IN THE COURT OF APPEAL OF SWAZILAND

CIVIL APPEAL CASE NO.28/2005

In the matter between:

LUCKY MAHLALELA	APPELLANT
AND	
GILFILLAN INVESTMENTS (PTY) LTD	RESPONDENT

CORAM

LEON JP

TEBBUTT JA

ZIETSMAN J

A

JUDGMENT

Leon JP

It will be convenient to refer to the parties, as they were in the court ***a quo,*** as the applicant and the respondent respectively.

On the 2nd May 2003, the applicant brought an application against the respondent claiming the sum of E43 250,65 and costs.

On the 26th November 2004 the respondent's attorneys filed a notice in terms of Rule 6(24) in which was sought the dismissal of the application on the ground that it had been novated by an agreement entered into by the parties representatives on 3rd June 2003. In support of the application for dismissal the respondent's attorney Earl John Henwood deposed to an affidavit.

After setting out the detailed and somewhat convoluted history of this matter, Mr. Henwood alleges that a meeting took place on 3rd June 2003 between himself, representing the respondent, and Mr. Mbuso Simelane, representing the applicant. The meeting took place at the offices of Robinson Bertram. According to Mr. Henwood the matter was "fully and finally" resolved on the following basis:

1. The respondent would accept the sum of E30 000 in full and final settlement of its costs including the costs of counsel.
2. That the difference between the amount paid by the garnishee of E49 074,03 and E30 000 i.e. E19 074,03 would be paid to the applicant and that the interest accrued would be shared equally.

In support of his allegation that the applicant's claim was settled Mr. Henwood annexed his letter of 4th June 2003 written to the applicant's attorney and the latter's letter of the same day. These letters are annexures "C" and "D" respectively and I shall later herein set them out in full.

Mr. Henwood alleges further that payment of the agreed amount was duly made to the applicant's attorney and accepted by him.

Mr. Henwood further alleges that, at all material times, Mr. Mbuso Simelane was duly authorized to act on behalf of the applicant.

Mr. Mbuso Simelane swore to an opposing affidavit. In the course of his affidavit Mr. Simelane accuses Mr. Henwood of exhibiting "traits of his diabolical attitude" in withholding money which is due to his client. The applicant has also laid a charge of fraud against Mr. Henwood.

With regard to annexures "C" and "D" (upon which the court ***a quo*** exclusively relied) the relevant part of Mr. Simelane's affidavit reads as follows:

"1.....

The agreement that was reached was on a without prejudice basis and Mr. Henwood knew for a fact that I had no instructions from my client. Mr. Henwood offered to take E30 000.00 ... which partly included his clients taxed costs as reasonable fees and to show his bona fides he said he was willing to release the balance of E19 074.03 .... in order to take it to my client.

20. Indeed he sent the cheque through his letter dated 4th June 2003 annexed to his affidavit marked "C". From the letter it is clear that it was written on a "Without Prejudice" basis. I do admit that I erroneously sent a letter to him without writing "Without Prejudice"....

21.....

The agreement reached on a without prejudice did not novate any issue relating to the application in court. I duly sent a letter to Mr. Henwood attached hereto... which I shall reproduce in the affidavit for ease of reference.

"10th June 2003

ROBINSON BERTRAM
Ingcongwane Building P.O. Box
24 MBABANE

Dear Sir,

RE: LUCKY MAHLALELA/GILFILLAN INVESTMENTS (PTY) LTD 1. Your letter

dated 9th June 2003 refers.

2. We confirm that the agreement that we reached with you was on a without prejudice basis.

3. In order for us to withdraw the proceedings we suggest that you tender costs and we estimate them to be E10 000.00.

4. Furthermore you have to remit the interest that is due on this account.

5. If your Mr. Henwood remembers very well, it was not part of our discussion to withdraw the pending action as we needed to take full and further instructions from client.'

It has always been clear that I did not have any instructions to settle the matter on a full and final basis because my client stayed in South Africa. The

> money I received on the 4th of June 2003 was paid and received on a without prejudice basis. Annexure "C" to Henwood's affidavit is clear on this fact."

In his replying affidavit Mr. Henwood refers to the scurrilous and unfounded allegations made against him. He reiterates that a final agreement was reached between the parties on the 3rd June 2003.

By notice dated the 22nd May 2005 the applicant (who was the respondent in the application that his claim had been novated by the subsequent agreement) filed a notice that he intended to raise a point of law which was formulated as follows:

> "The application dated 25th November 2004 moved by the Respondent contains information made on a 'without prejudice' basis thus falling foul of Rule 35(10) and (13) of the High Court Rules 1954 as amended."

