THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1135/2016

In the matter between:

KLD RESIDENTIAL CC **APPELLANT**

and

EMPIRE EARTH INVESTMENTS 17 (PTY) LTD **RESPONDENT**

Neutral Citation: *KLD Residential v Empire Earth Investments* (1135/2016) [2017] ZASCA 98 (6 July 2017)

Coram: Lewis, Tshiqi and Mbha JJA and Fourie and Schippers AJJA

Heard: 9 May 2017

Delivered: 6 July 2017

Summary: Where an acknowledgment of indebtedness is made by a debtor to a creditor, even in without prejudice settlement negotiations, the acknowledgment may be admitted in evidence for the sole purpose of interrupting the running of the prescription period in terms of s 14 of the Prescription Act 68 of 1969.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Rogers J sitting as court of first instance), reported sub nom *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* 2016 (5) SA 485 (WCC).

1 The appeal is upheld with the costs of two counsel.

2 The orders of the court a quo in subparagraphs (a) and (b) of para 66 of the judgment are set aside and replaced with the following:

'(a) The issue identified in para 3.1 of the stated case is determined in favour of the plaintiff.

(b) The special plea of prescription is dismissed with costs, including those of two counsel.'

JUDGMENT

Lewis JA (Tshiqi and Mbha JJA and Fourie AJA concurring)

[1] The issue before us on appeal raises a novel question of law. That is, whether an acknowledgment of indebtedness by a debtor, embodied in a letter written for the purpose of settling litigation, and thus 'without prejudice', may nonetheless be admitted in evidence for the limited purpose of showing that the period of prescription has begun to run afresh in terms of s 14 of the Prescription Act 68 of 1969.

[2] The matter came before the Western Cape Division of the High Court by way of a stated case. The question of law posed was put thus by the appellant:

'Does (or should) our law recognize an exception to the without prejudice rule (otherwise known as settlement or negotiation privilege), to the effect that such inadmissibility rule is not applied where the only purpose for which reliance is placed on a communication otherwise covered by the rule is to prove an acknowledgment of liability interrupting prescription as contemplated in s 14 of the Prescription Act . . . ?'

Rogers J considered that there was no such exception, but granted leave to appeal against his decision to this court.

[3] The facts are largely common cause, and the only issue before us is whether the common law should recognize the exception for which the appellant argues. This is a matter entailing competing policy considerations underlying the without prejudice principle, and the law of prescription, and I shall deal with them in due course. It is necessary first to describe the factual matrix and the communication that is argued by the respondent to be privileged even for the purpose of proving an acknowledgment of liability interrupting the running of prescription in terms of s 14 of the Prescription Act.

Factual background

[4] The appellant, KLD Residential CC (KLD), in an action against the respondent, Empire Earth Investments 17 (Pty) Ltd (Empire Earth), alleged in its particulars of claim that it had been given a written mandate in November 2006 to market erven in a new property development, and to receive commission on sales of which it was the effective cause. Commission was alleged to be payable once transfer of each property was passed to the buyer. KLD alleged that it was the effective cause of 99 sales referred to in a schedule to the particulars. It was entitled, it said, to R2 147 million in commission, due on transfers registered on dates ranging between October 2008 and November 2009. KLD issued summons for payment of the commissions in June 2013.

[5] In a special plea, Empire Earth pleaded that, save for one sale after 2009, the registration dates were more than three years before the summons was served, and that the claims for commission had become prescribed. In its plea on the merits, Empire Earth alleged that KLD itself was in breach of various terms of the contract such that any amount that was due by it fell to be reduced. Empire Earth had already

commenced action against KLD in respect of various claims, and asked that judgment be postponed until those claims had been adjudicated.

[6] KLD replicated to the special plea, alleging that on 29 July 2011, Empire Earth's then attorneys, Webber Wentzel, had written to KLD's then attorneys, acknowledging that it owed commissions in the sum of R2 105 960. This, it was alleged, had interrupted the running of prescription in terms of s 14 of the Prescription Act, and the prescription period had begun to run afresh on the date of the letter. KLD's claim for commission had not become prescribed, it averred.

[7] The parties' respective claims were consolidated in September 2013. It was agreed that a stated case would be put to the court, and that the issue set out earlier was to be determined. The letter is central to the argument and I shall set out its terms in so far as relevant fully. It should be recorded, however, that both in the court a quo and in this court, KLD accepted that the letter was written without prejudice to the rights of the parties, in the course of settlement negotiations. That concession was in my view rightly made. KLD also conceded that Rogers J had correctly found that an admission of part of a liability is sufficient to interrupt the running of prescription.

[8] KLD also accepts the finding of Rogers J that the law governing the legal question asked in the stated case is the English law of evidence as at 31 May 1961, as provided for in s 42 of the Civil Proceedings Evidence Act 25 of 1965. As Rogers J found, subject to specific legislation or any constitutional imperative, the law of evidence in England at the relevant date had long adopted the without prejudice rule – that statements, including admissions of liability, made in an attempt to settle litigation between parties are inadmissible in subsequent litigation between them. The rule is based on policy grounds: parties to disputes should be encouraged to avoid litigation, which usually entails expense, delay, hostility and inconvenience, by resolving their disputes amicably in frank discussions without the fear that if negotiations fail, admissions made by them in the course of negotiating may be used against them subsequently. It should be said that the rule has long been part of South African law as well, and I shall discuss the authorities in this regard later.

[9] However, as I have indicated, KLD does take issue with the finding by Rogers J that there are no compelling reasons of public policy to limit the protection afforded by the without prejudice rule so as to recognize an exception to it for the purpose of interrupting prescription. This, as I have said, is the only issue on appeal.

The letter in question

[10] The letter, written on 29 July 2011, was addressed by Empire Earth's then attorneys, Webber Wentzel, to Jooste Leidig attorneys, who were acting on behalf of KLD, which was trading as Seeff Properties, and referred to as 'Seeff'. It read (the precise punctuation is not reproduced here):

'1 As you know, our client [Empire Earth] instituted a claim against Seeff on 20 November 2007 for the payment of certain amounts for which Seeff is indebted to our client.

2 Certain monies have now become due and payable to Seeff by our client. These are comprised of commissions to which Seeff has become entitled in terms of the agreement dated 27 November 2006 and the extension thereof dated 23 March 2007, (collectively "the agreement") entered into between our client and Seeff.

3 We remind you that in terms of the agreement Seeff would become entitled to a four per cent commission for each successful sale which Seeff effected, upon transfer of the sold property. For your convenience we include under cover hereof a list of the properties sold by Seeff which were successfully transferred to the purchasers.

4 Accordingly Seeff has become entitled to commission in the amount of R2 105 960, including Vat.

5 By virtue of the operation of set-off this amount has been reduced by the following amounts for which Seeff is indebted to our client: . . .'

There followed a list of four claims not all of which were in fact liquidated and were thus not capable of set-off. That is of no consequence here.

'6 From the aforegoing, it is apparent that Seeff's indebtedness to our client amounts to R1 023 625.45.

7 Accordingly, we include under cover hereof a cheque for R1 082 334.55 including Vat (being R2 105 960 commission less the total indebtedness of R1 023 625.45) in full and final settlement of any and all claims that Seeff may have against our client, and of the litigation forming the subject matter of case number . . . .'

