REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 7470/2022

REPORTABLE
OF INTEREST TO OTHER JUDGES
REVISED
DATE:

In the matter between:

MAKHURA MAHLOMOLA **PLAINTIFF**

And

HENLEY AIR (PTY) LTD **DEFENDANT**

JUDGEMENT

KGANYAGO J

[1] The plaintiff has instituted an action against the defendant claiming damages arising out of an incident that occurred on 6th October 2015 when the plaintiff was injured by the defendant's helicopter that collided with wires and crashed. As at the date of the incident the plaintiff was still a minor, and she attained the age of majority when she turned 18 years on 8th February 2019. The plaintiff has served the summons on the defendant 20th July 2022.

[2] The defendant had defended the plaintiff's action. In pleading to the plaintiff's particulars of claim, the defendant had also raised a special plea in which it had pleaded that the plaintiff's claim had prescribed on 8th February 2020, which is one year after the plaintiff has attained the age of majority. At the commencement of the

trial the parties agreed to separate the issue of special plea of prescription from other issues for prior determination in terms of Rule 33(4) of the Uniform Rules of Court (the Rules).

[3] Both parties have led oral evidence. When the plaintiff was leading one of her witness, it sought to introduce a without prejudice letter dated 8th December 2020 in which the defendant had made an offer which was not acceptable to the plaintiff. The purpose for the plaintiff to introduce the without prejudice letter, was to argue that it had interrupted prescription.

[4] The defendant had objected to the introduction of its without prejudice letter. The basis of their objection is that the plaintiff tries to prove the interruption of prescription through section 14 of the Prescription Act 68 of 1969 (Act). That the issue of interruption of prescription must be alleged and proved by the plaintiff in the pleadings, and the onus rest with the plaintiff. The plaintiff has not alleged the interruption of prescription in her pleadings. Because the plaintiff has failed to allege the interruption of prescription in her pleadings, she cannot introduce the evidence on that issue, as this will cause prejudice to the defendant. Pleadings are supposed to put the defendant on the terms of the case it had to meet at trial.

[5] For the first time the defendant had wind that the plaintiff was going to raise the issue of interruption of prescription was a week before the trial date when the plaintiff filed her heads of argument which was also filed late. The plaintiff cannot lead evidence of a case not pleaded. The plaintiff has conceded that the 8th December 2020 letter does not state that the defendant admit liability. Therefore, the plaintiff does not fall within the narrow exception as stated in *KLD Residential CC v Empire Earth Investment 17 (Pty) Ltd 2017 (6) SA 55 (SCA)*. In the KLD case there was acknowledgment of liability.

[6] The plaintiff's counsel has submitted that the defendant in their 8th December 2020 letter did not state that they are liable, but in that letter, they undertook to compensate the plaintiff R150 000.00. According to the plaintiff this amount to tacit acknowledgment of liability. Section 17(2) of the Prescription Act provides that a party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings, provided that a court may allow prescription to be raised at any stage of the proceedings. The defendant had *ex facie* seen that there was prescription and should have raised an exception, and the plaintiff relied on the case of *Jugwanth v MTN [2021] ZASCA 114 (9 September 2021).* The plaintiff had further submitted that where prescription can be spotted from the particulars of claim the correct approach is to raise an exception. That they did not file a replication as it was not appropriate for the defendant to have raised a special plea, and the defendant's special plea will not succeed.

[7] There are two issues which this court is required to determine. The first issue is whether the without prejudice settlement proposal in the defendant's letter dated 8th December 2020 in which a draft settlement agreement was also attached to the letter should as an exception be admitted in evidence for the limited purpose of showing that the period of prescription has been interrupted, which in turn begun to run afresh. The second issue is whether the defendant should have raised the defence of prescription by way of a special plea or exception.

[8] The defence of prescription is a technical defence which does not go into the merits of the case, and can dispose the matter without the merits been dealt with. It is a defence which in terms of section 17(1) of the Act a court shall not of its own motion take notice of prescription. The party who invokes prescription must in terms of section 17(2) of the Act file a relevant document in the proceedings at any stage of

the proceedings. The question is whether this document should be in the form of a special plea or exception.

