IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

APPEAL CASE NO: A5028/08

CASE NO: 2005/26341

In the matter between:

POWELL: OLIVER MICHAEL Appellant/Plaintiff

and

ROUX: LYNETTE Respondent/Defendant

JUDGMENT

SALDULKER, J:

A. INTRODUCTION:

[1] This is an appeal against the judgment and order delivered by his Lordship Acting Justice De Jager on 8 July 2008.

[2] The appeal involves the interpretation of letters written by the appellant to the respondent and the respondent's reply thereto. The appeal is with the leave of the court a quo.

B. BACKGROUND:

[3] The appellant instituted an action against the respondent for damages, for alleged defamatory statements contained in a report written by the respondent, a clinical psychologist. The report was submitted to the Family Advocate in a litigation between the appellant and one Linda Petzer, who became embroiled in a custody/ access dispute concerning B, a minor child born from their relationship. The respondent was appointed as a clinical psychologist to perform forensic work and to furnish a report to the family advocate concerning access. The respondent furnished the family advocate with a report which she supplemented during March 2005.

[4] The respondent defended the action and the matter was set down on the trial roll for 30 January 2007. During December 2006, the appellant wrote a letter to the respondent. The interpretation of the contents of that letter and the reply thereto became a bone of contention between the parties. The dispute centres around their respective interpretations.

[5] The material terms of the undated letter (the first letter[1]),read inter alia as follows:

"For a number of reasons and in view of the fact that I have been satisfied by more than one independent expert that your diagnosis of me is flawed and misdirected, I do not intend pursuing the action against you. I have taken this decision for a number of reasons including the fact that I wish to get on with

[1] Record, p 18-19

my life and address those post traumatic stress disorder issues that may be impacting on me in my daily "functioning". Consequently, no useful purpose will be served to waste any more time and resources joining issue with you on your unsupported , flawed and malicious mis-diagnosis of me.
In the result, I shall not be proceeding with my action against you. The Medical and Dental Council must take such action against you as it deems meet.

My proposal is that each party pays his/her own costs and the matter be withdrawn from the roll. Please revert to me on your attitude to the proposal".
(my underlining)

[6] The respondent replied [2](the second letter) inter alia as follows:

"We do not intend to respond to any of the allegations made in that telefax save for the proposal which is contained in the last paragraph of your telefax. In not responding to the allegations which you make in the telefax our client is not to be deemed to have conceded that any of those allegations are correct.

Without being too technical, the settlement to which our client is willing to agree is not that the matter be withdrawn from the roll(which would simply remove it from the trial roll for hearing) but that the action itself must be withdrawn. Our client is willing to settle the action on the basis that the action is withdrawn, and that each party pays his/her own costs.

On the assumption that this is the basis of the settlement which was intended to be conveyed in your telefax, please could you arrange for the action to be withdrawn by delivery of the appropriate Notice of Withdrawal."
(my underlining)

[2] Record, p 20

[7] After the exchange of these letters , the appellant wrote to the respondent advising her that he had been urged to proceed with the action[3] and that in the circumstances he would be applying for a postponement of the action.

[8] There was an exchange of correspondence[4] between the parties before the respondent agreed to the postponement of the action at the appellant's cost on the 23 January 2007. However the respondent's rights were at all times reserved. During May 2007, the appellant amended his claim to introduce two further claims and the respondent then introduced a special plea.

[9] The Respondent's special plea[5] read as follows:

" 1. On or about the 7th day of December 2006, the Plaintiff advised the Defendant that he would not be proceeding with his action against her and proposed that the action be settled by each party bearing their own costs in the action ("the notification").

2. The notification was in writing and a copy thereof is annexed hereto marked "LR1".

3. ON 11 December 2006, the Defendant duly represented by Bowman Gilfillan Attorneys accepted the settlement agreement and agreed to bear her own costs in the action ("the acceptance").

4. The acceptance was in writing and a copy thereof is annexed hereto marked "LR2".

5. The action has accordingly been settled between the parties."

[3] Record, p41
[4] Record, p42;44;46;49
[5] Record, p11

[10] The special plea was upheld by the court a quo which found that a settlement agreement had been concluded and that the appellant had failed to prove a waiver[6] or an estoppel as raised in the appellant's replication to the defendant's plea.

[11] It is against these findings that the appellant appeals. It is the appellant's contention that the court a quo ought to have found that no settlement had been reached and that the special plea should have been dismissed with costs.

[12]According to the respondent, the letter formed the basis of a settlement agreement between the parties.

[13] Advocate Sutherland for the appellant argued that on a plain reading of the first letter there was no agreement of settlement but an enquiry. It was not an offer and all that the letter suggested was that the matter be removed from the roll. He contended that the appellant did not offer to withdraw the action. Had the respondent believed that the matter was settled from the contents of the first letter, then the respondent should have filed a special plea to this effect, instead of agreeing to a postponement. The latter conduct of the respondent cast a doubt on the respondent's belief that the matter was at an end.