[11] The cheque was not banked. KLD accepts that the entire letter was written without prejudice, in an attempt to settle the disputes between it and Empire Earth, and that no part of it would ordinarily be admissible for the purpose of proving the

amounts owed, if any. It accepts that the acknowledgements of liability in paras 2 and 4 of the letter would ordinarily be privileged. It nonetheless argues that the policy considerations underlying s 14 of the Prescription Act were not sufficiently taken into account by Rogers J and that too much weight was given to the policy underlying the without prejudice rule.

The policy underlying s 14 of the Prescription Act

[12] The section reads:

'Interruption of prescription

(1) The running of prescription shall be interrupted by an express or tacit acknowledgment of liability by the debtor.

(2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt, from the date upon which the debt again becomes due.'

[13] One of the principal reasons for extinctive prescription is to provide certainty to a debtor – after a period of time when the creditor has been inert, the debtor should have certainty as to whether or not a debt is still owed. The three-year period over which prescription runs is regarded as being enough time for the creditor to enforce the obligation, and conversely, if it is not enforced within that time, the debtor may be certain that the obligation has ended. The debtor is protected save where the reasons for the principles underlying prescription fall away and the protection of a creditor is justified.

[14] This is clearly explained in *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 (1) SA 571 (A) at 578F-H where Grosskopf AJA said:

'Although many philosophical explanations have been suggested for the principles of extinctive prescription . . . its main practical purpose is to promote certainty in the ordinary affairs of people. Where a creditor lays claim to a debt which has been due for a long period, doubts may exist as to whether a valid debt ever arose, or if it did, whether it has been discharged. . . . The alleged debtor may have come to assume that no claim would be made, witnesses may have died, memories would have faded, documents or receipts may have been lost, etc. These sources of uncertainty are reduced by imposing a time limit on

the existence of a debt, and the relevant time limits reflect, to some extent, the degree of uncertainty to which a particular type of debt is ordinarily subject (s 11 of the Act).'

[15] The justifications for extinctive prescription are also to be found in *Road Accident Fund v Mdeyide* [2010] ZACC 18; 2011 (2) SA 26 (CC) and *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus & others* [2016] ZACC 49 paras 28 to 30. In *Mdeyide*, Van der Westhuizen J said (para 8):

'This Court has repeatedly emphasized the vital role time limits plays in bringing certainty and stability to social and legal affairs and maintaining the quality of adjudication. Without prescription periods, legal disputes would have the potential to be drawn out for indefinite periods of time bringing about prolonged uncertainty to the parties to the dispute. The quality of adjudication by courts is likely to suffer as time passes, because evidence may have become lost, witnesses may no longer be able to testify, or their recollection of events may have faded. The quality of adjudication is central to the rule of law.'

See generally as to the justifications for extinctive prescription G B Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) 561; M M Loubser 'Towards a theory of extinctive prescription' (1988) 105 *SALJ* 34 and M M Loubser *Extinctive Prescription* (1996) pp 22-24.

[16] Section 14 of the Prescription Act, on the other hand, serves the purpose of protecting the creditor. As this court said in *Murray & Roberts* (at 578H-579A):

'The same considerations which provide a justification for extinctive prescription also suggest that limits should not be immutable. . . . Moreover, s 14 of the Act provides that the running of prescription is interrupted by an express or tacit acknowledgment of liability by the debtor. The reason is clear – if the debtor acknowledges liability there is no uncertainty about the debt.'

The court continued (at 579D-E):

'It will thus be seen that that there are two general principles which protect a creditor against the effects of extinctive prescription. The first is the basic requirement of certainty which underlies extinctive prescription. Where the debtor removes all uncertainty by acknowledging liability, or the creditor does so by instituting and prosecuting legal proceedings, the running of prescription is suitably adapted.'

[17] The second principle discussed by this court in *Murray & Roberts* was that underlying s 13 of the Prescription Act, which delays the completion of prescription

where it is difficult or undesirable for the creditor to claim performance (for example, where the debtor is a minor, or out of the country).

[18] Given that s 14 of the Prescription Act protects the rights of the creditor, does that protection fall away if the acknowledgment of debt is made without prejudice? The question requires a consideration of the other, competing, policy, which is that admissions made in the course of negotiating a settlement should not be admitted in proceedings between the creditor and the debtor.

The policy underlying the without prejudice principle

[19] The policy, as I indicated earlier, is to promote the settlement of disputes without resort to litigation, and was discussed at length by Trollip JA in *Naidoo v Marine & Trade Insurance Co Ltd* 1978 (3) SA 666 (A). Referring (at 674A-B) to a statement made by Lord Mansfield in the 19th century that 'it must be permitted to men to "buy their peace" without prejudice to them, if the offer did not succeed; and such offers are made to stop litigation without regard to the question whether any thing or what is due', Trollip JA said that the origin and the rationale for the without prejudice rule was public policy.

[20] In *Naidoo* the respondent, a third party insurer, wrote a number of without prejudice letters to the attorney of Mr Naidoo (the plaintiff), admitting that it was on risk as the insurer of the negligent driver. Settlement negotiations failed and in subsequent proceedings the insurer denied that it was the negligent driver's insurer. Naidoo, in his replication, asserted that the insurer was estopped from denying the admission. The trial court found that the correspondence was inadmissible as the letters were written without prejudice to the insurer's rights. This court upheld the finding. Trollip JA, finding that the letters had been written without prejudice, said (at 677B-D):

'[S]uch correspondence, once respondent objected to its being adduced in evidence, was wholly inadmissible. The rationale of the rule is public policy: parties to disputes are to be encouraged to avoid litigation and all the expenses (nowadays, very high), delays, hostility, and inconvenience it usually entails, by resolving their differences amicably in full and frank discussions without the fear that, if the negotiations fail, any admissions made by them during such discussions will be used against them in the ensuing litigation.'

[21] Rogers J in the court a quo considered that he was bound by *Naidoo*. KLD contends on appeal that *Naidoo* is distinguishable in that it was not concerned with the competing policy considerations underlying the provisions of the Prescription Act but only with the application of the without prejudice rule. In my view that is correct. In his consideration of English cases dealing with acknowledgments of liability and the without prejudice rule, Rogers J alluded to the tension between competing policy considerations. But he did not fully consider the policies underlying the rules of prescription.

The tension between competing policies and principles

[22] The tension between competing policies is recognized and discussed in *Bradford & Bingley plc v Rashid* [2006] UKHL 37; [2006] 4 All ER 705. There the respondent had mortgaged property to the appellants. He was unable to meet his payment obligations. He admitted in correspondence that he owed them money but asked for more time in which to pay. The House of Lords came to the unanimous conclusion that the admissions were not made without prejudice. The five law lords who wrote speeches differed in their approaches to the question whether there should be an exception to the without prejudice rule in the case of an acknowledgment of liability made without prejudice, but their statements in this regard were all made obiter. However, all the speeches acknowledged that there are competing policies at play.

[23] Lord Walker said in *Bradford* (para 38) that there were two public interests engaged in the appeal.

‘There is the interest in encouraging the settlements of disputes so as to avoid (or at least shorten) litigation; . . . but it is also in the public interest that a debtor who acknowledges his debt, and so induces his creditor not to have immediate resort to litigation, should not then be able to claim that the debt is statute-barred because the creditor held his hand.’

