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

REPORTABLE

CASE NO's:
5338/2007;
2417/2011

In the matter between:

JAMES JOHANNES GROEP	Plaintiff
and	
GOLDEN ARROW BUS SERVICES (PTY) LTD	Defendant
	(Case No 5338/2007)
WJ DA GRASS ATTORNEYS	Defendant
	(Case No 2417/2011)

JUDGMENT DELIVERED ON WEDNESDAY 15 NOVEMBER 2017

GAMBLE, J:

INTRODUCTION

[1] The plaintiff, Mr. James Groep, is a 65 year old working man who, on 2 September 2002, took a bus to work as he usually did. That day he intended to travel on a bus operated by Golden Arrow Bus Services (Pty) Ltd ("Golden Arrow"). As the

plaintiff was in the process of boarding the bus, and while still standing on the bottom step behind passengers ahead of him, it started to pull away. The plaintiff lost his footing and he was severely injured as the bus drove over his legs.

[2] The plaintiff suffered extensive orthopaedic injuries and he sought to claim damages therefor. On 4 September 2002, only 2 days after the accident and while still in hospital, the plaintiff was visited by Mr. William Da Grass ("Da Grass"), an attorney practicing for his own account, who accepted the plaintiff's instructions to perform professional services in relation to the plaintiff's claim for damages. Da Grass, it seems professed experience in matters of this sort.

[3] On 26 April 2007, under case no 5338/2007, Da Grass issued summons out of this Court on behalf of the plaintiff against Golden Arrow alleging damages of the order of R915 000 as a consequence of his injuries. The particulars of claim stated that the plaintiff had been conveyed as a fare-paying passenger on a Golden Arrow bus on 2 September 2002, that his statutory claim against the Road Accident Fund ("the RAF") in terms of Act 56 of 1996 was limited to R25 000, that he had received that amount from the RAF and that Golden Arrow was therefore liable to the plaintiff for damages in the sum of R855 000. The claim comprised general damages in the sum of R500 000 with the balance claimed in respect of special damages (past and future medical expenses, and past and future loss of income)

[4] Golden Arrow defended the claim and raised a special plea of prescription. It said that by no later than 2 September 2002, the plaintiff was aware of both the identity of the debtor which had caused him to suffer damages and the facts from which that debt arose. It alleged that, in the circumstances, the plaintiff's debt

had prescribed in terms of the Prescription Act, 68 of 1969 by no later than 3 September 2005.

[5] The plaintiff filed a replication to the plea of prescription alleging that on 21 May 2004 he had lodged a claim for compensation against the RAF for both special and general damages. He went on to allege that in consequence of s21 of Act 56 of 1996 he was precluded from proceeding against the owner of the bus that had caused his injuries. He claimed that on 20 June 2006 the RAF determined that his claim was limited to R25 000 in terms of s17 of that act and that he accordingly only acquired knowledge of the identity of his debtor and facts giving rise to his claim against Golden Arrow on that day. He accordingly disputed that his claim had prescribed.

[6] The action initiated by Da Grass on behalf of the plaintiff did not proceed and on 6 October 2010 he withdrew as the plaintiff's attorney in the claim against Golden Arrow.

THE CLAIM AGAINST DA GRASS AND THE SEPARATION OF ISSUES

[7] The plaintiff then consulted the Cape Town firm of A.Batchelor & Associates ("Batchelor"), attorneys who apparently specialise in personal injury claims. As a consequence of advice furnished by Batchelor the plaintiff issued a further summons on 2 February 2011 (under case no 2417/2011), this time against Da Grass claiming damages for professional negligence on the basis that he had permitted the plaintiff's claim against Golden Arrow to prescribe by failing to issue summons on or before 1 September 2005. It was alleged that the plaintiff had suffered

damages in the amount of R1,4m for which Da Grass was said to be liable. In that claim the general damages were quantified in the amount of R350 00 and the balance of the claim was said to be made up of special damages as before. For the sake of convenience I shall refer to the plaintiff's claim against Golden Arrow as "the first action" and the claim against Da Grass as "the second action".

