IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NUMBER:

In the matter between:

N M	**First Plaintiff**
SM	**Second Plaintiff**
LH	**Third Plaintiff**
And	
CHARLENE SMITH	**First Defendant**
PATRICIA DE LILLE	**Second Defendant**
NEW AFRICA BOOKS	**Third Defendant**

JUDGMENT

SCHWARTZMAN J:

1. Immediately after I had read out my order that included a costs order in favour of the Plaintiffs, Mr Campbell handed up a Notice in terms of Rule 34 (1) and Rule 34 (5). It was served on the Plaintiffs attorney on the morning of 14 April 2005 – the Friday on which the trial started. The Notice reads:

   "*Without prejudice or admission of liability, defendants having duly authorised its attorneys, jointly offer the following in full and final settlement of the plaintiffs' claim:*

1. *a private apology to each plaintiff;*
2. *removing/deleting from all unsold copies of the book reference to the plaintiffs' names and surnames;*
3. *payment direct to* ***each*** *plaintiff of R35 000* ***THIRTY FIVE THOUSAND RANDS)****.*
4. *to pay plaintiffs' taxed costs as between party and party to date of the service of this notice, including costs attendant on obtaining the amount referred to in paragraph 1 above."*

2. The amount I awarded to the Plaintiffs was substantially less than the amount tendered by the Defendants. In terms of Rule 34 (12), I am required to reconsider the costs order in favour of the Plaintiffs. In so doing, I am required to exercise a discretion – **Omega Plastics (Pty) Ltd v Swiss Tool Manufacturing Co (Pty) Ltd 1978 (4) 675 A** at page 678.

3. Mr Campbell submitted that, given the intervening weekend, Monday 18 April 2005 was a reasonable time for the Plaintiffs to notify their acceptance of the tender. Accordingly, the Third Defendant should be ordered to pay the Plaintiffs costs up to and including 14 April 2005, whereafter the Plaintiffs should pay the Third Defendant's costs.

4. Mr Berger SC submitted that if the rule applied (which he denied), a reasonable period would be the last day on which I heard evidence. This was Tuesday 26 April 2005, the day on which the First Defendant's evidence concluded. He submitted that it was only by this date, which was after both

the First and Second Defendant had given evidence, that the Plaintiffs could assess their prospects of success. The Plaintiffs knew, when the answering affidavit in the urgent application was filed, what the defence to their claims were. It was not reasonable or necessary for them to wait beyond 18 April 2005 to communicate the acceptance or rejection of the Defendants offer. In the circumstances, the Plaintiffs silence from 18 April 2005 can only mean that the offer was rejected.

5. Mr Berger's main argument was that the Defendants "*without prejudice and without admission of liability*" offer, made in terms of Rule 34 (1) and Rule 34 (5), did not apply to actions in which a party, in this case the Plaintiffs, seek to vindicate what is a common law right and a Constitutional right that has been infringed. Then (so goes the argument) the Constitutional Right is not vindicated by an offer that is made "*without prejudice*" or "*without admission of liability*". In other words, and where a Constitutional right is involved, the only effective or acceptable manner of making a tender is by making an unconditional offer in terms of Rule 34 (1) that is in turn disclosed to the court.

6. In support of his submission, Mr Berger referred me to Section 38 of the Constitution and the Constitutional Court's decision in **Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)** and in particular paragraphs 95 and 96 of the judgment of Kriegler J where he writes that

"[95] If constitutional rights have complementary remedies, the question is what these remedies should be. I would suggest that the nature of a remedy is

determined by its object. I agree with the contention advanced on behalf of the appellant that the object of remedies under s 7 (4) (a) differs from the object of common-law remedy. This appears from the liberal standing provisions of s 7 (4) (b) and the useful discussion of them by O'Regan J in Ferreira v Levin. Explaining why an expanded approach to standing is appropriate, she contrasted what she terms public and private litigation:

'As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a se of past events. Such litigation will generally not affect people who are not parties to the litigation. In such cases, the Plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that nexus is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous'.