Lord Hoffmann, in criticizing the approach of the Court of Appeal in *Bradford*, said (para 3) that it, and the judge a quo, took a ‘rather one-sided view of the matter’. He continued:

‘[T]hey looked only at encouraging the debtor to be open with his creditor without fear of what he said being used against him. But it takes two to negotiate and there is also a public policy in encouraging the creditor not to initiate legal proceedings. The acknowledgment rule plays an important part in furthering this policy because it means that a creditor, negotiating on the basis that his debt has been acknowledged, can proceed with the negotiations and

give time to pay without being distracted by the sound of time's winged chariot behind him. It is also unfair that a debtor who does not dispute his indebtedness should be able to ask for time and use that indulgence to rely on the statute.'

[24] Lord Mance, on the other hand, expressed concern about the difficulty of dissecting admissions of liability for admissibility from the balance of without prejudice discussions. Parties to a dispute would not be able to speak freely if they had to monitor every sentence to avoid making an acknowledgment of liability that would subsequently be admissible in litigation (para 91). He referred in this regard to the judgment of Walker LJ in *Unilever plc v The Proctor & Gamble Company* [2000] 1 WLR 2436; [2001] 1 All ER 783.

[25] Lord Mance referred also to the decision in *Kapeller v Rondalia Versekeringskorporasie van Suid-Afrika Bpk* 1964 (4) SA 722 (T) where the court was able to distinguish a clear admission by a motor vehicle insurer from the without prejudice negotiations that followed as to the quantum. But Lord Mance was not willing to recognize any exception for the purpose of limitation since the issue did not arise in *Bradford*.

[26] Indeed in *Naidoo*, this court said that any admissions that are unconnected with settlement negotiations are not protected by the without prejudice rule. The admission in *Kapeller* was of such a nature. The admission in *Naidoo* was not. And in this matter, KLD accepted that the admission of the debt was not separable from the negotiation about settlement.

[27] In *Ofulue & another v Bossert* [2009] UKHL 16 the law lords refused to admit an acknowledgment of title (the court was dealing with acquisitive prescription) in letters written without prejudice despite the argument that there was no admission of fact, just an acknowledgment of the claimants' title.

Lord Neuberger said (para 101):

'[T]he argument that there is a special exception to the without prejudice rule for acknowledgments for the purpose of s 29 [of the Limitations Act 1980] derives no support from any of the other opinions expressed in this House in [*Bradford*] . . . For my part at any rate, I do not accept that the argument is justified. I do not consider that there is any

significant public policy element in the acknowledgment provisions of the 1980 Act, save in so far as it can be said that any statutory provision carries with it an element of public policy.' Lord Neuberger accepted the view in *Bradford*, expressed by Lord Walker, (para 43) that 'the policy underlying the without prejudice rule seems to me to outweigh the countervailing policy reason for lengthening the period' of limitation through an acknowledgment.

[28] Referring to the opinions in *Bradford*, and to the policy considerations that compete, D T Zeffertt and A P Paizes *The South African Law of Evidence* 2 ed (2009) p 702 suggest that a 'robust' solution to 'the kind of problem that arose in *Bradford* . . . might . . . be to allow the reception of communications for the purpose of determining whether the debt had prescribed but not for other purposes on the basis that this best serves the resolution of the competing policies that the privilege accommodates.' That is the exception for which KLD now contends.

[29] Rogers J in the court a quo, on the other hand, accepted the approach of the English cases although he pointed out that he was not bound by them. He said that there are no compelling reasons of public policy to limit without prejudice protection and 'I am fortified in that view by the fact that no such exception has been recognized in English law'.

The exception to the without prejudice rule contended for

[30] KLD argued in the court a quo that the judgment in *Absa Bank v Hammerle Group* [2015] ZASCA 43; 2015 (5) SA 215 (SCA) is authority for the proposition that South African law recognizes that there are exceptions to the without prejudice rule. In that matter, in response to a letter of demand written by the bank, Hammerle had stated in a letter that it 'would like to make a settlement proposal' but that it was 'struggling to turn the business around' and was 'unable to make any meaningful profit in the business'. Counsel for Hammerle apparently conceded at the outset of the hearing that it was commercially insolvent and unable to pay its debts. Mbha JA stated (para 7) that the concession was 'well made'.

[31] In his view, the contents of the letter constituted not only an unequivocal acknowledgment of indebtedness but also showed that Hammerle was unable to pay

its debts and was commercially insolvent. The question that had to be determined was whether these admissions were protected by the without prejudice rule and were thus inadmissible.

[32] Mbha JA said (para 13):

'It is true that, as a general rule, negotiations between parties which are undertaken with a view to a settlement of their disputes are privileged from disclosure. This is regardless of whether or not the negotiations have been stipulated to be without prejudice. However, there are exceptions to this rule. One of these exceptions is that an offer made, even on a 'without prejudice' basis, is admissible in evidence as an act of insolvency. Where a party therefore concedes insolvency, as the respondent did in this case, public policy dictates that such admissions of insolvency should not be precluded from sequestration or winding-up proceedings, even if made on a privileged occasion. The reason for the exception is that liquidation or insolvency proceedings are a matter which by its very nature involves the public interest. . . . It follows that any admission of such insolvency, whether made in confidence or otherwise, cannot be considered privileged.'

The court referred to two decisions in which this exception had been explained and recognized: *Absa Bank v Chopdat* 2000 (2) SA 1088 (W) and *Lynn & Main Inc v Naidoo & another* 2006 (1) SA 59 (N). The policy is discussed fully in *Lynn Main* paras 23 to 30, with reference to *Chopdat*.

[33] This court in *Hammerle* considered in any event, however, that the admissions of indebtedness and insolvency were not made without prejudice, since there were no negotiations for the purpose of settlement (para 14). It concluded that the plea of prescription could not be sustained because of the unequivocal admission of liability. Rogers J in the court a quo was unable to discern whether the exception recognized in *Hammerle* in para 13 was the reason for the finding that the plea of prescription could not be sustained, or whether it was because the admission of commercial insolvency was not made without prejudice. He considered nonetheless that that exception was different because of the public interest element.

[34] In my view nothing turns on whether the dicta of Mbha JA in para 13 of *Hammerle* are obiter or the reason for the finding. The insolvency exception has been approved by this court and applied in the *Chopdat* and *Lynn Main* cases. The question before us is whether there should be another exception to allow for

admissions of liability, made without prejudice, where the debt would otherwise prescribe.

[35] KLD argues that there is no authority that precludes this court from deciding that, for policy reasons, where an acknowledgment of indebtedness is made in the course of without prejudice discussions, it should be admissible for the limited purpose of interrupting the running of prescription. As *Hammerle* shows, the without prejudice rule is subject to at least one exception, for reasons of public policy. Another exception should be recognized, KLD argues, based on the policy that an acknowledgment of liability protects a creditor from a debtor who is certain as to the existence of the debt and his or her liability, and the debtor should not be permitted to escape the obligation because the admission was made in the course of negotiations to settle a dispute.

[36] I referred earlier to the rationale underlying s 14 of the Prescription Act: where there is an acknowledgment of liability, there is no uncertainty on the part of the debtor as to the existence of the debt. As Grosskopf AJA said in *Murray & Roberts* at 579D-E (above), where the debtor removes uncertainty by admitting liability, the running of prescription is 'suitably adapted'. This accords with the views expressed in *Bradford* – it is in the public interest that a debtor who acknowledges his debt, 'and so induces his creditor not to have immediate resort to litigation', should not be able to claim that the debt has prescribed because 'the creditor held his hand' (Lord Walker para 38 and Lord Hoffmann para 3).