The correct reference to the Rule should have been Rule 34. Rule

34(1) provides:

> "No offer or tender in terms of the Rules made without prejudice shall be disclosed to the court at any time before judgment has been given, and no reference to such offer or tender shall appear on any file in the office of the Registrar containing the papers in connection with the case."

Rule 34(13) reads:

> "Any party who, contrary to the Rule, personally or through any person representing him discloses such an offer or tender to the Judge or the Court shall be liable to have costs given against him."

In his judgment the learned Judge refers to the following passage in **HOFFMAN AND ZEFFERT, SOUTH AFRICAN LAW OF EVIDENCE (3rd edition)** page 170:

> "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. The words 'without prejudice' mean without prejudice to the rights of the person making the offer should it be refused. The exclusion of the 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."

The learned Judge went on to hold that the parties had reached a binding agreement, i.e. an offer had been made and accepted.

> "The negotiations did not break down, on the contrary they succeeded and the correspondence between the relevant attorneys confirmed the agreement reached. Annexures 'C and 'D' are self-explanatory and the applicant's attorney in annexure 'D' unequivocally confirms the agreement reached. The point raised by the applicant is frivolous and legally inaccurate and therefore stands to be dismissed with costs.... These letters are self-explanatory and applicant's attorney in annexure
>
> 'D' unequivocally confirms the agreement. An offer had been made and accepted."

The effect of the judgment of the court ***a quo*** was that the applicant's claim had indeed been novated by the subsequent agreement reflected in annexures 'C and 'D'.

Annexure 'C is a letter written by Mr. Henwood, then of Robinson Bertram, to Mbuso Simelane and Associates. It is dated 4th June 2003. It is headed "Without Prejudice" and reads as follows: "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.

2.3 We confirm having already tendered to your client the sum of D8 000.00 ... 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 whereafter we will then transmit the interest.

For clarity we reconcile the figures as follows:

3.

Capital	E57.174.03

Less	E 8,000.00

Less telegraphic transfer costs	E 100.00

E49,074.03

3.

Less agreed costs	E30.000.00

Amount due to Mr. Mahlalela	E19.074.03

3.

4. In the interim we enclose herewith our cheque in the sum of E19,074.03.

Yours faithfully

ROBINSON BERTRAM"

On the same day i.e. 4th June 2004, Mr. Simelane wrote annexure "D" to Mr. Henwood at Robinson Bertram.

The letter reads as follows:

Dear Sir

RE: 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 of June 2004 the following was agreed:
   2.1 That your costs including counsel fee was negotiated to E30 000.00.
   2.2 You are to release the sum of E19 174.03 as per underlisted schedule:

Capital Less taken	E57 174.03
	E 8 000.00
	E49 174.03
Less agreed costs Total due 2.3	E30 000.00
	E19 174.03

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

3. We shall await your cheque.

Yours faithfully,

MBUSO E. SIMELANE & ASSOCIATES"

Although it is not an issue in this case it is perhaps advisable to indicate very briefly why the sum of E57 174.03 is referred to in annexures 'C and 'D'. The respondent, through its attorneys, caused a garnishee order to be served upon the Swaziland Royal Insurance Company after the applicant had obtained judgment against it. The garnishee sought to recover E57 174.03. The applicant thereafter instructed its former attorneys to challenge the garnishee order and the costs which had been taxed by the respondent. An urgent application was launched to that end. The Court ordered that the bill of costs should be re-taxed and that the sum of E57 174.03 should be held in an interest-bearing account. The bill of costs was re-taxed in the amount of E5 923.38. The applicant, through his former attorneys, had been advanced the sum of E8 000.00. He claimed the sum of E43 250.65 on the following basis: E57 174.03 less E13 923.38 (i.e. E8 000.00 plus E5 923.38).

On behalf of the respondent Ms. van der Walt raised a point of law ***in limine.*** She submitted that the order granted by the High Court in this case was an interlocutory order and consequently was not appealable without leave of this Court. Section 14(1) of the Court of Appeal Act No.74 of 1954 provides:-"An appeal shall lie to the Court of Appeal

(a) From all final judgments of the High Court, and

(b) By leave of the Court of Appeal from an interlocutory order or an order made ***ex parte*** or an order as to costs only.

