WITH OR WITHOUT PREJUDICE? – *Outule Keatimilwe (Associate)*

You have probably come across a letter or document which contains the phrase "without prejudice" and wondered "what prejudice?" In the legal profession this is a phrase that is commonly used in correspondence.

The concept is described in **Gcabashe v Nene** that letters marked without prejudice and written in a process of negotiations for a settlement are not to be used as evidence in court proceedings unless the protection is waived. The key phrase is therefore "negotiations for a settlement". Thus, a document is not without prejudice if it is not part of the negotiations or if it constitutes evidence of a settlement.

The rationale for this rule of law is to create an open environment for settlement discussions or negotiations and so that parties can negotiate potential settlements without the fear of those discussions or of any concessions or rejections made by either of them being exposed to the court.

In common law even if a letter or other document is not expressly marked "without prejudice", if it contains material that was part of the settlement negotiations, then the document is deemed to be a without prejudice document, and is privileged. This position was adopted in the case **AST Botswana (Pty) Ltd v The Public Procurement And Asset Disposal Board And Others**.

A further twist is that after the settlement has been reached, the negotiations are no longer without prejudice. The **Gcabashe v Nene** case states the reasons for this as follows:

"Negotiations conducted without prejudice are, of course, designed to resolve disputes between the parties and if negotiations result in a settlement then logically evidence about the settlement and the negotiations leading up to it should be available to the trial Court because the whole basis for non-disclosure has fallen away."

It is evident from the aforegoing that "without prejudice" is a term of art.