REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NUMBER: 09/35874
Reportable

In the matter between:

MANTRA CONSULTING (PTY) LIMITED	**Applicant**
and	
VALOR IT CC	**Respondent**
THE COMPANIES AND INTELLECTUAL PROPERTY REGISTRATION OFFICE	**First Interested Party**
ROBERT DAVIES N.O. THE MINISTER OF TRADE AND INDUSTRY	**Second Interested Party**

JUDGMENT

MOKGOATLHENG J

(1) The applicant has instituted this application against the respondent seeking an order in the following terms;

(a) Declaring that the agreements entered into between the applicant and the respondent namely, The Master Agreement (MA) and the Services Arrangement Letter (SAL) valid;

(b) Ordering the respondent to make payment to the applicant the sum of R2, 500.000.00 (plus VAT) and interest thereon, at the rate of 15.5% per annum a *tempora morae* being in respect of the second payment required in terms of *Clause 6.1.2 of (SAL)*;

(c) Ordering the respondent to make payment to the applicant the sum of R180.000.00 (plus VAT) per month in respect of the months April, May, June, July and August 2009 in total being the amount of R1, 026.000.00 (plus VAT), plus interest thereon, at the rate of 15.5% per annum a *tempora morae* in respect of the consulting services as set out in *Clause 6.1.2 of (SAL)*;

(e) Ordering the respondent to make payment to the applicant the amount of R180.000.00 (plus VAT) per month plus interest thereon at the rate if 15.5% per annum a *tempora morae* payable on the 7th day of each month for the duration of the Master Agreement with the first payment being in respect of the

month of September 2009, for consulting services as set out in *Clause 6.1.2 of (SAL)*;

(d) Ordering the respondent to make payment to the applicant 2% of the gross annuity revenue for the duration of the services made to CIPRO in terms of *Clause 6.1.4 of (SAL)*.

THE FACTUAL MATRIX

(2) It is common cause that parties concluded two written contracts, a Master Agreement (MA) on the 12 September 2008, and a Services Arrangement Letter (SAL) on the 4 September 2008 respectively.

(3) In terms of *Clauses 3.1.1.1 of (SAL) and 6.1 of (MA),* the applicant facilitated that the respondent be awarded by CIPRO, the Enterprise Content Management Tender (ECM). In terms of *Clause 3.1.2.of (SAL),* the respondent undertook to appoint the applicant to provide consulting services as an account executive.

(4) In terms of *Clauses 6.1 of (MA), 3.1.1.1 and 6.1.2 of (SAL)* the respondent was obliged to pay the applicant for services rendered the amount of R2, 500.000.00 on signature of the agreement, between it and CIPRO, and three months thereafter, a further amount of R2, 500.000.00.

(5) In terms of *Clauses 6.1.2 of (SAL) and 6.1 of (MA)* the respondent was obliged to pay the applicant in respect of consulting services the amount of R180.000.00 per month over the duration of the ECM project.

THE DEMAND

(6) Due to the respondent's breach of contract, the applicant, addressed a letter of demand to it enclosing Invoice No. C1003 dated the 6 April 2009, and requesting payment of the globular amount of R10.494.682.78 made up as follows:

(a) C001 1.00 Consulting fee as per
SAL Clause 3.1.1.1; R 2 192.982.46

(b) C002 1.00 Use of Mantra consulting's
intellectual capital in response to

	CIPRO Bid 943/2008 @ 5% of award value as per *MA Clause 12;*	R 6 697.879.63
(c)	C003 0.75 Consulting fee for February 2009 per *SAL Clause 3.1.2.1;* and	R 180.000.00
(d)	C003 1.00 Consulting fee for March 2009 per *SAL Clause 3.1.2.1.*	R 180.000.00
	Balance Due	R10.494.682.78

(7) In the body of the Invoice No C1003 there is an item captioned,

NOTE

1. Outstanding due item and payable in terms of *M.A Clause wrt 6.2.2* 2% of gross services from Valor IT to CIPRO in terms of SAL *Clause 6.1.4* could not be stated here as Mantra not privy to Valor IT invoice(s) to CIPRO……

(8) In terms of *Clauses 6.1 of (MA) and 6.1.4 of (SAL)* the respondent was to pay the applicant 2% of its gross annuity revenue for the duration of the services made to respondent arising from the ECM project.

