Revised and Reportable

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C402/99

DATE: 26-11-2001

In the matter between:

NUMSA & OTHERS First and Further Applicants

and

JOHN THOMPSON AFRICA Respondent

RULING

an application to cross-examine witness Croutz with regard to so-called "without prejudice" discussions held on 31 August 1999.

PILLAY, J:

1. Witness Alan Croutz testified in chief for the applicants about whether the respondent's representative, Mr Vorster, knew about a Court order issued on 30 August 1999 interdicting the retrenchment. That invoked cross-examination without objection about the notices relating to the retrenchment of the individual applicants. These notices were discussed at a meeting held on 31 August 1999 to canvass settlement without prejudice. Mr Croutz answered some questions relating to the notices during the without prejudice meeting. He refused to answer others claiming instead privilege of without prejudice discussions. More specifically, Mr Croutz refused to answer the question as to why he raised the issue of the notices at the meeting.

2. The principle of privilege is well-established in our law.
Inaccurate as the label is, it is nevertheless a convenient one. (Hoffmann & Zeffert South African Law of Evidence 3rd ed. at 196; Naidoo v Marine & Trade Insurance Company Ltd 1979(3) SA 666A). It is premised on the consent of parties and public policy which allows people to try to settle their disputes without fear that what they said would be held against them if the negotiations fail

(Hoffman & Zeffert *supra* @ 197; Kapeller v Rondalia Versekeringskorporasie van Suid-Afrika Beperk 1964(4) SA 722 and Naidoo at 677). The Courts have inclined in favour of extending the protection by adopting a liberal construction of the principle. (Wemyss v Stuart 1961(3) SA 889 at 891). Hence matter "not wholly unconnected with albeit irrelevant to" a subsequent case was excluded from disclosure. (Patlansky v Patlansky 1917 WLD 10.)

3. However, the words "without prejudice" does not automatically or absolutely confer protection against disclosure (Brauer v Markaw 1946 TPD 344 at 350; Kapeller, *supra*). The *onus* rests on the party claiming privilege to prove it. (Waterhouse v Shields 1924 CPD 155). Partial disclosure of privileged information may also result in loss of protection entirely.

4. In dealing with an implied waiver, Van Dijkhorst, J cited Wigmore in The Bank of Lisbon v Tandrien & Others (2) 1983(2) SA 626 at 628 thus:

"There is always the objective consideration that when his conduct touches a certain point of disclosure fairness requires that his immunity shall cease whether he intended that result or not. He cannot be allowed, after disclosing

as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final."

In that case, the Court had to deal with an attorney who had testified about consultations with his client. The Court ordered that the veil of secrecy which had been lifted in respect of oral communications between the attorney and client to be lifted off the contemporaneous notes in respect of such consultations.

5. Muller, J in Msimang v Durban City Council 1972(4) 333 at 338E-F ordered disclosure of two further privileged statements after the defendant introduced one made on the same occasion.

6. The defendant in Waterhouse v Shields 1924 CPD 155 raised the special defence of having acted on the advice of his attorney and counsel. For his defence to succeed he had to state what the advice was. Gardiner, J found that the defendant had waived the privilege as to the disclosure of communications between himself and his legal advisers.

7. In Greater Celtic Insurance v Home Insurers 1981 All ER 485 at 488-492, Templeton, J held:
"In my judgment the whole of the memorandum was privileged because it was a communication by the plaintiffs' American attorneys to the plaintiffs relating to the matter on which the American attorneys were instructed to act. The question is whether the whole of the memorandum, being a privileged communication between legal adviser and client, plaintiff may waiver privilege with regard to the first two paragraphs of the memorandum but assert privilege over the additional matter. In my judgment severance would only be possible if the memorandum dealt with entirely different subject matters or different incidents and could in effect be divided into two separate memoranda, each dealing with a separate subject matter."

8. In this case, evidence of the notice of retrenchment is an important issue. Mr Croutz testified freely about some aspects of the notices in the context of the without prejudice discussions, but was not prepared to be drawn on others. No privilege is claimed in regard to the evidence of the notices *per se*.

9. If there is no connection between the notices and the content of the without prejudice discussions then the issue of privilege does not even arise. Having regard to Mr Croutz's evidence though, I am not convinced that there is no connection. Insofar as a connection may exist I find that Mr Croutz has waived the applicants' privilege regarding all evidence relating to the discussions about the retrenchment notices at the meeting of 31 August 1999.
The applicant has not waived its privilege over the content of the settlement discussions insofar as they do not relate to the retrenchment notices. In any event, the relevance of the content has not been established, other than in the context of the retrenchment notices.

10. In the circumstances the Court rules as follows:
The respondent is permitted to cross-examine witness Croutz with regard to the contents of the so-called without prejudice discussion between himself and Mr Adrian Foster on 31 August insofar as it relates to the notices of retrenchment.

PILLAY, J

For the Applicant: Cheadle, Thompson & Haysom Inc. : Adv. P.A.L. Gamble SC

For the Respondent: Deneys Reitz: Adv. N.F. Rautenbach