THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no**:** 130/2013
Not Reportable

In the matter between:

WARREN BOWLES CORPORATION COMMUNICATIONS CC Appellant

and

RHEINMETTAL DENEL MUNITION LTD Respondent

Neutral citation: *Warren Bowles Corporation Communication CC v Rheinmettal Denel Munition Ltd* (130/2013) [2014] ZASCA 35 (28 March 2014)

Coram: Ponnan, Mhlantla, Theron and Willis JJA and Swain AJA

Heard: 25 February 2014

Delivered 28 March 2014

Summary: Contract – action for an account and debatement thereof.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Saldulker J sitting as court of first instance):

1 The appeal against paragraph d of the order of the court below is allowed and the order is amended by the deletion of that paragraph. Subject thereto and paragraphs e, f and g being renumbered d, e and f respectively, the order of the court below is confirmed.
2 Save as is set out in paragraph 1 hereto, the appeal is dismissed with costs.

JUDGMENT

Theron JA (Ponnan and Mhlantla JJA and Swain AJA concurring):

[1] This appeal relates to the entitlement of the respondent, Rheinmettal Denel Munition Ltd (RDM), to a statement of account and if necessary, the payment of such moneys as may be found to be due to it upon the debatement of such account, by the appellant, Warren Bowles Corporation Communication CC (the close corporation).

[2] On or about 19 February 2010 the parties entered into a partly written and partly oral agreement (the main agreement), in terms whereof the close corporation, upon payment of the agreed sum of R8,5 million, agreed to organise a special event for RDM, which involved a demonstration of the products manufactured by the latter. The demonstration was scheduled for 10 to

14 May 2010. The written portion of the agreement recorded that. It was recorded that RDM reserved the right to cancel the event up to 8 March 2010 and if cancelled around 8 March 2010, a forty per cent cancellation fee would be applicable. It was further agreed that RDM would pay forty per cent of the cost in advance for the demonstration.

[3] On 4 March 2010, RDM paid an amount of R3 million to the close corporation, which constituted forty per cent of the agreed price, excluding Value Added Tax (VAT). On 8 March 2010 RDM decided not to proceed with the demonstration but to postpone it to an unspecified date in 2011. RDM notified the close corporation of its decision on 8 or 9 March 2010. It was undisputed that prior to the decision not to proceed with the event, the close corporation had performed certain services pursuant to the main agreement, including developing a website in preparation for the event.

[4] It was common cause between the parties that as the main agreement did not provide for what was to happen in the event of a postponement (as opposed to a cancellation) of the event; and as certain disputes arose between the parties, in particular as to what was to happen to the moneys that had been paid by RDM to the close corporation in terms of the main agreement. The parties thus met on 7 April 2010 in Somerset West, when according to RDM, a further agreement (the further agreement) was concluded under which the matters in dispute were settled. The meeting was attended, on the one hand, by a number of senior executives in the employ of RDM including Mr Marcel Mbuyu, Mr Marius Zikmann, Mr Norbert Schultze and on the other, by Mr Warren Bowles, the sole member of the close corporation.

[5] On 25 August 2010 RDM's legal representatives addressed a letter of demand to the close corporation in which it stated, with reference to the further

agreement, that it had been agreed that the close corporation would account to RDM for all liabilities incurred in respect of the main agreement and reimburse RDM to the extent that the payment made by RDM exceeded the total liabilities incurred. A demand was also made in the letter for the close corporation to provide a detailed account to RDM. The response of the close corporation is contained in a letter dated 31 August 2010 and written by its legal representatives, which in relevant part, reads:

'We deny that the Agreement was varied as alleged or at all. We are instructed that our client, on a completely without prejudice basis, and as a show of good faith in order to maintain its business relationship with your client, undertook to negotiate terms with its suppliers and/or sub-contractors in order to reduce the cancellation fee. Our client further undertook to attend to reconciliation in this regard, and provide your client with the details of a refund, if any. Our client attended to the aforegoing and informed your client that it was prepared to refund the sum of R491 886.00 to your client on a without prejudice basis. It subsequently transpired however that your client was dissatisfied with the aforegoing refund and demanded a repayment of a larger portion of the said deposit.'(Underlining for emphasis.) Vol 4 para9 page: 506

[6] Asserting that the close corporation had breached the further agreement, *inter alia*, by failing to account to it, RDM instituted action against the former in which it sought as its primary relief a statement and debatement of account and in the alternative damages.

