IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 11867/2020

In the matter between:

ANDRE VAN DER WESTHUIZEN First plaintiff/applicant
and 5 others

and

AKARANA HOMEOWNERS' ASSOCIATION First defendant/respondent
and 36 others

REASONS (FOR ORDER GRANTED 19 JUNE 2023)
DELIVERED ON 22 AUGUST 2023
(delivered electronically via email)

VAN ZYL AJ:

Introduction

1. On 15 June 2023 I granted the plaintiffs leave to amend their particulars of claim in various respects. I however prohibited the plaintiffs from referring, by way of the amendment, to a letter dated 13 December 2022 written on the plaintiffs' behalf to the defendants (the letter was proposed to be annexed as "**POC14**" to the amended particulars of claim). I further ordered that any reference to such letter was to be removed from the record.

2. I also ordered the plaintiffs to bear the opposing[1] defendants' costs, including the costs of two counsel.

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[1] Not all of the defendants opposed the relief sought.

3. The defendants' opposition to the proposed amendment was limited to the proposed inclusion of the letter in the amended particulars of claim. The issue was whether the letter was in fact "without prejudice" and hence protected from disclosure to the Court.

4. The plaintiffs subsequently requested reasons for the order. These are the reasons.

The letter of 13 December 2022

5. By way of background, the plaintiffs are members of the first defendant ("the Akarana HOA"). In the main action the plaintiffs seek, amongst other relief, declaratory orders in relation to the validity of various iterations of the Akarana HOA constitution.

6. On 13 December 2022, the plaintiffs' attorneys addressed a letter to the opposing defendants' attorneys, the second paragraph of which states that "*[t]his is an open letter, the purpose of which is to make proposals for the settlement of the matter as contained in paragraph 12 below*". Paragraphs 3 and further set out the background to the action, and highlight issues that are already on record.

7. Paragraph 11 of the letter records that it is clear that "*there are three disparate categories of members in the Akarana HOA ... each with its own interests and needs. It is precisely for these reasons that [the plaintiffs] are of the view that the matter ought to be settled by allowing the three groups to functions autonomously – that is, on the basis described in 'Option 1' below*".

8. In paragraph 12 of the letter, the plaintiffs' attorneys stated that they were certain that all the parties could agree that settlement was "*in the best interests of all members of the Akarana HOA*". The plaintiffs indicated that they were willing to withdraw their action (with each party to pay their own costs) on the basis that one of the three proposals set forth in paragraphs 12.1 to 12.3 in the

letter was adopted and implemented. Those proposals were for the amendment of the relevant constitutions in various respects (the precise nature and extent of the suggestion variations would have to be discussed and agreed between the parties), or to revert to a constitution allegedly adopted in 2001. The options presented do not accord with the relief sought in the particulars of claim save for Option 2 which proposes that the members of the Akarana HOA revert to the provisions of the 2001 constitution – the proposed new prayer 13 seeks, as alternative relief (but only to "*prayers 1, 2 and 13*"), a declaration that the 2001 constitution remains valid and binding in respect of the HOA.

Reliance on Rule 34

9. In their heads of argument the plaintiffs submit, with reference to Rule 34, that the Rule distinguishes between unconditional offers and those made "without prejudice". They say that the disclosure of the latter is prohibited, but that the protection does not apply to unconditional offers.

10. I agree with the defendants that the plaintiffs' reliance on Rule 34 is misplaced. It is clear on a reading of the Rule, in particular subrules (1) to (4), that it applies only to offers made by a defendant. It does not apply to offers made by a plaintiff.

11. An unconditional offer made under Rule 34 is, moreover, an offer under which a defendant admits liability on the plaintiff's claim, in whole or in part.[2] The offer the plaintiffs have made in the present matter does not relate to the admission of part of their claim. It is an offer to compromise on terms that differ from their claim. This can be seen from a comparison of the proposals contained in paragraphs 12.1 to 12.3 of the letter with the relief set out in the particulars of claim.

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2 *Rielly v Seligson and Clare Ltd* 1976 (2) SA 847 (W) at 850G.

12. The plaintiffs' offer in the letter is therefore not an offer under Rule 34. Rather, it is an offer of compromise made outside of the parameters of Rule 34, and to which the usual common law rules of evidence apply.

May the letter be disclosed under the common law?

