

INSIGHTS

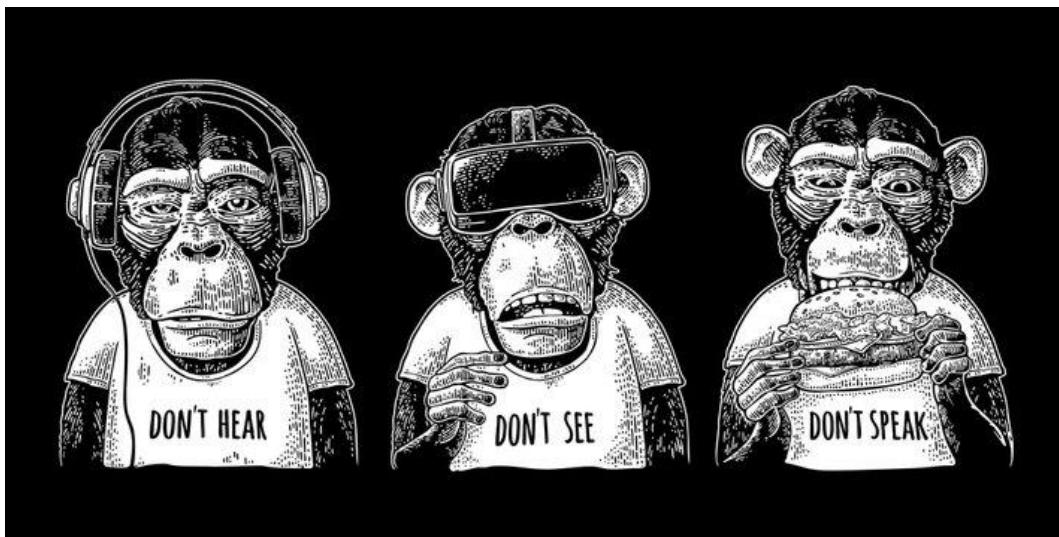


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WITHOUT PREJUDICE: CAN'T TOUCH THIS

You may have been involved in a discourse (pre or during litigation) and received a letter with the heading "Without Prejudice". The ordinary meaning of the phrase is, without disadvantage or impairment – "no judgment and don't hold it against me". In a litigious settlement negotiation, the deliberate use of the phrase has additional connotations. Essentially it is a prohibition against disclosure of the contents to 3rd parties, including the court; the sender is informing you that they are sharing confidential communication with you, and you can't tell.



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In a recent judgment, *SA Sportsbook (Pty) Limited t/a Yesplay v K.P and Another (2025/034789)* [2025] ZAGPJHC 415 (2 May 2025), the Johannesburg High Court reaffirmed the essence of "without prejudice" in settlement negotiations.

In summary, the Applicant approached the court for an urgent application to sequester the Respondent for committing an alleged act of insolvency by making a "without prejudice" settlement offer. The act of insolvency being that the settlement offer was an admission or acknowledgement of indebtedness to the Applicant (insolvency is another compounded topic, perhaps in a later article). The court found that the settlement offer was "without prejudice" and that the contents did not constitute an act of insolvency as there was no admission of indebtedness or any form of an implied "IOU". For further reading and the full judgment please see <https://www.saflii.org/za/cases/ZAGPJHC/2025/415.html>.

At {19} the court affirms: "... which means that the default position is reverted to, that being that negotiations between parties which are undertaken with a view to a settlement of their disputes are privileged from disclosure."

It is accepted in legal proceedings that absence of "without prejudice" does not preclude the confidentiality of settlement negotiations and communication, it is however advisable to include the phrase to alert the recipient of the intention behind the communication; that being: what you are about to read is not evidence that can be brought forward in court, for or against the sender.

The default position is however, like everything else, not without exceptions. There are defined instances where the intended protected disclosure is not afforded protection in court. This is when upholding confidentiality is against public policy, and the court will in that circumstance allow and accept disclosure of the confidential communication.

The Exceptions

- Fraud, Misrepresentation, and Undue Influence: If communication contains evidence of these, it may be disclosed to prove the misconduct.
- Separate Disputes: An admission that is relevant to a different dispute (e.g. a criminal matter) may be disclosed.
- Acknowledgment of Debt or Insolvency: If the communication acknowledges a debt/liability or an inability to pay/restore, it may be used to prove an act of insolvency.
- Interruption of Prescription: An admission of liability interrupts the running of prescription and may be disclosed for debt recovery.
- Waiver: Both parties agree to waive the "without prejudice" protection, the communication may be disclosed.
- Interpreting an Agreement: "Without prejudice" communications can be disclosed to help interpret the terms of an agreement reached after the negotiations.
- Breach of Settlement Agreement: If a settlement agreement is breached by a party the "without prejudice" communications resulting in the agreement can be disclosed to prove the breach.
- Cost Orders: In some cases, "without prejudice" offers can be relevant to costs orders in litigation.

"Without Prejudice" a practical tool, promoting honest and open communication, a safe space for negotiations and hopefully resolution and settlement. Be alert to the stumbling blocks and limitations. Applied mindlessly, it can and will be used against you, employed correctly you are untouchable.

By [Adv. Sannah Pooe](#) 2025/08/12