[7] The initial plea filed on behalf of the close corporation was in all material respects identical to its response to the letter of demand from RDM. The plea further records that Mr Bowles attended to the reconciliation and informed RDM that it was prepared to refund the sum of R491 886 to it. Thereafter the initial plea was amended, and in terms of the amended plea, the close corporation denied the existence of the further agreement. It alleged instead that RDM had, on 9 March 2010, cancelled, alternatively repudiated, the main

agreement. The close corporation filed a counterclaim in which it claimed payment of the amount of R420 000 being what it contended was the VAT, which RDM had failed to pay as it was obliged to in terms of the main agreement.

[8] The high court (Saldulker J) found in favour of RDM and issued the following order:

'a. The Defendant is directed to furnish a full account, together with all supporting documents, of all liabilities, including due and proper allowance for the Defendant's fee and profit, incurred by the Defendant up to 7 April 2010, pursuant to the agreement concluded between the parties on 19 February 2010;

b. A debatement of the aforesaid account;

c. Payment of such amount which may be found to be due to the Plaintiff upon the debatement of account;

d. Alternatively to (a), (b), and (c) above, payment of the sum of R1 438 086,00 as and for damages;

e. Interest on any amount payable as above, at the prescribed legal rate from date of demand, being 1 September 2010, to date of payment;

f. Costs of suit;

g. The defendant's counterclaim in the amount of R420, 000 is dismissed with costs.'

It is against this order that the close corporation appeals, with the leave of the high court.

[9] The order of the high court grants RDM relief on both the main and the alternative claims. Counsel for RDM conceded, both at the hearing of the application for leave to appeal in the high court and in this court that the high court had erred in doing so. RDM accordingly abandoned the relief granted to it in terms of paragraph d of the order of the high court. That order cannot stand and it must be amended accordingly.

[10] In *Doyle & another v Fleet Motors PE (Pty) Ltd*,[1] Holmes JA set out the general requirements for obtaining relief of the kind sought by RDM. The learned judge noted that a claimant for such relief should aver:

'(*a*) His right to receive an account, and the basis of such right, whether by contract or by fiduciary relationship or otherwise;

(*b*) any contractual terms or circumstances having a bearing on the account sought;

(*c*) the defendant's failure to render an account.'[2]

Each case must be decided on its own facts ie the particular acts or conduct of the parties and the surrounding circumstances.[3] The question therefore is whether the undertaking given during the course of the April meeting had contractual force. In my view, the construction that Mr Bowles, by his conduct, put upon the undertaking (*Breed v Van den Berg* 1932 AD 283 at 292) as well as a number of objective factors all tend to indicate that he intended that undertaking to constitute a concluded bargain on that issue.

[11] Mr Bowles, as is apparent from his attorney's letter and original plea, did not dispute that he gave certain undertakings at the meeting held on 7 April 2010. What he disputed is that amongst these undertakings was one to account to RDM as claimed by the latter. Although other issues were sought to be ventilated at the trial, it is that relatively narrow dispute upon which the case turns. In an e-mail written by Mr Bowles to Mr Zikmann on 15 July 2010, he records that he had approached suppliers in order to negotiate reasonable cancellation fees and had prepared a reconciliation which established that a refund of R491 886 was due to RDM. In the same e-mail Mr Bowles requested RDM's banking details so he could transfer the refund into RDM's account. The e-mail written by Mr Bowles to Mr Schultze dated 26 July 2010 continues in a similar vein. In that e-mail Mr Bowles set out a breakdown of how he reached

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[1] *Doyle & another v Fleet Motors PE (Pty) Ltd* 1971 (3) SA 760 (A).
[2] At 762F-H.
[3] *Pitout v North Cape Livestock Co-operative Ltd* 1977 (4) SA 842 at 851.

the surplus amount of R491 886 and tendered to repay it to RDM or to retain it and use it towards the cost of a similar future event mooted for 2011. His computation of the refund tendered is as follows:

'The non-refundable deposit of R3,000,000 was reduced to R2, 200,100 ….

