Dispute Resolution

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In this issue

SOUTH AFRICA

"Calderbank offers" and their costs implications

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"Calderbank offers" and their costs implications

Without prejudice offers and tenders form an integral part of our litigation processes. Done correctly, they can leverage an early settlement and save parties significant inconvenience and costs.

A *"Calderbank offer"* is a species of without prejudice offer than originates from the English Court of Appeal case of *Calderbank v Calderbank* [1975] 3 All ER 333 (CA) and has been accepted into South African law.

The tactical advantage of such an offer is apparent when one considers the manner in which the courts (or in the case of an arbitration, the arbitrator) deal with costs. The starting point is that costs are in the discretion of the court, which will take into account all relevant considerations in determining its costs award. That said, in most cases, the court will order that the 'losing' party must pay the 'winning' party's costs.

A Calderbank offer, which is customarily notified as being made *"without prejudice save as to costs"*, creates the risk of an adverse or more punitive costs order against a party if it unreasonably rejects such offer, and then fails to achieve a better outcome at trial than the substance of the offer. This is best illustrated by way of a simple example.

If a plaintiff is claiming R1 million, and the plaintiff makes a Calderbank offer to receive payment in the sum of R750,000, and the court finds that the defendant owes the plaintiff R850,000, then the court may take the Calderbank offer into consideration and award the plaintiff costs on a higher scale than it ordinarily would have been entitled to.

The reason being, had the defendant accepted the Calderbank offer, then the parties and the court would not have been put through the inconvenience and costs of a trial.

A Calderbank offer accordingly incentivises the recipient of the offer to very carefully consider accepting the offer rather than continuing with litigation.

Needless to say, whether to make such an offer, and in what amount, needs to be carefully considered in the context of each case. The aim would be to make an offer that is unlikely to be 'beaten' by the counterpart at trial.

Consideration of court cases

In *AD and Another v MEG for Health and Social Development, Western Cape* [2017] (5) SA 134 (WCC), Rogers J held that, in principle, Calderbank offers are admissible in relation to costs and can be disclosed to the court for that purpose after judgment has been given. Rogers J also held that in order to be admissible, a Calderbank offer must explicitly state that it is made without prejudice *"except in relation to costs"* (or words to that effect). If the words *"without prejudice"* are expressly qualified by the phrase *"except in relation to costs"*, there is no reason of policy to treat the communication as inadmissible for purposes of determining a just and equitable costs order.

"Calderbank offers" and their costs implications

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Recent case: *Du Toit*

In the 2024 High Court decision of *Du Toit N.O obo Nkuna v Road Accident Fund* (CA&R45/2023) [2024] ZANCHC, the court was tasked with deciding whether the appellant, after being successfully awarded damages, should be successful in the reconsideration of costs in light of its Calderbank offer made to the defendant.

Six weeks before the commencement of the trial, the appellant sent a formal *"Calderbank offer"* of R7,188,988.16 to the defendant notifying the defendant that the offer in question, absent its acceptance within a reasonable time, placed the defendant at risk of the payment of attorney and client costs in due course.

Pursuant to the trial, judgment was handed down by Mofokeng J, where the appellant was awarded damages in the capital sum of R7 208 988.16, which marginally exceeded the Calderbank offer by some R20,000. Costs on party and party scale was also granted in favour of the appellant.

Following judgment, the appellant notified Mofokeng J of the Calderbank offer and requested Mofokeng J to exercise her discretion on costs in favour of the appellant, by awarding the appellant his costs on the attorney and client scale in view of the court's judgment on capital exceeding the Calderbank offer. Mofokeng J refused to entertain the request for reconsideration.

Following the Mofokeng J decision, the appellant filed a substantive application for the reconsideration of costs seeking an order that the defendant be held liable for the appellant's costs on an attorney and client scale from the date of service of the appellant's Calderbank offer upon the defendant. Eillert AJ considered the application and held that the appellant's Calderbank offer was not admissible for the purposes of reconsidering costs, as the Calderbank offer had not been tendered in the required form and the appellant had not offered a fair discount to the defendant. In particular, the offer had not been prefaced with the words *"without prejudice save as to costs"*, nor were words to similar effect employed (notwithstanding that the appellant's offer was titled: *''The Plaintiff's Calderbank offer in terms of Rule 34"*).

"Calderbank offers" and their costs implications

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Dissatisfied with Eillert AJ's conclusion, the appellant filed an application for leave to appeal. Leave to appeal was granted, and in coming to its decision, the appeal court first considered whether the Calderbank offer was admissible in the circumstances, and secondly, whether the defendant had behaved unreasonably in rejecting the appellant's offer, and whether it had engaged reasonably in attempting to settle.

Admissibility and reasonableness

In the appeal court's view, the lack of the exact words *"without prejudice save as to costs"* was not reason enough to hold the Calderbank offer inadmissible. This was because the offer had been preceded by the *"plaintiff's without prejudice settlement proposal"*, which tendered the same settlement figure as contained in the subsequent Calderbank offer. Additionally, the final paragraph of the Calderbank offer stated that:

> *"Should the above offer not be accepted by the defendant within a reasonable time and the eventual outcome is similar or less favourable to the defendant, the plaintiff will request that a punitive costs order be made against the defendant."*

The appeal court concluded that the appellant had properly placed the defendant at risk with its timeous Calderbank offer and had explicitly reserved the question of its indemnifying costs. The defendant's failure to respond to the offer or to make a counter-offer, which would have ended the litigation and obviated the unavoidable escalation of costs, was unreasonable.

Instead, it allowed litigation to continue to its conclusion at considerable cost to the public purse and put its opponent to unnecessary trouble and expense, which he ought not to bear.

The order of the court *a quo* was set aside and substituted with, among other things, an order declaring that the appellant be awarded all costs incurred from the date of the Calderbank offer on an attorney and client scale.

Conclusion

Calderbank offers can be a very effective way of achieving an early settlement in a matter and thus avoid having to go all the way to trial. At the very least, they can be used to position oneself to achieve a more advantageous cost award at the end of the matter. It is however important that they are worded correctly and that the offer, itself, has been carefully thought through for maximum effectiveness.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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