



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 16611 /2010

(1)	REPORTABLE: YES/NO ✓
(2)	OF INTEREST TO OTHER JUDGES: YES/NO ✓
(3)	REVISED. ✓
04/06/2019	
DATE	SIGNATURE

In the matter between:

PUBLIC INVESTMENT CORPORATION SOC LTD

PLAINTIFF

And

MADIBENG LOCAL MUNICIPALITY

DEFENDANT

JUDGMENT

SARDIWALLA J,

- [1] This is an action for payments of loans advanced to the defendant. The plaintiff instituted proceedings in March 2010 on the zero coupon stock certificates issued by the defendant. The plaintiff's original amounts claimed were amended and the amount claimed is R 162 639 962, 00 together with interest thereon at the rate of 10% per annum with effect from 1 February 2010.

Background

[2] The matter initially came before Jansen, J, wherein the defendant sought its special plea of authority to be adjudicated separately. The authority point was dismissed with punitive costs order against the defendant.

[3] The matter then proceeded before the Supreme Court of Appeal wherein the judgment of Jansen J was upheld and the punitive costs order was confirmed. The court in paragraphs 29, 30, 31, 32 and 33 held the following:-

“[29] In turning to consider the propriety of Jansen J’s costs order it is, unfortunately, necessary to say something about the way in which Madibeng conducted its case. It took the money on offer from the PIC in order to avert a crisis of Madibeng’s own making. It agreed to a means of repayment. When its debts fell due, it made certain payments. Then, after it had reneged and summons was issued against it, it raised the unenforceability of the loans as a defence.

[30] The conduct of Madibeng was beyond the pale. As an organ of state, it is required to act ethically, and has failed dismally to do so in this matter. Litigation, said Harms DP in Cadac (Pty) Ltd v Weber-Stephen Products Co & others, ‘is not a game’; organs of state should act as role models of propriety; and they may not behave in an unconscionable manner.

[31] The unconscionable approach taken by Madibeng appears to be the basis for Jansen J granting a ‘punitive costs order’. By that, I presume she meant an order of costs on the attorney and client scale. While it was within her discretion, on the strength of Madibeng’s unconscionable conduct to award a punitive costs order against it, her order conduces to confusion and cannot be endorsed in its original form.

[32] Jansen J’s order in respect of the merits also requires reconsideration. She ordered that the ‘separate issue regarding the alleged invalidity of the zero coupon certificates is dismissed’. In my view, it would have been more appropriate for a declaratory order to have issued to the effect that the loans were not unenforceable for want of the Administrator’s consent. Thus, despite the appeal failing, both orders cannot stand. They must be set aside and replaced with the orders set out below.

[33] In the result:

1 The order of the court below is set aside and substituted with the following order:

‘1 It is declared that the loans raised by the defendant from the plaintiff are not unenforceable for want of compliance with s 52(2) of the Local Government Ordinance 17 of 1939.

2 The defendant is ordered to pay the plaintiff’s costs on an attorney and client scale, such costs to include the costs of two counsel.’

The Pleadings

[4] In its plea, the defendant raised a special plea of prescription by alleging that the plaintiffs' claim has prescribed. The defendant pleads that:-

- On the hypothesis that the plaintiff had a valid claim against the defendant, and that the defendant consequently owed the plaintiff a valid debt, the plaintiff's claim has been extinguished by prescription in that ~
 - the plaintiff's claim arising from BR25 became due and payable on 30 June 2003;
 - the plaintiff's claim arising from BR20 became due and payable on 30 November 2003;
 - the plaintiff's claim arising from BR26 became due and payable on 30 November 2003;
 - the plaintiff's aforesaid claims are debts as contemplated in the Prescription Act;
 - by no later than at least 1 December 2006 being a period of more than three (3) years after the date on which the whole of the plaintiff's cause of action and claims arose, the plaintiff had knowledge of the defendant's identity and of the facts from which the plaintiff's alleged claims arose, alternatively, the plaintiff could by exercising reasonable care have acquired knowledge of the defendant's identity and of the facts from which its alleged claims arose;
 - in terms of section 11(d) of the Prescription Act, the period of extinctive prescription in respect of the defendant's alleged debt to the plaintiff is a period of three (3) years;
 - the plaintiff issued and served its summons against the defendant in March 2010 which is more than three (3) years after the dates on which its claims allegedly arose or from the dates on which the debts became due;
 - the defendant did not, at any time prior to the institution of the plaintiff's action, expressly or tacitly acknowledge (to the plaintiff itself) liability in the whole amount claimed in these proceedings (nor for that matter in respect of the interest component) and in any event, none of the acts listed in subparagraph 10.2.2 of the plaintiff's particulars of claim amount to an

express or tacit acknowledgment of liability in the whole of the amount claimed as contemplated in section 14 of the Prescription Act; and