Of the R2, 200,100 paid:

R320,000 was spent in various areas (Flights, Meetings, Web and Brochure Development, Concept and planning meetings with in-house and suppliers etc) ….

R1, 050,100 was cancellation money to suppliers …..

R830,000 was cancellation money ….'

[12] The subsequent conduct of Mr Bowles, as evidenced from the e-mails referred to above, namely, negotiating with suppliers, attempting to do a reconciliation and the tender to repay the surplus to RDM, is all consistent with him having undertaken to account to RDM at the April meeting. All of that was consistent with him still believing that the main agreement was in force. He at no stage disavowed that he had given an undertaking to refund the balance of the money paid to RDM. His e-mails confirm that he was prepared to repay the refund to RDM. That he plainly was not obliged to do in terms of the main agreement.

[13] It was only when Mr Bowles testified in the high court that he denied having given the relevant undertaking upon which RDM relied. Relevant portions of his evidence, in respect of the initial plea filed on behalf of the close corporation, reads:

'The allegation is that an agreement was reached on the 7 April and in relation to that you presumably instructed your attorneys to plead as follow and let us go through it. The defendant on . . . [indistinct] without prejudice basis and as a show of good faith in order to maintain its business relationship and may I just stop there and say that it is not really relevant why you did it, but what you undertook to do or the defendant undertook to do was to negotiate terms with its suppliers and subcontractors in order to reduce the cancellation fee. That is the first element of an admission made by you as to what the defendant undertook.

Now that is in line with the evidence that has been adduced on behalf of the plaintiff that the meeting of 7 April you gave certain undertakings, agreement was reached that you would do certain things. Now 10.1.1 of your plea is to the effect that you undertook to negotiate terms with suppliers and subcontractors in order to reduce the cancellation fee. Did you agree to do that? --- No.

In 10.1.2 you further, it is further claimed on your behalf that you undertook to attend to a reconciliation statement. A reconciliation statement in regard to whatever reduced costs had been incurred or negotiated, do you see that? --- I see that.

Did you undertake to attend to a reconciliation … [intervenes]. - - - No.

…

And did you undertake to … furnish the plaintiff with details of the refund that you would make? --- No, ….'

[14] But on that score his evidence was not consistent, for at another point in his evidence, Mr Bowles admitted that he had given certain undertakings to RDM at the April 2010 meeting but attempted to escape the consequences of that by alleging that he had been under pressure from RDM at the time and had given the undertaking sought, to maintain a good business relationship with it. It is necessary, because of the importance of this issue, to refer to Mr Bowles's evidence in this regard:

'And I am putting to you it is as plain as a pikestaff in paragraph 10.1 [of the original plea] and the subparagraph thereof that you admit that you undertook to do certain things as set out in these paragraphs. You must acknowledge that surely, Mr Bowles. --- I acknowledge that they are there I do not acknowledge them under the terms that is being applied. I was again under extreme pressure from the management to come up with some kind of something and I did do that.

It may have been that you felt you were under pressure or you were motivated by client retention motives or whatever be the case, but the fact of the matter is it appears you gave these undertakings and the answer you have just given seems to confirm that. --- It was not about sitting in a meeting and agreeing that I would do it.

….

These instructions were given to your legal team after the event when you were no longer under pressure, not so? --- I was always under pressure.
Well you were not under the kind of pressure you have been hinting at in your answers to my questions. And in those circumstances you furnished these instructions to your legal team, not so? --- Well we communicated them yes.'

Mr Bowles' motives for binding the close corporation to the further agreement are irrelevant. His failure to adequately explain the initial plea, the contradictions in his evidence and the further contradictions between his evidence and the various correspondence, including the response to the letter of demand and the initial plea of the close corporation, not only impacts adversely on his credibility as it relates to a substantive issue in this matter, but also serves to corroborate RDM's claim that he had indeed undertaken at the April meeting to account to it.

[15] It was argued that the evidence of Mr Mbuyu and Mr Zikmann did not accord with the pleadings and the court, should, as a result make an adverse credibility finding against them. In the particulars of claim filed on behalf of RDM it is alleged that the parties had, in terms of the further agreement, agreed that the close corporation would render an account to RDM for all liabilities incurred by it. Accordingly, so the argument proceeded, RDM had not made any allowance for the close corporation's fees and profits. But the evidence of Mr Mbuyu and Mr Zikmann clarified that the close corporation would be entitled to claim its fees as well as a profit. Their evidence thus gives flesh to the pleadings.