13. In the context of a defendant, an offer made "without prejudice" is an offer of settlement coupled with a denial of liability.[3] The defendant argue that, logically, in the context of the plaintiff it is an offer to take something less, or other, than what is claimed, without conceding the relief sought as pleaded.

14. Although the plaintiffs' letter stated that it was an "open letter", it was manifestly an offer made by the plaintiffs in an attempt to settle the dispute without prejudice to their right to continue to prosecute their claims to the full, and without acknowledging any liability to the defendants or acknowledging the correctness of their pleaded position. This is apparent from the tone of the letter, and the formulation of the proposals contained therein as opposed to the relief sought in the particulars of claim.

15. There is "*no particular magic*" in the use of the words "without prejudice" as an introduction to a statement or as a heading to a letter. The substance of the communication is considered to determine if it forms part of genuine negotiations for the compromise of a dispute.[4] The same principle logically applies to a communication described as an "open letter": if it forms part of genuine settlement negotiations made without prejudice to the rights of the person making the offer, and without acknowledging any liability, it is privileged and may only be disclosed with the consent of both parties.

16. I agree with the defendants that the impugned letter satisfies these criteria. It may therefore not be disclosed to the Court without the defendants' consent.

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3 Harms *Civil Procedure in the Superior Courts* at B34.1.

4 See the discussion in Zeffertt & Paizes *The South African Law of Evidence* (2ed) at p 703; Joubert *et al The Law of South Africa* (2ed, Vol. 9) at para 755.

17. The plaintiffs accept that *bona fide* offers of settlement made without prejudice may not disclosed without the consent of both parties. They contend, however, that because the 13 December 2022 letter was expressed to be an "open letter", it cannot be implied that the offer was made on a without prejudice basis. They say that the offer contained in the letter was not subject to any conditions.

18. At the hearing of this matter the plaintiffs argued that, because the letter warned the defendants that the offer was an "open" one, the plaintiffs are at liberty to disclose the content of such offer. In other words, if the offeree knows that the offeror intends disclosing the offer to the Court, then the offeree's consent for such disclosure is not required. They say this with reference to the following English cases:

    18.1 *Tramountana Armadora SA v Atlantic Shipping Co SA*:[5] The Court discusses three different types of offers of settlement in arbitral proceedings,[6] including an "open" offer which is one to which either party can refer an any stage of the proceedings.[7]

    18.2 *Cheddar Valley Engineering Ltd v Chadddlewood Homes Ltd*:[8] The Court considered whether a telephone discussion between the parties' respective attorneys was "open" or conducted on a "without prejudice" basis, and concluded that a party who changes the basis of negotiations needs to make such change very clear to the other party. If there is a bilateral understanding of the "open" basis of the communications, then the communications may be disclosed.[9]

19. The plaintiffs referred further, in support of their argument, to *Agnew v Union and South West Africa Insurance Co. Ltd*[10] in which it was held that the "with

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5 [1978] 2 All ER 870.
6 At 876b.
7 At 876g.
8 [1992] ADR.L.R. 02/28.
9 See paras [13]-[14]; [17]-[19].
10 1977 (1) SA 617 (A).

prejudice" letter written in that case was in effect an "open" offer upon which the defendant intended subsequently to rely should the question of costs arise.[11]

20. The plaintiffs referred, too, to *AD and another v MEC for Health and Social Development, Western Cape*:[12]

> "*[56] In my respectful view, those cases in which Naudé was applied to without prejudice offers failed to appreciate the need to distinguish between open tenders and without prejudice offers. It is inherent in a without prejudice offer that it will not be made known to the court, at least not until judgment has been delivered. It is self-defeating to say that if a defendant wishes to rely on a without prejudice offer as protection against costs he must plead it. ... a without prejudice offer containing no reservation as to costs is inadmissible for all purposes, even in relation to costs. A defendant cannot permissibly plead and prove the making of the without prejudice offer, at least not without the consent of the plaintiff. The defendant could, of course, make the same tender in his plea, ie as an open tender, but his protection would then operate only from the date of the plea. He could not allege that the tender in his plea was a repetition of a without prejudice offer made at an earlier stage.*" [Emphasis supplied.]

21. The plaintiffs argue that the Court's remarks in relation to an open tender supports their submission that the "open" letter in the present matter may be relied on in the action.

