in to explaining unsatisfactory parts of his evidence and his omissions to have pertinent aspects of the case put to Mr. Henwood. He also contradicted himself on occasions. His revelation about a letter of the 9th June 2003 which had, however, disappeared, left a sour taste more so because it was not even put to Mr. Henwood. It was also not referred to in his affidavit during motion proceedings but was referred to only three years later and that after Mr. Henwood had testified and it was not even put to Mr. Henwood.

c) The probabilities overwhelmingly favour Mr. Kenwood's version.

d) As a result I find Mr. Henwood a credible witness and accept Mr. Henwood's evidence and reject the version of Mr. Simelane.

139] I accordingly find that the matter in feet was settled and that the question posed by the Court of Appeal must be answered in the affirmative and I find that the applicant's claim was thus novated.

[40] With regard to costs Adv. van der Walt argued that costs should be awarded de bonis proprii against Mr. Simelane. It is so that there are worrying aspects in Mr. Simelane's evidence an conduct but to my mind it stems from a situation he landed in perhaps due to some lack c experience. I will accordingly not make such a punitive costs order but will make the usual ord and. also certify counsels fees in terms of Rule 68(2).

[40] I accordingly make the following order:

1. The question posed by the Court of Appeal is answered in the affirmative and applicant's claim against respondent was novated and is no longer enforcea against respondent.

2.The applicant must pay respondents costs and the costs of counsel are certifie terms of Rule 68(2).

3. Leave is granted to any of the parties to approach me in Chambers within 7 days after the date of handing down this judgment to rephrase paragraph 1 of the order if necessary.

P.Z. EBERSOHN
JUDGE OF THE HIGH COURT