[37] And as Lord Hope said in *Bradford*, there is a balance to be struck between the public interest in prolonging the prescription period when there has been an acknowledgment of liability, and the public interest in preventing statements made in the course of negotiations being used at trial as admissions of liability. He stated (para 34):

'It would be bizarre if a claimant who had been dissuaded from taking proceedings time and time again both before and after the expiry of the limitation period by prolonged correspondence which contained repeated statements that liability was admitted, and which sought to negotiate only on the matter of quantum, was to be deprived of his claim on limitation grounds when negotiations broke down simply because the admissions were made

in letters which contained proposals as to the amount that was to be paid in settlement of that liability. This suggests to me that there is something wrong with an absolute rule that will always exclude an admission made in the course of negotiations from being relied upon as an acknowledgment for the purposes of the 1980 Act.'

[38] The example given by Lord Hope is not directly in point, for it deals with the *Kapeller* situation when an admission of liability is made, and negotiations that follow are purely in respect of quantum. And in any event in *Bradford* the court found that the admissions were not made without prejudice. It is accepted in this matter that the admissions in question were without prejudice. The point that Lord Hope makes, however, is that there should not be an absolute rule.

[39] I consider that the exception contended for is well-founded. Where acknowledgments of liability are made such that, by virtue of s 14 of the Prescription Act, they would interrupt the running of prescription, such acknowledgments should be admissible, even if made without prejudice during settlement negotiations, but solely for the purpose of interrupting prescription. The exception itself is not absolute and will depend on the facts of each matter. And there is nothing to prevent the parties from expressly or impliedly ousting it in their discussions. What the exception allows for, as I see it, is the prevention of abuse of the without prejudice rule, and the protection of a creditor. The admission remains protected in so far as proving the existence and the quantum of the debt is concerned. It is not, as Empire Earth suggested in argument, a question of the without prejudice rule trumping prescription. It is a question of recognizing that both s 14 of the Prescription Act and the without prejudice rule protect policy interests, and recognizing an exception so that both interests are properly served.

[40] I consider therefore that the appeal should be upheld with the costs of two counsel, and the question in the stated case be answered in favour of KLD. That question, as framed in KLD's heads, reflecting the actual terms of para 3.1 of the stated case, is repeated here for the sake of clarity: 'Does (or should) our law recognize an exception to the without prejudice rule . . . to the effect that such general inadmissibility rule is not applied where the only purpose for which reliance is placed on a communication

otherwise covered by the rule is to prove an acknowledgment of liability interrupting prescription as contemplated in s 14 of the Prescription Act 68 of 1969?'

[41] Accordingly:

1 The appeal is upheld with the costs of two counsel.

2 The orders of the court a quo in subparagraphs (a) and (b) of para 66 of the judgment are set aside and replaced with the following:

'(a) The issue identified in para 3.1 of the stated case is determined in favour of the plaintiff.

(b) The special plea of prescription is dismissed with costs, including those of two counsel.'

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C H Lewis

Judge of Appeal

Schippers AJA dissenting:

[42] There is a single issue in this appeal: whether an acknowledgment of liability, made without prejudice in a written offer of settlement, may be admitted in evidence for the purpose of interrupting prescription within the meaning of s 14 of the Prescription Act 68 of 1969 (the Prescription Act).[1] My colleague, Lewis JA, has answered this question affirmatively, holding that such acknowledgment justifies an exception to the without prejudice rule because it 'allows for . . . the prevention of abuse of the without prejudice rule, and the protection of a creditor', and that

[1] Section 14 of the Prescription Act reads:
'(1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.
(2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt from the date upon which the debt again becomes due.'

recognising such an exception would properly serve the policy interests of s 14 of the Prescription Act and the without prejudice rule.[2]

[43] In my opinion such an exception would negate the without prejudice rule, which operates to encourage parties to a dispute to settle their differences amicably in full and frank discussions, and 'to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence'.[3]

[44] The appellant (KLD) accepts - as it must - that by virtue of s 42 of the Civil Proceedings Evidence Act 25 of 1965 (an object of which is to state the law of evidence in regard to civil proceedings) the law to be applied is the English law of evidence as at 31 May 1961.[4] In my view, the court a quo was correct in holding that the English cases do not permit an acknowledgment of liability in a genuine offer of settlement, as evidence of an interruption of time running against a claimant under the provisions of the English Limitation Act 1980 (the Limitation Act).

Facts

[45] The basic facts may be simply summarised. On 27 November 2006 the respondent (Empire) and KLD, an estate agent also known as Seeff Properties, entered into a written agreement (the agreement). In terms of the agreement, KLD was given a mandate to market and sell erven in a residential property development by Empire in Croydon, Western Cape (the development); commission was payable once the relevant purchaser took transfer; and KLD undertook to contribute to the media advertising and marketing costs of the development.

[46] In November 2007 Empire sued KLD in the Western Cape High Court under case number 16844/07, for payment of R428 000 in respect of media advertising and marketing costs, and R35 889 being expenses which Empire had incurred in the administration of sales. While this action was pending, by letter dated 29 July 2011,

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[2] Judgment of Lewis JA para 39.

[3] Lord Griffiths in *Rush & Tompkins Ltd v Greater London Council* [1988] UKHL 7, [1989] AC 1280, [1988] 3 All ER 737 at 2.

[4] Section 42 of the Civil Proceedings Evidence Act, 1965 reads:
'The law of evidence including the law relating to the competency, compellability, examination and cross-examination of witnesses which was in force in respect of civil proceedings on the thirtieth day of May, 1961, shall apply in any case not provided for by this Act or any other law.'

Empire's attorneys made a written offer of settlement to KLD's attorneys (the Letter).[5] The Letter referred to Empire's action against KLD under case number 16844/07, and stated that KLD was entitled to commissions in a total sum of R2 105 960 under the agreement, and that it was indebted to Empire for marketing costs, expenses incurred in the administration of sales by KLD, and legal costs totalling R1 023 625.45. The Letter concluded with the following offer of compromise:

'Accordingly we include under cover hereof a cheque for R1 082 334.55 including VAT (being R2,105,960.00 commission less the total indebtedness of R1,023, 625.45) in full and final settlement of any and all claims that Seeff may have against our client, and of the litigation forming the subject matter of case number 16844/2007.'

[47] It is common ground that the Letter was a without prejudice offer of settlement, and that KLD did not deposit the cheque of R1 082 334.55 and thus rejected the offer.

[48] In June 2013 KLD instituted an action against Empire for R2 147 million, being commissions on the sales of 99 erven in the development set out in a schedule to KLD's particulars of claim. The commissions were earned on the registration dates specified in the schedule. Save for one sale to Mr Werner Grift (the Grift sale), the registration dates specified in KLD's schedule range from October 2008 to November 2009.

[49] KLD's summons was served on 26 June 2013. Empire delivered a special plea of prescription in which it alleged that KLD's alleged right to commissions became due on the registration dates specified in KLD's schedule; that except for the Grift sale, those registration dates were more than three years before the service of summons; and that KLD's claims to commissions had thus prescribed.

[50] In its replication to the special plea, KLD alleged that in the Letter, Empire's attorneys, acting as Empire's authorised representatives, expressly acknowledged that KLD had become entitled to payment of commissions totalling R2 105 960. This, so KLD alleged, was an acknowledgment of liability which interrupted prescription as contemplated in s 14 of the Prescription Act.

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[5] The Letter is quoted in para 10 of the judgment of Lewis JA.

