IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

APPEAL NO. CA 43/2015

Reportable	**Yes / No**

In the matter between:

EBHAYI CHARTER AIR CC **Appellant**

and

JP SMIT, JJ SMIT and SE KAPP N.O **Respondent**

in their capacities as the Trustees of the **JP SMIT FAMILY TRUST**

FULL BENCH APPEAL JUDGMENT

D VAN ZYL ADJP:

[1] The appellant instituted an action in the Port Elizabeth Local Division claiming payment from the respondent of two amounts. The claims arose from a contract **(the agreement)** concluded by the appellant and the respondent for the provision of, what has been described as **"piloting services",** against payment of a fixed monthly fee. The first claim was for arrear payments, while the second was

alleged to be one for damages consequent upon the respondent's breach of the agreement, and the appellant's resultant cancellation thereof.

[2] The existence of the agreement on which the appellant based its claims was not in dispute. It was a verbal agreement. In concluding the agreement the appellant, a close corporation, was represented by its sole member, Mr RDV Crichton (Crichton). The respondent, a family trust, was represented by its managing trustee, Mr JP Smit (Smit). Crichton was a qualified commercial pilot, and the agreement was that he would provide piloting services to the respondent whenever required against payment of an amount of R60, 000 per month, which amount was exclusive of value added tax. The appellant pleaded that the agreement was subsequently amended by the parties by agreeing that the respondent would **"be entitled to deduct against each such monthly invoice an amount of R33 684,21 in reduction of an indebtedness of the said Crichton to the Defendant in respect of a loan made and advanced by the Defendant to the said Crichton of R300 000.00 during or about May 2008, until such indebtedness has been extinguished."**

[3] The appellant's first claim was based on the respondent's breach of the agreement by having failed to pay to it the full amount agreed to in terms of the agreement after it had repaid the full balance of the loan referred to, that is, from

April 2010 until the cancellation of the agreement in November 2011. The amount claimed in respect of the appellant's second claim represented those amounts the appellant would have become entitled to during the period December 2011 to March 2013 had the agreement not been terminated prematurely by its cancellation. This claim was premised on an allegation that the term of the agreement was for five years, instead of three years as contended by the respondent.

[4] The respondent denied any liability for the amounts claimed. The issues raised in the respondent's plea placed the terms of the agreement on which the appellant relied upon for it claims in issue. The respondent's pleaded defence was that the agreement was for a period of three years and that the terms of the oral variation of the agreement were far more extensive than that alleged by the appellant. According to the respondent the variation of the agreement was in the following terms:

> **"4.3.1 The monthly fee payable to the Plaintiff, from August 2009, would be R30 000,00 per month, inclusive of VAT;**
>
> **4.3.2 Crichton, who had signed as surety in respect of a loan which had been made by the Defendant to the trustees for the time being of the**

Crichton Family Trust, in the sum of R300 000,00, agreed that Plaintiff, of whom he was the sole member, would repay the loan of the Crichton Family Trust as follows:

4.3.2.1 Payment of the sum of R100 000,00 at the beginning of July 2009;

4.3.2.2 The balance of the loan to be paid by Plaintiff to Defendant would be set-off against the difference between the initial contract price of R68 400,00 per month and the new contract price of R30 000,00 per month, provided the contract endured for a sufficient period so as to enable a complete set-off of the balance of the loan;

4.3.3 Once the loan had been discharged, monthly fees payable to Plaintiff would continue to be R30 000,00 per month, inclusive of VAT."

[5] The difference in the two versions in relation to the terms of the amended agreement is that on the appellant's version, upon repayment of the loan, the amount payable to it in terms of the agreement would revert to the original amount

of R60, 000.00 per month, while on the respondent's version that amount would reduce to an amount of R30, 000.00 per month. The respondent's defence was accordingly that after the appellant repaid the balance of the loan, the respondent continued to pay to it the reduced amount of R30, 000.00 per month in accordance with the terms of the amended agreement, and that after the expiry of the fixed period of three years, the agreement continued on a month to month basis until it was repudiated by the appellant unlawfully cancelling it in November 2011. For the sake of completeness it may be added that in respect of the appellant's claim for damages, the respondent also pleaded that the appellant had failed to act reasonably to mitigate its loss.

[6] The respondent in turn lodged a counterclaim for payment of an amount arising from its liability to pay employees' tax, interest and penalties to the Commissioner of the South African Revenue Services **(the Commissioner)**. It is a liability which the respondent had incurred by reason of its failure to deduct from the remuneration which it had paid to the appellant an amount representing employees' tax, colloquially known as **PAYE (Pay As You Earn).** The respondent's pleaded case was that its failure to deduct employees' tax from the appellant's remuneration was as a result of a misrepresentation made by the appellant. According to the respondent, the appellant misled it into believing that the

appellant was not a personal service provider by reason of its employment of three or more full time employees in its business, thereby excluding it from the legislative provisions relating to PAYE.

[7] The respondent was alleged to have acted on this misrepresentation to its own detriment by failing to deduct employees' tax from the appellant's remuneration, and that the appellant was liable to reimburse it for monies it had to pay to the Commissioner as a consequence. In the alternative, the respondent claimed that it was entitled to recover the monies from the appellant in terms of the provisions of section 5(3) of the Fourth Schedule to the Income Tax Act.[1] The provisions of this section will be dealt with more fully later in this judgment. In the further alternative, it was pleaded that the appellant had received a benefit from that payment, and that it was consequently enriched at the respondent's expense.

[8] In response to the counter-claim the appellant raised a special plea. It admitted the respondent's liability to the Commissioner incurred by reason of its failure to comply with its obligation in terms of the provisions of the Fourth Schedule, but pleaded specially that the respondent's claim had become prescribed as a period of more than three years had elapsed between the date the appellant's

[1]58 of 1962. Reference to **"Fourth Schedule"** in any part of this judgment should be taken as referring to the Fourth Schedule to the Income Tax Act.

claims arose and the institution of the counter-claim. In its plea over and replication the appellant admitted that the respondent was entitled to recover the amount of employees' tax which it had failed to deduct from the remuneration it had paid to the appellant , but alleged that that amount must be set-off against the amounts claimed by the appellant in its claim in convention. The appellant however denied that it had made any misrepresentation to the respondent, and instead alleged that the respondent, with full knowledge of the appellant's status as a personal service provider, had elected not to deduct employees' tax from the amounts it had paid to the appellant. On this basis the appellant accordingly denied being liable to the respondent for any payment it was obliged to make to the Commissioner in respect of penalties and interest.

[9] Before the commencement of the trial the parties had agreed to limit the issues in the claims in convention to two issues. The first was whether the agreement was for a period of five years as contended by the appellant, or three years as contended by the respondent. The second issue was whether the parties had agreed to vary the agreement in terms of which the amount payable in term of the agreement was to be reduced to R30 000.00 per month upon full repayment by the appellant to the respondent of the balance of a loan. In respect of the respondent's counter claim, the issues were limited to that of prescription and the

appellant's liability for the interest and penalties. It was formulated in the following terms:

> **"Subject to its Special Plea of Prescription, Plaintiff admits that it is indebted to Defendant and obliged to repay to Defendant the sum of R554,224.20 being amount of tax which Defendant ought to have paid to SARS. Plaintiff contends however that this should be set off against amounts which Plaintiff contends is owed to it by the Defendant."**

[10] The Court *a quo* dismissed the appellant's claims and the special plea raised, upheld the respondent's counter claim and ordered the appellant to pay the costs of the proceedings. The appellant has, with the leave of the trial Court, lodged an appeal against the judgment and the orders granted.