[8] One of the defences raised by Da Grass in the second action included reliance on a letter dated 26 June 2008 (written by Deneys Reitz, the attorneys who represented Golden Arrow at the time[1]) as constituting an alleged waiver by Golden Arrow of its entitlement to rely on the defence of prescription. In the light of this, Batchelor requested Golden Arrow's attorneys to indicate whether their client persisted in its special plea of prescription. Upon confirmation that prescription was still a live issue, the plaintiff successfully applied for the consolidation of the first and second actions and the matter came before this Court for the determination, in terms of Rule 33(4), of the question whether Golden Arrow had waived (or abandoned) its reliance on the special plea of prescription.

[9] It is common cause that determination of the separated issue will have the following consequences –

- Should Da Grass succeed in having the separated issue decided in his favour, the plaintiff will have no option but to withdraw the second action and to proceed with the first action against Golden Arrow;

[1] The evidence revealed that the firm changed its name from Deneys Reitz to Norton Rose Fulbright after the initiation of the second action.

- If, on the other hand, Da Grass is unsuccessful on the separated issue, the second action will proceed whilst the special plea of prescription will effectively put an end to the first action.

[10] At the hearing on the separated issue, the plaintiff was represented by Adv. N.T. Louw, Da Grass by Adv. D.W. Gess and Golden Arrow by Adv. M Blumberg. The Court is indebted to counsel for their detailed heads of argument which have facilitated the delivery of this judgment.

THE RELEVANT PLEADINGS IN THE SECOND ACTION

[11] In an amended plea filed on 7 January 2013 to the plaintiff's particulars of claim, Da Grass made, *inter alia,* the following allegations.

> *"AD PARAGRAPH 14*
>
> *12. Without derogating from the generality of the aforegoing denials, the Defendant pleads that even had the claim by Plaintiff against Golden Arrow…. prescribed prior to service of Summons (which is denied), that by reason of the waiver by Golden Arrow….. [of the plea of prescription] pleaded below, the Plaintiff suffered no loss or damage as a consequence of any act or omission on the part of the Defendant, and the plaintiff is put to the proof thereof.*
>
> *AD PARAGRAPH 15*
>
> *13. It is admitted that Summons was served on Golden Arrow….on 26 April 2007.*

14. The further allegations contained in this paragraph are denied as if specifically traversed and the Plaintiff is put to the proof thereof.

15. In amplification of the denial that the Plaintiff's claim against Golden Arrow… has prescribed, and is accordingly unenforceable, the Defendant pleads that:

15.1 On or about 2 October 2007 Golden Arrow… represented by the firm of attorneys Deneys Reitz of Cape Town, filed a Special Plea contending that the Plaintiff's claim had been (sic) prescribed, in terms of the provisions of the Prescription Act, Act 68 of 1969, by not later than 3 September 2005;

15.2 On or about 10 October 2007 the Defendant, on behalf of the Plaintiff, filed a Replication to the Special Plea filed on behalf of Golden Arrow… in which it was denied that the Plaintiff's claim against Golden Arrow… had become prescribed prior to the service of Summons;

15.3 On or about 26 June 2008 a letter was received from Denys Reitz Attorneys on behalf of Golden Arrow…, a copy of which is annexed hereto as Annexure" A", in which Defendant was informed that Golden Arrow… had instructed Denys Reitz that it no longer intended to persist with its Special Plea of Prescription;

15.4 Golden Arrow… accordingly waived the right to rely upon the Special Plea of Prescription, which waiver was confirmed in the aforegoing letter, Annexure "A" hereto;

15.5 Accordingly, Golden Arrow… are precluding (sic) from further relying upon the Special Plea of prescription in respect of the claim instituted against Golden Arrow… by the Plaintiff."

For the sake of convenience the Deneys Reitz letter of 26 June 2008 will be referred to as *"Annexure A"* where appropriate.

