REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 29002/2010

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

17/10/2014
DATE

SIGNATURE

In the matter between:

BOWER CARDONA INCORPORATED Plaintiff

and

CASH CONVERTERS SOUTHERN AFRICA (PTY) LTD Defendant

J U D G M E N T

MASHILE, J:

[1] This is a stated case by which the parties request this court to establish whether or not the running of prescription against the claim of the Plaintiff was interrupted as envisaged in Section 14 of the Prescription Act No. 68 of 1969

("hereinafter referred to as 'the Prescription Act'"). In addition, the parties also require the court to make a pronouncement on whether or not certain letters exchanged between them constitute the outcome of settlement negotiations and therefore privileged.

[2] A brief background of the facts in this matter is that:

2.1 During the period between April 2003 and November 2006, the Plaintiff rendered various legal services to the Defendant;

2.2 The cause of action upon which the Plaintiff relies arose in April 2003 and November 2006 during which it provided the legal services;

2.3 The Plaintiff's claim constitutes a debt as defined in the Prescription Act;

2.4 The sheriff served the summons upon the Defendant on 16 August 2010;

2.5 The service of the summons took place outside of the three year period from November 2006.

[3] The Defendant has raised a special plea to the Plaintiff's claim. It pleaded that the claim has prescribed in terms of section 11(d) of the

Prescription Act. In reply, the Plaintiff has contended that the Defendant has in different letters and/or e-mail messages expressly or tacitly acknowledged its indebtedness to the Plaintiff albeit that the extent of its indebtedness remains in contest.

[4] Accordingly, the Plaintiff asserts that the Defendant's acknowledgement of indebtedness to it has interrupted the running of prescription as contemplated in Section 14 of the Prescription Act. The Plaintiff's claim has, notwithstanding that the action was instituted well outside of the three year period, not prescribed.

[5] The Defendant contends that the Plaintiff's claim consists of several different individual claims. The acknowledgments of debt upon which the Plaintiff relies are the upshot of settlement negotiations held in confidence between the parties. They are as such immuned from discovery and admission into evidence. The Plaintiff denies this and in the alternative argues that such privilege, if was ever present at all, was waived by the Defendant in its affidavit resisting summary judgment in this matter.

[6] Against that background, the court is called upon to determine whether or not the running of prescription was interrupted as envisioned in Section 14 of the Prescription Act. Less significantly, whether or not the Defendant's assorted acknowledgments of debt are the product of legitimate settlement negotiations whose objective was to endeavour to dispose of the matter.

[7] I turn to consider Section 14 of the Prescription Act, which stipulates:

> "*14. Interruption of prescription by acknowledgment of a liability:*
>
> *14.1 The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.*
>
> *14.2 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.*"

[8] In *Mothupi v Road Accident Fund* 2000 (4) SA 38 (SCA) Nienaber JA quoted with approval the following passage from *Petzer v Radford (Pty) Ltd* 1953 (4) SA 314 (N) at 317 and 318 where Broome J stated:

> "*To interrupt prescription an acknowledgment by the debtor must amount to an admission that the debt is in existence and that he is liable therefor.*"

[9] It is apparent that the acknowledgments of debt of the Defendant amount to no more than a concession that it owes money to the Plaintiff the precise figure of which remains questionable. One needs to bear in mind that throughout the parties' dealing with each other on this matter, especially if the acknowledgments of debt to which the Plaintiff has referred this court have anything to do with it, the Defendant has at every turn requested the Plaintiff to provide a reconciliation of its account. That reconciliation was never forthcoming throughout the dispute of the parties.

[10] The court in *Mothupi (supra)* shed light on the meaning of the passage

from the *Petzer* case *(supra)* when it stated that the admission must cover every element of the debt and should exclude any defence as to its existence. This court must therefore ask itself whether or not the acknowledgments of debt exclude any other defence to the claim. The answer is without any doubt that it does not. There is a clear acknowledgment from the Defendant that some amount of money is due but how much that money is, stays unresolved. See the *Mothupi* case *(supra)* at Paragraph 38.