[9] In terms of rule 23(1) of the Rules, a party intending to take an exception must do so within 10 days of receipt of the pleading. It is trite that an exception goes to the root of the entire claim or defence. In the Jugwanth case at paragraph 12 in relation to an exception Gorven JA said:

"The true test remains to determine whether the particulars of claim sustain a cause of action. It is important to bear in mind that Uniform Rule 23(4) does not, in the ordinary course, envisage further pleading, including a replication that might be a retort to a plea of prescription. In trial proceedings prescription is conventionally raised by way of a special plea to which there might be a replication. Exceptions are decided on the pleadings as they stand at the time that the exception is taken".

[10] When a party raises the defence of prescription, he or she does not challenge the particulars of claim that they did not sustain a cause of action, but raises a technical issue which had the potential to dispose the whole matter or partially without going into the merits of the case. Even if it appears *ex facie* that the claim has prescribed, that does not mean that the particulars of claim will not sustain a cause of action. There is a cause of action to be sustained, but that cause of action might have prescribed. Hence the other party may replicate setting out the basis on which the claim might have not prescribed, whilst in an exception there is no provision to replicate, but the exception is decided on the pleadings as they stand. It will therefore be a party's choice whether to raise prescription by way of special plea or exception depending on the facts of the case. In the case at hand the defendant cannot be faulted for having raised their defence of prescription by way of a special plea.

[11] Turning to the without prejudice letter, on 23rd November 2020 the then plaintiff's attorneys had written to the defendant's attorneys proposing that the defendant admits liability of the plaintiff's claim and that they deal with the issue of quantum later. In that letter the plaintiff shows that the parties have exchanged a series of emails before that letter. The plaintiff's attorneys in that letter have threatened to institute a civil claim against the defendant should the defendant denies liability of the plaintiff's claim.

[12] That led to the defendant writing the without prejudice letter dated 8th December 2020 which is currently the subject of an objection. In that letter the defendant's attorneys have given a long background of the matter, and thereafter titled a certain paragraph *"Without prejudice settlement proposal"* and it read as follows:

"18. Notwithstanding the above and without any admission of liability to your client as demanded or at all, our client is amenable to reaching an expeditious and cost-effective resolution of the claim. Accordingly, our client tenders settlement on the following terms:

18.1 Our client will pay R150 000.00 (settlement amount) to your client in full and final settlement of claim without any admission of liability. Payment of the settlement amount will be in settlement of any and all claims, damages, and causes of action which your client has now or may have in the future against our client arising out of the incident.

18.2 Your client will sign the attached settlement agreement. Your client must sign the agreement personally.

18.3 Each party will be liable for its own legal costs incurred in respect of the matter.

18.4 Neither the payment of the settlement amount nor the execution of the settlement agreement constitutes or should be construed as an admission of any liability whatsoever by either party.

19. Please provide us with the signed agreement by no later than close of business on 24th December 2020, failing which the offer will lapse.

20. We further remind you that without prejudice settlement negotiations are inadmissible in legal proceedings, save as to extent of costs. Should your client institute legal proceedings and the proved quantum of her claim is ultimately not materially greater than that offered herein, we will bring this settlement offer to the court's attention and seek the appropriate costs order against your client.

21. All our client's rights remain reserved".

[13] As a general rule without prejudice letters are inadmissible as evidence, as parties are encouraged to settle their disputes on their own without been involved in costly and protracted litigation. Parties must be able to negotiate freely and good faith without the fear that the admissions they made during settlement negotiations might be used against them should the negotiations fail. However, for public policy there are exceptions to the rule. The generally accepted exception is where the without prejudice offer will be admissible in evidence as an act of insolvency. The KLD case above had added another exception, and that is where an acknowledgment of liability is made such that, by virtue of section 14 of the Prescription Act, they would interrupt the running of prescription.

[14] In the KLD case Lewis JA at paragraph 39 writing for the majority said:

"I consider that the exception is well contended 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 purposes 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 the creditor. The admission remains protected insofar as proving the existence and quantum of the debt concerned. It is not, as Empire Earth suggested in argument, a question of the without prejudice rule trumping prescription. It is a question of recognising that both s 14 of the Prescription Act and the without prejudice rule protect policy interest, and recognising an exception so that both interests are properly served".

