IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No 2948/2011

In the matter between:

OLD MUTUAL LIFE ASSURANCE COMPANY

(SOUTH AFRICA) LIMITED Plaintiff

(Registration number: 1999/0046543/06)

and

REVERE PROPERTIES (PTY) LIMITED Defendant

(Registration number: 2005/021744/07)

JUDGMENT DELIVERED ON 06 MAY 2015

RILEY AJ:

[1] This matter comes before me for hearing in terms of paragraph 1.1 of the Minutes of the second Pre-trial Conference held on 11 February 2014 in terms of which the parties agreed that the issue raised by the defendant in its special plea, i.e. whether plaintiff's claim against defendant has prescribed, should be tried separately and shall proceed to trial before any of the other issues in the matter. It was further agreed that in the event of the special plea failing, all the remaining issues would be determined at the trial of the matter.

[2] The parties further agreed that:

2.1 Save in the event of the issue prescription being heard separately that Plaintiff will bear the duty to begin in respect of the factual issues in its claim against defendant, save for any factual issues relating to the alleged impossibility of performance pleaded by defendant in paragraph 4 of its plea;

2.2 Defendant bears the onus in respect of the factual issues in its plea of prescription and (if this is to be determined separately) it will bear the duty to begin;

2.3 Plaintiff and defendant shall compile a bundle of documents to be used at the trial and shall be admitted as evidence without further proof, on the basis that the documents contained therein are what they purport to be, but without admission as to the truth of the contents thereof. In the case of correspondence and communications, the documents in the bundle shall be deemed to have been sent by the addressor and received by the addressee on or about the dates appearing thereon, unless evidence to the contrary is led.

[3] At the trial of this matter plaintiff called three witnesses, namely Carla Delaney ("Delaney"), David Falck ("Falck") and Helga Pheiffer ("Pheiffer"). The defendant elected not to call any witnesses.

Background facts

[4] It is common cause that the defendant purchased a rental enterprise from Knysna Mall (Pty) Ltd in 2007 and, before taking transfer, on-sold it to the plaintiff. The plaintiff concluded a written agreement of sale with the defendant on 18 June 2007 in terms of the which the defendant sold to plaintiff a rental enterprise comprising Erfs 2851 and 6704 Knysna, movable

assets, the right to the existing lease agreements and goodwill attending to the rental enterprise at a purchase price of R170 million.

[5] It is further common cause that in terms of the agreement, payment of the purchase price was due on registration of the property into the name of the plaintiff. Registration of the property into the name of the plaintiff was effected on 13 September 2007. This was also the date when plaintiff took possession of the rental enterprise and from which date all risk passed.

[6] The plaintiff issued summons against the defendant on 15 February 2011 for payment of R1 786 060-87 in terms of the adjustment account delivered on 9 September 2008. The important parts of the plaintiff's particulars of claim which sets out the essence of plaintiff's case read as follows:

> '*8. The plaintiff, in accordance with the aforegoing, prepared the adjustment account and forwarded such account to the defendant. On or about 9 September 2008, the adjustment account reflected that the defendant was indebted to plaintiff in the sum of R1 786 060-87. A copy of the adjustment account together with the covering email and letter of demand is annexed hereto, marked "OM2 – 1 to 15"*.
>
> 9. *The sum reflected in the adjustment account, annexure "OM2" hereto was accordingly due and payable by the defendant within ten business days of the receipt of the adjustment account prepared on its behalf and accordingly fell due for payment on 23 September 2008.*
>
> *10. In the circumstances the defendant is liable to effect payment of the sum of R1 786 060-87 to the plaintiff, but despite demand, fails and refuses to do so.*'

[7] In its special plea to the plaintiff's particulars of claim, the defendant pleads that in terms of Clause 7.4 of the agreement of sale, annexure OM1,

the adjustment account had to be delivered within 90 days from the date of transfer, which it averred was the 13th September 2007. Defendant avers further that payment of any amount had to be made within 10 days of delivery of the adjustment account in terms of Clause 7.4.8 of the agreement of sale.