[11] Dealing firstly with the issues raised in convention, what the trial court was tasked to do was to resolve a factual dispute with regard to the terms of the agreement. It was common cause that by seeking to enforce the terms of the amended agreement in support of the relief sought, the burden of proving the terms of that agreement rested on the appellant.[2] That this required the appellant to

[2] *Kriegler v Minitzer and Another* 1949 (4) SA 821 (A) at 826 – 828; *Da Silva v Janowski* 1982 (3) SA 205 (A) at 219B–C and 220A–B; and *Robarts v Antoni NO and Others* [2014] ZASCA 64; [2014] 3 All SA 160 (SCA).

prove a negative, that is that an additional term as alleged by the respondent was not agreed upon, was correctly not placed in issue.[3]

[12] It is trite that the measure or degree of proof that will produce in the mind of the trier of fact in civil cases a firm belief or conviction as to the truth or correctness of the allegations sought to be established is that of a balance of probability. Where, as in the present matter, there exists two irreconcilable versions, the correct approach to the resolution of a factual dispute is that set out in cases such as *National Employers' General Insurance Co Ltd v Jagers*[4] and *SFW Group & Another v Martell et Kie & Others*.[5] That is, the court must determine whether the party burdened with the *onus* of proof has succeeded in discharging it by an assessment of the credibility of the witnesses; their reliability, and the probability or improbability of each party's version on each of the disputed issues.[6] These aspects do not constitute separate enquiries which must be considered piecemeal. **"They are part of a single investigation into the acceptability or otherwise of a plaintiff's version, an investigation where questions of demeanour and impression are measured against the content of a witness's evidence, where the importance of any discrepancies or contradictions are assessed and where a particular story is tested against facts which cannot be disputed and against the inherent probabilities, so that at the end of**

[3] *Topaz Kitchens (Pty) Ltd v Naboom Spa (EDMS) BPK* 1976(3) SA 470 (A) at 474A – B and *Stocks & Stocks (Pty) Ltd v T J Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A) at 761.

[4] 1984 (4) SA 437 (E) at 440D – G.

[5] 2003 (1) SA 11 (SCA) at 14H-J and 15A-D. See also *Dreyer and Another NNO v HXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA).

[6] See footnotes 5 and 7.

the day one can say with conviction that one version is more probable and should be accepted, and that therefore the other version is false and may be rejected with safety.[7]

[13] The trial court found that the appellant had failed to discharge the burden of proof. It found Crichton, the sole witness for the appellant, to be an unimpressive witness who was evasive and whose evidence was vague and contradictory. It considered the evidence of the witnesses who testified on behalf of the respondent, and found their evidence to be satisfactory in all material respects, in accordance with the probabilities, and it accepted their evidence in preference to that of Crichton.

[14] It is a well-established principle that a court of appeal will be slow to interfere with the credibility findings of the trial court, and that the factual findings of that court are presumed to be correct unless a misdirection on the part of the trial judge can be pointed to in order to justify interference with those findings on appeal.[8] The appellant did not challenge the demeanour and credibility findings of the trial court. Mr Friedman, who appeared for the appellant, instead argued that the trial court's acceptance of the truthfulness or correctness of the respondent's

[7]Jones J in *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SECLD) at 662D – F. See also *Baring Eiendomme Bpk v Roux* [2001] 1 All SA 377 (A) at 402a – f.
[8]*R v Dhlamayo and Another* 1948 (2) SA 677 (A) at 705 – 6; *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) at para [5]; *Roux v Hattingh* 2012 (6) SA 428 (SCA) at 433I – 434A and *Fourie v FirstRand Bank* 2013 (1) SA 204 (SCA) at 209J – 210A.

version in relation to the terms of the agreement, did not account for the wider probabilities of the case, the evidence placed before the court and the probabilities raised by that evidence.[9] To this extent he essentially made three submissions.

[15] The first was the probability of the respondent's version that the appellant had agreed to a drastic reduction in the remuneration payable to him in terms of the agreement. The argument is essentially that it is improbable that any person would have agreed to that. However, as correctly pointed out by Mr Ford for the respondent, an evaluation of the probability or improbability of the respondent's version in this regard must be assessed against the evidence as a whole.[10] According to Smit, whom the trial court found to have been a reliable witness whose testimony was to be preferred to that of Crichton, he was approached by Crichton in 2008 with a request for financial assistance. He agreed to advance to Crichton the sum of R300, 000.00 as a loan. The terms of the loan agreement were reduced to writing. The parties thereto were the respondent and the trustees of the Crichton Family Trust represented by Crichton. Crichton also bound himself in his personal capacity as a surety and co-principal debtor in *solidum* with the Crichton Trust for the repayment of the loan amount. In terms of Clause 3 of the loan agreement the loan amount and the interest thereon was repayable in full on or before 4 November 2008.

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[9] *Body Corporate of Dumbarton Oaks v Faiya* 1999 (1) SA 975 (SCA) at 979I – J.

[10] *CIR v SA Mutual Unit Trust Management Co Ltd* 1990 (4) SA 529 (A) at 543D – E.

[16] The probability of the respondent's version must be assessed against two subsequent events. Smit's evidence was that the financial markets drastically declined in October 2008 which negatively affected the financial position of the respondent. The respondent's main assets consisted of its shareholding in a group of coal mining companies whose turnover was effectively reduced overnight by as much as 50% due to the financial crisis. By July the following year the situation according to Smit had deteriorated to the extent that all options to stay financially afloat had been exhausted. The second event related to the failure, or the inability of Crichton and the Family Trust, to repay the loan. Smit testified that the financial position of the respondent had caused him to push for the repayment of the loan which was overdue. He further indicated to Crichton that due to the respondent's dire financial position the appellant's employment would either have to be terminated, or agreement had to be reached to reduce the amount payable to it. This position did not only apply to Crichton, but to all other employees of the respondent. When Crichton only managed to repay R100, 000.00 of the loan amount, Smit suggested to him that the terms of the agreement be varied so as to provide for the repayment of the balance of the loan, and in order to ensure the continued employment of the appellant, that the amount payable to the appellant be reduced to R30, 000.00 a month.

[17] Smit's evidence that Crichton accepted this arrangement must be assessed against the fact that neither Crichton nor the Family Trust were in a position to repay the loan on the agreed terms. Piecing the rather vague and evasive evidence of Crichton together, it was to the effect that he had required the loan amount in order to enable him to close down and pay the creditors of a panel-beating business which he had operated together with his wife. The financial statements of the business suggested that at that time it was not doing well, and according to Crichton, being engaged in having to pilot the respondent's aeroplane had negatively impacted on the business. It is apparent from Crichton's evidence that he had hoped to finance the repayment of the loan through the sale of a property in which the Family Trust had an interest. However, the property did not sell, which clearly left Crichton in a financial predicament.

[18] Confronted by what appears to have been his own dire financial position, the inability to repay the loan, and the possibility of the appellant's employment being terminated, Crichton's acceptance of the onerous terms suggested by Smit, cannot in my view be said to be inherently improbable. I am accordingly not convinced that the trial court can be said to have misdirected itself in this regard in its findings in relation to the wider probabilities of the case.

[19] The second argument was in relation to the appellant's attempt at the trial to rely in evidence on the contents of a document which it sought to introduce by way of an amendment to its pleadings. As the proposed amendment was opposed the appellant lodged an application for leave to amend as contemplated in Rule 28(4)[11] of the Uniform Rules of Court **(Rules of Court)**. The document in question is the second of three, which were referred to as schedules, and which were prepared on the instruction of the respondent's accountant, Mr S E Kapp **(Kapp).** It reflected an amount of R750, 148.67, calculated on the basis of what the appellant would have received in payment but for the reduction of the sum of R68,000-00 to R30,000-00 less the balance outstanding on the loan. This schedule represented a revised calculation of the amounts contained in the first schedule. The calculations in the first schedule only went as far as August 2011 and reflected a total of R629, 591.67. The third schedule, which was the one annexed to the appellant's particulars of claim, represented a further calculation, with the addition of amounts for interest. Its total is R824, 051.74, being the amount of the appellant's first claim.

[11]Rule 28(4) provides: If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.

[20] The appellant's application to amend its particulars of claim was aimed at amending the first claim by substituting the third schedule with the second and to reduce the amount claimed accordingly. The appellant's pleaded case was that the schedule **"constitutes an admission of liability of the amount due by the Defendant to the Plaintiff."** The argument in the appeal was that the second schedule reflected not only an unconditional obligation to pay the amount therein, but the manner of the calculation of that amount on the probabilities supported the appellant's version of what the terms of the agreement were, and militated against the respondent's version, which was submitted to have amounted to an act of benevolence. The question raised is whether or not the trial court had erred in excluding the respondent from placing any reliance on the second schedule by its refusal to allow the amendment.

[21] The proposed introduction of the second schedule was premised on the allegation in the affidavit filed in support of the application to amend that it was part of the documentation discovered by the respondent. The issue raised in the application to amend was whether the schedule referred to in items 46, 47 and 48 of the respondent's discovery affidavit, was the first or the second schedule. Item 46 was described as an **"Undated schedule reflecting outstanding balance due to J P Smit Familie Trust."** Item 46 clearly could not have referred to any one of the three

schedules. It pertained to a document marked "D" to the appellant's affidavit filed in support of its application to amend. That document reflected the balance outstanding on the loan advanced to the Crichton Family Trust by the J P Smit Familie Trust. Item 47 referred to an **"Undated schedule titled "Ebhayi Air Charter" furnished by Defendant's representative to Plaintiff's representative on 2 December 2011 together with termination and settlement agreement dated 2011".** Item 48 was the unsigned **"termination and settlement agreement."** The unsigned agreement proposed a settlement on the basis of the termination of what is referred to as a monthly agreement, by payment to the appellant of two amounts totalling R630, 000.00.