- the payments referred to in subparagraphs 4.3, 5.3 and 6.3 of the plaintiff's particulars of claim do not amount to an express or tacit acknowledgment of liability of the whole of the amount claimed as contemplated in section 14 of the Prescription Act and did not revive the plaintiff's debts.

[5] In its replication the plaintiff pleads that in terms of s 14 of the Prescription Act 68 of 1969, the Defendant made numerous part payments thereby acknowledging liability of the debts, which had the effect of interrupting prescription prior to and after the issuing of summons against it. Further in the alternative, the matter has not prescribed in terms of section 11(b) of the Prescription Act 68 of 1969, which provides that the period of prescription of debts shall be fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question. Therefore, prescription was timeously interrupted in terms of section 15 of the Prescription Act 68 of 1969.

[6] It was agreed again between the parties that the issue of prescription would be adjudicated separately and that the defendant bears the onus in relation to the special plea.

Plaintiffs' version

[7] The plaintiff's submits that the issue of prescription has been dismissed by the oral evidence of M Leon Smit which remains uncontested. It contends that the aspect pertaining to the issue of amortization was never pleaded by the defendant in its original plea and that the defendant raised this aspect only from the bar during cross-examination without leading any evidence. Further that the defendant's acknowledgement of its liability through various means of correspondence had the effect of interrupting any prescription that may have commenced even on the alleged amortization dates.

Defendants version

[8] The Defendants raised a special plea of prescription alleging that the claim relating to

the zero coupon certificates had prescribed in terms of section 11 of the Prescription Act, 1969 in that a period of more than 3 years has passed since the payments were made.

- [9] The defendants submit that the aforementioned approach fits in with the provisions of section 12(1) of the Prescription Act, 1969 which reads as follows:

"...prescription shall commence to run as soon as the debt is due."

- [10] The defendants allege that the cause of action originates from the half-yearly amortization dates and prescription commenced to run the day after each of the payments was due which by its version has subsequently prescribed and that any acknowledgement of liability made without prejudice by the defendant during settlement negotiations does not resuscitate the debt.

- [11] It is by agreement between the parties that the issue of prescription is only issue therefore to be determined by this Court and more specifically:

- (a) When did the claims arise,
- (b) When did prescription begin to run, and
- (c) Whether prescription was interrupted by the defendants acknowledgment of liability?

Prescription

- [12] Section 12 of the Prescription Act 68 of 1969 states that;

"12 When prescription begins to run

(1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.

(2) ..

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

Interruption of prescription by acknowledgment of liability

- [13] The Section 14 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.'*

Judicial Interruption of Prescription

[14] The Section 15 reads:

"(1) The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.

(2) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall apse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside."

[15] The term "due" is not defined in the Prescription Act. Its meaning was recently considered by the SCA in *Miracle Mile*¹ where it was held that; *"In terms of the [Prescription] Act, a debt must be immediately enforceable before a claim in respect of it can arise. In the normal course of events, a debt is due when it is claimable by the creditor, and as the corollary thereof, is payable by the debtor. Thus, in [Deloitte Haskins] at 532G-H, the court held that for prescription to commence running,*

'there has to be a debt immediately claimable by the creditor or, stated in another way, there has to be a debt in respect of which the debtor is under an obligation to perform immediately'.