The adjustment account

[9] The relevant clauses of the Agreement of Sale relating to preparation of the adjustment account provide as follows:

"*2. Introduction*

2.1 The Seller warrants that it will be the beneficial owner of the total Rental Enterprise at the transfer date.

2.2 The Seller has agreed to sell the Rental Enterprise as a going concern to the Purchaser who has agreed to purchase the said Rental Enterprise on the terms and conditions contained herein.

…

Possession, risk and benefit

7.1 Possession of the Rental Enterprise and occupation, subject to the Lease Agreements, Contracts and Rules shall be given to the Purchaser on the Possession Date, from which date the risk in and to the Rental Enterprise shall pass to the Purchaser and from which date the Purchaser shall become entitled to all the income of the Rental Enterprise and shall be liable for the

payment of rates, insurance premiums and all other outgoings in respect of the Rental Enterprise.

…

7.4 Within a period of ninety days from the Transfer Date, the Seller shall cause an adjustment account to be prepared to reflect the amount payable by the Seller to the Purchaser, or by the Purchaser to the Seller, as the case may be, in respect of prepaid and accrued expenses and income. The items appearing on the adjustment account will include, but shall not be limited to…'

Clause 7.4.7 provides that *'… as soon as possible after completion of the adjustment account, and prior to the expiry of the aforesaid ninety day period referred to in 7.4 …the Seller shall deliver to the Purchaser the adjustment account together with the copies of the documents used by the Seller in preparation thereof…'*

In terms of clause 7.4.8 *'the amount payable by the Seller to the Purchaser or by the Purchaser to the Seller as the case may be, shall be paid within ten business days of the presentation to the Purchaser of the adjustment account but not later than ten days after the period referred to in 7.4 above*'.

[10 It is clear that in order to establish and allocate payments and expenses made in the course of the rental enterprise to the party entitled thereto or liable therefor from and before the transfer date, the parties agreed that the

defendant would cause an '*adjustment account*' to be prepared to reflect the amount payable by the defendant to the plaintiff or by the plaintiff to the defendant as the case may be.

[11] It is not in dispute that the defendant did not comply with its obligation to cause the adjustment account to be prepared within ninety days from the transfer date. Defendant claimed that it did not have the necessary information to prepare the adjustment account. It is further not disputed that at a meeting held to resolve several outstanding issues, including the adjustment account, the defendant informed the plaintiff that it had still not received the information necessary to draw the adjustment account and requested the plaintiff to obtain the necessary information from Knysna Mall (Pty) Ltd's accountants. The parties agreed that plaintiff would prepare the adjustment account on defendant's behalf and the defendant undertook to pay the amount so determined. In my view this is borne out by what is contained in the defendant's reply to plaintiff's request for trial particulars and the evidence presented by plaintiff at the trial on this issue. In accordance with the agreement between the parties the plaintiff accordingly obtained the necessary information as aforesaid and prepared the adjustment account and delivered it to the defendant on 9 September 2008.

[12] I agree with the submission of Mr Tainton for the plaintiff that what had in effect occurred is that by obtaining the necessary information and by preparing the adjustment account and delivering it to the defendant, the plaintiff had caused the defendant to comply with its obligation in terms of the agreement. This is borne out by the wording of the defendant's plea that:

> '*Plaintiff undertook to draw the adjustment account as required in terms of the Deed of Sale, annexure 'OM1' to plaintiff's particulars of claim*.'

And further:

'*Defendants' Mark Barnaschone made sure that the Knysna Mall, who had the information and plaintiff were in contact with each other enabling the delivering of the adjustment account and hence complied with their responsibilities in terms of the agreement*'.

[13] Ms Dicker for the defendant contended strongly that on a plain reading of the agreement of sale, which had not been varied or amended by way of rectification or in any other way, plaintiff's claim for payment of the amount due in terms of the adjustment account fell due on 22 December 2007, as in her view plaintiff's claim arose at the latest ten days after the ninety day period referred to in clause 7.4 [i.e. the 90 day period commencing from the transfer date]. She submitted that plaintiff then had three years within which to sue the defendant, for a debatement of account and payment of the amount determined. She contended further that plaintiff is not entitled to rely on its own conduct in order to delay the running of prescription.