[22] According to Crichton the documents given to him on 2 December at a meeting with Kapp and the respondent's lawyer were the proposed settlement agreement and the second schedule. The respondent's version on the other hand was that the discovery of the documents in item 47 was not only made erroneously, but that it did not include the second schedule. According to Kapp, while the second schedule was given to Crichton on 2 December, it was not at their meeting. The documents initially handed over to Crichton at the meeting were the settlement agreement and the first schedule. Crichton however requested a calculation up to November 2011. Kapp asked an accountant to prepare a revised schedule and to leave it at reception where it must later have been collected by

Crichton. The respondent contended that the second schedule formed part of on-going settlement negotiations and was therefore privileged.

[23] At the trial the appellant conceded that by reason of the fact that the third schedule had been accompanied by a letter marked **"without prejudice"**, it constituted a privileged document, and that any reference thereto in the pleadings had to be struck out. Respondent's counsel in turn conceded that any privilege that may have attached to the first schedule, which on the respondent's version was the document discovered in item 47 of its discovery affidavit, had been waived notwithstanding its claim that it had been disclosed in error. It is clear from the record of the proceedings that these concessions were made by the respective parties simply on the basis, firstly that the third schedule was marked with the words **"without prejudice",** and the first schedule was not, and secondly, that the respondent had chosen to disclose the first schedule in its discovery affidavit. However, as Mr Friedman correctly pointed out in his heads of argument, whether or not the documents were part of without prejudice discussions, and whether the respondent had waived reliance on any privilege that may have attached to the first schedule, were factual issues which were to be determined objectively on the evidence placed before the trial court.[12] To the extent that the concessions were

[12] See *Naidoo v Marine & Trade Insurance Co Ltd* 1978 (3) SA 666 (A) at 674F.

made on any other basis, they were, as a matter of law, wrongly made. The parties acknowledged that to be the position.

[24] The trial court struck out the third schedule and dismissed the application to amend. In its judgment it found that the first and second schedules were two separate documents, that the second schedule formed part of without prejudice negotiations, and that it consequently did not form part of the documentation discovered by the respondent.[13] The trial court's acceptance of Kapp's evidence that the first and second schedules were not given to Crichton simultaneously on 2 December, cannot be faulted. Kapp's evidence that the second schedule came into existence by reason of Crichton's request at their meeting on that day that he be provided with an updated schedule, appears in the circumstances to be the more plausible of the two versions. The second schedule represents a revised calculation of the amount in the first schedule, which amount bears a closer resemblance to the amount offered to the respondent in the proposed settlement agreement. This strongly suggests that the agreement was drafted with reference to the first schedule.

[13]As the issue raised by the application to amend dealt with the admissibility of evidence (see below para [41]), it should have been dealt with either before or during the plaintiff's case, and not only at the end of the trial. If the application was granted, it would have meant that the parties, more particularly the respondent, had to be given an opportunity to deal in evidence with the issues raised by the amendment. However, as the application to amend was refused, no trial prejudice resulted to either party.

[25] The appellant however argued that an acceptance of Kapp's evidence that the first and second schedule were not simultaneously given to Crichton did not render the second schedule a privileged document. The argument was essentially that on the evidence the two schedules could not be separated. The second schedule was part and parcel of the first. It simply represented an update of the first schedule, in respect of which any privilege that may have existed was impliedly waived by reason of the respondent having disclosed it in its discovery affidavit.

[26] This argument raises two questions, namely whether the schedules were documents to which the respondent could claim a privilege to their disclosure, and if so, whether that privilege had been waived by the respondent having disclosed them. Generally all relevant evidence is admissible, and a party's admissions in relation to what is in dispute (the *lis*) between the parties are relevant and therefore admissible. It is however a truism that not all relevant evidence is admissible. A rule of evidence may result in otherwise relevant evidence being ruled inadmissible. One such rule is the well-established rule that written or oral communications which are made for purposes of a genuine (*bona fide*) attempt to settle a dispute between parties may not generally be admitted in evidence.[14] This

[14]The rule is qualified as there do exist exceptions thereto, for instance in cases where the existence, or the terms of a compromise are in issue. These are usually in matters where the relevance of the communication lies not in the truth of any fact which it asserts or admits, but simply the fact that it was made. See *Unilever v Proctor & Gamble* [2001] 1 All ER 783 CA at 791 – 793. See generally Schmidt & Rademeyer ***Law of Evidence***, LexisNexis, at 20-19

rule, referred to as a negotiations privilege or without prejudice rule, was developed in the English law and has been incorporated into our law of evidence.[15]

[27] The rationale for the rule is founded on the public policy of encouraging litigants as far as possible to resolve their disputes without resort to litigation.[16] The settlement of disputes without recourse to litigation is a legitimate objective in our law and is favoured and encouraged by the courts.[17] In order to achieve that goal parties must be allowed to communicate openly in settlement negotiations, and to make concessions in the course of those negotiations, with the knowledge that if those negotiations are unsuccessful, any communications, which may consist of suggestions, statements, offers or as in most instances, admissions adverse to the maker made during the course of those negotiations cannot be

- 20-20 and Zeffert and Paizes ***The South African Law of Evidence*** 2 ed, LexisNexis Durban, at 200-5.

[15] *Naidoo supra* at 677E – G.

[16] *Ibid* at 677E – D.

[17] See *PL v YL* 2013 (6) SA 28 (ECG) and *Eke v Parsons* [2015] ZACC 30 at paras [22] - [23].

considered in determining liability in later litigation.[18] In *Cutts v Head*[19] the principles upon which the rule operates were explained as follows:

> **"That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in *Scott Paper Co v Drayton Paper Works Ltd* (1927) 44 RPC 151 at 157, be encouraged fully and frankly to put their cards on the table . . . The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability."[20]**

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[18] It has been suggested that the rule is in part also based on an implied contract. See *Rush & Tompkins v Greater London Council* [1988] 1 All ER 549 (*Rush & Tompkins*) at 551 and *Naidoo supra* 674G - H. There are two problems with this: Firstly it would be incapable of covering the first communication, the so-called **"opening shot,"** which would have been made or sent before any implied agreement could have arisen with the other negotiating party. Secondly, the rule does not only apply to the negotiating parties, but also applies to a different party in the same litigation it **"goes without saying that admissions made to reach settlement with a different party within the same litigation are also inadmissible".** (*Rush & Thompkins* at 1305.) It is not necessary for purposes of this judgment to make any decision in this regard, and I express no views thereon.

[19] [1984] 1 All ER 597.

[20] *Ibid* at 605 – 606.

[28] Whether or not a communication falls within the ambit of this rule is a matter of substance rather than form.[21] The application of the rule is not dependent on the parties using the label or phrase **"without prejudice"**[22] on their communications. The use of the phrase does not conclusively or automatically render inadmissible a document marked as such.[23] Conversely, the absence of the phrase does not necessarily render the document admissible. The rule will apply if it is clear from the surrounding circumstances that the written or oral statement is part of a dispute which is genuinely the subject of settlement discussions. The test is therefore whether, the circumstances, judged objectively, are such that it can be concluded that the statement was made as part of a genuine attempt to negotiate a settlement. In *Rush & Thompkins* Lord Griffiths explained it as follows:

> **"The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence 'without prejudice' to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent on the use of the phrase 'without prejudice' and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be**

[21] *Rush & Thompkins supra.*
[22] Its means **"without prejudice to the position of the writer of the letter if the proposed terms for the resolution of the dispute are not accepted."**
[23] See *Gcabashe v Nene* 1975 (3) SA 912 (D) at 914E; *Jili v South African Eagle Insurance Co Ltd* 1995 (3) SA 269 (N); *Lynn & Main Inc v Naidoo and Another* 2006 (1) SA 59 (N) at 65B-C.

admissible at the trial and cannot be used to establish an admission or partial admission."[24]

In short, for a communication to attract the negotiations privilege there must be a pre-existing dispute between the parties, a genuine attempt to compromise the dispute, and the communications must have come into existence as part of the negotiations. These are fact based questions.