[16] Finally, it was submitted that an account should not be ordered because it may lead to yet further proceedings between the parties. A similar argument was

advanced and rejected, correctly in my view, by the court in *Afrimeric Distributors (Pty) Ltd v E I Rogoff (Pty) Ltd*,[4] where Ettlinger AJ stated:

'That may be perfectly true, but every time an order is made for an account and debatement, whether by application or otherwise, the consequence may be a subsequent action if, as a result of the rendering of the account and the attempted debatement, the parties are still unable to agree.'

[17] It follows, in my view, that RDM has satisfied the requirements as set out by Holmes JA in *Doyle v Fleet Motors PE (Pty) Ltd* and the high court thus cannot be faulted for concluding that RDM had established that the parties had agreed to deal with the postponement of the event on the basis that Mr Bowles would submit an appropriately substantiated account to RDM. It follows that the appeal must fail.

[18] For these reasons the following order is made:

1 The appeal against paragraph d of the order of the court below is allowed and the order is amended by the deletion of that paragraph. Subject thereto and paragraphs e, f and g being renumbered d, e and f respectively, the order of the court below is confirmed.

2 Save as is set out in paragraph 1 hereto, the appeal is dismissed with costs.

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L V THERON

JUDGE OF APPEAL

[4] *Afrimeric Distributors (Pty) Ltd v E I Rogoff (Pty) Ltd* 1948 (1) SA 569 (W) at 576.

Willis JA: (**dissenting**):

[19] Having had the benefit of reading the judgment of Theron JA, I regret that I cannot concur therein. This case turns on whether: (a) on 7 April 2010 the parties agreed upon a legally enforceable variation of the agreement concluded between them on 19 February 2010 and (b) if so, whether the agreement was in the terms claimed by RDM.

[20] In my opinion the high-water mark for RDM is that Mr Bowles, at that meeting on 7 April 2010 at which several representatives of RDM and the he (Mr Bowles) alone were present, undertook to look into the matter, obtain further advice and information and then revert to RDM with a view to reaching an amicable settlement in the matter. As no such settlement was reached, the agreement of 19 February 2010 remained in force in the terms concluded at that date. Accordingly, I should have upheld the appeal and granted an order in the terms sought by the appellant.

[21] I come to the conclusions which I do bearing in mind: (a) the classic principle of the onus in civil trials that 'The person who asserts must prove' set out in the *Corpus Juris Civilis* as: '*Semper necessitas probandi incumbit illi qui agit*'[5] (which translates literally as 'The requirement of proof always falls on the person who brings the action') and (b) whether the credibility of RDM's witnesses is so good, when evaluated against that of the appellant's own testimony, that it compels a finding against the probabilities in this case, mindful of the fact that, when all factors are equipoised, the probabilities will prevail.[6]

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[5] See *Pillay v Krishna and Another* 1946 AD 946 at 951.
[6] See *Stellenbosch Farmers' Winery Group Limited and another v Martel et Cie and others* 2003 (1) SA 11 (SCA) para 5.

[22] The following are the facts upon which to determine the probabilities:

(a) The decision not to stage the demonstration - for which the close corporation had received payment - for the period from 10 to 14 May 2010 and to postpone it was taken by RDM and not Mr Bowles.

(b) The meeting on 7 April 2010 was at the instance of RDM and not Mr Bowles.

(c) The meeting took place at the premises of RDM in Somerset-West;

(d) At the meeting there were five representatives of RDM present and only Mr Bowles for the close corporation.

(e) There were neither lawyers nor duly appointed representatives of the accountancy profession present.

(f) Other than that the postponement of the demonstration was to be discussed, Mr Bowles had no precognition of what would be discussed at the meeting and in particular had no idea that he would be called upon to agree to render an account of 'all liabilities (sic)[7] incurred by RDM to the date pursuant to the agreement, a 'debatement' of the aforesaid account' and that, whether or not it did so, RDM would nevertheless claim damages.

(g) Mr Bowles was offered no tangible or digestible 'sweetener' in, for example, a lump sum payment or a percentage of the amount by which the expenses would have been reduced (the reduction of charges by the close corporation's suppliers was an idea which was mooted at the meeting).