The approach to interpretation

[14] In the circumstances the crucial question to decide is when the amount became payable in terms of the agreement as it impacts directly on the issue of prescription. In my view this will require an interpretation of the agreement of sale (and in particular the provisions hereinbefore referred to) so as to determine the intention of the parties when they entered into the agreement.

[15] It is accepted law that the earlier approach to the interpretation of contract is to the effect that the apparent literal meaning of the words must be read in the context of the agreement as a whole and may by modified in the process of interpretation to avoid absurdity, or a result repugnant or inconsistent with the contract as a whole. In his quest to persuade me that the interpretation suggested by defendant would result in absurdity and a result repugnant and inconsistent with the rest of the agreement of sale, Mr Tainton placed reliance on the following cases which I deem appropriate to

refer to at this stage as the principles applied are equally applicable in the present matter.

In Scottish Union & National Insurance Co Ltd v Native Recruiting Corp Ltd 1934 AD 458, where Wessels CJ held at 465 - 6 that:

> *"If, however, the ordinary sense of the words necessarily leads to some absurdity or to some repugnance or inconsistency with the rest of the contract, then the Court may modify the words just so much as to avoid the absurdity or inconsistency but no more".*

In Gravenor v Dunswart Iron Works 1929 AD 299 at 303 Stratford JA held at 303 that:

> *"But the qualification to that rule is equally well established, namely, that if to give words their ordinary meaning would lead to an absurdity or to something which, from the instrument as a whole it can clearly be gathered the parties could not have intended, then a Court of law is justified in departing from the literal meaning of words so as to give effect to the true intention of the parties".*

O K Bazaars (1929) Ltd v Grosvenor Buildings (Pty) Ltd and Another 1993 (3) SA 471 (A), concerned the interpretation of the word "*party*" in a contract which in its natural or literal meaning was not restricted to any particular party.

Grosskopf JA held as follows at 477E:

> *"In view of these considerations, the word "party" in clause 3.3.2 cannot, I believe, be accorded its natural meaning. In the context the parties*

must have intended the provision to apply to one party only, namely the tenant."

And at 478C - E:

"The prime reason why the landlord's interpretation cannot in my view be accepted is not that it is foolish or that it lacks business efficacy, but that it is repugnant to clause 3.2 and to the whole scheme of ascertaining a market rental laid down in the contract.

For the reasons I have given, I consider that "a party" in clause 3.3.2 should be interpreted as referring only to the tenant. It was not disputed in argument that such a result could legitimately be reached by a process of interpretation if the parties' intention appeared clearly enough from the contract as a whole. See Gravenor v Dunswart Iron works 1929 AD 299 at 303; *Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd 1934 AD 458 at 465-6*; *Swart en n Ander v Cape Fabrix (Pty) Ltd 1979 (1) SA 195 (A) at 202 C*. *In view of this conclusion it is not necessary to consider the tenant's claim for rectification"*

[16] Mr Tainton contended that the reference to the matter of Swart en n Ander in the above judgment is to the following well known statement of Rumpff CJ where he stated at 202 C:

"Wat natuurlik aanvaar moet word, is dat, wanneer die betekenis van woorde in 'n kontrak bepaal moet word, die woorde onmoontlik uitgeknip en op 'n skoon stuk papier geplak kan word en dan beoordeel moet word om die betekenis daarvan te bepaal. Dit is vir my vanselfsprekend dat 'n mens na die betrokke woorde moet kyk met inagneming van die aard en opset van die kontrak, en ook na die samehang van die woorde in die kontrak as geheel"

[17] Mr Tainton contended that based on these cases the interpretation suggested by the defendant would result in both absurdity, inconsistency and repugnancy with the rest of the agreement of sale, which he submitted provides for the debt to be determined by the adjustment account and paid within ten business days after presentation of such account. In his view the interpretation favoured by the defendant could never have been the intention of the parties at the time of the conclusion of the agreement.