[29] The facts which are relevant in the context of the issues raised in the application to amend are that during the course of 2011 Smit made a decision to relocate some of his business interests to Namibia. There was a dispute as to whether or not he gave Crichton the option to accompany him, which offer, according to Smit, Crichton declined. However, what is evident is that this meant that the relationship between the appellant and respondent had to be terminated, and that the issue of the liability of the respondent to pay to the appellant what Crichton contended was actually due to it, arose. Crichton testified that Smit had mentioned an amount of R600, 000.00. Crichton rejected this amount, saying that what was owing to him was much more. This, according to Crichton was a softening in the stance adopted by Smit from 2009, which amounted to a refusal to pay what, according to Crichton, was owing to the appellant. It is evident from

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[24] *Supra* at 739 – 740.

this that Crichton must from time to time have asked for payment from Smit of what he thought was owed to him, and that Smit had refused to do so.

[30] Smit's evidence was that nothing was owed to Crichton but that when Crichton declined his offer to relocate with him to Namibia, he instructed Kapp to make a calculation on the basis of what would have been paid to the appellant but for the agreement to reduce the contractual amount from R68, 000.00 to R30, 000.00. Kapp returned with a figure of R630, 000.00, and Smit instructed him to meet with Crichton and offer that as payment. The motivation for this offer was that, according to Smit, Crichton had served him well, that it was not of the appellant's making that the respondent's financial position had deteriorated in 2008 necessitating a reduction in the appellant's remuneration, and that in line with *ex gratia* payments that were made to other employees whose services also had to be terminated as a result of the respondent's relocation to Namibia, he thought it fair to make a similar payment to the appellant.

[31] Kapp's evidence was that he then, on the instructions of Smit, proceeded to draft the settlement agreement and had asked Crichton to attend a meeting with him and a Mr Walker, a lawyer employed by the respondent. According to Crichton the meeting raised a concern with him because **"that is the way Mr Smit**

operates when he needs to get rid of people." As a result he telephoned his attorney telling him that he was **"not very comfortable about the fact that I am going into a meeting with an accountant and a lawyer on a settlement because I was quite happy to negotiate a decent settlement."** The advice given to Crichton was to attend the meeting, and to bring along all the documentation that he may receive thereat. He acted on this advice by attending the meeting and on the same day handing to his attorney the documents he had received from Kapp.

[32] At the meeting Crichton was presented with the settlement agreement. He rejected the terms thereof. According to Crichton he was flabbergasted and said to Kapp that the amount was more than that offered in the agreement. He asked Kapp to give him a schedule of how **"I was paid,"** and the schedule was given to him in response. Kapp admitted that he gave Crichton the schedules, the purpose of which **"was to negotiate a settlement and to terminate his services."** In an electronic mail to Kapp later in the day he expressed his disappointment at the information which had been presented to him at the meeting. In this communication Crichton said that the calculations presented to him wrongly included a charge for interest on the loan to the Crichton Family Trust despite the fact that the loan, was repaid; that the appellant was owed **"a minimum of R750,148-67 plus any further interest that has been wrongly occurred";** and that he was **"more than happy to sit down and**

structure a reasonable exit" on condition that the overdue amount be paid by a specified date.

[33] Further correspondence and meetings followed between the parties. This culminated in another offer marked without prejudice. The appellant similarly rejected that offer, and gave notice of his intention to cancel **"our five year agreement."** What followed was the present litigation.

[34] On the evidence there quite clearly existed a dispute, the subject matter of which was not only the respondent's liability to pay what Crichton had claimed was owed to the appellant in terms of the agreement, but also the extent of that liability. Smit's decision to relocate his business interests then also brought into play the issue of the termination of the respondent's contractual relationship with the appellant. Crichton, on his own evidence, appreciated that the scheduled meeting with Kapp on 2 December was to terminate that relationship, and to negotiate a settlement.[25] It was in this context that Crichton was given the settlement agreement and the first and second schedules. Despite Crichton's rejection of the first offer the negotiations continued, and a further offer was made which was also rejected.

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[25] See paragraph [31] above.

[35] The next question is whether the second schedule was properly to be regarded as part of an attempt to compromise the dispute between the parties. As Mr Friedman correctly stated, albeit for a different reason to the one advanced by him, the schedules cannot be separated from one another. The scope of the negotiations privilege is not limited to communications which constitute an actual offer to settle, but may also cover communications which form part of settlement negotiations. The question is whether the communication falls within the scope of the subject matter of the settlement negotiations. This requires the party who places reliance on the privilege to satisfy the *onus* of showing that the communication is connected to, and relevant to the settlement negotiations, that is, whether the communication was within the scope of the subject matter of the settlement negotiations. It is a question of fact. **"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."**[26] The policy underlying the existence of the privilege does not favour a restrictive approach to the scope thereof. As stated in *Unilever v Proctor & Gamble*:[27]

> **"[T]o dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to**

[26] *Naidoo supra* at 678H – 679A.
[27] [2001] 1 All ER 783.

> **the underlying objective of giving protection to the parties in the words of Lord Griffiths in the *Rush & Tompkins* case [at p 1300] 'to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts'. Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders".[28]**

These remarks are particularly apposite to the recognition that the settlement of disputes and its encouragement by the court serves the broader consideration of what is in the interest of the administration of justice.[29]

[36] The schedules were produced as part of on-going settlement negotiations and in order to facilitate the settlement of the dispute. To only consider one of the schedules to the exclusion of the other two would negate the fact that it formed part of a series of documents which cannot be viewed in isolation from one another. For the reasons which are more fully dealt with in paragraph [45] of this judgment, the schedules can also not be separated from the unsigned settlement agreement. These documents were, in the words of Trollip JA in the *Naidoo* case, **"not merely reasonably incidental to those settlement negotiations, they were actually part of them."**[30]

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[28] *Supra* at 796. See also *Bradford & Bingley v Rushid supra* at para [24] and *Barnetson v Framlington Group Ltd* [2007] 3 All ER 1054 at 1064.

[29] *Supra PL vYL* at 49C - 50F and *Eke v Parsons* at paras [22] - [23] and [27] - [28].

[30] *Supra* at 680G – H.

[37] I am accordingly satisfied that, on the evidence as a whole, the schedules were protected by the negotiations privilege. There existed a dispute between the parties, the subject matter of which was the nature and extent of the respondent's liability to pay the appellant what he claimed was due to it, the parties entered into negotiations aimed at settlement, and the three schedules and their contents, which were generated for the purpose, and in the context of facilitating a settlement, were connected to and relevant to the settlement negotiations which remained on-going.

[38] Did the respondent impliedly waive any reliance on the privilege by disclosing in its discovery affidavit the documentation handed to Crichton on 2 December 2011? In support of its argument in this regard the appellant placed reliance on the decision in *Competition Commission v Arcelormittal SA*[31] where it was held that the privilege that attached to a document may be impliedly waived if the person who claimed the privilege disclosed the contents of the document, or relied upon it in its pleadings or during court proceedings. The test, the court held, is objective**, "meaning that it must be judged by its outward manifestations, in other words, from the perspective of how a reasonable person would view it. It follows that privilege may be lost, as the English courts have held, even if the disclosure were inadvertent or made in error."**[32]

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[31] 2013 (5) SA 538 (SCA).

[32] *Ibid* at 545G-H.