Where an application for leave to appeal is required it must be brought within six weeks of the date of the judgment sought to be appealed against (See Rule 8(1) of the Court of Appeal Rules), i.e. within six weeks of the 15th July 2005 being before the 26th August 2005. No such application has been made and, it followed, so Ms. Van der Walt submitted, that the appeal is not properly before this Court and that it should be struck off the roll with costs.

Fundamental to the ***point in limine*** is the contention that the decision by the ***court a quo*** was not a final order in that it did not grant any definite relief but was concerned solely with the question of the admissibility of evidence.

It is trite law that no appeal lies against a simple interlocutory order without leave to appeal having been sought and obtained. In Swaziland Section 14(1) of the Court of Appeal Act gives effect to this.

3.

However, where the interlocutory order irreparably anticipates or precludes relief which would or might be granted at the hearing; it is appealable without leave.

See e.g. **SOUTH CAPE CORPORATION (PTY) LTD V ENGINEERING MANAGEMENT SERVICES (PTY) LTD 1977(3) SA 534 (A)** at 549-551

TROPICAL (COMMERCIAL AND INDUSTRIAL) LTD V PLYWOOD PRODUCTS LTD 1956**(1) SA** 339 **(A)** at 344E

In **HERBSTEIN AND VAN WINSEN: THE CIVIL PRACTICE OF THE SUPERIOR COURTS OF SOUTH AFRICA** the law on this topic is correctly summarized as follows:-

> "it is only interlocutory orders in the narrow sense viz such orders which do not have the effect of a final and definitive sentence, which are not appealable without the leave of the court.... Such leave is unnecessary if the order, although interlocutory in form, has in substance the effect of a final and definitive sentence."

In the **SOUTH CAPE CORPORATION** case (supra) Corbett, JA (as he then was) conducted his usual meticulous and exhaustive examination of the cases. After referring to a number of cases Corbett, JA went on to say at page 549 in fine - page 550 A:"... statutes relating to the appealability of orders...which use the word "interlocutory" or other words of similar import are taken to refer to simple interlocutory orders. In other words it is only in the case of simple interlocutory orders that the statute is read as prohibiting an appeal, or making it subject to the limitation of requiring leave, as the case may be. Final orders, including interlocutory orders having a final and definitive effect, are regarded as falling outside the purview of the prohibition or limitation."

See also e.g. the judgment of Schreiner JA in **PRETORIA GARRISON INSTITUTES V DANISH VARIETY PRODUCTS 1948(1) SA 839 AD** at page 870.

On the face of it the point of law raised by the applicant relates only to the improper use of evidential material marked "with prejudice" thus falling foul of Rule 34.

However, in order to decide this question, the learned Judge ***a quo*** held that the applicants' claim had been novated by annexure's "C" and "D". That had the effect of

being a final judgment on the applicant's claim and is therefore, in my view, appealable without leave.

The point ***in limine*** must fail, and is dismissed.

If one has regard solely and exclusively to annexures 'C and 'D' it would seem that the Court a ***quo*** was correct in holding that the applicant's claim had been novated by the subsequent agreement reflected in annexures 'C and 'D'. On the face of it both parties agreed that the applicant would accept the sum of E19 074.03. In those circumstances the heading of Mr. Henwood's letter "Without Prejudice" has no adverse significance whatever.

However. I do not think that it was correct in the circumstances for the court a ***quo*** to rely solely and exclusively on annexures 'C and 'D'. By doing so it had no regard to Mr. Simelane's affidavit.

Ms. van der Walt submitted that Mr. Simelane's version should be rejected as false. She referred to a number of improbabilities in his case including:-

1. The unexplained fact that no affidavit had been filed by the applicant in support of Mr. Simelane's version.
2. Mr. Simelane's letter to Mr. Henwood of 3rd June (annexure "D") is quite unqualified. There is no hint in that letter that the agreement reached was not a final agreement. That submission is well founded.
3. Not only did Mr. Simelane state in his letter "we await your cheque" but he accepted and deposited that cheque after he had received it.

I am prepared to accede to Ms van der Walt's argument that there are indeed improbabilities in Mr. Simelane's version including those referred to above.

However, there are certain matters which are consistent with Mr. Simelarie's version. These include the fact that Mr. Henwood marked his letter "Without Prejudice". If there had been a final agreement reached there would have been no need for him to do so. On the other hand Mr. Simelane has given a perfectly plausible reason why the letter was marked "Without Prejudice."

Moreover, Mr. Simelane wrote to Mr. Henwood within one week of the meeting setting out his version of the meeting of the 3rd June.