[12] In response to the amended plea, and on 16 January 2013, the plaintiff filed an initial replication to Da Grass' plea, the material averments whereof are as follows:

"AD PARAGRAPHS 15.3 AND 15.4 THEREOF

2.1 The Plaintiff has no personal knowledge of the allegations herein and accordingly denies each and every allegation is if specifically traversed.

2.2 In respect of the said Annexure "A", the Plaintiff notes that the defence sought to be relied upon related to a letter allegedly written by Deneys Reitz Attorneys on behalf of its client, Golden Arrow… and addressed to the Defendant on a "without prejudice" basis and whereupon statements appeared to be made without prejudice in the course of what appears to be bona fide settlement negotiations for

settlement of a dispute. The Plaintiff denies that such document is admissible and contends that same cannot be used in evidence unless privilege had been properly waived by the party concerned. The requisite waiver of privilege has not been pleaded and the Plaintiff accordingly disputes the admissibility and relevance thereof."

[13] The letter referred to above as Annexure A reads as follows:

"1. Our client has indicated that, although it no longer intends to persist with its Special Plea, it disputes that your client's claim against the Road Accident Found was limited to R 25,000.00. Our client's view is that your client was at best entitled to recover R 25,000.00 in respect of his special damages and all of his general damages from the Fund. In the circumstances, even if your client is successful in the action, our client will only be liable for your client's special damages, less any amounts recovered from the Road Accident Fund.

2. As part of its on-going assessment of your client's claim, our client has instructed us to request any documentary evidence your client may have to support his alleged loss of earnings claim. Such documentation will include copies of payslips and tax returns. We also request a brief outline from you explaining how your client's earning capacity has been diminished as a result of his alleged injuries.

3. We appreciate that the gathering of this information can be time-consuming. In the interim, please will you simply confirm that your client is prepared to furnish this information to us on a "without prejudice" basis."

[14] During the course of the trial the parties fine-tuned their pleadings to tie in with the evidence that had been adduced. Accordingly, on 17 February 2016, Golden Arrow filed a comprehensive document headed *"Replication in the Consolidated Action",* and on 22 February 2016 Da Grass filed a rejoinder to the replication of 17 February 2016. While there was no objection to either amendment, it is necessary to recite both documents in some detail to appreciate the impact thereof.

[15] In the consolidated replication Golden Arrow says the following:

> ***"Ad paragraph 15 of Da Grass's plea***
>
> *3. Golden Arrow admits that:*
>
> *3.1 On or about 2 October 2007, Golden Arrow, represented by Deneys Reitz Attorneys, delivered a special plea in the first action in which Golden Arrow contended that the claim asserted by the plaintiff against Golden Arrow in the first action had prescribed.*
>
> *3.2 On or about 10 October 2007, the plaintiff filed a replication in the first action in which the plaintiff denied that his claim against Golden Arrow had prescribed.*
>
> *3.3 On or about 26 June 2008, Golden Arrow's attorneys addressed 'without prejudice' correspondence to the plaintiff's erstwhile attorneys, Da Grass, a copy of which is annexed to Da*

Grass's plea in the second action marked 'A' ('the 26 June 2008 letter')

4. *Save as aforesaid, each and every allegation in the paragraph under reply is denied as if individually here set forth and traversed, including in particular the allegation that the 26 June 2008 letter constituted a waiver of Golden Arrow's entitlement to rely on the defence of prescription, and that Golden Arrow is thereby precluded from so relying on such special defence (as is averred in paragraphs 15.4 and 15.5 of Da Grass's plea in the second action).*

5. *In amplification of the aforegoing denial (but without in any way derogating from the generality thereof), Golden Arrows avers that the 26 June 2008 letter:*

5.1 was or formed part of a genuine attempt to settle the first action, was clearly marked 'WITHOUT PREJUDICE', accordingly has the status of a without prejudice communication and is not admissible into evidence and may not be used to prejudice the rights of Golden Arrow;

5.2 in any event, did not constitute a waiver of Golden Arrow's entitlement to rely on its pleaded special defence of prescription;

5.3 alternatively, in so far as the 26 June 2008 letter is held to be admissible into evidence and to constitute a purported waiver by the author of the letter of Golden Arrow's entitlement to rely on its pleaded special defence of prescription, then in that event, Golden Arrow denies:

5.3.1 that such waiver was authorised, expressly or impliedly, by either Golden Arrow or its insurers, Stalker Hutchison Admiral (Pty) Ltd (who were responsible for providing instructions to Denys Reitz);

5.3.2 accordingly, that the purported waiver was binding on Golding Arrow.