I would add that the harm caused by violating the Constitution is a harm to the society as a whole, even where the direct implications of the violation are highly parochial. The rights violator not only harms a particular person, but impedes the fuller realization of our constitutional promise.

[96] Our object in remedying these kinds of harms should, at least, be to vindicate the Constitution, and to deter its further infringement. Deterrence speaks for itself as an object, but vindication needs elaboration. Its meaning, strictly defined, is to 'defend against encroachment or interference'. It suggests that certain harms, if not addressed, diminish our faith in the Constitution. It

recognizes that a Constitution has as little or as much weight as the prevailing political culture affords it. The defence of the Constitution – its vindication – is a burden imposed not exclusively, but primarily, on the judiciary. In exercising our discretion to choose between appropriate forms of relief, we must carefully analyse the nature of a constitutional infringement, and strike effectively at its source.

In the context of Mr Berger's submission, paragraphs 98 and 67 of the judgment are also relevant. In paragraph 67 Ackerman J held that "*In the present case there can, in my view, be no place for further constitutional damages in order to vindicate the rights in question. Should the Plaintiff succeed in proving the allegations pleaded he will no doubt, in addition to a judgment finding that he was indeed assaulted by members of the police force in the manner alleged, be awarded substantial damages. <u>This, in itself, will be a powerful vindication of the constitutional rights in question, requiring no further vindication by way of an additional award of constitutional damages</u>*.

7. The nub of Mr Berger's submission is that a "*without prejudice*" or "*without admission of liability*" offer would not, if accepted, vindicate the Plaintiffs Constitutional rights that have been invaded. Rule 33 (4) cannot, he says, apply to what is an invasion of a Constitutional right, i.e. the bundle of private rights on which the Plaintiffs cause of action is based.

8. The words "*without prejudice*" where they appear in Rule 34 (1) serve to distinguish an unconditional offer to settle that can be disclosed to the court at

any time during proceedings from a "*without prejudice*" offer that can only be disclosed after the court has made its award (see **Erasmus: Supreme Court Practice** commentary on Rule 34 (10) BI, 242).

9. In a broader sense, the words "*without prejudice*" and "*without admission of liability*" cannot and do not connote a denial of the Plaintiffs rights to claim damages or of the right to vindicate the invasion of either the Constitutional or the common law right. What the Defendants are asserting is that they do not admit that they did wrong but if a court finds that what they did was wrong, an offer to pay an award is made with a tender to pay costs. It is also no more than what a court does where there is no offer – it vindicates the Plaintiffs rights by making an appropriate award of damages. It does so notwithstanding the fact that the Defendant disputed its liability.

10. The vindication of a right occurs where the court makes an appropriate order. The attitude of the Defendant to the order does not determine its appropriateness. In my judgment there is no Constitutional imperative that militates against my approach.

11. I awarded an amount of damages that I determined as an appropriate award. This served to sufficiently vindicate the invasion of the Plaintiffs rights. The Defendants had, on the first day of the trial, tendered substantially more. The Plaintiffs decision to proceed carried the risk that they may recover less. There is no reason why they should not bear the consequences.

12. I would in conclusion add that to uphold Mr Berger's submission would mean that no Defendant, who is alleged to have infringed a common law and Constitutional right, can avoid the costs of a trial by making a without prejudice tender in terms of Rule 34 (1). This would, by way of example, include a Defendant who knows it is not liable but whose witnesses are dead or unavailable, and a Defendant who may be liable and who wants to avoid the costs of a long trial that it can never recover from the Plaintiff. Such an approach is counter-productive to the need to settle and dispose of litigation as expeditely as possible.

13. The weekend of 15 and 16 April gave the Plaintiffs sufficient time to consider the Defendants offer.

14. In the result, I withdraw my original costs order and replace it with the following:

    1. The Third Defendant is to pay the Plaintiffs costs up to an including Friday 14 April 2005. The Plaintiffs are to pay the Defendants costs from 17 April 2005.

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I W SCHWARTZMAN

JUDGE OF THE HIGH COURT