[39] The without prejudice privilege may be waived.[33] In the context of the present matter the question can be more accurately posed as being whether a reasonable person would view the respondent's disclosure of the first schedule in its discovery affidavit as a waiver of its right to object to the admissibility of the contents of the without prejudice documentation at the trial. In *Arcelormittal* the court dealt with what is known as a litigation privilege. It protects written communications between a litigant and his legal advisor, or his legal advisor and a third party from disclosure if such communications are made for the purpose of pending or contemplated litigations. The purpose and scope of the privilege is to enable legal advice to be sought and given in confidence.[34] **"It applies typically to witness statements prepared at a litigant's instance for this purpose. The privilege belongs to the litigant, not the witness, and may be waived only by the litigant."**[35]

[40] There are a number of important differences between the litigation privilege on the one hand, and the negotiations privilege on the other. As stated in *Naidoo*,[36] by describing communications made in the course of negotiations for the settlement of a dispute as being **"privileged",** is **"an inaccurate but convenient label provided one always remembers that their admissibility or otherwise are not necessarily**

[33] *SOS Kinderdorf International v Effie Lentin Architects* 1993 (2) SA 481 (Nm HC) at 490H. Also **Tapper Cross and Tapper on Evidence** Oxford University Press, 12ed at para 24 – 39.
[34] The classic formulation of the rule is found in *Anderson v Bank of British Columbia* [1876] 2 ch D at 648 – 9.
[35] *Ibid.*
[36] *Supra* at 666D – E.

governed by the same considerations as are applicable to privileged communications."[37]

The most obvious difference is that the negotiations privilege is a jointly held privilege and therefore cannot be waived without the consent of both parties. A more fundamental difference which is particularly relevant in the context of present matter is that the privileges serve different purposes. The litigation privilege protects a litigant against the disclosure of all documents made for purposes of pending or contemplated litigation, and the Rules of Court have created a mechanism to give effect thereto.[38] It represents a category of otherwise relevant evidence which may be withheld from forensic scrutiny. It constitutes an exception to the general rule that a party is entitled to the discovery of all documents which are relevant as falling within the ambit or the *lis* between the parties as delineated by the pleadings, and which may either directly or indirectly enable the party seeking discovery to either advance his own case, or to damage the case of his opponent.[39]

[41] It is necessary to recognise the distinction between the discovery of a document and its admissibility in evidence. The right to the discovery and the

[37]*Ibid* at 677 D – E. As stated in *Rush & Thompkins*, the without prejudice rule is a rule governing the admissibility of evidence.

[38]Rule 35(1). A discovery affidavit must be in accordance with Form 11 of the first schedule to the Rules. Form 11 requires that the documents be listed in two schedules. The first schedule is in respect of documents still in the possession or power of the party concerned, and the second schedule is in respect of documents no longer in his or her possession or power. The first schedule is again to be divided into two parts. The first part is in respect of documents to whom there exists no objection to their discovery. The second part is in respect of documents to which an objection to produce is raised and the reasons therefor.

[39]*Ferreira v Endly* 1966 (3) SA 618 (E) at 622A – B; *M V Alina II, Transnet Ltd v M V Alina II* 2013 (6) SA 556 (WCC) at 563J – 565C and *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) at 197I – 198A.

production of a document is not dependent on the admissibility of that document in evidence.[40] To put it differently, the discovery of a document does not render it admissible. Admissibility is a separate matter, one with which the negotiations privilege is concerned with. **"The 'without prejudice rule' is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish."**[41] While the public policy underlying this privilege may provide a litigant with the right to also object to the discovery of a document made in the course of settlement negotiations,[42] it is primarily concerned with the admission in evidence of communications which are adverse to the maker thereof. In most instances such communications are relied upon, as in the present matter, as constituting an admission of liability. In *Forster v Friedland,* Lord Hoffmann explained the distinction as follows:

> **"The fact that a party cannot or does not claim privilege from production does not necessarily mean that the document will be admissible. In the nature of things without prejudice communications will usually be within the knowledge of, and if in writing in the possession of, both parties. They are nevertheless inadmissible unless their exclusion is waived by both parties. Mr Wingate-Saul again relied upon the analogy of legal professional privilege. Once again I think the analogy is a false one. Legal professional privilege is the right of a client to withhold documents or to**

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[40] *O'Rourke v Darbishire* [1920] AC 581. See also *Naidoo supra* at 677G.

[41] *Rush v Thompkins supra*.

[42] For instance, in multi-party litigation without prejudice communications between two parties may be protected from disclosure to a third party. It may also include communications which did not reach the other party but were created in the course and for the purpose of settlement negotiations. See *Rush v Thompkins*.

> **refuse to divulge communications . . . there is no rule that such documents or communications cannot be adduced in evidence by someone else. It follows that a waiver of legal professional privilege against production will automatically entitle the opposing party to use the document in evidence. A communication without prejudice, however, remains inadmissible whether tendered by plaintiff or defendant. Even if the opposing party has the document, as he usually will, he can make no use of it."** [43]

[42] Where the litigation privilege normally deals with information only one party has and is seeking to withhold from being disclosed to the other, without prejudice correspondence is information that has more often than not passed between the parties in the course of negotiation, and is therefore known to both parties. The discovery of the latter category of documentation must objectively have a lesser impact on the question whether a party has waived the right to object at the trial to the admissibility of an adverse statement therein, than would be the position when deciding whether a party simply waived the right to object to the production and inspection of the document in question.

[43] The fact that the respondent had disclosed the first schedule in its discovery affidavit, standing on its own, does not in my view support a conclusion that it had

[43] *Forster v Friedland* (unreported judgment) [1992] CA Transcript 1052.

waived its right to object to the admissibility in evidence of the statements embodied therein. The first schedule, and for that matter the second and third schedules, were exchanged between the parties during the course of their negotiations and already in the appellant's possession. Another aspect that militates against waiver is that, as stated hereinafter,[44] the second schedule cannot be separated from the other two schedules and the settlement agreement. To do so would have allowed the appellant to be selective by placing before the court evidence that is outside its proper context.

[44] There is another reason why the application to amend was in my view correctly dismissed. On the assumption that the respondent had waived the negotiations privilege, the question is then whether, in the context of deciding the application to amend, the second schedule constituted an admission of liability as the appellant sought to allege with the proposed amendment to paragraph 7 of its particulars of claim. In deciding this question it must be recognised that parties in settlement negotiations may assume disputed facts to be true solely for the purpose of reaching settlement. The introduction into evidence of these sorts of facts has therefore the potential to be misleading.[45] As stated, Kapp's evidence was that the schedules were produced simply to serve as a basis for calculating an amount to be

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[44] See paragraphs [44] and [45] below.

[45] "I should think that during settlement negotiations misrepresentations are often innocently **and** unwittingly made." Trollip JA in the *Naidoo* case at 681E.

offered in the settlement agreement.[46] This was corroborated by the fact that the amounts in the schedules were adjusted in response to meetings held by the parties and the passing of correspondence between them.

[45] The schedules can also not be considered in isolation from the terms of the unsigned settlement agreement. That agreement did not contain an acknowledgement of liability on the terms as contended by the appellant and for the amount claimed, and bears no resemblance to the basis of the calculations in the second schedule. On the contrary, it corresponded with the respondent's version of what the terms of the amended agreement were. The settlement proposed in the unsigned agreement was on the basis that the appellant's employment was on a monthly basis,[47] and importantly, that the agreed monthly fee was R30, 000.00.[48] The issue raised by this is whether the introduction of the second schedule would lend support to the appellant's pleaded case, or to put it differently, whether it would constitute evidence of the truth of the facts asserted in the appellant's pleadings.

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[46]See paragraph [32] above.

[47]Clause 1.1 of the agreement reads: **"The Trust, Ebhayi Air and Crichton ("the Parties") entered into an agreement in terms of which the Trust engaged Ebhayi Air and Crichton to render aviation services (namely private flying services) to the Trust as and when required by the Trust on a <u>monthly</u> basis against payment of an agreed fee.**

[48]This was dealt with in clause 2.1: **"The Parties agree to terminate the Agreement with effect from 31 December 2011 on the following basis:- 2.1.1 an amount of R30,000-00 (Thirty Thousand Rand) shall be paid by the Trust to Ebhayi Air on or before 15 December 2011, being in respect of the <u>agreed monthly fee</u> payable in terms of the Agreement." (My emphasis.)**

[46] Seen in the context of the settlement agreement, the second schedule does not constitute an unqualified and unequivocal acknowledgement of liability as the appellant sought to contend with the proposed amendment. To allow the amendment, or to rule the second schedule, with the exclusion of the other two schedules and the settlement agreement, as being admissible in evidence, would result in it being plucked out of context and only part of the story being told. It would allow the appellant to be selective and to adjust its case to fit in with a document which is taken out of context. The second schedule was part and parcel of on-going settlement discussions, and the three schedules, read with the settlement agreement, do not prove, or will as a matter of probability, not prove the issue raised by the amendment, namely that it constitutes an admission of liability of the amount claimed on the terms alleged by the appellant. The proposed amendment therefore did not raise a triable issue, that is one which, **"if it can be proved by the evidence foreshadowed in the application for the amendment, will be viable or relevant, or which, as a matter of probability, will be proved by the evidence so foreshadowed."**[49]

[47] For these reasons I am satisfied that the trial court did not err in refusing the amendment sought.

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[49]Van Loggerenbery ***Erasmus Superior Court Practice*** 2ed at D1–338. See also *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n Ander* 2002 (2) SA 447 (SCA) at 462F-463C and *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen* (2) 2005 (6) SA 23 at 36E – J.