(See also The Master v I L Back & Co Ltd 1983 (1) SA 986 (A) at 1004F-H). In Truter v Deysel 2006 (4) SA 168 (SCA) ([2006] ZASCA 16) para 16, Van Heerden JA said that a debt is due when the creditor acquires a complete cause of action for the recovery of the debt, i.e. when the entire set of facts which a creditor must prove in order to succeed with his or her claim against the debtor is in place".²

¹ *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd 2017 (1) SA 187 SCA*

² *Standard Bank of South Africa Ltd v Miracle Mile Investments supra at para 24.*

- [15] A fundamental principle of prescription, which is much clearer under the current Prescription Act, is that it will begin to run only when the creditor is in a position to enforce his right in law, not necessarily when that right arises.³
- [16] In applying the principle held in *Miracle Mile* that a debt is due when it is immediately claimable by the creditor and immediately payable by the debtor, the debt became claimable by the plaintiff on each of the amortization dates in which the defendant was required to reduce the loan as correctly averred by the defendant. However the complete cause of action was only established after the redemption date of each certificate. This principle was also confirmed in *Truter*⁴ where the SCA held that, for the purpose of prescription, a debt is due when the creditor acquires a complete cause of action to approach a court to recover the debt. Although the right to reclaim the amounts arose the day after each payment was due, in absence of any knowledge that the defendant would not extinguish the debt by complete payment of the yield of stock on the redemption date of each certificate it would not make litigious sense to institute proceedings until the redemption date. Therefore the plaintiff's rights in law only became enforceable on 1 December 2006 and 1 July 2006 respectively.
- [17] Considering the above prescription would not have commenced as alleged by the defendants, the day after each payment was made, but would commence from the instance the plaintiffs' became aware that the debt was due which was after the redemption date, the plaintiffs' claim would have only then have prescribed on 1 December 2006 and 1 July 2006.

Was Prescription interrupted?

- [18] It is well established in South African Law that without prejudice statements made by one party to another, in contemplation of settlement, are inadmissible as evidence in later proceedings, should such negotiations fail. The public policy doctrine underlying this rule is to encourage parties to enter into open settlement discussions with one another, without fear that should the negotiations fail, admissions, including admissions of liability, made during the course of those discussions, will be used

³ See Lubbe "Die Aanvang van Verjaring waar die Skuldeiser oor die Opeisbaarheid van die Skuld kan Beskik" (1988) 51 THRHR 135.

⁴ *Truter v Deyssel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA) at para 16.

against them in later litigation. Until recently our courts recognised limited exceptional circumstances, in terms of which evidence disclosed in without prejudice negotiations were admissible. These exceptions include: acts of insolvency, fraudulent misrepresentations, threats and limited instances of estoppel.

- [19] The South African Supreme Court of Appeal has created a new exception to the without prejudice rule. In *KLD Residential v Empire Earth Investments*⁵, the court held that admissions of liability, made during without prejudice negotiations, are now admissible for the purposes of interrupting the prescription period in terms of section 14 of the Prescription Act, 1969.
- [20] In an action against the respondent, Empire Earth Investments 17 (Pty) Ltd alleged in its particulars of claim that it had been given a written mandate to market erven in a new property development and to receive commission on the resultant sales. 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 its particulars of claim. It was entitled, it said, to R2,147,000 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. Empire Earth raised a special plea in reply to the particulars of claim, alleging that, other than 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. KLD replicated to the special plea, alleging that Empire Earth wrote to KLD in July 2011 acknowledging that it owed commissions in the sum of R2,105,960 and that prescription had begun to run afresh from the date of that letter of acknowledgement. KLD accepted that the letter of acknowledgement was without prejudice to the rights of the parties in the course of settlement negotiations. The court stated that 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 court also emphasised the vital role time limits play in bringing certainty and stability to social and legal affairs and maintaining the quality of adjudication. Without prescription periods, legal disputes would have the

⁵ (1135/2016) [2017] ZASCA 98

potential to be drawn out for indefinite periods of time bringing about prolonged uncertainty to the parties to the dispute.

- [21] In determining whether an exception to the without prejudice rule was possible, the court referred to the case of *Absa Bank v. Hammerle Group 2015 (5) SA 215 (SCA)*, where, 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”. Mbha J found that the contents of the letter not only constituted an unequivocal acknowledgment of indebtedness but also showed that Hammerle was unable to pay its debts and was commercially insolvent. The court declared that any admission of such insolvency, whether made in confidence or otherwise, cannot be considered privileged.
- [22] In establishing the latest exception, the majority judgment balanced the policy considerations underlying section 14 of the Prescription Act; namely, to provide certainty to a debtor in circumstances where a creditor has been inert, against the principles underlying the without prejudice rule and reasoned that, “*the exception allows for... the prevention of abuse of the without prejudice rule, and the protection of a creditor and that recognising such an exception would properly serve the policy interests of section 14 of the Prescription Act and the without prejudice rule.*”
- [23] The SCA accordingly held that “*Where acknowledgments of liability are made such that, by virtue of section 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.*” KLD’s appeal was therefore upheld with costs and the special plea of prescription was dismissed.