[18] In *KPMG Chartered Accountants (SA) v Securefin Ltd and Another 2009(4) SA 399 (SCA) at paras [39] – [40]* and *Natal Joint Municipal Fund v Endumeni Municipality 2012(4) SA 593 (SCA) at para [18]* the SCA adopted the view that in interpreting any document the starting point is inevitably the language used but it falls to be construed in the light of its context, the apparent purpose to which it is directed and the material known to those responsible for its production. In my view it is clear that the context, the purpose of the provision under consideration and the background to the preparation and production of the document in question are fundamental to the process from the outset. It is clear that those factors referred to are not secondary matters which are introduced to resolve linguistic uncertainty. It is now clear that context is determined by both the internal context, namely the language, words, grammar and syntax of both the provisions in question and the documents as a whole, and also by the external context provided by the factual matrix in which the document finds its setting, which includes both the background and surrounding circumstances.

[19] I am accordingly mindful as has been emphazised in the authorities hereinbefore, that situations may arise where it may be necessary to correct an apparent error in the language used in a document in order to avoid an identified absurdity. It is however also clear that courts should be slow to alter the words actually used, and as was stated in Natal Joint Municipal Fund *supra* at para [18], courts must guard against the '*temptation to substitute what they regard as reasonable, sensible or businesslike for the*

words actually used'. In Natal Joint Municipal Fund *supra* the court aptly summarised the position as follows when it held at para [18] that:

> '*A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document*'.

[20] The position with regard to the approach to be adopted in the process of interpretation is now decisively dealt with in the dicta of Wallis JA in *Bothma-Batho Transport (EDMS) Bpk v S Bothma & Seun Transport (EDMS) Bpk 2014(2) 494 (SCA)* where, after referring to the previous approach in regard to interpretation, the learned judge of appeal held at para [12] that:

> '… *The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise*''.

[21] It is clear that Ms Dicker has attached a very narrow and or restrictive interpretation to the clauses in the agreement of sale. In my view such an approach is not in accordance with the present SCA approach with regard to interpretation. Accordingly, if I regard the process of interpretation as '*essentially one unitary exercise*' and I apply the principles adopted and applied by the SCA to the present matter, then I come to the following conclusions:

1. It is clear that the words '*amount payable by the seller to the purchaser or by the purchaser to the seller as the case may be*' in clause 7.4.8 are repeated verbatim in clause 7.4 and '*the amount payable by the seller to the purchaser or by the purchaser to the seller as the case may be*' referred to in clause 7.4.8, must be a reference to the amount payable as determined by the adjustment account;

2. This is borne out by the fact that this amount is to be paid in terms of clause 7.4.8 after '*presentation to the purchaser of the adjustment account*';

3. It cannot be, as contended on behalf of the defendant, that the defendant was obliged to pay the amount payable in the terms of the adjustment account on 22 December 2007, i.e. approximately nine months before the adjustment account was delivered;

4. It is clear that the defendant conveniently wishes to ignore the words in clause 7.4.8 which provide that, '*the amount payable …shall be paid …not later than ten days after the ninety day period referred to in 7.4 above*'. To ignore these words, in my view, is impermissible and should it be allowed it would do violence to the process of interpretation.

5. If I were to accept the contentions made on behalf of the defendant, then it will result in what the SCA has described as insensible and / or unbusinesslike results, which would undermine the purpose of the agreement the parties entered into. In my view the conduct of the parties leading up to the conclusion of the agreement, their conduct subsequent to the signing of the agreement are all indicative of and point to the fact that they were very much aware that the preparation of the adjustment account was decisive to give effect to the terms of the agreement and consequently their intention. It is for this reason that they effectively assisted and cooperated with each other in their quest to bring the adjustment account to fruition. The insensibility and or absurdity of defendants contentions are aptly illustrated by Mr Tainton in the following examples illustrated in his heads of argument as follows:

"This absurdity can be illustrated by the following questions:

5.10.1 What amount does defendant say it was obliged to pay plaintiff on 22 December 2007?

The only rational answer to this (it is submitted) is no amount, as the process agreed in terms of clause 7.4 to determine who the debtor and who the creditor was and in what amount, had not yet been followed.