[14] Did the first letter convey sufficiently that the action had become settled? In my view this question must be answered in the affirmative. There is nothing whatsoever in the terms of the letter that suggests the contrary. The terms of the first letter clearly indicate in unequivocal terms that the appellant was no longer proceeding with the action against the respondent and made settlement proposals on the basis that the action is withdrawn and each party is to pay its own costs. This was the offer put on the table.

[6] Record,p30-34; Judgment, Record- 80-81

[15] The intention behind the words *"My proposal is that each party pays his/her own costs*".., can only be interpreted to mean that the appellant was concerned about the issue with regard to the costs now that he no longer intended pursuing the action. His offer to the respondent was that in such circumstances, the respondent was to bear her own costs, and that "the matter be withdrawn from the roll".

[16] The respondent responded as follows in the second letter :

" *Our client is willing to settle the action on the basis that the action is withdrawn, and that each party pays his/her own costs. On the assumption that this is the basis of the settlement …."* was an acceptance of the settlement proposal of the appellant. This is a clear and unequivocal response and an acceptance of the appellant's offer.

[17] Did the appellant abandon his action against the Respondent in writing?This question must be answered in the affirmative. The appellant put up an offer after saying that he was not proceeding with the action. The offer was that each party was to pay its own costs and the matter be removed from the roll. He clearly proposed an end to the litigation. The offer was reasonably understood by the respondent to mean that the matter was over. The Appellant made his intention clear in the words "*I do not intend pursuing the action, I shall not be proceeding with my action against you, my proposal is that each party pays its on costs and the matter be removed from the roll".*

[18] The terms of the first letter is clear and unambiguous. It is in plain English conveying more than adequately the appellant's intentions that the appellant does not intend pursuing the action against the respondent:

" I shall not be proceeding with my action against you" , means in plain language exactly that, conveying the nub of the detailed letter to the respondent. The purport of the letter clearly reveals the intention of the

appellant. It is not written in vague or ambiguous terms but in explicit and candid language thereby conveying its ordinary grammatical meaning. There is in my view no doubt as to its literal significance. The interpretation of these words finds support in the body of the letter which on close scrutiny intimated the appellant's reasons not to proceed with the litigation against the respondent and must therefore be understood in that context. I am not persuaded that the letter was an enquiry written in a "tentative tone." It clearly alerted the respondent to what the appellant had in mind which was a settlement of the action.

C. WAIVER/ESTOPPEL:

[19] The appellant has contended that the respondent's subsequent conduct in consenting to the postponement of the matter after she claimed that the matter was settled, and taking further steps in the proceedings, all constituted representations that she intended to continue with the litigation.As a consequence of this conduct the respondent was estopped, alternatively had waived her rights to raise the settlement in the proceedings. In my view, there is no ambiguity in what was being conveyed in writing by the appellant to the respondent and vice versa.

[20] The respondent clearly viewed the matter as at an end and settled when she received the first letter. Her response clearly conveyed this. What occurred was that a proper offer was made and accepted resulting in an agreement of settlement of the action between the appellant and the respondent.

[21] In all the subsequent correspondence and the pleadings filed on her behalf, the Respondent conveyed that the matter had been settled and her right to contend that the action had been settled was reserved.[7]In fact the respondent's attorneys contended in their subsequent correspondence with the appellants attorney that *"our client accepted your proposal"..* and that they

[7] Record, p 39;42;44;49

"accordingly contend that the matter is at an end".[8] The respondent's attorney furthermore warned the appellant that should the appellant *"wish to take the matter any further our client will raise the plea that the matter has become settled".*[9]

[22] Clearly from the aforegoing, her subsequent conduct indicated that she intended pursuing litigation with the firm belief that the matter had become settled , and would plead this, electing to rely on the settlement agreement. At the first opportunity the respondent raised her special plea and in no manner led the appellant to believe she had waived or abandoned this defence which always featured as a special plea in bar.

[23] In view of all the aforegoing, the court a quo did not err in upholding the special plea. Accordingly the appeal falls to be dismissed.

[24] In the result, I propose the following order:

1. The appeal is dismissed with costs.

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H K SALDULKER

JUDGE OF THE HIGH COURT

I AGREE:

_____

L GOLDBLATT

JUDGE OF THE HIGH COURT

I AGREE:

_____

[8] Record, p42
[9] Record, p44

_____

C NICHOLLS
ACTING JUDGE OF THE
HIGH COURT

For the Appellant	:	Advocate R Sutherland SC Advocate D Vetten
Instructed by	:	Darryl Furman & Associates
For the defendant	:	Advocate PM Beltramo
Instructed by	:	Bowman Gilfillan Incorporated