THE OFFER OF COMPROMISE

(9) On the 17 April 2009 the respondent's attorneys addressed a letter to the applicant accompanied by a cheque, which reads:

"Our instructions are to place the following facts on record in relation to your claim invoice C003 dated 6 April 2009;

1. *Our client admits that it is liable for the claim in terms of Clause 3.1.1.1 of the SAL;*
2. *Our client is not privy to the claim purported to be under Clause 1.2 and records that none exist;*
3. *No work has been performed and none has been required in terms of Clause 3.1.2.1 and therefore no liability accrues;*
4. *Our client is making an offer of compromise to your claim in full and final settlement of his (sic) obligations and liability on Invoice C1003.*

This offer is made by the enclosed cheque in the sum of R2,5 million which has special clearance and can be liquidated today. Acceptance of this cheque shall be appreciated as acceptance of our offer. We reiterate that our client denied any further liability to your above-mentioned claim……."

(10) A cheque dated the 17 April 2009, payable to the applicant bearing the words "*in full and final settlement INV C1003,* written at the foot of the cheque across its face, was attached to the letter.

(11) The applicant deposited the cheque on the same day, the 17 April 2009. On the 20 April 2009, applicant's attorneys e-mailed a letter to the respondent wherein the following is recorded;

" Our client stands by the content of its letter dated 9 April 2009. Our client is accepting the cheque purely on account and in settlement of item C001 of its invoice dated 6 April 2009. We stress that our client is ***not*** *accepting the cheque in settlement of its entire claim, as proposed by you and our client is not regarding this matter as fully and finally settled*

THE ISSUE

(12) The essential issue is whether objectively construed, the evidence shows that the respondent's tender, the acceptance and deposit of the cheque marked "*in full and final settlement of Invoice C1003,*" and the respondent's attorneys letter dated the 17 April 2009,

constituted an offer of compromise of the respondent's entire liability to the applicant, or a tender to pay an admitted debt.

LEGAL PRINCIPLES

(13) A compromise is a settlement of a disputed liability by agreement, it is a rearrangement of the parties rights and obligations arising from such disputed liability. Concerning the expression "*in full settlement*" De Villiers JA enunciated himself thus in ***Harris v Pieters 1920 AD 644, at***

654-5:

"Now the phrase 'in full settlement' is ambiguous and may mean one of two things. A debtor, in offering a sum in full settlement, may intent to tender the amount unconditionally, only adding the words 'in full settlement' by way of emphasizing his contention that the amount tendered covers the whole of his liability. In that case the offer is made ***animo solvendi****. Or he may intend to offer the amount on condition that the creditor, by accepting it, should forego his claim for the balance. In the latter case the offer is made for the purpose of entering into a new contract with the creditor,* ***animo contrahendi*** *……."*

(14) The words annoted on the cheque. *"in full and final settlement of INV C1003"* have to be construed in the context of the communications and the surrounding circumstances of the dispute between the parties, to ascertain whether the respondent intended to effect a compromise of its entire liability or to make payment of an admitted debt. ***(Burt NO v National Bank of South Africa Ltd 1921 AD 59 at 62; Paterson Exhibitions CC v Knights Advertising and Marketing CC 1991 (3) SA 523 (A) at 529D; and Absa Bank Ltd v Van Vyver NO 2002 (4) SA 397 9SCA).***

(15) "*The law, as a general rule, concerns itself with the external manifestations, and not the workings, of the minds of parties to a contract."* ***Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis 1992 (3) SA 234 at 238I.*** The elements of effective acceptance are a question of law, proof of these elements is juridically premised on the prevailing factual matrix. ***See Paterson Exhibitions CC v Knights Advertising and Marketing CC 1991 (3) SA 523 (A) at 529C-D;***