5.10.2 Does defendant aver that it was obliged to pay plaintiff the sum of R1 786 060-00 as claimed on 22 December 2007?

The only rational answer to this (it is submitted) is no, as the process agreed to in terms of clause 7.4. which determined that that was the amount owing had not yet been followed." (my emphasis).

6. It must accordingly be that, "*the amount payable*" referred to in clause 7.4.8, is the amount payable as determined by the adjustment account referred to in clause 7.4. It is clear that only once the amount payable by the seller to the purchaser or the purchaser to the seller '*as the case may be*' has been determined in accordance with the agreed process in clause 7.4, that the amount payable referred to in clause 7.4.8 exists. In short the amount payable does not exist until it has been determined. Only once that amount has been determined by the process agreed to in clause of 7.4, can there be any talk of a debt in existence which can become due and payable. (my emphasis)

7. In my view the interpretation that the defendant seeks to employ results in the untenable situation that '*the amount payable*', is payable at a time when the identity of the creditor and or the debtor

and the amount of the debt have not been determined. This could surely not have been intended by the parties.

8. I am satisfied that what the parties did in fact intend was a situation where the defendant would comply with the obligation in terms of clause 7.4 at the same date within the ninety day period, in which event 'the amount due and payable' would have to be paid, at the latest, no more than ten days after the ninety day period.

9. It could never have been the intention of the parties that defendant does not comply with its obligation in terms of clause 7.4 timeously. It therefore follows that until the defendant has complied with the obligation in terms of clause 7.4, no enforceable monetary debt existed.

[22] In any event, the conduct of the defendant seems to me to point to the fact that it always intended to pay the plaintiff what it was entitled to in terms of the adjustment account but that it was having difficulties in sorting out its accounts with Knysna Mall (Pty) Ltd, which ultimately resulted in the delay in it paying the plaintiff.

[23] I now turn briefly to deal with certain principles developed by our courts in relation to the issue of prescription that further confirm, and more so enforces the finding that the interpretation which defendant seeks to attach to the agreement between the parties cannot be sustained and must accordingly fall to be dismissed.

The Principles

Prescription commences to run, not when a debt arises, but on the date which it became due

[24] In *Farocean Marine (Pty) Ltd v Minister of Trade & Industry of the RSA 2007(2) SA 324 (SCA)*, Malan AJA held at 340 E – F that, "Prescription commences to run '*as soon as the debt is due*' (s 12(1)). Although the 'date on which a debt arises usually coincides with the date on which it becomes due' this need not always be the case. The question '*is thus when the debt the respondent seeks to recover arose and when it became due*.' If this principle is applied to the present matter, the defendant's plea that prescription in respect of the plaintiff's claim for payment of the amount referred to in the adjustment account, commenced to run on 22 December 2007, should fail. It is clear that it was an express term of the agreement of sale that an adjustment account would be prepared to determine who was indebted to whom and in what amount. The debt could not have become due before the adjustment account was drawn, irrespective of when any contractual obligation to draw the account arose.

<u>The debt has to be one which is immediately claimable and which the debtor is under an obligation to perform immediately</u>

[25] In *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutch (Pty) Ltd 1991(1) SA at 532H*, Van Heerden JA, in commenting on S12(1) of the Act, made it clear that the debt has to be a debt which is immediately claimable and which the debtor is under an obligation to perform immediately. In the present matter the debt which plaintiff claims is the amount reflected in the adjustment account which is required in terms of clause 7 of the agreement of sale. On this principle such debt only becomes claimable by the plaintiff and payable by the defendant ten business days after the presentation of the adjustment account on or about 9 September 2008. It is clear that prior to that date the debt was not '*one which is immediately claimable and which the debtor is under an obligation to perform immediately'*.

<u>A debt is not due until the entire set of facts which the creditors must prove in order to succeed with his or her claim against the debtor have occurred</u>

[26] In *Truter and Another v Deysel 2006(4) SA 168 (SCA)* Van Heerden JA held at 174 C - D that: *"…a debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim'*.