[51] In the court a quo, KLD accepted that it could reasonably have ascertained the facts giving rise to its commission claims not later than 30 days after the relevant dates of transfer. Thus prescription began to run before 25 June 2010, save for the Grift sale. And it is not KLD's case that it delayed in instituting its claim against Empire because it understood that, by making the offer of compromise in the Letter, Empire acknowledged that it was liable for commissions as contemplated in s 14 of the Prescription Act.

[52] The issue came before the court a quo in the form of a stated case as envisaged in rule 33 of the Uniform Rules of Court. The parties agreed that the Letter, which they attached, was sent and received by their authorised representatives. They recorded that there were two issues for determination, which would dispose of the special plea: (a) whether the Letter, regardless of its admissibility for any other purpose, was admissible as evidence of an interruption of prescription as contemplated in s 14 of the Prescription Act; and (b) whether, assuming that the Letter was admissible for that purpose, it did in fact interrupt prescription.

The without prejudice rule

[53] The without prejudice rule operates to render evidence inadmissible. The directly relevant authority for this proposition is *Rush & Tompkins*,[6] in which Lord Griffiths said:

'The "without prejudice rule" is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver LJ in *Cutts v Head* [1984] Ch 290, 306:

> "That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in *Scott Paper Co v Drayton Paper Works Ltd* (1927) 44 RPC 151, 156, be

[6] *Rush & Tompkins Ltd v Greater London Council* fn 1 at 2.

> encouraged fully and frankly to put their cards on the table. … The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability."

The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence "without prejudice" to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase "without prejudice" and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission.'

[54] In *Unilever*, [7] Robert Walker LJ noted that aside from being based in part on the public policy of encouraging parties to negotiate and settle their disputes out of court, a second basis of the without prejudice rule '. . . is in the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence if, despite the negotiations, a contested hearing ensues'. Hoffmann LJ in *Muller*,[8] observed that '[i]n some cases both of these justifications are present; in others, only one or the other'.

[55] Without prejudice communications are normally inadmissible in their entirety. In *Unilever*,[9] Robert Walker LJ explained why this is so:

'. . . I consider that this court should, in determining this appeal, give effect to the principles stated in the modern cases, especially *Cutts v Head*, *Rush & Tompkins* and *Muller*. Whatever difficulties there are in a complete conciliation of those cases, they make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties (in the words of Lord Griffiths in *Rush & Tompkins* at p 1300)

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[7] *Unilever Plc v The Proctor & Gamble Company* [2001] 1 All ER 783, [1999] EWCA Civ 3027 para 17, [2000] WLR 2436.
[8] *Muller & Anor v Linsey & Mortimer* [1994] EWCA Civ 39; (1996) PNLR 74.
[9] *Unilever* fn 7 paras 35 and 36.

> "to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts".

Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers . . . sitting at their shoulders as minders.'

[56] There are, however, occasions when the without prejudice rule does not prevent the admission in evidence of what parties said or wrote. Robert Walker LJ in *Unilever*,[10] set out and explained eight such instances. The most important of these are where the negotiations are said to have resulted in a contract, an estoppel, or a misrepresentation, or where they are invoked '. . . as a cloak for perjury, blackmail or other "unambiguous impropriety",' or an explanation for delay. In *Rush & Tompkins*[11] Lord Griffiths referred to *Daintrey*[12] as authority for the proposition that a court will not permit the without prejudice rule to be used to exclude an act of bankruptcy; and said that the admission of an independent fact in no way connected with the merits of the cause is admissible even if made in the course of settlement negotiations. The UK Supreme Court has recognised an exception to the rule in terms of which:

'facts identified during without prejudice negotiations which lead to a settlement agreement of the dispute between the parties are admissible in evidence in order to ascertain the true construction of the agreement as part of its factual matrix or surrounding circumstances'.[13]

[57] Important for present purposes, is the observation by Robert Walker LJ in *Unilever*,[14] with reference to an article by Professor David Vaver, published in the University of British Columbia Law Review in 1974:[15]

'It is apparent that none of the exceptions to the public policy rule involves the disclosure of admissions bearing on the subject matter in dispute, at any rate unless the expression "admission" is given a substantially wider meaning than it usually has in the law of evidence. . . . Conversely, however, I respectfully doubt whether the larger residue of communications which remain protected can all be described as admissions (again, unless that expression is given an unusually wide meaning). One party's advocate should not be able to subject the

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[10] *Unilever* fn 7 para 23.
[11] *Rush & Tompkins Ltd* fn 6 at 3.
[12] In re *Daintrey, Ex Parte Holt* [1893] 2 QB 116.
[13] *Oceanbulk Shipping & Trading SA v TMT Asia Ltd & Ors* [2010] 4 All ER 1011, [2011] 1 AC 662, [2010] 3 WLR 1424 paras 30, 46 and 47.
[14] Unilever fn 7 para 25.
[15] D Vaver *'Without Prejudice' Communications – Their Admissibility and Effect* Vol 9 (1974) UBCLR 85.

other party to speculative cross-examination on matters disclosed or discussed in without prejudice negotiations simply because those matters do not amount to admissions.'

[58] In our law the public policy foundation of the without prejudice rule was affirmed by this court in *Naidoo*.[16] Trollip JA, referring to the same article by Vaver,[17] said:

' … [O]ne of the first reported uses of the words "without prejudice" in the present sense was by Lord Mansfield in England in the 18th century when he said, apropos of offers to compromise litigation not being regarded as admissions of liability, that:

> "it must be permitted to men 'to buy their peace' without prejudice to them, if the offer did not succeed; and such offers are made to stop litigation without regard to the question whether anything or what is due.'"[18]

Trollip JA went on to say:

'The rationale of the rule is public policy: parties to disputes are to be encouraged to avoid litigation and all the expenses (nowadays very high), delays, hostility, and inconvenience it usually entails, by resolving their differences amicably in full and frank discussions without the fear that, if the negotiations fail, any admissions made by them during such discussions will be used against them in the ensuing litigation. (*Kapeller v Rondalia Versekeringskorporasie van Suid-Afrika Bpk* 1964 (4) SA 722 (T) at 728F-G; Schmidt *Bewysreg* at 420; Hoffman *SA Law of Evidence* 2nd ed at 155; *Vaver* at 94.) Often such admissions are classified or described as being "privileged" communications. That is an accurate but convenient label provided one always remembers that their admissibility or otherwise [is] not necessarily governed by the same considerations as are applicable to privileged communications (*Vaver* at 105; *Hoffman* (*supra* at 155)).'[19]

[59] As in the case of English law, our law recognises that in some instances without prejudice communications may be admitted in evidence. In *Naidoo* it was held that admissions unconnected with or irrelevant to settlement negotiations are not covered by the rule and are admissible in evidence.[20] Trollip JA referred to *Kapeller's* case,[21] in which it was found that according to the parties' intention and

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[16] *Naidoo v Marine & Trade Insurance Co Ltd* 1978 (3) SA 666 (A).
[17] *Vaver* fn 15.
[18] *Naidoo* fn 16 at 674A-B.
[19] *Naidoo* fn 16 at 677C-D.
[20] *Naidoo* fn 16 at 678H-679A.
[21] *Kapeller v Rondalia Versekeringskorporasie van Suid-Afrika Bpk* 1964 (4) SA 722 (T) at 792A-D.

discussions, the admission of liability in question was made independently of and separately from the settlement negotiations and was therefore admissible.