6. Save to the extent of the admissions made above, and save further to the extent that Da Grass's plea accords with that of Golden Arrow in the first action, Golden Arrow joins issue with the content of Da Grass's plea and persists with its contentions in its plea and special plea in the first action."

[16] The rejoinder filed on behalf of Da Grass in response to this consolidated replication is to the following effect:

"1. The present Rejoinder is conditional upon the above Honourable Court holding, as pleaded by GOLDEN ARROW in paragraph 5.3

of its aforementioned Replication, that the waiver/abandonment of the defence of prescription was not authorised, expressly or impliedly, by either GOLDEN ARROW or its insurers, Stalker Hutchison Admiral (Pty) Ltd (who are pleaded by GOLDEN ARROW as being responsible for providing instructions to Deneys Reitz).

2. *DA GRASS records his denial that such waiver/abandonment was not authorised, either expressly or impliedly, and puts GOLDEN ARROW to the proof thereof.*

3. *DA GRASS pleads that GOLDEN ARROW is estopped from denying the authorisation, whether express or implied, of its attorneys, Deneys Reitz, to make the waiver/abandonment contained in the latter (sic) of 26 June 2008, Annexure "A" to the DA GRASS plea, inter alia in that:*

    3.1 GOLDEN ARROW, (alternatively its insurers, Stalker Hutchison Admiral (Pty) Ltd acting on its behalf), by appointing Deneys Reitz as its attorneys of record to defend the claim instituted against GOLDEN ARROW by GROEP, represented to GROEP (represented by DA GRASS) that Deneys Reitz had the usual and customary powers associated with such appointment, these including but not being limited to defend the claim; draft the Plea and any Special Plea; to waive/abandon or withdraw any

Special Plea that was filed by them; attend to all pre-trial procedures and to make concessions and to take the matter to final conclusion;

3.2 DA GRASS (and GROEP who he represented in such proceedings), reasonably believed that such representation was correct;

3.3 Deneys Reitz communicated the said waiver/abandonment to DA GRASS (and GROEP who he represented in such proceedings), as set out in the letter dated 26 June 2008, Annexure 'A' to the Plea (as amended) filed on behalf of DA GRASS;

3.4 DA GRASS (and GROEP who he represented in such proceedings), received such waiver/abandonment and relied upon same;

3.5 The said waiver/abandonment was persisted in from 26 June 2008, when Annexure 'A' was dispatched to and received by GROEP (and DA GRASS who represented him), until on or about 15 April 2011 (a period of almost 3 years), when Deneys Reitz dispatched letters to GROEP and the Legal Aid Board, in which they sought to rely upon the Special Plea of prescription, and in effect

to resile from the waiver/abandonment of the defense (sic) of prescription;

3.6 After receiving the letter of 26 June 2008, GROEP (and DA GRASS who represented him), proceeded with the claim (and attempts to settle same) on the basis of an understanding that the defense (sic) of prescription had been waived and/or abandoned by GOLDEN ARROW, and that the Special Plea would not be persisted with;

3.7 GROEP (and DA GRASS who represented him), would be prejudiced should the defense (sic) of estoppel not be upheld;

3.8 It would neither be unjust or equitable to uphold the defense (sic) of estoppel in the circumstances of the present matter.

4. DA GRASS otherwise joins issue with all the allegations contained in the aforesaid Replication filed by GOLDEN ARROW, insofar as they all inconsistent with what is pleaded in the Plea (as amended) file on behalf of DA GRASS in case number 2417/2011."