[27] In *Evins v Shield Insurance Co Ltd 1980(2) SA 814(A) at 838g* Corbett JA in considering the meaning of the expression "*cause of action*", referred with approval to the dicta of Watermeyer J in *Abrahamse & Sons v SA Railways and Harbours 1933 CPD 626*, where the learned judged stated that:

> "*The proper legal meaning of the expression 'cause of action' is the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not 'arise' or 'accrue' until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action*."

[28] If the aforesaid principle is applied to the present matter then the amount payable would be determined by the adjustment account and would be due and payable within ten days of the presentation of the adjustment account. Accordingly '*the facts*' as referred to in the judgments hereinbefore only occurred on 23 September 2008, and the debt could not have become due prior to that date. (my emphasis)

<u>Where the debt is for payment of an amount pursuant to a contractual obligation there must be a liquidated monetary obligation presently claimable by the creditor for which an action could presently be brought against the debtor</u>

[29] A further important principle to be considered in the context of this matter is that our SCA has clearly held that where the debt is for payment of an amount pursuant to a contractual obligation there must be a liquidated monetary obligation presently claimable by the creditor for which action could be brought against the debtor. See Farocean Marine (Pty) Ltd v Minister of Trade and Industry *supra* at para [12] and the authorities cited in foot note 25, in that matter, *Singh v Commissioner, South African Revenue Service 2003(4) SA 520 (SCA) at 533D - E*. If this principle is applied to the present matter then the liquidated monetary obligation only arose in the present matter when the adjustment account was prepared. On this score too the defendant's contention that the debt to plaintiff fell due on 22 December 2007 must fail.

Where a contractual debt is conditional on the performance of some act or the happening of some event that debt is due upon the fulfilment of the condition

[30] It is further clear from the authorities and the cases that where a contractual debt is conditional on the performance of some act or the happening of some event, the debt is due upon the fulfilment of the condition. See Laubser Extinctive Presciption p.53 para 4.3.2., *Rodger NO en 'n Ander v Erasmus NO en Andere 1975(2) SA 59 (TPD); Van Vuuren v Boshoff 1964(1) SA 395(T) at 401*. Applying the above principle to the present case, the contractual monetary debt was contingent on the preparation of the adjustment account and the lapse of ten business days thereafter.

[31] Finally I am also not persuaded that the defendant (on whom the onus rests) has proved the date when the plaintiff acquired knowledge of the material facts constituting the cause of action for recovery of the monetary claim, including knowledge of the determination of who owed what, pursuant to the adjustment account. See S12(3) of the Act.

[32] Accordingly for the reasons set out hereinbefore the defendant's special plea, averring that the monetary debt claimed by plaintiff pursuant to the adjustment account fell due on 22 December 2007, and that it has prescribed, cannot succeed.

Interruption of prescription

[33] In the alternative it is necessary to consider whether or not prescription has been interrupted by the acknowledgement of liability and the undertaking given by Mr Nick Barnaschone that the defendant had every intention to pay the debt due to plaintiff. It is trite law that the plaintiff bears the onus to prove that prescription is interrupted. According to Section 14 of the Act, the running of prescription shall be interrupted by an express or tacit acknowledgement by the debtor. 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. In this matter the plaintiff called Pheiffer to testify in its quest to show that prescription was interrupted when Nick Barnaschone, the defendant's attorney, acknowledged liability and indicated that defendant had every intention to pay the debt.

[34] Ms Dicker contended strongly that the evidence presented by the plaintiff in regard to the interruption of prescription had to be disregarded and that no reliance could be placed on it. She submitted that since the acknowledgement of liability must be made by the debtor and that it must be made to the creditor himself or his authorised agent, the plaintiff had failed to prove these crucial elements. In support of her contentions she submitted that there was no evidence that Nick Barnaschone, if he acted as attorney for the defendant, was its authorised agent, with express or implied authority to acknowledge liability on behalf of defendant. She contended further that there is no evidence to the effect that Pheiffer, who was employed by Old Mutual Group Properties Investments (Pty) Ltd (OMIGPI), was the duly authorised agent of plaintiff and or that she had express on implied authority to acknowledge liability on plaintiff's behalf. According to Ms Dicker S12(1)

of the Act requires an acknowledgement of liability and not merely an acknowledgement of indebtedness.

