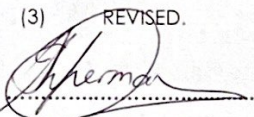


REPUBLIC OF SOUTH AFRICA



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

Case No: 41535/2019

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	<u>26/10/2020</u>
SIGNATURE	DATE

In the matter between:

WILLOW AND ALOE GROVE BODY CORPORATE Plaintiff/Respondent

and

BIG BELL INVESTMENTS (PTY) LTD T/A CITYNET Defendant/Applicant

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 26 October 2020

JUDGMENT

INGRID OPPERMAN J**Introduction**

[1] The Defendant seeks to strike out paragraph 15 and annexure 'POC2' ('POC2') of the Plaintiff's particulars of claim on the basis that annexure 'POC2' constitutes a without prejudice communication and is thus inadmissible and irrelevant. Defendant invokes rule 23(2).

[2] The Defendant afforded the Plaintiff an opportunity to remove the cause of complaint which opportunity was not taken up.

Application to strike is defective

[3] The notice of application to strike dated 11 February 2020 (*the notice to strike*), provides that the Defendant intends to apply to strike out the offending allegations as an 'irregular step'. The Plaintiff argues that rule 23(2) does not make reference to and/or provide for an 'irregular step' process, and any reference thereto ought to be dealt with in terms of rule 30. The notice to strike is thus defective as, although it appears to be brought in terms of rule 23(2), it makes reference to a process that is dealt with in another rule of court.

[4] Although reference is made in the pre-amble to the notice to strike, that the allegations fall to be struck 'as an irregular step', there can be no doubt to the reader of the document as a whole that the Defendant seeks the removal of the offending matter by virtue of the without prejudice rule attaching to it. The notice to strike afforded the Plaintiff an opportunity to remove the causes of complaint and sets out the grounds for that demand clearly enough. It is evidently an application brought in terms of rule 23(2) of the Rules of this court and in my view, substance should prevail over form.

Paragraph 15 and 'POC2'

[5] Paragraph 15 of the Plaintiff's particulars provides:

'15. The Plaintiff raised its concerns with the Defendant in respect of the abovementioned breaches, to which the Defendant acknowledged its liability in respect thereof during November 2019. Attached as Annexure "POC2" hereto is an email sent by the Defendant acknowledging such liability.'

[6] Annexure "POC2" to the Plaintiff's particulars of claim reads in relevant parts:

" WITHOUT PREJUDICE

Dear Trustees,

We acknowledge that our previous financial manager's neglect resulted in losses to the body corporate and as such, we have calculated interest and penalties incurred.

As per my email below;

We further remain open to a meeting with all parties referred to below to properly clarify and establish any further claims you feel you have against Big Bell Investments (Pty) Ltd.

Nick Obel"

The without prejudice rule

[7] The parties were in agreement regarding the relevant legal principles applicable: the without prejudice rule is well established in South African law, being *'that statements, including admissions of liability, made in an attempt to settle litigation between parties are inadmissible in subsequent litigation between them'*¹, save in limited circumstances being for purposes of interrupting prescription; and an

¹ *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd 2017 (6) SA 55 (SCA) at [8]*

act of insolvency.² It is well established that inadmissible evidence is by its very nature irrelevant.³

Nature of communication in 'POC2'

[8] The proper approach to adopt for the interpretation of 'without prejudice' negotiations for a settlement was formulated in *Naidoo v Marine & Trade Insurance Co Ltd*⁴, it being an objective approach. Trollop JA writing for a unanimous court held:

'It is therefore irrelevant what Ryan subjectively intended or meant in writing the "without prejudice" letters; the true inquiry is how a reasonable man in the recipient's position would have read and understood them'.

[9] The purpose of annexing annexure 'POC2' to the particulars of claim, absent being to interrupt prescription or to establish the Defendant's inability to pay its debts, is evidently to establish that the Defendant acknowledged liability to the Plaintiff. This much is stated in paragraph 15 of the Plaintiff's particulars of claim. An objective reading of the letter reveals the intention to admit liability.

