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DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

LOWER COSTS – THAT'S THE BEST MEDICINE

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WITHOUT PREJUDICE CORRESPONDENCE: ADMISSIBLE OR INADMISSIBLE?

The recent judgment of Rogers J in the case of *AD and another v MEC for Health and Social Development, Western Cape* 2017 (5) SA 134 (WCC) has shed further light on the admissibility of without prejudice communications and the exceptions thereto. The general rule applied in the South African courts is that without prejudice communications are inadmissible and cannot be used by either party in evidence in trial proceedings. However, certain exceptions have developed.

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Ms Harriellal would not be deterred. She proceeded to launch a review of UKZN's decision not to grant her access to the programme. She argued that the university failed to consider and apply its own admission policy in not admitting her to the programme. Hats off already to Ms Harriellal for doggedly pursuing her dreams. Unfortunately for Ms Harriellal, the High Court, the Supreme Court of Appeal and eventually the Constitutional Court all agreed that the university had indeed applied its policy for determining her admission. There were 160 applicants vying for 10 placements and the other applicants had simply scored higher. The focus of the Constitutional Court's judgment then shifted to whether or not Ms Harriellal should be saddled with the cost of litigating against the university.

The ordinary rule is this - if a litigant wins its case, the court will usually award it costs. This means that the winning party in a case can claim its necessary costs from the losing party. That is not true in constitutional matters against the State. An unsuccessful party in proceedings against the State should be spared from paying the State's costs in constitutional matters. This principle was first established in *Biowatch Trust v Registrar, Genetic Resources* 2009 6 SA 232 (CC) and, thankfully, confirmed in Ms Harriellal's case.

The rationale behind the *Biowatch* principle is easy to understand and the judges in *Harriellal* were disappointed that the principle – a general rule to be applied in every constitutional matter involving organs of State – has not been widely applied by other courts. The rule is intended to prevent the chilling effect that adverse costs orders might have on litigants seeking to assert constitutional rights.

Does this mean that we can we all tootle off to court with any complaint that we can find a constitutional angle to? No, unfortunately not. There are instances where the Court may depart from the *Biowatch* rule. If a court were to find that the litigation was frivolous (meaning improper, or instituted without sufficient ground and intended only to annoy) or vexatious (meaning it has no serious purpose or value); or if certain conduct on the part of the litigant deserves censure by the Court – it may well order the unsuccessful litigant to pay costs. Unless the unsuccessful litigant is guilty of one of these things, the *Biowatch* rule must be followed. The Constitutional Court specifically said that another court may justifiably interfere with the award where the *Biowatch* principle is not followed.

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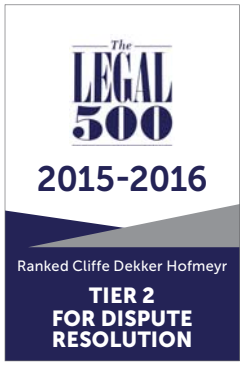
CONTINUED

Both the SCA and the High Court were wrong not to apply the Biowatch principle and Ms Harriellal was at least able to avoid paying the University's costs.

An interesting question that may arise in future, as it did in this case, is whether or not a case does involve a constitutional matter. The SCA held that the *Biowatch* principle did not apply in Ms Harriellal's case because a review under the Promotion of Administrative Justice Act is not a constitutional issue. Not so fast, said the Constitutional Court. There were in fact two constitutional issues at play in the *Harriellal* case. Firstly, the review of administrative action under PAJA was a constitutional issue because the purpose of PAJA is to give effect to administrative justice rights guaranteed by s33 of the Constitution. Also, when the university determined the application for admission, it exercised a public power and public power is now controlled by the Constitution. Secondly, in applying for admission Ms Harriellal sought to have access to further education. That too is a constitutional matter.

In short, both the SCA and the High Court were wrong not to apply the *Biowatch* principle and Ms Harriellal was at least able to avoid paying the University's costs even if she couldn't study to be a doctor at UKZN.

Tim Fletcher and Megan Badenhorst



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Tim Fletcher ranked by CHAMBERS GLOBAL 2015–2017 in Band 4 for dispute resolution.

Pieter Conradie ranked by CHAMBERS GLOBAL 2012–2017 in Band 1 for dispute resolution.