[35] In this regard it is necessary to point out that in the context of the special plea of prescription, the plaintiff avers as follows:

> "4. *In the alternative and in any event, the plaintiff pleads that on or about 16 December 2009 the defendant represented by Mr N Barnaschone, orally and expressly acknowledged to the plaintiff, represented by Ms Helga Pheiffer that the defendant was liable to pay the adjustment account in terms of the Agreement of Sale. The running of prescriptions was accordingly interrupted by such acknowledgement of liability in terms of section14 of Act 68 of 1969*".

[36] It is now accepted law that '*for an acknowledgment of debt to be effective as an interruption of prescription it is not necessary that is should be quantified in figures. It is sufficient if it is capable of ascertainment by calculation or extrinsic evidence without the further agreement of the parties*'. See *Benson v Walters 1984(1) SA 73(A) at 90G*.

[37] In *Erasmus v Grunow en 'n Ander 1978(4) SA 233(OPA)* at 244A - C Van Heerden J by way of the following simple example, crisply explains the concept of acknowledgement of liability as follows:

> '...*Na woordlui vereis art 14(1) egter nie dat die skuldenaar ten volle aanspreeklikheid moet erken nie. Die skuldenaar wat erken dat hy vir 'n gedeelte van die skuld aanspreeklik is, erken dan ook steeds aanspreeklikheid vir of ten opsigte daardie skuld. Neem bv. die geval waarin dir skuldenaar,wat 'n motorkar vir R1000-00 aangekoop het, die kooptransaksie erken maar die houding inneem dat die koopprys slegs R900 bedra. Die skuld voer 'n objektiewe bestaan en word, behalwe uit 'n bewysoogpunt, nie geraak deur die skuldenaar of skuldeiser se siening of betwisting van die presiese omvang of terme*

daarvan nie. In die gegewe voorbeeld erken die skuldenaar die skuld en betwis hy slegs die omvang daarvan. Anders gestel, erken hy aanspreeklikheid ten opsigte van die skuld, maar stel hy die omvang van sy aanspreeklikheid in geskil...'

[38] In *Cape Town Municipality v Allie NO 1981(2) SA 1 (C) at 7 D – G* Marais AJ as he then was held that "*full weight must be given to the legislature's use of the word 'tacit' in section 14(1) of the Act. In other words, one must have regard not only to the debtor's words, but also to his conduct, in one's quest for an acknowledgement of liability. That, in turn, opens the door to various possibilities. One may have a case in which the act of a debtor which is said to be an acknowledgement of liability, is plain and unambiguous. His prior conduct would then be academic. On the other hand, one may have a case where the particular act or conduct which is said to be an acknowledgement of liability is not so plain and unambiguous. In that event, I see no reason why it should be regarded in vacuo and without taking into account the conduct of the debtor which preceded it. If the preceding conduct throws light upon the interpretation which should be accorded to the later act or conduct which is said to be an acknowledgement of liability, it would be wrong to insist upon the later act or conduct being viewed in isolation. In the end, of course, one must also be able to say when the acknowledgement of liability was made, for otherwise it would not be possible to say from what day prescription commenced to run afresh.*"

[39] It is clear from the evidence that after the adjustment account had been prepared, there were delays on the part of the defendant in paying the amount due in terms of the adjustment account to the plaintiff. It is not disputed that the defendant was, at the time when its obligation was due to plaintiff, having its own difficulties with its seller. It is clear that defendant was still in the process of resolving outstanding issues with its seller and that this was the reason causing defendant's delay in making payment to plaintiff.

[40] On 3 November 2009, Pheiffer, in her capacity as legal adviser of OMIGPI, sent a letter of demand to Mark Barnaschone of the defendant, demanding payment of the amount due to plaintiff after defendant had failed, neglected and refused to pay the amount due in terms of the adjustment account. According to Pheiffer's evidence, she thereafter received a telephone call from Mr N Barnaschone on 16 November 2009, who, with reference to the letter of demand, told her that there was no need to institute action as the defendant knew that there was an amount owing and that the defendant had every intention to pay the debt. I am satisfied that N. Barnaschone in doing so had expressly acknowledged liability and given an undertaking to pay.