- [24] It is common cause that there were various correspondences between the parties regarding the amounts due to the plaintiff by the defendant. It is noteworthy that the defendant in its numerous requests for balance certificates following the loans, did not at any stage dispute the amounts claimed by the plaintiff. In fact the balance certificates were requested by the defendant in order to compile its financial statements for each financial year.
- [25] In a letter dated 15 May 2003 the Municipal Manager stated that *"My Council has now resorted to the State and the North West Province in a dire plight to assist us as we simply do not have the necessary resources to repay your loan at this stage"*. The manager further went on to state that *"I re-iterate that you must please not see our request as a ploy to shirk Madibeng's liability, but rather a serious action to find a solution for the whole matter"*. In applying the principle of *Absa Bank* this was an unequivocal acknowledgment and admission of liability by the defendant of its indebtedness and insolvency and cannot be considered privileged for the purposes of prescription.
- [26] It is alleged by the defendant that the plaintiff's claim in respect of the above-mentioned amounts prescribed on the zero-coupon certificates and that the parties entered into a new agreement regarding the debt whereby the loan was restructured after various Council resolutions. Turning to this I refer to the numerous correspondences between the parties about the submission of these proposals and must take cognisance of the fact that they indicated that deliberations were on-going and active attempts were made to resolve the defendants financial issues. However there is no evidence before me that the matter was indeed resolved and a new agreement restructuring the loan was agreed upon. The defendant led no evidence in this regard. The plaintiff however led the evidence of Mr Leon Smit whose testimony confirmed that loan agreements were concluded between the parties through monies advanced to the defendant by zero-coupon certificates which were repayable upon the redemption dates of each certificate. This evidence was not rebutted by the defendant. Further that although the defendant alleges that the debts prescribed at the end of on 1 December 2006, there are payments made by the defendant during and after the prescribed period and even after proceedings were instituted against the defendant. The defendant sought to rely on the new restructured loan agreement to justify the payments which on the

face of it is clear evidence of the defendant's admission of its liability to the plaintiff. I am therefore satisfied that an exception as held in KLD exists and that such payments are acknowledgments of the defendant's liability in terms of Section 14 of the Prescription Act and therefore interrupted the running of prescription. I am satisfied that each payment was a separate admission of liability that interrupted prescription on each of the payment dates and that prescription began to run afresh each time such admission of liability was made. The plaintiff instituted action in March 2010 and the last payment (admission of liability) was made on 4 July 2011. The last payment prior to the institution of proceedings was made on 22 February 2008 for an amount of R2, 100 000.00. There can be no doubt that this acknowledgement by the defendant created a certainty that the debt was still owed and that the exception contended for is well-founded. As I have already found that prescription was interrupted each time a payment was made, the claim would only have prescribed on 22 February 2011. The plaintiff accordingly instituted proceedings in March 2010 timeously.

[27] I hereby make the following findings:

1. The date of prescription began to run on each of the redemption dates when a complete cause of action by the plaintiff arose;
2. That the payments by the defendants are an admission of liability which interrupted the running of prescription on each date; and
3. The prescription date was 22 February 2011 and the claim has accordingly not prescribed.

Order

1. **The special plea is dismissed with costs including the costs of two counsel.**



C M SARDIWALLA

APPEARANCES

Date of hearing	:	12 February 2019
Date of judgment	:	04 June 2019
Plaintiff's Counsel	:	Adv.: P.L Moekoena SC & Adv.: P Khoza
Plaintiff's Attorneys	:	Werkmans Attorneys
Defendant's Counsel	:	Adv.: K. Tsatsawane SC & Adv.: X Mofokeng
Defendant's Attorneys	:	Gildenhuis Lessing Malatji Inc