[10] The manner in which 'POC2' has been formulated is clearly designed to facilitate settlement. The reasonable man in the Plaintiff's position would most certainly have concluded that this was an attempt to settle. It contains an admission of liability coupled with an invitation to engage in amicable and frank discussions as

² See *Groep v WJ Da Grass Attorneys and Another* 2018 (5) SA 248 (WCC) para [31] - [39] at 258-261; *KLD Residential CC (supra)* para [19] - [41] at 62-67; *Absa Bank Ltd v Hammerle Group* 2015 (5) SA 215 (SCA) para [13] - [15] at 219, 220; *Lynn & Main Inc v Naidoo* 2006 (1) SA 59 (N) para [22] - [24] at 64-66; *Absa Bank Ltd v Chopdat* 2000 (2) SA 1088 (W) at 1092H-1094F; *Naidoo v Marine & Trade Insurance Co Ltd* 1978 (3) SA 666 (A) at 677A-D. See also *Public Investment Corporation Soc Ltd v Madibeng Local Municipality* (16611/2010) [2019] ZAGPPHC 213 (4 June 2019) para [18] - [27]; *Absa Bank Ltd v Trotskie NO and Others* (1940/2018) [2018] ZAFSHC 183 (29 November 2018) para [26]-[28]; *Oakbay Investments (Pty) Ltd v Tegeta Exploration and Resources (Pty) Ltd and Others* (83344/18) [2019] ZAGPPHC 411 (30 August 2019) para [22].

³ See *NDPP v Zuma* 2009 (2) SA 277 (SCA) para [23] at 289.

⁴ 1978 (3) SA 666 (A) at 675B; See too *KLD Residential CC (supra)* at [72]

to the amount that might be due, and to thereby avoid litigation. This is the sort of communication to which the rule applies.

[11] 'POC2' contains 2 sentences. The first, the admission of liability and the second, the invitation to debate and resolve the dispute. The second sentence in annexure 'POC2' is clearly intended to bring about an overall resolution. There is clearly a connection between the admission and the invitation to settle. It sets out the concession/admission (the calculation is attached) and then invites input in relation to that very admission. It was suggested during argument that these sentences were unconnected. For the reasons stated herein, I cannot agree.

[12] Unless and until the Defendant pleads prescription in its plea, which the Defendant is obliged to do, as prescription cannot be raised *mero motu*⁵, there cannot be any basis for the Plaintiff to rely on annexure 'POC2' to interrupt prescription.

[13] The Plaintiff does not rely on annexure 'POC2' to establish that the Defendant is unable to pay its debts (the current proceedings are not winding-up proceedings).

[14] Thus, none of the recognised exceptions as to the inadmissibility of without prejudice communications are applicable.

Prejudice

[15] In terms of rule 23(2)(b), the Court shall not grant an application to strike unless it is satisfied that the applicant (the Defendant) will be prejudiced in the conduct of its defence if the application is not granted.

⁵ As per the provisions of Section 17(1) and (2) of the Prescription Act 68 of 1969:

"17 Prescription to be raised in pleadings

- (1) A court shall not of its own motion take notice of prescription.
- (2) 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."

[16] If not struck out, the Defendant will have to plead thereto and deal with annexure 'POC2' in circumstances where the Defendant, protected by the without prejudice rule, would not otherwise have to answer to annexure 'POC2'.

[17] Although not part of the overall test, it bears mentioning that the allegation in paragraph 15 is not essential to the Plaintiff's cause of action. It amounts to the pleading of an extra curial admission.

Conclusion

[18] It bears mentioning that this ruling is premised on the pleading and on the assumption that what is recorded in 'POC2' is correct. It may well be that at the trial, 'POC2' may be supplemented by contemporaneous oral discussions⁶, telephonic conversations or email communications which put a different slant on how the reasonable man in the recipient's (the trustees') position would have read and understood 'POC2' or that admissible evidence may establish that 'POC2' was not written in the course of *bona fide* negotiations for the settlement of the dispute, however unlikely that seems now.

[19] My enquiry is limited to whether paragraph 15 and 'POC2' should remain in the particulars of claim. For the reasons set out herein, I find that they should be struck.

[20] There is however, another reason, one not argued or raised, why I would be inclined to grant the relief: particulars of claim should not require the pleader to plead to evidence ie the *facta probantia*. As mentioned, paragraph 15 does not contribute to the Plaintiff's cause of action and is not part of the Plaintiff's *facta probanda*. The averments accordingly have no place in the particulars of claim.

⁶ As contemplated in *Naidoo v Marine* (supra) at 675B

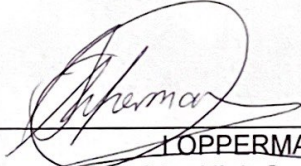
[21] The Defendant did not persist with seeking a punitive costs order.

Order

[22] I accordingly grant the following order:

22.1. The contents of paragraph 15 and the entirety of annexure 'POC2' of the Plaintiff's particulars of claim, are struck out.

22.2. The Plaintiff is to pay the costs of this application.



LOPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Counsel for the applicant/defendant: Adv L Hollander

Instructed by: Harris Incorporated

Counsel for the respondent/plaintiff: Adv L de Wet

Instructed by: Ian Levitt Attorneys

Date of hearing: 2 September 2020

Date of Judgment: 26 October 2020