[48] That brings me to the appellant's third argument, which is that on the respondent's own version it was liable to pay the appellant the full extent of its claim for arrears. In support of this argument, and with reliance on the evidence of Smit and Kapp, it was submitted that the respondent had undertaken to pay the appellant the arrears, that is, the difference between R68,000-00 and R30,000-00, once the respondent's financial position had improved, and that Smit in his evidence to the court had acknowledged that the respondent's position did in fact improve.

[49] I agree with counsel for the respondent that there is no merit in this argument. The submission is not only in conflict with the appellant's own pleaded case, but those portions in the evidence of Smit and Kapp in cross-examination on which reliance was placed in support of this submission, must be evaluated in the context of their evidence as a whole, and the subject matter of the questioning at the relevant time. The questioning of the two witnesses and their responses were in the context of testing the probability of Crichton agreeing to a reduction in the appellant's remuneration, and whether the offer of settlement was made as a gesture of benevolence, rather than an acknowledgement of the existence of a contractual obligation to pay what was owing to the appellant. Both Kapp and

Smit gave responses, the import of which was that Crichton had agreed to a reduction in the appellant's remuneration, but that the respondent had undertaken to revisit the matter if and when the respondent's financial position had improved. It was not their evidence that the respondent had agreed to either prospectively or retrospectively re-instate payment of the sum of R68,000-00 once that event had taken place. Kapp explicitly denied that there were any arrears owing to the appellant, but said that when circumstances changed **"we can reach a new agreement."** Smit's evidence was similarly to the effect that it was nothing more than a promise to reconsider the remuneration payable to the appellant, and that there was no legal obligation on the respondent to re-instate the payment of R68,000-00 once its financial position had improved. That this distinction was appreciated, is evidenced by the fact that it was put to Smit in cross examination, and confirmed by him as correct, that **"the only difference between you, and Mr Crichton is that you did not have to do it [re-instate the payment of R68,000-00], but you could do it if you felt like it and he says you always had to pay him, he always submitted his invoices and you undertook to pay him at some point and you agreed to pay him."**

[50] Was the agreement for three or five years? According to Crichton, Smit's offer was for **"R60,000-00 a month cost to company, five year contract"** Smit's evidence that the agreement was for a period of three years was corroborated by a former employee, Mr D C Oosthuizen **(Oosthuizen)** who testified that he had been

instructed by Smit to draft an employment contract for Crichton. According to Oosthuizen, he was told to prepare, what he referred to as a fixed term contract for a period of three years. In preparation for the drafting of the agreement he had a meeting with Crichton in order to obtain particulars such as a copy of Crichton's identity document, his pilot certification, address **"and other detail which I captured in the fixed term contract."** Oosthuizen kept notes of the meeting, some of which were in Crichton's own handwriting, such as his banking details, and others in Oosthuizen's handwriting which included a note that the agreement was to be for three years. That Crichton was prepared to accept a contract for that period was also not against the probabilities. As stated earlier, his panel beating business at the time appeared not to have been doing very well financially, and a fixed term contract would have provided him with financial security. I am accordingly not convinced that the finding of the trial court that the agreement was for three years was wrong. It is not inconsistent with the accepted evidence and the probabilities raised by it.

[51] That leaves the respondent's counter-claim and the appellant's defence of prescription raised thereto. As indicated earlier, the respondent's claim was in respect of monies it had to pay to the Commissioner arising from its failure to deduct employees' tax from the appellant's remuneration. The factual background

to the counter-claim is that, as Smit put it, Crichton had a gripe about paying employees' tax. Smit told him to take the matter up with Kapp who, as an accountant, was in a better position to inform him about tax related matters. Kapp testified that Crichton approached him in April 2008 enquiring about the tax implications if he were to make use of a close corporation as a vehicle to contract with Smit. Kapp told him that there would be no concern about paying employees' tax should the close corporation employ more than three full-time **"unconnected"** employees. Crichton then later, after he had raised his unhappiness with Smit about the contract drafted by Oosthuizen, informed Smit that he had discussed the issue with Kapp, and that Kapp had cleared the way for the conclusion of the agreement with the appellant as the contracting party.

[52] According to Kapp, in November 2012 when the appellant's action in this matter was to proceed to trial, it came to light from documentation made available by the appellant, that the respondent may have been misled into believing that the appellant was employing the required number of employees. Kapp investigated the matter further, and it became evident that the respondent had incurred a liability in respect of employees' tax in terms of the Income Tax Act. The respondent as a result made a voluntary disclosure to the Commissioner, who held the respondent liable for the payment of the amounts of employees' tax it should

have deducted from the remuneration paid to the appellant, but had failed to do so. The Commissioner in addition levied interest and imposed a penalty as it is entitled to do in terms of the relevant provisions of the Income Tax Act.[50]

[53] The respondent's counter-claim was in the main premised on the allegation that the respondent's failure to deduct employees' tax from the appellant's remuneration had been induced by the respondent's misrepresentation that it employed more than three full time employees. The legislative framework relevant to the counter-claim is found in Part II of the Fourth Schedule **(the Fourth Schedule)** to the Income Tax Act. Paragraph 2 of the Fourth Schedule places an obligation on an employer to deduct from an employee's salary an amount in respect of the employee's liability for normal tax and to pay it over to the Commissioner.[51] Paragraph 4 in turn provides that any amount of employees' tax that is required to be deducted or withheld is a debt due to the State, and the employer is absolutely liable for the payment thereof to the Commissioner.[52]

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[50] See footnotes 64 and 65.

[51] Paragraph 2 provides that every employer: **"who pays or becomes liable to pay any amount by way of remuneration to any employee shall, unless the Commissioner has granted authority to the contrary, deduct or withhold from that amount, or, where that amount constitutes any lump sum contemplated in paragraph 2(1)(b) of the Second Schedule, deduct from the employees benefit or minimum individual reserve as contemplated in that paragraph, by way of employees' tax an amount which shall be determined as provided in paragraph 9, 10, 11 or 12, whichever is applicable, in respect of the liability for normal tax of that employee."**

[52] Paragraph 4 reads: Any amount required to be deducted or withheld in terms of paragraph 2 shall be a debt due to the State and the employer concerned shall save as otherwise provided be absolutely liable for the due payment thereof to the Commissioner.

[54] In terms of paragraph 1 of the Fourth Schedule an employee includes a personal service provider as defined, which definition excludes a company or trust[53] which throughout the year of assessment **"employs three or more full-time employees who are on a full-time basis engaged in the business of such company or trust of rendering any such service, other than any employee who is a holder of a share in the company or member of the trust or is a connected person in relation to such person."** The effect of this provision is that if the appellant was employing the required number of employees, the respondent would have been exempted from its obligation to deduct employees' tax from the appellant's remuneration.

[55] The *onus* was on the respondent to prove its counter-claim. The trial court found that Crichton misrepresented to Kapp the number of persons employed by the appellant. On the evidence this finding was justified, and it was not attacked on appeal. It is evident from a reading of the evidence as a whole that Crichton was dissatisfied with the fact that employees' tax was deducted from the amounts paid to him in respect of the first two months of his employment. The reason clearly was that it substantially reduced the amount of remuneration agreed upon with Smit. He said that much to both Smit and Oosthuizen, and refused to sign the agreement which Oosthuizen had drafted. That agreement was drafted on the basis that Crichton was to be employed as a pilot in his personal capacity. This meant that Crichton would have been liable for payment of income tax which had to be

[53]The definition of a **"company"** in the Income Tax Act includes a close corporation. (See section 1(f)).

deducted from his remuneration. Crichton could have avoided a deduction from the remuneration if payment had been made to a close corporation, and if it employed more than three full time employees. According to Crichton he proceeded to pursue the possibility of invoicing the respondent through either the appellant or his family trust. He spoke to his accountant about this aspect and also with Kapp, to whom he was referred to by Smit. On Crichton's own evidence it is evident that Kapp raised with him the issue relating to the number of persons employed by the appellant. That could only have been in the context of determining the appellant's liability for employees' tax. Crichton's explanation with regard to the content and the purpose of this conversation was evasive, and anything but satisfactory, and was correctly rejected.