[11] The aforegoing must mean that even though the Defendant might have acknowledged liability, the extent of it is still to be proved by the Plaintiff. The Plaintiff has so far failed to discharge that burden insofar as it has since 2007 not provided the Defendant with a reconciled statement of account.

[12] The Defendant's acknowledgment of debt does not therefore exclude every possible defence to the Plaintiff's claim. The parties are presently before this court precisely because the Defendant challenges the amount it is said is due, owing and payable by it to the Plaintiff. Applying the test that was laid down in *Mothupi (supra)*, Prescription has therefore run as provided in Section 11(d) of the Prescription Act, which provides that:

> "*(a) save where an Act of Parliament provides otherwise, three years in respect of any other debt.*"

[13] In view of my finding that prescription was not interrupted in terms of

Section 14 of the Prescription Act, it is unnecessary to decide when it began to run on each claim.

[14] This represents an opportune moment to turn to the question of privilege of the acknowledgments of debt. One of the general rules pertaining to privilege is that statements that have been made during the course of *bona fide* endeavour to settle a dispute are immuned from disclosure unless the parties agree otherwise. See in this regard Coetzee v Union Government 1941 TPD 1

[15] The Plaintiff's contention in this regard is that the Defendant cannot claim immunity for the correspondence dated 28 November 2007, 13 March, 17 March, 27 May, 29 May and 30 September 2008 as it waived its right to do so by disclosing in its affidavit resisting summary judgment that it made a tender to pay R50 000.00 in full and final settlement of all claims against it to the Plaintiff during negotiations aimed at disposing of the dispute.

[16] This calls for examination of what constitutes waiver. In the *Mothupi case (supra)* Nienaber JA said the following about waiver:

> *"Waiver is first and foremost a matter of intention. Whether it is the waiver of a right or a remedy, a privilege or power, an interest or benefit, and whether in unilateral or bilateral form, the starting point invariably is the will of the party said to have waived it."*

[17] The Defendant has not responded directly to the Plaintiff's allegation

that it has waived its right to claim privilege. That aside, there is little doubt that the Defendant has by implication waived its right to claim privilege for the correspondence referred to above by disclosing the the tender or offer that it made to the Plaintiff. The letters are therefore vulnerable to disclosure and must be admitted into evidence.

[18] That is not the end of the matter though. The Defendant has correctly argued that even if they are admitted into evidence, they should be regarded as being insufficient for purposes of acknowledgment of liability as envisaged in Section 14 of the Prescription Act.

[19] I have to a large extent discussed this above but perhaps it is worth repeating myself. The statements no doubt acknowledge indebtedness to the Plaintiff on the condition that the Plaintiff is able to reconcile the amount.

[20] The Plaintiff has failed to reconcile the amount and to date the dispute on quantum remains. The admission by the Defendant is not unequivocal such that it excludes a possible defence by the Defendant.

[21] In the premises, I find that:

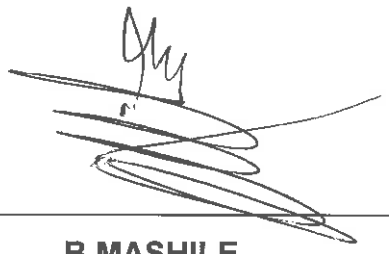
21.1 The admission of indebtedness by the Defendant does not cover every element of the debt and does not exclude any defence as to its existence;

21.2 The statements are not privileged and are therefore vulnerable to disclosure; and

21.3 The statements do not constitute an unequivocal admission of liability as contemplated by Section 14 of the Prescription Act.

[22] In the circumstances I make the following order:

1. The special plea is upheld with costs.



B MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 26 August 2014

Date of Judgment: 17 October 2014

Applicants Counsel: Adv. H P Van nieuwenhuizen
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Instructed by Faber Goertz Incorporated