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WITHOUT PREJUDICE CORRESPONDENCE: ADMISSIBLE OR INADMISSIBLE?

The general rule applied in the South African courts is that without prejudice communications are inadmissible and cannot be used by either party in evidence in trial proceedings.

The recent judgment of Rogers J in the case of *AD and another v MEC for Health and Social Development, Western Cape* 2017 (5) SA 134 (WCC) has shed further light on the admissibility of without prejudice communications and the exceptions thereto. The general rule applied in the South African courts is that without prejudice communications are inadmissible and cannot be used by either party in evidence in trial proceedings. However, certain exceptions have developed.

Judge Rogers was accordingly called upon to determine whether a Calderbank letter is admissible at all in relation to costs.

The question that Judge Rogers was called upon to decide was whether a party to litigation should be permitted to produce, in support of a particular costs order, a settlement offer made prior to the commencement of the proceedings and which was expressly made "without prejudice save as to costs". In particular, Judge Rogers had to determine whether such settlement offer could form part of the evidence after judgment had been granted.

In this matter the defendant had conceded the merits and the trial proceeded on the quantum of the plaintiffs' claim only. The plaintiffs had incurred substantial legal costs not only in respect of their legal team, but also in respect of several expert witnesses that were required to give evidence in regard to the plaintiffs' quantum. The plaintiffs sought a punitive costs order against the defendant on the basis that the defendant pay the plaintiffs' legal costs on the attorney and client scale as opposed to the usual party and party scale. In presenting their argument before Judge Rogers, the pivotal part of their case was a without prejudice settlement proposal that had been made to the defendant on 31 October 2013. The plaintiffs argued that the defendant unreasonably rejected the settlement offer.

This decision by the defendant resulted in the plaintiffs having to incur substantial legal costs in running a lengthy trial, which the plaintiffs contended was ultimately unnecessary.

South African law of evidence regarding without prejudice privileged communication is based on English law. This particular aspect of evidence was considered by the English court of appeal in the matter of *Calderbank v Calderbank (1975) 3 ALL ER 333 CA* in which Cairns LJ found that there was "no reason in principle why, in cases not covered by the rules of court covering secret offers, a litigant should not be permitted to make a settlement offer 'without prejudice save as to costs' and to rely on such offer, once judgment has been granted, in support of a particular costs order." In light of the latter decision, these without prejudice letters became known as Calderbank letters.

Judge Rogers was accordingly called upon to determine whether a Calderbank letter is admissible at all in relation to costs.

In dealing with this question, the court found that to a large extent considerations of public policy in determining whether such without prejudice correspondence should be admitted fall away once the issues in dispute between the parties have

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CONTINUED

The judge thus concluded that in principle Calderbank letters are admissible in regard to costs orders and can be disclosed to the courts in evidence for the purposes of costs orders and after judgment has been granted.

been decided. Furthermore, public policy also encourages settlement as between parties so as to avoid costly litigation and if for no other reason, these are compelling reasons for allowing the presentation of without prejudice correspondence in litigation where costly litigation should and could have been avoided.

The defendant attempted to argue that in order for such correspondence to be admissible such a tender must be pleaded and must remain open until the end of the case. The learned judge rejected this argument on the basis that if that were the case, without prejudice offers could never be relied upon as it is not permissible to plead and prove a fact in respect of which evidence is by its nature inadmissible.

The judge thus concluded that in principle Calderbank letters are admissible in regard to costs orders and can be disclosed to the courts in evidence for the purposes of costs orders and after judgment has been granted. This is a further exception to the inadmissibility of without prejudice correspondence exchanged between parties during the course of litigation.

The impact of this case is to provide parties with a further exception to the general rule of evidence that without prejudice correspondence as between parties is not admissible in court proceedings. That said, it is imperative that litigants are aware of the requirements for the admissibility of such correspondence:

- firstly, that the correspondence will only be admitted in evidence after judgment has been obtained; and
- secondly, provided that the Calderbank letter clearly states that the offer is without prejudice save as to costs. Alternatively, it must be clear from the import of the letter that the offer does not address the issue of costs.

Accordingly, litigants are cautioned in regard to the use of without prejudice correspondence and to ensure that without prejudice correspondence is carefully thought through before it is drafted and sent to opponents.

Burton Meyer

Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017** in the litigation category.

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BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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