(16) In ***Be Bop a Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd 2008 (3) SA 327 (SCA) at para 10***, Malan AJA (as he then was) stated:

"The essential issue is whether an agreement of compromise was concluded: one is concerned simply with the principles of offer and acceptance. The first question is whether the cheque accompanied by the Credit Request and Final Reconciliation constituted an offer of compromise. In other words, "the proposal, objectively construed, must be intended to create binding legal relations and must have so appeared to the offeree"……

(17) An offer of compromise is strictly interpreted, such offer must be unambiguous, or shall be construed *contra proferentem.* The onus reposes on the respondent to show that the applicant ought reasonably have interpreted the letter and cheque as an offer of compromise of its entire liability to the applicant's contractual entire claim. ***(See RH Christie The Law of Contracts in South Africa 5 ed at 456-9 and Karson v Minister of Public Works 1996 (1) SA 887 (E) at 896C-D.)***

(18) To resolve this conundrum, it is apposite to fully restate the seminal remarks of Innes C J in **Harris v Pieters 1920 AD 644 at 649.** The learned Judge held that the inscription: "*in full settlement*" "*ordinarily used clearly amounts to a condition*", but that: "*Instances may possibly occur in which the context or other evidence may show that the words in question or similar words were not intended to condition the offer — that they were merely intended to emphasise the tender's view as to the extent of his liability. If so, the expression would, for all practical purposes, be taken pro non scripto…….*

The plaintiff may reject it and continue his action……it may accept it and thus obtain the lesser amount forthwith instead of enforcing his full claim……..But if he does accept, he is bound by the terms of the offer. His claim to the balance cannot be enforced……where all liability is denied so that the offer is in essence one of compromise, the position is, if possible, clearer still……..whether a tender or a payment is intended is a matter to be settled upon the facts of each case…….But if payment is intended, then further considerations arise. For payment must be made in the exact terms and to the extent of the relative obligation. The debtor cannot vary the manner or amount of his payment, nor can he engraft upon it any condition not contained in the contract or implied by law

when money is delivered to the creditor in payment of a liability which the debtor admits, accompanied by the statement that it is paid in full settlement, he is bound to accept it as such. He may, of course waive his rights and do so. But he is entitled to reject the condition. On the assumption that the debtor intends to pay the liability, which he admits, and delivers the money with that intention, the condition which he seeks to attach is inoperative save with the creditor's assent and if the creditor withhold's his assent and repudiates the condition, he may in my opinion retain the money and sue for the balance. For the position is this: The obligation is discharged to the extent of the payment; the debtor who pays cannot compel the creditor to donate his claim for the balance. And if the creditor refuses to do this, his right to that claim remains unaffected by the receipt of the money……

The test in all these cases therefore is this, was there a tender accompanied by money or cheque, or was there a payment with an attempt to annex a condition. In the former case, if the tender is refused the money should be returned: in the latter, if the condition is rejected the money may be retained and the balance claimed."

See also R.H. Christie The Law of Contract in South Africa 4th Edition 529ff

(19) Prof D T Zeffertt in his article "*Payments in Full Settlement" **(1972) 89 SA Law Journal 35 at 40*** states: *"To be an effective offer of compromise,……the tender must contain only one condition: that acceptance ends the dispute,……the acceptance must be clear and unambiguous……."*

See ABSA Bank Ltd v Van der Vyver NO 2002 (4) SA 397 (SCA) para 17; Bebop A Lula Manufacturing and Printing CC v Kingtex Marketing 2008 (3) SA 327 (SCA) para 10 and 13.

LEGAL ARGUMENT

(20) Mr Sher on applicant's behalf argued that the respondent's offer of compromise can only relate to some of the items set out in Invoice No C1003 depending on whether the latter admitted liability in respect thereof or not, consequently, he submitted the offer of compromise specifically related only to item C001 in respect of consulting fees pursuant to *Clause 3.1.1.1 of SAL*, namely the amount of R2 192.982.46, this sum being in fact, the first payment instalment of the respondent's contractual liability of R2.500.000.00, which was due and payable on the 27 March 2009, on signing of the agreement between CIPRO and the respondent.