[17] And so one sees from this exchange of pleadings that while the plaintiff, who was badly injured more than 15 years ago and is yet to be fully compensated,

two insurance companies (for it is common cause that Da Grass, too, has handed the matter over to his professional liability insurers) have embarked on the *"blame game"* in an endeavor to avoid the payment of compensation to a person who has suffered disabling injuries which have allegedly severely impacted on his ability to work. It is a matter of deep concern that the parties were unable to come to a suitable settlement but elected rather to spend many thousands of Rands in litigating a dispute in which the pleadings bear the hallmark of an examination paper in the law of civil procedure. Little wonder then that lay persons so often express their mistrust in the courts with asinine comparisons and complaints that "justice delayed is justice denied". But that is just an irksome judicial remark in passing and it is to the evidence that the focus must now move.

THE EVIDENCE

[18] Evidence on the disputed issue was given by Da Grass personally, as well as by Golden Arrow's erstwhile attorney and Ms. Samantha Clark, an employee of Stalker Hutchison, Golden Arrow's insurers. None of the *viva voce* evidence really took the matter much further other than providing some understanding of the background and surrounding circumstances relevant to the parties' correspondence [2]. At the end of the day the disputed issue falls to be determined with reference to a limited number of documents located in that correspondence between Da Grass and Deneys Reitz, and the application of the legal principles relating to offers to settle disputes and the impact of without prejudice negotiations in that context.

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[2] KPMG Chartered Accountants (SA) v Securefin Ltd and Another 2009 (4) SA 399 (SCA) at [39]

[19] The evidence revealed that Da Grass first sued the RAF in May 2004, claiming both special and general damages. The present papers do not reveal why, although he was instructed to recover damages just 2 days after the accident, Da Grass took more than 18 months to iniate the claim. Nevertheless, after limited success on behalf of the plaintiff[3] in those proceedings Da Grass commenced the litigation on behalf of the plaintiff against Golden Arrow in April 2007. His claim in subsequent pleadings in the first action that the claim against Golden Arrow had not prescribed at that stage (a claim inconsistent with the stance adopted in the second action) is an issue that need not be dealt with now, given that it may form the basis of later investigation.

[20] After the claim had been instituted in April 2007, Golden Arrow's special plea of prescription and plea on the merits was filed in October 2007. Thereafter, in late 2007 and early 2008, Da Grass and Deneys Reitz entered into correspondence in relation to an assertion by Da Grass that there was certain legal authority which would settle the prescription point in the plaintiff's favour. Da Grass undertook to procure same and eventually forwarded that authority to Deneys Reitz on 7 February 2008, and reported to the plaintiff on 22 February 2008 that having sent a *"highly relevant court decision"* to Golden Arrow, he was hoping to settle the matter with them.[4]

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[3] On 20 June 2006 the RAF determined and settled the plaintiff's claim in the amount of R25 000 on the basis that the plaintiff was a fare-paying passenger on the bus and hence his claim was limited to that amount in terms of s 17 of the erstwhile RAF Act of 1996.

[4] The authority, Conradie v Erasmus & Son 1951 (4) SA 29 (T), indeed appears to deal (at least in part) with the running of prescription of a claim against a wrongdoer whose liability is limited by statute – a forerunner of legislation similar to the 1996 RAF Act..

[21] Deneys Reitz responded immediately and informed Da Grass that they were *"in the process of considering your authority furnished and suspect to be in a position to reply thereto shortly."* Thereafter things went quiet for 4 months and there appears to have been no communication between the 2 firms of attorneys until 26 June 2008, when Deneys Reitz sent the aforementioned Annexure "A" to Da Grass.

[22] Da Grass did not reply promptly to Annexure "A" notwithstanding several reminders from Deneys Reitz. Eventually, on 11 September 2008, Da Grass informed Deneys Reitz that he was preparing documentation in support of the plaintiff's claim *"on a completely without prejudice basis"* and undertook to forward same when they were to hand.