22. The defendants point out that the English law of evidence must be used with caution in determining South Africa cases following 1961,[13] especially cases such as *Tramountana* which was decided in the context of the law relating to arbitration as opposed to litigation. *Cheddar Valley* in fact supports the defendants' argument: there is recognition of the fact that there should be an

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11 See the discussion at 624A-H.
12 2017 (5) SA 133 (WCC) at para [56].
13 By virtue of the provisions of the Civil Proceedings Evidence Act 25 of 1965.

agreement or "*bilateral understanding*" between the parties as to the disclosure of the communications. The fact remains that the 13 December 2022 letter was written in a *bona fide* attempt to dispose of the litigation, and clearly without prejudice to the plaintiffs' rights. Its disclosure requires the defendants' consent – the plaintiffs cannot impose an entitlement to place the letter before the Court by calling it an "open" letter.

23. Again, I prefer the defendants' approach to that of the plaintiffs. *Agnew* and *AD* do not, in my view, take matters any further for the purposes of the present case. They are distinguishable. One must return to the rationale behind and content of the letter in question. The plaintiffs' argument is based on a flawed distinction between offers that the offeror can frame in a manner that indicates that such offers may be disclosed; and offers that are made without prejudice (which may not be disclosed).

24. Whether an offer is made without prejudice is not determined with reference to whether the offeror (expressly or impliedly) intends that offer to be disclosed, but rather with reference to whether it is made without prejudice "*to the rights of the person making the offer if it should be refused*".[14]

25. Where a plaintiff makes a settlement offer without prejudice to its rights to continue with its claim (or where a defendant makes an offer without prejudice to its right to advance its defence to the full), it invites the other party into privileged settlement discussions. The offeror and offeree are both protected: "*both the person making the statement and the person to whom it is made are entitled to the privilege*".[15] The offer creates an opportunity for both parties to engage frankly without fear that the content of their communication - whether it be an offer or the refusal of an offer – will be disclosed. They engage in their discussions knowing that if the negotiations fail, they will be entitled to proceed with their claim or defence to the full.[16]

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14 Zeffert & Paizes *op cit* at p 702, with reference to *De Beers Consolidated Mines Ltd v Ettling* 1906 TS 418, and see *Wemyss v Stuart* 1961 (3) SA 899 (N) at 890D-G.

15 Schmidt & Rademeyer *Bewysreg* (4ed, Butterworths) at p 567.

16 See Zeffert & Paizes *op cit* at pp 702-703.

26. The letter in the present matter was not an unconditional offer to satisfy all or a portion of a claim (or an invitation to the defendants to do so). Despite the plaintiffs arguing that the offer was not "*subject to any conditions*", the letter constituted an offer to settle the action on the basis of a compromise. The plaintiffs were willing to withdraw their action (with each party to pay their own costs), but only on the basis that one of the three proposals set out in paragraphs 12.1 to 12.3 in the letter was adopted and implemented.

27. The letter further invited the defendants to engage in discussions concerning the basis upon which the matter might be settled. Neither of the proposals set out in paragraphs 12.1 and 12.3 of the letter could have been implemented without further discussion and agreement about how exactly the constitutions would be amended. It was consequently a *bona fide* offer to enter into further (privileged) settlement discussions.

28. By way of summary: the offer, with its invitation to engage in settlement discussions (without prejudice to the plaintiffs' right to proceed with their claim), was privileged. That offer may not be disclosed without the consent of both parties. The defendants have not given their consent.

29. The plaintiffs wish to amend their particulars of claim by including that they "*have attempted to resolve the matter by way of an open letter, a copy of which is attached marked 'POC14'*". They are seeking an inference favourable to themselves to be drawn from this.

30. The fact that the matter has not been settled suggests that the defendants have refused the offer. The disclosure of the offer in those circumstances would necessarily include the disclosure of the defendants' implied refusal thereof. The defendants run the risk that adverse inferences may ultimately be drawn against them. In the absence of their consent to the disclosure of the letter, the defendants are protected from this risk.

Costs

31. The defendants were successful in their opposition to the proposed amendment, and there was no reason to depart from the general rule that costs follow the result. Both sides were represented by two counsel.

32. I accordingly granted the order as indicated at the outset of this judgment.

[redacted]

P. S VAN ZYL

Acting Judge of the High Court

Appearances

For the plaintiffs: Mr M. Blumberg SC and Ms S. Webb, instructed by Hayes Inc.

For the opposing defendants: Mr A. R. Sholto-Douglas SC and Mr G. Quixley, instructed by Maurice Phillips Wisenberg Inc.