(21) Counsel argued that since the respondent's offer of compromise, does not mention the second payment of the amount of R2.5 million due and payable pursuant to *Clause 3.1.1.1 of SAL,* on the 27 June 2009, the respondent cannot claim that it sought to compromise that contractual liability.

(22) In the alternative, Mr Sher made a concession that at best for the respondent only two items in Invoice No C1003 were compromised, namely item C001 in respect of consulting fees pursuant to *Clause 3.1.1.1 of SAL*, and item C002 in respect of the use of applicant's intellectual property pursuant to *Clause 12 of the Master Agreement.*

(23) Mr Sher contended that the respondent did not make an offer of compromise in respect of the item under the heading "*NOTE,*" relating to 2% of the respondent's annuity revenue pursuant to *Clause 6.2.2 of MA*, because in essence the respondent denies liability thereof, and item C003 in respect of the consulting fees pursuant to *Clause 3.1.2 of SAL.*

(24) Mr Bokaba on the respondent's behalf, relying on the authority in the case of ***ABSA Bank Limited v Van Vyver NO supra,*** submitted that the applicant by depositing the cheque, appropriating and retaining the funds to itself, has in essence accepted the offer of compromise set out in the respondent's attorneys letter dated the 17 April 2009, consequently, applicant has no further claim against the respondent, arising from the contracts concluded between the parties.

(25) Counsel further submitted that there was an effective acceptance of the offer of compromise made by the respondent, the purported rejection of the offer of compromise three days after depositing the cheque and retaining the proceeds thereof is irrelevant and of no legal import.

(26) Counsel argued that the applicant attorney's statement that the applicant is not accepting the cheque "*in full and final settlement"* of its entire claim or that it did not regard the matter as fully and finally settled, made it clear, that the parties were *ad idem* that, the offer of compromise was made in relation to the applicant's entire

claim. Consequently, beyond 17 April 2009, any liability the respondent had towards the applicant was extinguished.

A CONSIDERATION OF THE EVIDENCE

(27) The applicant's concession that an offer compromise was made in respect of items C001, C002 and C003 does not bind or preclude the court from objectively inquiring whether as a matter of law, an offer of compromise did eventuate in regard to the applicant's entire claim or part thereof.

(28) Under item C001 in Invoice No C1003, the applicant claims R2 192.982.46 in terms of *Clause 3.1.1.1 of SAL*, this claim is R300.017.34 less than the R2.5 million contractually due and payable by the respondent upon contract signing on the 27 March 2009. The respondent attorney's letter dated 17 April 2009 admits liability in the amount of R2 192.982.46 in respect of item C001 pursuant to *Clause 3.1.1.1 of SAL*.

(29) Through its attorneys statement that "*it is liable for the claim in terms of Clause 3.1.1.1 of SAL."* the respondent unequivocally admits liability for the applicant's contractual claim in the amount of R2.5 million pursuant to *Clause 3.1.1.1 of SAL,* and makes a tender in respect thereto, which unambiguously relates to the first payment of R2.5 million which was contractually due and payable on 27 March 2009. This contractual liability for some inexplicable reason is categorized as the amount of R2 192.982.46 in C001 which the applicant declares the respondent is liable for in terms of *Clause 3.1.1.1 of SAL*.

(30) In my view because respondent admits liability for the claim in item C001 in terms of *Clause 3.1.1.1 of SAL,* its offer of compromise can only relate to the balance of the items set out in Invoice No C1003 dated 6 April 2009. The respondent has therefore pertinently and specifically tendered to pay its admitted debt of R2 192.982.46 under item C001, and correspondingly also tendered the balance of R307.017.34 as an offer of compromise in respect of items C002, C003 and the unquantufied claim accruing from *Clause 6.2.2 of the Master Agreement,* under the heading "*NOTE*" in Invoice No C1003.