[23] The next day Deneys Reitz replied to Da Grass's email of 11 September 2008 and directed the following enquiry in a letter similarly marked without prejudice.

> *"3. Is it safe to assume at this stage that you agree with the conclusion reached in paragraph 1 of our facsimile of 26 June 2008? You will appreciate from the tone of that correspondence that our client is considering settlement of the matter on the basis that it pays your client's special damages, less any amounts he recovered from the Road Accident Fund. Whether it is able to make such a proposal formally will ultimately depend on the documents received from your client"*

[24] Approximately 6 months later, Da Grass replied in an email dated 19 March 2009, also marked without prejudice. Supporting documentation was enclosed for Deneys Reitz's consideration who replied soon thereafter on 24 March 2009, also

without prejudice. They sought additional information from the plaintiff, including documentation if available, and concluded by asking for a response to paragraph 3 of their letter of 12 September 2008.

[25] That response came a week later in another without prejudice communication dated 31 March 2009. Da Grass informed Deneys Reitz that there was no further documentation available which could be forwarded and went on to debate, with reference to the law, the basis of the plaintiff's claim for compensation other than that it was limited to special damages.

[26] On 15 April 2009 Deneys Reitz replied, still on a without prejudice basis, to the debate in regard to the legal position (the issue being whether the plaintiff was indeed being conveyed for reward at the time he was injured) and concluded the correspondence as follows:

> *"3. In light of the above, we are prepared to recommend to our client that this matter is settled on the basis that our client pays your client's special damages and party and party costs. Obviously a formal offer will be forthcoming once the quantum of your client's special damages has been ascertained. At this stage, we simply want to gauge your client's attitude to settlement in order to see whether it is worth our client subjecting him to the necessary medico-legal examinations. If your client is not interested in settlement, we will propose that merits and quantum are separated and that the matter proceeds only on the former."*

[27] Notwithstanding various reminders, Da Grass did not reply to this email until 19 November 2009 when a copy of legal authority relating to the circumstances under which a person is conveyed for reward was forwarded to Deneys Reitz. The latter replied a week later, on 26 November 2009, taking issue with the import of the alleged authority in relation to the conveyance for reward point. Deneys Reitz concluded by asking for a response to their proposal of 15 April 2009.

[28] That response came some two and a half months later when, on 4 February 2010, Da Grass responded curtly and asked that Deneys Reitz's client *"table a concrete rands and cents settlement [proposal] for consideration by ours."* The following day Deneys Reitz, repeating its stance that it was only prepared to consider the payment of special damages asked for documentation in support of the plaintiff's claim for such damages. Certain further details were furnished by Da Grass on 19 June 2010 and once again Deneys Reitz were asked to table an offer of settlement.

[29] Thereafter, Da Grass ceased to act for the plaintiff. In correspondence with the Legal Aid Board in September 2010 an *"associate"* of Da Grass stated that the firm was no longer prepared to act in the matter. He stated that they were of the view that, in light of the fact that the RAF had already paid out the plaintiff's statutory claim under the 1996 RAF Act, the matter was no longer *"an MVA matter and based on the fact that the RAF has already conceded negligence, on Golden Arrow's part, the matter has good merits."* He went on to say that Da Grass' problem was that it was *"unable to sustain the litigation and cannot find Counsel who is prepared to proceed on 'spec' ".*

[30] Thereafter, Batchelor stepped in to assist the plaintiff in February 2011 and issued summons in the second action against Da Grass. During December 2014 the first and section actions were consolidated pursuant to an order made by Kuschke AJ. When the separated issue was heard by this Court the *lis* was between Da Grass and Golden Arrow, with the plaintiff effectively reduced to an innocent bystander awaiting his fate either way.

THE PRINCIPLES APPLICABLE TO PRIVILEGED COMMUNICATIONS

[31] It is by now trite that communications exchanged by litigants in the course of legal proceedings in a *bona fide* endeavour to resolve their differences are protected from subsequent disclosure at trial and from admission into evidence.[5] In *Naidoo*[6] Trollip JA observed that the rule is based upon considerations of public policy to encourage the extra curial resolution of disputes.