[56] It was common cause at the trial that the remuneration paid to the appellant in terms of the agreement was subject to employees' tax, that the respondent had failed to deduct therefrom an amount determined in terms of the Fourth Schedule, that the Commissioner had not absolved the respondent from its payment, and that the appellant was obliged, subject to its defence of prescription, to repay the respondent the amount it had paid to the Commissioner. The basis of the appellant's defence of prescription at it was pleaded was that the respondent knew that the appellant was a personal service provider;[54] that it was obliged to deduct

[54] The definition of an **"employee"** in the Income Tax Act includes **"any personal service provider."**

employees' tax from the remuneration paid to it, and that a period of more than three years had elapsed between the institution of the counter-claim and the date **"that PAYE prior to October 2010 should have been paid by the Defendant on a monthly basis, upon receipt of invoice from the Plaintiff."**[55] In other words, the appellant's defence was that the debt was due and prescription started running on the dates when the respondent was obliged in terms of the Fourth Schedule to pay to the Commissioner the amounts it had failed to deduct from the appellant's remuneration.[56] For the reasons stated below this defence was correctly dismissed by the trial court.

[57] In the appeal the appellant chose to take a different course and to confine itself to the submission that the respondent ought to have acquired knowledge of its claim against the appellant prior to the institution of its counter-claim. It was argued that the respondent had been negligent in failing to earlier establish the facts underlying its obligation in terms of the Fourth Schedule to deduct employees' tax from the remuneration paid to the appellant. This argument was based on the provisions of section 2(1A) of the Fourth Schedule and the *proviso* to section 12(3) of the Prescription Act[57] **(the Prescription Act).**

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[55] Paragraph 4 of the appellant's special plea.

[56] Paragraph 2(1) of the Schedule provides that an employer shall, **"subject to the Employment Tax Incentive Act, 2013, pay the amount so deducted or withheld to the Commissioner within seven days after the end of the month during which the amount was deducted or withheld, or in the case of a person who ceases to be an employer before the end of such month, within seven days after the day on which that person ceased to be an employer, or in either case within such further period as the Commissioner may approve."**

[57] 68 of 1969.

[58] In order to deal with this argument it is necessary to first consider the provisions of the Prescription Act and the nature of the respondent's counter-claim. The relevant provisions are sections 10(1), 11(d), 12(1) and (3) and 15(1). They read as follows:

"10 Extinction of debts by prescription

(1) Subject to the provisions of this chapter and of ch IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.

. . .

11 Periods of prescription of debts

The period of prescription of debts shall be the following:

. . .

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.

. . .

12 When prescription begins to run

(1) Subject to the provisions of ss (2) and (3), prescription shall commence to run as soon as the debt is due.

. . .

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

. . .

15 Judicial interruption of prescription

(1) The running of prescription shall, subject to the provisions of ss (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt."

[59] It was common cause that the relevant prescriptive period in this matter was three years. For prescription to commence running, there has to be a **"debt"** which is **"due"**. The term **"debt"** is not defined and must be given a wide and general meaning. In relation to the Prescription Act it is used to describe the correlative of a right or claim to some performance, in other words, as the duty side of an obligation created by contract, delict or another source.[58] In the context of a delictual debt, it is **"due"** when **"the creditor acquires a complete cause of action** [claim or right 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 the action, and to pursue his or her claim."**[59] A money debt is said to be **"due"** when **"there is a liquidated monetary obligation presently claimable by the creditor for which an action could presently be brought against the debtor. Stated differently, the debt**

[58]**"Prescription is about rights that have come into existence but have ceased to exist by the passage of time. If a right has not come into existence then there is nothing that is capable of expiring."** Nugent JA in *Duet and Magnum Financial Services v Koster* 2010 (4) SA 499 (SCA) at para [9].

[59]Van Heerden JA in *Truter v Deysel* 2006 (4) SA 168 (SCA) at para [15]. With regard to the difference between a **"cause of action"** and a claim or **"right of action"** see *Drennan Maud & Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) at 212E – G; *Nedcor Bank Bpk v Regering van die Republiek van Suid Afrika* 2001 (1) SA 987 (SCA) at 995G – H and *Unilever Bestfoods Robertsons (Pty) Ltd v Soomar* 2007 (2) SA 347 (SCA) (*Unilever Bestfoods Robertsons*).

must be one in respect of which the debtor is under an obligation to pay immediately". In the normal course of events, this means that a debt is **"due"** when it is claimable by the creditor and, as its correlative, the debtor is under an obligation to pay it immediately.

[60] What is extinguished by prescription in terms of the Prescription Act is a **"debt"**, that is a claim or right of action, and not a **"cause of action"**.[60] As to when the debt became due in the present matter must therefore be determined against the nature of the claim or right of action underlying the respondent's cause of action. The respondent pleaded a number of causes of action in the alternative. I propose to deal only with the first two. An action based on intentional or negligent misrepresentation is a delictual claim for damages actionable under the *actio legis Aquiliae*.[61] The **"debt"** is the liability to pay damages arising from the misrepresentation. As in the case of any other claim for damages arising from a single wrongful act, the claim is only complete after damage has been suffered, at which time prescription commences to run.[62] In the context of the present matter, the respondent's damages arose and the **"debt"** was due when it had to pay to the

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[60] See footnote 56 above.

[61] See generally Van der Walt and Midgley **Principles of Delict 3rd ed** Lexis Nexis at page 90 to 91 and the authority referred to.

[62] *Oslo Land Co Ltd v Union Government* 1938 AD 584 at 590; *Evins v Shield Insurance Co. Ltd* 1979 (3) SA 1136 (W) at 1141F – G; *Philip Robinson Motors (Pty) Ltd v NM Dada (Pty) Ltd* 1975 (2) SA 420 (A) at 428F – G; *Unilever Bestfoods Robertsons supra* at paras [11] and [18] and *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) at para [6].

Commissioner the employees' tax it had failed to deduct from the appellant's remuneration together with the interest and the penalty imposed in respect thereof.

[61] An alternative cause of action on which the defendant relied upon was based on paragraph 5(3) of the Fourth Schedule. It must be read with paragraph 5(2) which authorises the Commissioner to absolve an employer from liability who had failed to deduct employees' tax, and to instead recover the tax from the employee, when satisfied that there was no **"intent on the part of the employer to postpone payment of the tax or to evade his obligations",** and **"there is a reasonable prospect of ultimately recovering the tax from the employee."**[63] Should the Commissioner decide not to absolve the employer from liability, and recover the outstanding employees' tax from the employer, paragraph 5(3) gives the employer a statutory remedy in the form of a right to recover the amount from the employee in respect of whom the tax was paid.

It reads:

> **"An employer who has not been absolved from liability as provided in subparagraph (2) shall have a right of recovery against an employee in respect of the amount paid by the employer in terms of subparagraph (1) in respect of that employee, and such amount may in addition to any other right of recovery be deducted from future remuneration which may**

[63] Paragraph 5(2) of the Fourth Schedule.

become payable by the employer to that employee, in such manner as the Commissioner may determine."

[62] On a reading of sub-paragraph (3) it is evident that: (a) The right to recover payment from the employee is limited to the amount paid by the employer in terms of subparagraph (1), that is employees' tax paid in respect of the employee. It accordingly does not include the right to recover any additional amounts paid by the employer such as interest[64] charged by, and penalties[65] imposed by the Commissioner. In the absence of another right to recover it, these amounts would constitute a cost to the employer. (b) The right provided by the sub-paragraph does not exclude, but is in addition to any other right which the employer may have to recover from the employee the amounts paid to the Commissioner. (c) Where the employee is still in the employment of the employer, the employer is authorised to recover the amount paid to the Commissioner by deducting it from the employee's future remuneration, but then only in such manner as the Commissioner may determine. This provision provides statutory authority for making a deduction from an employee's salary without his or her consent as provided for in section 34 (1) (b) of the Basic Conditions of Employment Act.[66] That section provides that an employer may not make any deduction from an

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[64] Section 89 *bis* (2) of the Income Tax Act.
[65] Paragraph 6(1) of the Fourth Schedule.
[66] 75 of 1997.

employee's remuneration unless **"(1) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award."**[67] (d) The decision to absolve an employer from liability is within the discretion of the Commissioner, and subject to being satisfied (i) that the employer's failure to deduct employees' tax was not due to an intent to postpone the payment of tax, or evade the employer's obligations under the Fourth Schedule; and (ii), that there is a reasonable prospect of recovering the tax from the employee.

[63] On a reading of the Fourth Schedule as a whole it is evident that its purpose is to facilitate the collection of income tax by making use of the employer-employee relationship to receive advance payment in respect of the employee tax payer's tax liability. To give effect to this purpose the employer is placed under an obligation to deduct and withhold from the employee's remuneration **"an amount in respect of the liability for normal tax of the employee,"**[68] and to pay it over to the Commissioner. As correctly stated in *Estate Late G A Pitye v Commissioner of the South African Revenue Services*[69] the collection mechanism created by the schedule to give efficiency to the Income Tax Act does not alter the employee's tax liability. The ultimate liability to pay income tax remains with the employee.