(31) Payment "*in full and final settlement of INVC1003*" by the respondent in the amount of R2.5 million was therefore intended not only as payment of the admitted debt of R2 192.982.46 which accrues pursuant to *Clause 3.1.1.1 of SAL*, the balance of R307.017.34 was also effectually offered as an offer of compromise for all items encapsulated in Invoice No C1003 dated 6 April 2009.

(32) In my view the respondent's failure to refer to the liability accruing in respect of *Clause 6.2.4 of MA* or the failure to address or mention any other liability encapsulated in Invoice No C1003, does not, detract from the fact that it was the respondent's intention to tender to pay an admitted debt and to make an offer of compromise to the applicant's claim as encapsulated in invoice No. C1003.

(33) Consequently, the acceptance of the balance of R307.017.34, the depositing thereof, and the appropriation thereof by the applicant constitutes effective acceptance of an offer of compromise in

respect of the balance of the items set out in Invoice No C1003 dated 6 April 2009, excluding item C001.

(34) Even if I am wrong in this conclusion, if for instance it was the respondent's intention to make an offer of compromise only and not also a tender to pay an admitted debt, respondent's letter and cheque can only encapsulate an offer of compromise in respect only of items set out in Invoice No C1003 dated the 6 April 2009, and cannot and do not extend such offer of compromise beyond the scope of INV C1003, because Invoice No C1003 does not embrace the applicant's entire contractual claim.

(35) The scope of the offer of compromise, in respect of item C001 however, does not in its ambit encompass the applicant's contractual entitlement to payment of the second payment in respect of consulting fees pursuant to *Clause 3.1.1.1 of SAL* which contractually accrues as the second payment due and payable on the 27 June 2009.

(36) The applicant's attorney's letter dated 20 April 2009 makes it clear that the acceptance of the payment of the cheque is on account and in settlement of item C001 only, that is it relates to the first payment as per *Clause 3.1.1.1 of SAL*. Such acceptance therefore does not encapsulate the second payment accruing in terms of *Clause 3.1.1.1 of SAL* due and payable on 27 June 2009.

(37) The cheque was accepted on the terms and conditions set out in the applicant's letter dated 20 April 2009, which makes it clear that it regards the tender in the respondent's attorneys letter dated the 17 April 2009 as payment of an admitted liability in respect of item C001, and not as payment of respondent's entire liability to the applicant's contractual claim in its entirety.

(38) The respondent's tender in respect of item C001 "*in full and final settlement"* is therefore meant in the sense explained in ***Odendaal v Du Plessis 1918 AD.*** The cheque was therefore accepted as payment of an admitted liability which is in the exact terms and to the exact extent of the respondent's liability as set out in item C001, by the applicant, consequently, concerning item C001, the

applicant is entitled to ignore the words "*in full and final settlement,*" and regard them as ***pro non scripto,*** keep the payment in respect of item C001, and sue for the balance of the claim accruing in terms of MA and SAL.

(39) Regarding *claim 3.1.1.1 of SAL* the words "*in full and final settlement INVC1003"* in respect of claim C001 do not necessarily by implication import the condition that acceptance of R2 192.982.46 can be construed as payment for the balance of the entire claim in *Clause 3.1.1.1 of SAL*, consequently the balance of R2 500.000.00 due and payable on 27 June 2009 can be claimed despite the retention of payment of R2 192.982.46 in respect of claim C001.

(40) The respondent's offer of comprise in the amount of R307.017.54 therefore, extinguishes the balance of the items as set out in invoice C1003, and not respondent's entire liability and obligations as defined and agreed to by the parties in the two respective contracts M.A and SAL.

(41) Consequently, as Invoice No C1003 stands, item C001 in the amount of R2 192.982.46, item C002 in the amount of R6 697.879.63, and item C003 in the amounts of R180.000 in respect of February 2009 and R180.000.00 in respect of March 2009 respectively, have been extinguished.

(42) The applicant also seeks an order declaring that the agreements MA and SAL are valid, binding and of full force and effect. The respondent does not disputes this prayer, it actually acknowledges the validity of the two contracts, beyond Invoice No C1003.