> *"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*

[5] Naidoo v Marine & Trade Insurance Co Ltd 1978 (3) SA 666 (A) at 677 A-D. See also KLD Residential CC v Empire Earth Investments [2017] ZASCA 98 (6 July 2017) at [8];[19] – [28]

[6] *Ibid*

722 (T) at 728F-G; Schmidt Bewysreg at 420; Hoffmann SA Law of Evidence 2nd ed at 155….)

[32] In that matter Trollip JA was required to deal with an argument by counsel that application of the privileged communication rule was limited to letters marked *"without prejudice"* and, further, that non-disclosure did not apply in relation to matters that did not concern the subject-matter of the dispute.

> *"Obviously, any admissions that are quite unconnected with or irrelevant to the settlement negotiations are not covered by the protection of the rule and are admissible in evidence. The authorities just mentioned[7] amply support that qualification. The presence or absence of any such connection or relevance is essentially a question of fact in which the intention of the party making the admission, as objectively manifested, may be of importance.[8]"*

[33] Furthermore, it has repeatedly been held that there is no magic in the use of the words *"without prejudice"* as a preface to a communication sought to be covered by privilege. To enjoy protection the discussions must constitute a *bona fide* attempt to resolve a dispute and, even where the phrase is not used by the party claiming privilege, the negotiations will be regarded as privileged if they were part of a genuine attempt to settle an existing dispute.[9]

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[7] Field v Commissioner for Railways for NSW (1957) 99 CLR 285 ; Kapeller v Rondalia , supra.

[8] 678H – 679A

[9] Millward v Glaser 1950 (3) SA 547 (W) at 554G-H; Gcabashe v Nene 1975 (4) SA 912 (D) at 914E-H; Schwikkard and van der Merwe Principles of Evidence, 3rd ed at 322.

[34] In argument on behalf of Golden Arrow, Mr. Blumberg referred to the recent decision of the Supreme Court of Appeal in ***KLD Residential*** [10] and argued that the decision of Lewis JA for the majority permitted an incursion into the rule protecting privileged communications in very limited circumstances. In that matter an admission of liability had been made during without prejudice discussions and was subsequently sought to be disclosed for purposes of interrupting the running of prescription in terms of s14 of the Prescription Act, 1969. In permitting the disclosure Lewis JA observed that, in the context of the facts at hand, it was important to preclude an abuse of the rule.

> *"[39] I consider that the exception contended for is well-founded. Where acknowledgements of liability are made such that, by virtue of s 14 of the Prescription Act, they would interrupt the running of prescription, such acknowledgements 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 the 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 insofar as proving the existence of the quantum of the debt is concerned. It is not, as [was] suggested in argument, a question of the without prejudice rule trumping prescription. It is a question of recognising that both s14 of the Prescription Act and the without*

[10] Footnote 5, *supra.*

prejudice rule protect policy interests, and recognising an exception so that both interests are properly served."

[35] Having considered the *dictum* in *KLD Residential* I agree with Mr. Blumberg's submission that the disclosure of the admission of liability sanctioned in that case was expressly permitted in the context of interrupting the running of in terms of s14 of the Prescription Act, and does not constitute a general rule permitting a court to go behind the *"protective shield"* otherwise provided by without prejudice discussions. And, to the extent that the present matter does not involve the interruption of prescription under the aforesaid s14, *KLD Residential* falls to be distinguished on the facts.

[36] Mr. Gess sought to persuade the court that the concession by Golden Arrow's attorneys in Annexure A not to rely on the special plea of prescription was excluded from protection because it was *"quite unconnected with or irrelevant to the settlement negotiations"*[11]. Counsel contended that while it was initially relevant to the negotiations, once conceded by Deneys Reitz, the prescription point taken in the special plea somehow became *"disconnected"* from the remainder of the train of discussion, and remained parked in some remote siding, as it were.