3.

Even if it is assumed in favour of the respondent that the probabilities are in its favour that is not a sufficient basis upon which to reject Mr. Simelane's version on the papers.

I am satisfied, that where there is a genuine dispute of fact on the papers it is not sufficient to reject a respondent's version merely on the ground that it is improbable. It must be shown to be not only improbable but incredible.

Thus in **ADMINISTRATOR, TRANSVAAL AND OTHERS V THELETSANE 1991 (2) SA 192 BOTHA, JA** said this at page 196 I to page 197 C:

> "it is not permissible to base factual findings regarding such contentions on a mere weighing up of probabilities.... for my purpose it is enough to say that in motion proceedings, as a general rule decisions of fact cannot be founded on a consideration of the probabilities, unless the court is satisfied that there is no real or genuine dispute on the facts in question, or that the one party's allegations are so far fetched or clearly untenable as to warrant their rejection merely on the papers, or that ***viva voce*** evidence would not disturb the balance of probabilities appearing from the affidavits. This Rule, which is trite applies to instances of disputes of fact (see e.g. **SEWMUNGAL AND ANOTHER NNO VS REGENT CINEMA 1977(1) SA 814 (N)** at 818G-821G and the authorities discussed there) and also to cases where an applicant seeks to obtain final relief on the basis of the undisputed facts together with the facts contained in the respondent's affidavits (see PLASCON EVANS PAINTS (PTY) LTD V VAN RIEBEECK PAINTS (PTY) LTD 1984**(3) 623** (A) at 634E-635C
>
> and the authorities cited there)"

In the Plascon Evans case (supra) Corbett, J.A. (as he then was), after setting out the general rule, went on to say the following at page 635C:-

> "Moreover, there may be exceptions to the general rule, as, for, example, where the allegations or denials of the respondent are so far fetched or clearly untenable that the court is justified in rejecting them merely on the papers."

The principle referred to by Botha JA in the ADMINISTRATOR TRANSVAAL case (supra) is supported by the cases on this topic. They include the following:-

> TRUST BANK VAN AFRIKA VS WESTERN BANK EN ANDERE **1978(4)** SA281 (A) at pages 294D-295A (and the cases there cited)

ROOM HIRE COMPANY (PTY) LTD V JEPPE STREET MANSIONS (PTY) LTD **1949** SA **1155** (T) at 1162

da MATA V OTTO N**.0.1972(3)** SA **858** (A) at page 865 G-H

MAHOMED V MALK **1930** T.P.D. **615**

HILLEKE VS LEVY **1946** AD **214**

In the latter case Greenberg, JA held (at page 220) that the court ***a quo*** did not have sufficient justification:-

> "for being satisfied that ***viva voce*** evidence would not have disturbed the balance of probabilities which he considered to be in favour of the respondent."

In an earlier statement in that judgment Greenberg J.A. said this page 219:-

> "I do not think that on the affidavits the court was justified in coming to any final conclusion on the question whether the respondent had given his consent to the removal of the livestock."

The present case is not one where a court would be justified in coming to a final conclusion on the affidavits because it is not a case, adopting the approach of Corbett, J.A. in the Plascon Evans case (supra), where it can be said that the allegations of Mr. Simelane are so far-fetched as to make his version untenable.

Even if it is assumed, in favour of Mr. Henwood, that the probabilities favour his version, it is not possible to resolve the conflict of fact without recourse to oral evidence. Indeed, it is of interest to record that Mr. Henwood himself, in paragraph 5 of his replying affidavit, refers to the irreconcilable dispute of fact which has arisen on the affidavits.

Although the court **a *quo*** was dealing with the admissibility of evidence it is necessary, in order to do justice between the parties, to allow the appeal and refer the dispute between the parties for the hearing of oral evidence by the High Court.

The following order is made:

3.

1) The appeal is allowed, with costs, and the judgment of the court **a *quo*** is set aside.
2) In its place the following order is granted:-

> The application is referred for the hearing of oral evidence by the High Court 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 the parties which novated the applicant's claim.

3) The costs in the court **a *quo*** are reserved for consideration by the court hearing the oral evidence.

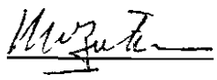
JUDGE PRESIDENT

I AGREE

P.H. TEBBUTT JA

JUDGE OF APPEAL

I AGREE



N.W. ZIETSMAN

JUDGE OF APPEAL

DELIVERED IN OPEN COURT ON THIS **IM**^DAY OF NOVEMBER 2005.