(43) In its letter of demand and breach dated the 9 April 2009, the applicant placed the respondent on terms in respect of breach for:

(a) Outstanding payments due and payable;

(b) Unilateral appointment of Account Executive; and

(c) Non-payment of annuity revenue.

All these exigencies were itemized and priced in the claim encapsulated in Invoice No C1003 dated 9 April 2009.

(44) On the 1 July 2009 the applicant again dispatched a letter to the respondent attaching Invoice No C1006 dated the 25 June 2009 wherein it demanded payment of:

(a) Consulting fee for April 2009 per *Clause 3.1.2.1 SAL* in the amount of R180.000.00, under item C002; and

(b) Consulting fee for May 2009 per *Clause 3.1.2.1 SAL* in the amount of R180.000.00, under item C003.

(45) The respondent responded to Invoice No C1006 by stating that it has made an offer of compromise to the applicant, which the latter accepted in full and final settlement of all its liability. Consequently there was no legal basis for the applicant to continue submitting invoices.

(46) As already found, the applicant's contractual claim beyond Invoice No C1003 has not been extinguished in its entirety. The respondent is therefore contractually liable for the balance of its contractual claim to the applicant, of course the assumption being applicant is able to prove such liability.

(47) The respondent's attorneys in their letter dated the 8 July 2009, in response to applicant's letter and Invoice No C1006 allege that:

"3. After payment of R2.5 Million was offered to your client in full final settlement and his acceptance thereof, he continued to publish serious defamatory statements resulting in disrepute of our client's and threatening the continuation of our clients' contract with CIPRO:

4. The payment made to your client for facilitation has not borne any result and on the contrary, he actively attempted to destroy the relationship between our client and CIPRO.

5. As a result your client has breached the contract……."

7. Your client's conduct is clear mal-performance and shows no intention to facilitate the relationship between our client and CIPRO:

8. Your client has caused loss to our client in payments made to him and now having to pay other service providers in order to remedy the profile of our client and improve its standing with CIPRO.

As a result of your client's conduct, we are in this regard instructed as follows:

* *To accept the above mal-performance and repudiation and claim damages for losses incurred in the sum of R4 million being, for payment of R2.5 made without your client carrying out his obligation to facilitate the relationship between CIPRO and our client, and a further R1.5 million in damages incurred and still to be incurred by our client in remedying the reputation of Valor IT……and other important stakeholders in the project"*

(48) In my view concerning prayers 7 and 8 in respect of the payment of the amount of R1.026.000.00 and R180.000.00 per month for the duration of the Master Agreement for consulting services set out in *Clause 6.1.2 of SAL,* the respondent invokes various defences amongst which, it is denied that the applicant rendered any consulting services. These defences raise disputes of fact which cannot be resolved on the papers, consequently these aspects are referred to trial.

THE ORDER

(49) In the premises the following order is made:

(a) The respondent is ordered to make payment to the applicant the sum of R2.500.000.00 (inclusive of VAT) being the second payment in terms of *Clause 6.1.2 of SAL,* and interest thereon at the rate of 15% per annum a *tempora morae; and*

(b) The aspects relating to Prayers 7, 8 and 9 are referred to trial for adjudication;

(c) The applicant's founding affidavit shall stand as the particulars of claim, respondent's answering affidavit as the plea, and the applicant's replying affidavit as the applicant's replication;

(d) The respondent is ordered to pay 50% of the applicant's taxed legal costs.

Signed at Johannesburg on the 7th April 2010.

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MOKGOATLHENG J

JUDGE OF THE HIGH COURT

DATE OF HEARING: 10TH DECEMBER 2009

DATE OF JUDGMENT: 7TH APRIL 2010

FOR THE APPLICANT: MR SHER

INSTRUCTED BY: F E LACHPORIA ATTORNEYS

TELEPHONE NUMBER: (011) 830-2186/7

FOR THE RESPONDENT: MR BOKABA WITH MR MPOFU

INSTRUCTED BY: NOKO INCORPORATED

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