[41] As a result of the acknowledgement of liability and the undertaking to pay, Pheiffer on behalf of plaintiff pended the matter and the institution of action by plaintiff against the defendant was averted. It is not disputed that she immediately thereafter notified her colleagues by email of the defendant's acknowledgement of liability. In my view it is not fatal to the plaintiff's case that Mr N Barnaschone did not acknowledge liability for a specified amount. I am satisfied that the acknowledgement of liability made by N Barnaschone falls squarely within the ambit of and is of similar nature as in the case of Erasmus v Grunow (*supra*). Accordingly I am satisfied that N Barnaschone in doing what he did, had expressly acknowledged liability and given an undertaking to pay on behalf of the defendant.

[42] On 10 and 11 November 2009, defendant's Mark Barnaschone, clearly concerned about the letter of demand, called Pheiffer, requesting her to call him regarding the letter of demand and advised that defendant is in discussion with Knysna Mall (Pty) Ltd in order to resolve the outstanding aspects of the sale, but that he needed certain information from plaintiff to enable defendant to do so.

[43] Can it be said that Mr Nick Barnaschone had actual, implied or ostensible authority to call on behalf of defendant, acknowledge liability and give the undertaking to pay the debt to plaintiff?

[44] It is clear that Mr Nick Barnaschone and Mr Mark Barnaschone acted on behalf of and or represented the defendant interchangeably with regard to the present matter as well as in relation to concluding agreements and ancillary matters thereto on behalf of the defendant. Examples of the interchangeable representation by Mark and Nick Barnaschone in regard to the affairs of the defendant is illustrated by M Barnaschone representing the defendant in the agreement of sale between defendant and Knysna Mall (Pty) Ltd and the fact that the addendum thereto was signed by N Barnaschone. I am satisfied that, apart from the fact that he has a very close family relationship with Mr Mark Barnaschone that Mr Nick Barnaschone was intimately involved in attempting to find a resolution with regard to the issues relating to the adjustment account and other issues in relation to the agreement between the plaintiff and the defendant.

[45] On the evidence it is further clear that after the letter of demand was sent by Pheiffer to the defendant, both Mark and Nick Barnaschone were in contact with her. A conspectus of the evidence, including the correspondence and documents in the evidence bundle, points to the inescapable conclusion that Nick Barnaschone had the necessary authority to acknowledge liability on behalf of the defendant and to give an undertaking on behalf of defendant to the plaintiff's representatives that defendant would pay the debt due to plaintiff. On the whole I am accordingly satisfied that the plaintiff has established *prima facie,* at the very least, that Nick Barnaschone had the actual, implied or ostensible authority of the defendant to make the telephone call to Pheiffer and make the statement on behalf of the defendant. In any event, no evidence was presented to rebut the evidence of Pheiffer even though there was nothing that prevented the defendant from presenting evidence to dispute that Nick Barnaschone had the authority to represent the defendant. Accordingly her evidence regarding her discussions with Nick

Barnaschone in regard to defendant's acknowledgement of the debt due to plaintiff must stand.

[46] I am further satisfied that on the evidence presented, that all the employees of OMIGI, dealing with all matters in relation to the agreement of sale and the matters arising therefrom, were duly authorised by the plaintiff to represent OMIGI in such matters.

[47] In the premises I find that the special plea of prescription as raised by the defendant cannot succeed. In the alternative, I am satisfied that prescription was indeed interrupted when Mr N Barnaschone acknowledged liability in respect of defendant's indebtedness to plaintiff and gave the undertaking that the defendant would pay the debt owing to the plaintiff.

[48] In the result I make the following order:

1. The defendant's special plea of prescription is dismissed with costs;

2. The trial is postponed for a hearing to a date to be agreed between the parties after consultation with the Judge President.

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RILEY, AJ