[60] But *Naidoo* makes it clear that our courts must apply the without prejudice rule as expounded by the English courts:

'According to various statutes in South Africa our Courts are in effect enjoined to apply the "without prejudice" rule as developed and expounded by the English Courts. I emphasize this here because, as will presently appear, the judicial and other views expressed in the USA and Commonwealth countries other than the UK appear to differ from the English view on a particular aspect of the rule that is crucial to the present case. If that is so, then undoubtedly the English view must prevail. The reason is that questions relating generally to the admissibility of evidence, which includes "without prejudice" communications, are now governed by s 42 of our Civil Proceedings Evidence Act 25 of 1965.'[22]

[61] In my view the position is no different under the Constitution, by virtue of item 2(1) of Schedule 6 thereto. It reads:

'All law that was in force when the new Constitution took effect, continues in force, subject to-

(a) any amendment or repeal; and

(b) consistency with the new Constitution.'[23]

[62] In *Naidoo*,[24] Trollip JA said that the House of Lords has not yet pronounced authoritatively on the content of the English rule. It has since done so in *Ofulue*,[25] as regards an issue akin to the one in this case: an acknowledgment or admission in a letter written without prejudice with a view to settling proceedings, cannot be relied upon so as to interrupt time running against a claimant under the provisions of the Limitation Act.

[63] The relevant facts in *Ofulue* can be shortly stated. In 1989 Mr and Mrs Ofulue, the registered owners of property, instituted proceedings against Mr Bossert and his daughter in the high court for possession of their property, on the grounds that they

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[22] *Naidoo* fn 16 at 677E-H.
[23] *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC).
[24] *Naidoo* fn 16 at 678E.
[25] *Ofulue & Anor v Bossert* [2009] UKHL16, [2009] 3 All ER 93, [2009] 2 WLR 749.

were the owners, and the Bosserts trespassers. In their defence the Bosserts admitted the Ofulues' title, but denied their right to possession on the basis that the lease of an erstwhile tenant had been assigned to them, and that they had carried out substantial work to the property on the understanding that they would be granted a 14-year lease. In the course of these proceedings, on 14 January 1992 the Bosserts, through their solicitors, wrote a without prejudice letter to the Ofulues' solicitors, stating that the Ofulues were at most entitled to arrear rental for six years, and setting out their assessment of the value of the property and the work carried out to it. The letter concluded with the following sentence: 'In these circumstances, our client would be willing to make an offer of £35 000 to your client for the purchase of the property'. The Ofulues rejected this offer.

[64] Nothing happened as regards the proceedings brought by the Ofulues for nearly ten years and they were automatically stayed under the provisions of the English Civil Procedure Rules. In 2002 the Ofulues applied to lift the automatic stay. Ms Bossert (whose father had passed away) opposed the application, which was refused and the proceedings were struck out. In 2003 the Ofulues issued fresh proceedings against Ms Bossert for possession of the property. Ms Bossert then claimed that she had obtained title to the property by adverse possession, and that she and her father had been in uninterrupted possession, as trespassers, for more than 12 years before the 2003 proceedings had been initiated. To refute this contention, the Ofulues sought to rely inter alia on the Bosserts' acknowledgment of their title during that 12 year period, in the without prejudice letter of 14 January 1992.

[65] Consequently, one of the issues that had to be decided was whether the letter of 14 January 1992, written without prejudice in order to settle the earlier proceedings, could be relied on as an acknowledgment of liability under s 29(2) of the Limitation Act. In terms of that provision, '[i]f a person in possession of the land . . . acknowledges the title of the person to whom the right of action has accrued . . . the right shall be treated as having accrued on and not before the date of the acknowledgement'. It was argued that an acknowledgment which satisfies the requirements of s 29(2) is an exception to the without prejudice rule, and that public policy justified such acknowledgment.

[66] The Court of Appeal decided that the letter could not be relied on as an acknowledgment, because it was written without prejudice with a view to settling the earlier proceedings.

[67] A majority of the House of Lords (4:1) agreed and dismissed the appeal. The majority, on the authority of *Rush & Tompkins* and *Unilever*, concluded that the without prejudice letter of 14 January 1992 could not be invoked as an acknowledgment interrupting time running against a claimant under the provisions of s 29(2) of the Limitation Act. The basic reason was that to do so would undermine the effectiveness of the without prejudice rule as an encouragement to parties to speak freely when negotiating a compromise of their dispute, without having to worry that what they say may be used against them subsequently.

[68] Lord Hope put the matter thus:

'I think that the public policy basis for not allowing anything said in the letter to be used later to her prejudice provides Ms Bossert with all she needs to defeat the argument that the implied admission that it contains can be used as an acknowledgement against her in these proceedings. The essence of it lies in the nature of the protection that is given to parties when they are attempting to negotiate a compromise. It is the ability to speak freely that indicates where the limits of the rule should lie. Far from being mechanistic, the rule is generous in its application. It recognises that unseen dangers may lurk behind things said or written during this period, and it removes the inhibiting effect that this may have in the interests of promoting attempts to achieve a settlement. It is not to be defeated by other considerations of public policy which may emerge later, such as those suggested in this case, that would deny them that protection.'[26]

[69] Lord Rodger was of the opinion that the without prejudice rule is actually a privilege forming part of the general law of evidence and is based on public policy. Whilst the courts have recognised certain exceptions to the privilege when the justice of the case required it, the question was whether creating such an exception in the circumstances would be consistent with the overall policy behind the rule. He concluded that it would not, and that there was a significant danger that the

[26] *Ofulue* fn 24 para 12.

effectiveness of the rule as an encouragement to parties to speak freely, would be undermined if admissions of independent facts were allowed in evidence.

[70] Lord Walker took the view that as a matter of principle, the without prejudice rule should not be restricted unless justice clearly demanded it. He said that the letter of 14 January 1992 was undoubtedly connected with the possession proceedings that the parties were trying to settle, and that 'the recognition of an exception for an acknowledgement under section 29 of the Limitation Act 1980 would whittle down the protection given to the parties to speak freely'.

[71] Lord Neuberger's opinion was to the same effect. He summed up the position as follows:

'I entirely agree with . . . Lord Rodger of Earlsferry . . . that it is open to your Lordships to create further exceptions to the rule, and in particular the sort of admission identified by Lord Hoffman in *Rashid* [2006] 1 WLR 2066, para 13 and by Lord Scott in this case. However, I also agree with him, and indeed with Lord Hope and Lord Walker, that it would be inappropriate to do so, for reasons of legal and practical certainty. To uphold such an exception in this case would run counter to the thrust of the approach of Lord Griffiths in *Rush & Tompkins* [1989] AC 1280 and of Robert Walker LJ in *Unilever* [2001] 1 WLR 2436, and would severely risk hampering the freedom parties should feel when entering into settlement negotiations.'[27]

[72] With those principles in mind I return to the facts of this case. In my view, to allow an admission against interest of the kind sought by KLD, would fly in the face of the underlying rationale for the without prejudice rule, and would create legal and practical uncertainty. Viewed objectively, as it must be,[28] the Letter plainly was a without prejudice offer of compromise to bring an end to the litigation that Empire instituted, and to avert future litigation by KLD. That is precisely why Empire acknowledged that KLD was entitled to commissions. The protection of this acknowledgment is the most important practical effect of the without prejudice rule.

[73] I cannot put the point better than Lord Rodger did in *Ofulue*:[29]

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[27] *Ofulue* fn 24 para 98.
[28] *Naidoo* fn 16 at 675B.
[29] *Ofulue* fn 24 para 39.

