

Legal Alert – May 2016 - “Without Prejudice” – When does it apply?

Introduction

Transactions marked “Without Prejudice” usually connote a party’s good faith exchange of correspondence, without any admission of liability, or the abandonment of a claim, or counter claim, or a defence, privilege or other rights arising from such transaction correspondence, regarding an existing dispute.

The essence of the above legal rule is to encourage disputing parties to amicably settle their disputes without resort to an expensive and prolonged litigation process.

Changes in the “Without Prejudice” Rule

Section 25 of the repealed Evidence Act, 1945 (as amended) provided that no admission will be allowed in evidence if it was made either under the express condition that such admission will not be used in a judicial proceeding, or in circumstances where a Court can infer that the parties agreed that such admission obtained during a negotiation, will not be used in a judicial proceeding.

The above protection only applied in disputes between the same parties; third parties could not claim or enjoy the protection. See *Nwadike v. Ibekwe* (1987) 12 S.C. 12 @ 31.

The Evidence Act 2011 however repealed the provisions of the Evidence Act 1945 (as amended), and as stated above. *Section 196 of the Evidence Act 2011* provides that “A statement in any document marked “without prejudice” made in the course of negotiation for a settlement of a dispute out of court, shall not be given in evidence in any civil proceeding in proof of the matters stated in it”. Underling ours for emphasis.

Section 196 above cited therefore implies that documents with admissions in them, marked “Without Prejudice”, will only be protected and inadmissible where (a) there is already a dispute in Court as not all disputes go to Court; (b) there is a good faith negotiation to settle such a dispute which is in Court, out-of-Court.

Section 196 of the 2011 Evidence Act has therefore narrowed the protection or *inadmissibility* of admissions in correspondence marked “Without Prejudice”, in judicial proceedings, to only disputes that are already in Court.

Another likely situation where a “Without Prejudice” rule will not prevent an admission from been received in a judicial proceeding, even if such proceeding is already in Court, is where it is used as a “fishing expedition”, which will be a bad faith use of this equitable provision.

“Without Prejudice” – Admissibility in other Instances

Like in the repealed Evidence Act provisions, correspondence marked “Without Prejudice”, under the 2011 Evidence Act, though containing admissions, could be admitted in evidence regarding other issues that are not admitted in the subject correspondence. For example, in a land dispute, a correspondence though marked “Without Prejudice”, with an admission of liability in it, could have previous acts of trespass or other infraction that is/are not otherwise admissible in evidence regarding such other matters outside of the admitted facts, been admitted in evidence.

Conclusion

Based on the change in the statutory provision of this subject of “Without Prejudice”, businesses will need to exercise more circumspection or caution in their business communication.

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