IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 415/09**

In the matter between:

ABEL SIBANDZE **APPLICANT**

And

STANLIB SWAZILAND (PTY) LIMITED LIBERTY **1st RESPONDENT**

LIFE SWAZILAND (PTY) LIMITED **2nd RESPONDNT**

CORAM:

NKOSINATHI NKONYANE DAN MANGO **JUDGE**

GILBERT NDZINISA **MEMBER**

MEMBER

FOR APPLICANT : **J. N. HLOPHE**

FOR RESPONDENTS : **ADVOCATE H. WOUDSTRA S.C. INSTRUCTED BY ROBINSON BERTRAM**

RULING ON APPLICATION TO STRIKE OUT
12.08.09

[I] The respondents on 04.08.09 moved an application to strike out certain paragraphs from the applicant's founding affidavit, namely paragraphs 28, 29, 30, 31 to 35 and 40 on the basis that they are inadmissible as evidence in that they form part of the settlement negotiations that the parties engaged in, in an attempt to reach a settlement of the dispute between the parties.

[2] The application is opposed by the applicant. It was argued on behalf of the applicant that;

i) There is no prejudice that the respondents would suffer if the said paragraphs were not struck out.

ii) There was no dispute or issue that had to be settled between the parties.

iii) This is a labour law matter and the court is not strictly bound by the rules of evidence or procedure which apply in civil proceedings and that this court may disregard any technical irregularity which does not or is not likely to result in a miscarriage of justice as envisaged by Section 11 of the Industrial Relations Act of 2000 (as amended).

[3] The brief undisputed facts of the main application before the court show that the parties did meet to discuss an exit package for the applicant. Prior to the meetings the parties communicated with each other by writing letters, using electronic mail and by telephone. The respondents are arguing that the contents of the letters and what was said during the meetings should not be disclosed to the court as the parties engaged in these with the intention of settling the dispute without coming to court, and that therefore these are inadmissible except with the consent of the parties.

[4] The law applicable to this subject is well established in our law. 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 fear that what they have said will be held against them if the negotiations fail.

See: Hoffmann and Zeffert: The South African Law of Evidence, 4th edition at p. 197.)

NUMSA And Others v John Thompson Africa [2001] ZALC 215

[5] The evidence before the court clearly shows»that there is a dispute between the parties. The applicant stated in paragraphs 14, 15, & 16 of the founding affidavit that the parties agreed on a salary review and that such agreement has not been implemented which resulted in him constantly engaging with senior management

at head office. He said only the salaries of his subordinates Mandla Ndlovu and Lomangwane Zwane were adjusted leaving him out and was not given any reason for that. This is denied by the respondents. The argument on behalf of the applicant that there was no issue or dispute to be resolved between the parties was therefore not correct.

[6] The question that the court must ask itself is whether there was a genuine undertaking by the parties to engage each other in negotiations in order to settle the dispute before the court. If there were genuine efforts by the parties to engage each other with a view to reach an out of court settlement, clearly the statements made are protected from disclosure. The parties need not make undertakings that the discussions are privileged. The position of the law is that as long as the parties are seriously and genuinely engaging each other in negotiations for the compromise or settlement of a dispute, the statements forming part of that process will be privileged.

[7] The bona fides of both parties in the dispute cannot be questioned. It is highly unlikely that the respondents could hire an attorney to travel from South Africa to Swaziland if they were not genuinely seeking to settle the dispute. It will also be highly unlikely that the applicant could engage an attorney to represent him if he was not bona fide engaging the respondents with a view to have the matter settled. The respondents made their offer and the applicant rejected it. The applicant likewise made a counter offer and the respondents rejected it. The negotiations failed to yield a settlement.

[8] The contrary position holds true. If the negotiations result in a settlement, the evidence about the settlement and the negotiations leading up to it should be available to the court because the whole basis for non-disclosure would have fallen away.

See: Gcabashe¥^6116^75^)8,^^9^2_____

(P) at p.114.

Any admissions or evidence that is unconnected with or irrelevant to the settlement negotiations are not covered by the protection of this rule and are admissible in evidence.

See: Naidoo v. Marine & Trade Insurance Co. Ltd 1978 (3) SA 666 (A).

[9] **Trollip J.A.** in the Naidoo case, supra, pointed out at page 677 that;

> *"The rationale of the rule is public policy: parties to disputes are to be encouraged to avoid litigation and all the expenses (nowadays very high), delays, hostility and inconvenience it usually entails, by resolving their differences amicably in full and frank discussions without fear that, if the negotiations fail, any admissions made by them during such discussions will be used against them in the ensuing litigation."*

[10] The court is alive to the provisions of section 11 of the Industrial Relations Act that the Industrial Court it shall not be strictly bound by the rules of evidence and procedure which apply in civil proceedings. We do not however think that a relaxation of the rules should apply to this particular application to strike out statements made during negotiations to settle a matter out of court. The Industrial Court's policy is in fact to encourage parties to first try to solve disputes between themselves by negotiations^ anoWtj^^n]yjw^

[11] resolve the dispute that the matter is brought to court as an unresolved dispute.

Looking at the applicant's papers as a whole, and also all the evidence before the court, no prejudice will be suffered by the applicant if the court grants the application to strike out the said paragraphs.

[12] Taking into account all the circumstances of the case, the application to strike out the said paragraphs is granted, and that is the order that the court makes. Each party is to pay its own costs for this application.

The members agree.