'In *Rush & Tompkins* [1989] AC 1280, 1300F-G, he [Lord Griffiths] went out of his way to emphasise that the exception in *Waldridge v Kennison* (1794) 1 Esp 42 "should not be allowed to whittle down the protection given to the parties to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts." In my view there must indeed be a significant danger that allowing in evidence of admissions of "independent facts" would undermine the effectiveness of the rule as an encouragement to parties to speak freely when negotiating a compromise of their dispute. As was said many years ago,

> "If the proper basis of the rule is privilege, is there any logical theory under which the court can, by methods akin to chemistry, analyze a compromise conversation so as to precipitate one element of it as an offer of settlement and the other as an independent statement of fact? Would not the layman entering into a compromise negotiation be shocked if he were informed that certain sentences of his conversation could be used against him and other sentences could not?" '[30]

[74] The necessity of admitting certain facts so as to achieve a compromise and the practical difficulty of admitting in evidence those facts, is illustrated by this very case. What of the remaining content of the Letter, if the acknowledgment of liability for commissions were to become admissible in evidence? Could it exist independently of the acknowledgment? I think not. The acknowledgment has a direct bearing on the subject matter in dispute. It cannot be detached from the offer of compromise in the last paragraph of the Letter. Indeed, the Letter is meaningless without the offer of compromise of which the acknowledgment of liability forms an integral part. It seems to me that on any view, the acknowledgments in paras 2 and 4 of the Letter that KLD was entitled to commissions, as was held in *Naidoo*, '. . . were not merely reasonably incidental to . . . settlement negotiations, they were actually part of them.'; and cannot be said to be unconnected with, or to fall outside the ambit of, the offer of compromise in the Letter.[31] It should therefore not be admissible in evidence against Empire.

[75] It is thus hardly surprising that in *Ofulue*, Lord Neuberger held that to uphold an exception to the rule that an acknowledgment in a without prejudice letter is admissible to stop time running against a claimant under the provisions of the

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[30] J E Tracey *Evidence - Admissibility of Statements of Fact made during Negotiation for Compromise* (1935-1936) 34 Michigan Law Review 524 at 529.
[31] *Naidoo* fn 16 at 680G-681A.

Limitation Act (an exception of the kind sought by KLD), would run counter to the thrust of the approach in *Rush & Tompkins* and *Unilever*, and '. . . would severely risk hampering the freedom parties should feel when entering into settlement negotiations'.[32]

[76] For these reasons, the submission by Mr La Grange, who with Mr Cilliers appeared for KLD, that *Naidoo* is distinguishable because it did not involve the interruption of prescription, is quite wrong.

[77] What all of this shows, is the practical difficulty that arises when dissecting out identifiable admissions from without prejudice communications. But it also shows that to do so, particularly in the circumstances of this case, would render the operation of the without prejudice rule nugatory and meaningless.

[78] Lord Hope made the point more forcefully:

'If converting offers of compromise into admissions of acts prejudicial to the person making them were to be permitted no attempt to compromise a dispute could ever be made.'[33]

[79] So, the Letter was a bona fide attempt to compromise the dispute between Empire and KLD in case number 16844/07 and to avoid the litigation by KLD, which at that stage had not yet commenced. It contains statements and an offer genuinely made with a view to settling disputes. Had that offer of compromise been accepted, that would have brought an end to Empire's case and KLD would not have brought its claim for commissions. As such, the Letter, in my view, falls under both the public policy and implied agreement justifications for the without prejudice rule: parties are encouraged to settle their disputes out of court; and they impliedly agree to the consequences of offering to negotiate without prejudice - that what they say will not be used against them subsequently.[34]

[80] This being so, it cannot be suggested that the Letter constitutes some sort of 'abuse' of the without prejudice rule, to justify an exception of the kind sought by KLD. There has been no 'unambiguous impropriety' on the part of Empire, either

[32] *Ofulue* fn 24 para 98.
[33] *Ofulue* fn 24 para 2.
[34] Hoffmann LJ in *Muller & Anor* fn 8; *Unilever* fn 7 para 18.

generally or in claiming the benefit of the rule and by raising prescription. This, a fortiori in light of the following facts. The period of three years within which a claim must be brought under the Prescription Act, as the court a quo rightly observed, is generous. When the Letter was sent, KLD's claim had not yet prescribed. Its inertia has given rise to the issue in this case. There is nothing to suggest that KLD's delay in bringing its claim was because Empire had acknowledged its liability for commissions. And there was nothing that prevented the parties from agreeing that the running of time would be suspended whilst KLD considered the offer of compromise in the Letter.

[81] In these circumstances, I consider that the without prejudice rule should not be restricted to permit KLD to rely on the Letter as an acknowledgment of liability interrupting prescription.

[82] Any such restriction, in my opinion, would be one of principle and cannot depend on the facts of a particular case.[35] It must mean that whenever liability is acknowledged in a without prejudice offer of compromise, prescription can never be raised as a defence. The consequence of this surely must be the effective exclusion of the without prejudice rule in these circumstances: there would be no point to attempt to compromise a dispute. The only alternative would be an attempt at settling a dispute without full and frank discussions, with parties monitoring every sentence to guard against admissions, and lawyers sitting at their shoulders as minders. In *Bradford*,[36] Lord Hoffmann said that guardedness in without prejudice negotiations would be novel:

'It has frequently been said that the purpose of the rule is to encourage parties engaged in settlement negotiations to express themselves freely and without inhibition. It is well established that the rule applies to any genuine attempt at negotiation, whether or not the communications are expressly said to be without prejudice, and I think it would be most unfortunate if the law introduced a new requirement that the parties should preface anything they said with the standard disclaimer that any admissions of fact were to be taken to be hypothetical and solely for the purposes of the negotiation.'

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[35] *Ofulue* fn 24 para 56.
[36] *Bradford & Bingley Plc v Rashid* [2006] UKHL 37, [2006] 4 All ER 705, [2006] 1 WLR 2066 para 13.

[83] This is quite apart from disputes that will arise when, for example, a party disavows making an admission in the first place, or there is a dispute about the meaning of certain statements, during without prejudice discussions or communications, which a court will have to determine on a balance of probabilities. Such practical difficulties, of course, do not arise if effect is given to the rationale for the without prejudice rule.

[84] The submission on behalf of KLD that the exception that it seeks to the rule is clear, easy to apply, has no side-effects and will not restrict the scope of the rule, is therefore unsustainable.

[85] KLD also submitted, on the authority of *Naidoo*, that the rule may be departed from in exceptional circumstances, which leaves room for the potential recognition of a distinction between an admission and the mere fact that an admission had been made. In other words, an acknowledgement of liability in a without prejudice communication should be admissible not to establish its truth, but as proof of the fact that it was made. Then it was submitted that there is a public policy rationale for the exception in the speech of Lord Walker in *Bradford*,[37] namely that it is in the public interest that a debtor who acknowledges his debt and so induces his creditor not to resort to litigation, should then not be able to claim that the debt is statute barred; and that the exception was in effect recognised by this court in *Hammerle*.[38]

[86] These submissions are likewise unsustainable. The first is based on a misreading of *Naidoo*. As was said in that case, the purpose for which a party wishes to adduce a without prejudice communication is all-important, since it may be admitted in evidence in exceptional circumstances to prove, for example, that it contains a threat, an act of insolvency or other matters that it would be contrary to public policy to protect it from being admissible.[39] No such exceptional circumstances exist in this case. One is again driven back to the principle in *Naidoo* and the English authorities, in particular, *Ofulue*, referred to above: the without prejudice rule applies to any genuine attempt at settlement of a dispute and

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[37] *Bradford* fn 35 para 38.
[38] *Absa Bank Ltd v Hammerle Group* [2015] ZASCA 43; 2015 (5) SA 215 (SCA).
[39] *Naidoo* fn 16.

admissions forming part of such attempt are covered by the rule.[40] In the words of Lord Mance in *Bradford*:[41]

'The existence of a dispute and of an attempt to compromise it are at the heart of the rule whereby evidence may be excluded (or disclosure of material precluded) as "without prejudice".'