[37] That argument flies in the face of the entrenched approach of the courts both in South Africa and the United Kingdom (from whence so much of our law of evidence in regard to civil proceedings is derived[12]), that a court should be most cautious to lift the protection offered by the *"without prejudice shield"* unless it is quite

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[11] Per Trollip JA in Naidoo at 678G; para [32] *supra.*

[12] KLD Residential at [44]

clear that this show ensue. In *Naidoo*[13] Trollip JA cited with approval the *dictum* of Ormrod J in the English Court of Appeal[14] that –

> *"the Court, in my judgment, should be very slow to lift the umbrella of 'without prejudice' unless the case is absolutely clear."*

[38] In his minority judgment in *KLD Residential* [15] Schippers AJA referred to the judgment of Lord Rodger in *Ofulue*[16] in which attention was drawn to an article in the Michigan Law Review[17] cautioning against attempts to distill the unconnected elements of a discussion from the connected whole.

> *"If the proper basis of the rule is privilege, is there any logical theory under which the court can, by methods akin to chemistry, analyse 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 lay man 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?"*

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[13] At 680B-C

[14] Tomlin v Standard Telephones & Cables Ltd (1969) 1 WLR 1376 (CA) at 1385A

[15] [73]

[16] Ofulue and Another v Bossert [2009] 3 All ER 93 (HL) at [39]

[17] JE Tracey *Evidence-Admissibility of Statements of Fact made during Negotiation for Compromise* (1935-1936) 34 Michigan Law Review 524 at 529

[39] Of course, there can be no problem in going behind the *"privilege shield"* once a matter has been resolved through, for example, settlement.[18] But until that occurs the overwhelming bulk of authority cautions strongly against doing so.

CONCLUSION

[40] In this matter, as I have attempted to demonstrate above with reference to the relevant facts, the undertaking by Golden Arrow not to rely on the special plea of prescription came at a relatively early stage of negotiations, all of which were classified throughout by the parties as being *"without prejudice".* And although that concession was not expressly referred to again in the discussions thereafter, it formed the very bedrock of Golden Arrow's offer to settle. As such it can most certainly not be characterized as an irrelevancy which was unconnected to the settlement negotiations.

[41] In the result, I am not persuaded that that the Deneys Reitz letter of 26 June 2008 is admissible in evidence against Golden Arrow. Consequently, it is not necessary to go into the questions of waiver, authority and estoppel so keenly contested in argument. In the circumstances, the separated issue must be determined in favour of Golden Arrow and the special plea will prevail.

COSTS

[42] As between Da Grass and Golden Arrow, the latter has been substantially successful and is entitled to its costs. What of the costs of the plaintiff?

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[18] Gcabashe v Nene *supra* at 914H

He has been required to be on the sidelines throughout this phase of the matter but there can be no doubt that his presence at the hearing through counsel was justified. Both Da Grass and Golden Arrow accepted that that the plaintiff was entitled to participate in this stage of the proceedings but, somewhat predictably, neither party was prepared to accept liability for his costs in the event of it not succeeding on the separated issue.

[43] Throughout the plaintiff has maintained a stance aligned to that of Golden Arrow and has not sought to contend for the waiver of the special plea of prescription. A costs order must be underpinned by considerations of fairness and equity. Those principles demand that Da Grass be held liable for the plaintiff's costs in these proceedings.

ORDER OF COURT:

A. The separated issue is determined in favour of Golden Arrow and it is declared that;

    a. the letter of 28 June 2008 written by Deneys Reitz to Da Grass Attorneys is inadmissible in evidence;

    b. the special plea of prescription has not been abandoned by Golden Arrow.

B. Da Grass is ordered to pay the costs of suit of Golden Arrow and the plaintiff in these proceedings relating to the separation of issues.

C. The Registrar is directed to place the consolidated actions on the Rule 37(8) conference roll for management by Gamble J at the earliest available date.

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GAMBLE, J