[67] My emphasis. The finding in *Naidoo v The Careways Group (Pty) Ltd and Another* [2013] ZALCJHB 96 that the obligation of an employer to deduct tax from an employee's salary is subject to the ceiling imposed by section 34(2)(d) of the Basic Conditions of Employment Act is incorrect. Paragraph (d) deals with deductions made in terms of subparagraph (2) of section 34, which are deductions to reimburse an employer for loss or damage.

[68] Paragraph 2(1) of the Fourth Schedule.

[69] [2003] JOL 11197 (W) at para [10].

What this means is that insofar as the employer-employee relationship is concerned, the Fourth Schedule does not create an obligation on the part of the employee to pay to his or her employer an amount representing his or her liability to the Commissioner for income tax.

[64] It similarly does not create any obligation on the part of an employer to pay income tax on behalf of his or her employees. In the context of the employer-employee relationship the Fourth Schedule simply authorises the employer, as required by section 34(1) (b) of the Basic Conditions of Employment Act, to deduct from an employee's remuneration without his or her consent an amount representing the employee's liability to the Commissioner for income tax. In other words, the employer's obligation to deduct employees' tax and the liability created thereby does not create a debt which is due and payable by the employee to the employer.

[65] In the scheme of the Fourth Schedule, the employer obtains a claim or right to recover payment and the employee is under an obligation to pay only once the Commissioner has refused to absolve the employer from liability arising from his or her duty to deduct employees' tax, and the employer has in fact paid that amount to the Commissioner. The right created by paragraph 5(3) is a right of

recovery. The complement of that right is the obligation of the employee to refund the employer. That obligation arises once the right has accrued. The **"debt"** accordingly arose, and prescription commenced running, from the time the respondent had performed its liability in terms of the Fourth Schedule, and the appellant incurred the obligation to refund the respondent in respect of the employees' tax it had to pay to the Commissioner.

[66] It follows that the respondents' **"debt"** underlying its counter-claim was not due three years prior to the institution of that claim. Did the respondent have knowledge, or must it be deemed to have had knowledge of the identity of the debtor and the facts from which the debt rose as contemplated by section 12(3) of the Prescription Act? In order to successfully invoke section 12(3), either actual or constructive knowledge must be proved.[70] **"Knowledge"** is not mere opinion or supposition. **"There must be justified, true belief".**[71] Constructive knowledge is established if the creditor could reasonably have acquired the requisite knowledge by the exercise of reasonable care.[72] The test is what a reasonable person in the position of a creditor would have done.[73] Section 12(3) only requires knowledge of the material facts upon which the debt arises, and does not postpone the running

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[70] *Gericke v Sack* 1978 (1) SA 821 (A) at 826A – 827B and *Van Staden v Fourie* 1989 (3) SA 200 (A) at 216B.

[71] *Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA) at para [18].

[72] *MacLeod v Babalwa Kweyiya* 2013 JDR 0581 (SCA) at para [11].

[73] *Supra Drennan Maud & Partners v Pennington Town Board* at 209F – G; *Leketi v Tladi NO* [2010] 3 All SA 519 (SCA) at para [18] and *Gunase v Anirudh* 2012 (2) SA 398 (SCA) at para [15].

of prescription until a creditor becomes aware of the full extent of his or her legal rights and remedies.[74]

[67] The appellant's submission was that the respondent must be deemed to have had the required knowledge as Kapp was negligent in failing to have obtained an affidavit or a solemn declaration from the appellant that it was employing three or more full-time employees. The most obvious difficulty with this proposition arises from the fact that the *onus* to prove prescription rested on the appellant.[75] The appellant accordingly had to prove the facts on which the special plea was based. In the context of section 12(3) this means that it was essential that the appellant not only had to allege, but also prove that the respondent had, or ought to have had, the requisite knowledge on a particular date on which it was contended prescription commenced running.[76] The appellant failed to pertinently place any reliance on section 12(3) in its special plea. Not only was there no mention of section 12(3) in the special plea, but there was no allegation that the respondent had, or ought to have had the requisite knowledge, and by when it had or ought to have had that knowledge. No doubt because it was not fully pleaded, this aspect was not

[74]*Truter v Deysel supra* at para [17]; *Yellow Star Properties 1020 (Pty) Ltd v MEC Department of Development Planning and Local Government, Gauteng* 2009 3 SA 577 (SCA) at para [37], where Leach AJA said that if the applicant **"had not appreciated the legal consequences which flowed from the facts"** its failure to do so did not delay the running of prescription. See also *ATB Chartered Accountants (SA) v Bongfiglio* [2011] 2 All SA 132 (SCA) at paras [14] and [18] and *supra Van Staden v Fourie* at 216E.
[75]*Supra Gericke v Sack* at 826A – 827B *supra* and *Van Staden v Fourie supra* at 216B.
[76]*Nedcor Bank Bpk v Regering van die RSA* 2001 (1) SA 987 (A) and *Lavers v Hein & Far BK* 1998 (3) SA 195 (SCA) at 198I – 199G and *Minister of Finance and Others v Gore NO supra* at para [13].

properly canvased and explored in evidence. In fact, save to deny that he ever told Kapp that the appellant had more than the required number of employees, the appellant failed to present any evidence on this aspect. In the absence of having established at least a *prima facie* case, Kapp's acknowledgment, when the issue of a written statement was raised with him for the first time in cross-examination, that he had made a mistake in not asking Crichton for such a statement, could not in my view assist the appellant in discharging the *onus*.

[68] I am in any event not convinced of the correctness of the legal basis for the contention that the respondent had a statutory duty to obtain written confirmation from the appellant of the number of persons employed by it, and that it was negligent by failing to do so. The relevant paragraph in the Fourth Schedule relied upon in support of this argument is paragraph 2(1A). It provides that: **"Notwithstanding the provisions of subparagraph (1), a person shall not be required to deduct or withhold employee's tax in respect of any year of assessment of a company or trust solely by virtue of paragraph (c) of the definition of "personal service provider" where the company or trust has in respect of such year of assessment provided that person with an affidavit or solemn declaration stating that the relevant paragraph does not apply and that person relied on that affidavit or declaration in good faith."** On a reading of this provision it is clear that the **"relevant"** paragraph that **"does not apply",** is paragraph (c) of the definition of **"personal service provider."** In terms of that

definition, a personal service provider includes a company or a trust in respect of which a service is personally rendered on behalf of such company or trust by a person who is **"a connected person in relation to such company or trust and**

(a) . . . or;

(b) . . . or;

(c) where more than 80 per cent of the income of such company or trust during the year of assessment, from services rendered, consists of or is likely to consist of amounts received directly or indirectly from any one client of such company or trust, or any associated institution as defined in the Seventh Schedule to this Act, in relation to such client". Paragraph 2(1A) accordingly envisages a declaration that paragraph (c) of the definition of a service provider does not apply, that is, that the company or trust has more than one client and it is not receiving more than 80 per cent of its income from any one particular client. It has nothing to do with the exclusion of a company or trust from the definition of a service provider on the basis of the number of its full-time employees. It follows that the reliance placed on paragraph 2(1A) in support of the argument that the respondent was negligent, was misplaced.

[69] The material facts in respect of the respondent's claims arising from the Schedule and the appellant's misrepresentation were with respect to the

incorrectness and the truthfulness respectively of Crichton's statement of fact that the appellant employed more than three full-time employees. The question raised thereby in the context of section 12(3) of the Prescription Act is whether a reasonable person in the respondent's position would have taken steps to establish the correctness and truthfulness of that statement, in other words, was the respondent negligent in failing to do so? There was no evidence that Kapp at the time had any reason to doubt the correctness of what Crichton had told him, or that there were any subsequent events that would have led a reasonably prudent person to believe that the appellant was not employing the required number of persons. There accordingly in my view existed no factual basis to conclude that the respondent was negligent.

[70] Accordingly, and for these reasons I would dismiss the appeal with costs.

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D VAN ZYL

JUDGE OF THE HIGH COURT

I agree

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J M ROBERSON

JUDGE OF THE HIGH COURT

I agree

_____

G GOOSEN

JUDGE OF THE HIGH COURT

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Date Heard: 10 August 2015

Judgment Delivered: 10 November 2015