[87] The difficulty with the argument that an acknowledgment in a without prejudice communication should be admissible as a fact, rather than for the truth of its contents, was neatly stated by Lord Walker in *Bradford*:

'An acknowledgment of a debt is in its very nature an express admission (just as a payment on account is an implied admission) of the existence of a debt. To say that it does not matter whether the admission is true or false . . . seems to me rather unreal. Few debtors would see any advantage in making a false admission of debt. . . . Just as the law would be complicated and distorted by a rule which protected only "qualified" or "hypothetical" admissions, so it would in my opinion tend to be complicated and distorted by a rule under which one and the same statement was admissible as an acknowledgment for the purposes of section 29(5) of the Limitation Act 1980, but not as an admission against interest. It would not, as I see it, be relying on the distinction between testimonial and non-testimonial use, but on a more elusive distinction between different types of testimonial use.'[42]

[88] Lord Brown made the point even more tersely:

'In acknowledgment cases . . . the statements *are* sought to be adduced in evidence as admissions. Indeed, it is only as admissions that they are relevant as acknowledgments.'[43]

[89] In my opinion *Bradford* does not support the argument that public policy dictates that a debtor who acknowledges his debt in a without prejudice communication, should not be able to claim that the debt is time barred, to the contrary. The issue in *Bradford* was whether admissions by a mortgagor in default that he was liable for the outstanding amount, were admissible in subsequent proceedings by the mortgagee for the arrears. The only question was whether those admissions, as distinct from an offer in negotiations with a view to compromise of a disputed liability, were covered by the without prejudice rule. The House of Lords

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[40] *Naidoo* fn 16 at 680G-681A.
[41] *Bradford* fn 35 para 81.
[42] *Bradford* fn 35 para 42.
[43] *Bradford* fn 35 para 67.

held that they were not. The mortgagor was simply asking for time to pay. Lord Brown said that it was impossible to regard the correspondence in question as constituting 'negotiations genuinely aimed at settlement' or 'an attempt to compromise actual or impending litigation'.[44]

[90] The argument that there is a public policy rationale for the exception does not, in my view, bear scrutiny, for the reasons advanced above. It also ignores the fact that in *Bradford*, Lord Walker agreed with Lord Brown that the policy underlying the without prejudice rule outweighed any countervailing policy reason for lengthening the period of limitation through a written acknowledgment of liability. In fact, Lord Brown said that there are sound policy reasons for having limitation periods in the first place - disputes should be litigated before they become too stale.[45]

[91] Similar policy reasons underlie the Prescription Act. Thus in *Uitenhage Municipality*, Mahomed CJ said that one of the main purposes of the Act is to protect a debtor from old claims against which it cannot effectively defend itself because of the lapse of time.[46] This court has held that the main practical purpose of the Act is to promote certainty in the ordinary affairs of people; and that sources of uncertainty such as whether a valid debt arose or has been discharged, or an assumption by a debtor that no claim would be made, are reduced by imposing a time limit on the existence of a debt. Uncertainty about the existence of a debt is removed when the creditor takes judicial steps to recover the debt. Likewise, there is no uncertainty about a debt when the debtor expressly or tacitly acknowledges liability for it, and for this reason a creditor is not required to interrupt prescription by instituting legal proceedings for the recovery of the debt.[47]

[92] This, however, in my opinion, does not mean that an acknowledgment of liability, *made without prejudice* by a debtor, should excuse the creditor from instituting proceedings to recover the debt within three years, for the following reasons. First, s 14 of the Prescription Act does not permit such a construction, having regard to its wording, the context in which it appears, its purpose and the

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[44] *Bradford* fn 35 para 73.
[45] *Bradford* fn 35, Lord Brown para 75, Lord Walker para 43.
[46] *Uitenhage Municipality v Molloy* 1998 (2) SA 735 (SCA) at 742I-743A.
[47] *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 (1) SA 571 (A) at 578F-579A.

material known to those responsible for its production.[48] If the legislature wanted without prejudice acknowledgements of liability to interrupt prescription, it could have said so. Second, this interpretation is buttressed by the presumption that the legislature does not intend to alter the common law - the without prejudice rule - unless it is clear from the language of the statute that the object is to alter or modify it.[49] Nothing in the Prescription Act suggests such an object. And third, there is simply no need to allow the admission in evidence of a without prejudice acknowledgment of liability to interrupt prescription. As Lord Neuburger observed in *Ofulue*,[50] where a debtor acknowledges liability *and so induces the creditor not to institute proceedings*, the creditor can rely on such acknowledgment as founding an estoppel - one of the exceptions listed in *Unilever*.

[93] KLD's submission that the exception for which it contends was in effect recognised by this court *Hammerle*, can be dealt with briefly. It has no merit. The holding in *Hammerle* that a without prejudice communication containing an act of insolvency is admissible in evidence, is not new.[51] The exception was recognised in *Naidoo*.[52] The public policy grounds for allowing the insolvency exception stand on a wholly different footing from an acknowledgment under a limitation statute, as recognised by Lord Neuberger in *Ofulue*:

'An acknowledgment under section 29 operates only as between the parties to and by whom the acknowledgment is made (and their privies), whereas a person's act of bankruptcy has an impact on all the creditors and potential creditors of that person. Although not mentioned in the judgment of Vaughan Williams J [in *Daintrey*], it appears to me that there is therefore a pretty strong case for saying that the public interest in ensuring that an act of bankruptcy can be referred to and acted on as such, should outweigh the public interest in the without prejudice rule being observed.'[53]

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[48] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.
[49] *Attorney General Transvaal v Botha* 1994 (1) SA 306 (A) at 330I, *Land and Agricultural Development Bank of SA t/a Landbank v Master of the High Court & others* (352/05) [2006] ZASCA 70; [2006] SCA 68 (RSA) (30 May 2006) para 58.
[50] *Ofulue* fn 24 para 100.
[51] *Hammerle* fn 37 para 13.
[52] *Naidoo* fn 16 at 681B-C.
[53] *Ofulue* fn 24 para 102.

Conclusion

[94] In my opinion, the recognition of the exception sought would contradict the public policy and contractual foundations of the without prejudice rule. The exception is at odds with the rationale for the rule as expounded in *Naidoo* and by the English courts. I would therefore dismiss the appeal with costs.

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A Schippers
Acting Judge of Appeal

APPEARANCES

For the Appellant:	A de V La Grange SC (with him C R Cilliers)
Instructed by:	Hannes Pretorius Bock & Bryant, Somerset West c/o MacGregor Stanford Kruger, Cape Town Van Wyk & Preller, Bloemfontein
For the Respondent:	R J Howie
Instructed by:	Matthew Walton & Ass Inc, c/o Harold Gie Attorneys, Cape Town Honey & Partners Inc, Bloemfontein