[15] From the letter of the plaintiff's attorneys dated 23rd November 2020 there were prior emails communication which the plaintiff wanted the defendant to admit liability of the plaintiff's claim, but the defendant was not doing that. The plaintiff in their letter of the 23rd November was still requesting the defendant to admit liability and that they deal with quantum later. In that letter the defendant is requested to either admit or deny liability. In the event of denial of liability that will enable the plaintiff to proceed with its civil claim against the defendant. The defendant instead of unequivocal denial or admission of liability, came up with the settlement offer and also in their letter attached a draft of the deed of settlement. That had enticed the plaintiff to continue negotiating. It would have been undesirable for the plaintiff to negotiate and at the same time proceed with the civil claim against the defendant. Had the plaintiff done so, she would have been accused of negotiating in bad faith and also defeating the purpose of minimizing costs.

[16] On receipt of the defendant's offer, the plaintiff's attorney per their letter dated 9th December 2020 were pleased with the new developments and even wrote a letter to the defendant stating that there was a high possibility that the claim will be settled out of court. The negotiations continued and the parties agreed to appoint an expert who is an orthopaedic surgeon to conduct a medico-legal assessment of the plaintiff of which the parties will equally share the costs of the expert. The defendant proceeded to obtain the quotation of the two experts. The negotiations continued and the plaintiff was assessed during May 2021. Throughout their correspondence, the defendant was stating that they were engaging in that process for the purposes of exploring a commercial settlement of the plaintiff's claim and that the process they were engaging in did not constitute an admission of liability. Negotiations continued up June 2022 when the defendant informed the plaintiff per their letter dated 21st June 2022 that all the plaintiff's claim against the defendant had prescribed on 8th February 2022. That led to the plaintiff instituting the civil claim against the defendant.

[17] Even though the defendant had throughout the negotiations stated that it was not admitting liability, the implied impression they have created was that they were willing to settle. Firstly, when the defendant was requested to either admit or deny liability, it came up with a settlement proposal which enticed the plaintiff to continue with settlement negotiations. Secondly, to show that the parties were serious about settling their dispute out of court, they agreed to take the plaintiff for medical assessment in order to settle the claim. Normally, the medico-legal reports assist in determination of quantum. The parties will only deal with quantum once the issue of liability has been disposed. Even though the defendant had throughout that process consistently stated that the settlement negotiations were without admission of

liability, their action was impliedly telling the opposite. This is one example where the abuse of without prejudice rule should be prevented. The defendant had willingly been negotiating with the plaintiff for more a year, and giving hope to the plaintiff that the claim will be settled, but suddenly tells the plaintiff that her claim had prescribed.

[18] The plaintiff at the time of instituting the action against the defendant was aware of the without prejudice letter and having all the facts in relation to her delaying in instituting the action against the defendant. The plaintiff in her particulars of claim did not plead that the without prejudice offer had interrupted prescription. What she had pleaded in her particulars of claim in relation to prescription was that at the time of the crash the plaintiff was still a minor, prescription had paused and started running when the plaintiff reached the age of majority. Even after been served with a plea of prescription, the plaintiff has failed to file a replication setting out facts which according to her will render the matter not to have prescribed. The issue that the defendant's without prejudice offer had interrupted prescription was raised for the first in her heads of arguments.

[19] Rule 18(4) provides that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply. In *Phakula v Minister of Safety and Security*[1] Mocumie JA said:

"It is trite that the whole purpose of pleadings is to define the issues between the parties, to confine the evidence of the trial to the matters relevant to those issues, and ensure that the trial may proceed to judgment without either party being disadvantaged by matters not fairly ascertainable from the pleadings. In other words,

[1] [2020] ZASCA 109 (23 September 2020) at para 12

a party should know in advance, in broad outline, the case they will have to meet at the trial".

[20] The material facts upon which the pleader relies upon for his or her claim should appear in the pleadings in a clear and concise manner, and not for the first time in the heads of argument. By admitting the defendant's letter of without prejudice offer of the 20th December 2020 in evidence despite the plaintiff having failed to plead interruption of prescription by the defendant's offer in her pleadings to enable the defendant to reply, will be disadvantaging and prejudicing the defendant. The defendant's special plea is based only the issue of prescription allegedly being paused when the plaintiff was still a minor. There is therefore merit on the defendant's objection.

[21] In the result the following ruling is made:

21.1 The defendant's objection in its without prejudice letter of 20th December 2020 being admitted in evidence is upheld.

21.2 Costs will be costs in the main action.

KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the plaintiff	**: Moitsi MA**
Instructed by	**: Moitsu & Associates**
Counsel for the defendant	**: Adv Dafel M**
Instructed by	**: Bowman Gilfillan Inc**

Date heard : **22nd February 2024**

Electronically circulated on : **2nd April 2024**