(h) Mr Bowles was entitled to a cancellation fee of 40% of the contract price in the event that RDM 'cancelled' the contract.

(i) At the time of meeting the representatives of RDM, Mr Bowles would have had no precise knowledge of (i) which of his suppliers had been paid; (ii) how much each had been paid and the extent to which they would accept a reduction, if any, in the amount due to them.

[7] It is not clear to me what this is supposed to mean.

(j) The nature of the Mr Bowles' business is that it would have generated revenue for itself purely out of profits rather than any fees it might charge.

(k) RDM's interest would have been in the extent of the appellant's actual disbursements rather than its 'liabilities' as set out in the relief claimed and the order granted.

(l) No other terms and conditions for the 'postponement' were either discussed at the meeting, never mind agreed upon.

(m) The legal remedy of the rendering of an account and a debate thereof falls naturally in situations where there is a fiduciary relationship between the parties but not in a relationship such as that between the parties even though, as a matter of law, they may contract to do so.[8]

(n) The legal remedy of 'rendering an account and a debate thereof' is a 'term of art', not widely known among persons who are not lawyers other than accountants, builders and quantity surveyors and is, as matter of fact and law, technical ('regs-tegnies') in its nature.

(o) Mr Bowles had been an 'events organizer' for approximately 30 years and was accordingly no 'babe-in-the-woods'.

(p) Had he agreed to the variation as claimed by RDM he would have been so naïve as to have made Moses in the bulrushes seem like a scheming charlatan.

(q) Mr Bowles had to do his best to protect his situation while, at the same time, keeping RDM 'sweet' in the hope that his services would continue to be used in future.

[23] On 21 July 2010, Mr Marius Zikmann, RDM's project manager, sent an email to Mr Bowles in which he said:

'As discussed, it would clear the air if you can give him (Mr Norbert Schulze, RDM's chief executive officer) some background as to the possible savings we

[8] See, *Doyle and Another v Fleet Motors PE (Pty) Ltd* 1971 (3) SA 760 (A) at 762E-763D.

might incur if we continue using the same suppliers for next year's event since a lot of work are (sic) done and equipment procured for the event. It would be first prize if you can prepare and put facts and figures on the table during your meeting next week. RDM will be more than willing to contract immediately for next year's event'.

This perspective is reflected in Mr Zikmann's evidence under cross-examination where he says:

'The purpose of the meeting (i. e on 7 April 2010) was to get Mr Bowles around the table which we did in the past, now things have changed, so we need to see how we are going about to the, for the postponed event. So that was merely the purpose of it'.

These aspects of Mr Zikmann's evidence are consistent with Mr Bowles' version of events that all that the parties had undertaken to do was to explore possibilities as to how best to salvage the situation. The fact that RDM made no attempts to negotiate the way forward also casts doubt on the integrity of its witnesses and their credibility.

[24] Mr Zikmann repeatedly said during the trial that RDM wanted a statement of the appellant's 'real expenses'. When questioned whether the close corporation would be entitled to 'fees' in respect of work that had already been done, he replied that: 'I think that is a general feeling is just that we were looking for the expenses, the statement of account'. That the close corporation was expected by RDM to walk away empty handed points to the improbability that Mr Bowles would have agreed thereto. It also belies the notion that the 'debate' of the account would permit a discussion of the reasonableness of a fee or payment to the appellant for work done. Later, Mr Zikmann changes his evidence to :

'It was proposed by RDM management that we get a statement of account, to see what is the real expenses and then we decide how we are going to deal with that.

Question (by counsel): So you wanted to get the real expenses and then you would decide how you would deal with that?

Answer (by Mr Zikmann): Yes, in conjunction with Mr Bowles.'

Mr Zikmann's second answer closely echoes that of Mr Bowles himself.

[25] When Mr Bowles sent an email to Mr Marcel Mbuyu, the chief operating officer of RDM, on 5 May 2010 which was clearly at variance with any notion of a firm agreement having been concluded between the parties, Mr Mbuyu did not protest that Mr Bowles had either misunderstood or misrepresented the situation.

[26] As late as 21 July 2010, Mr Zikmann addressed an email to Mr Bowles in which he says:

'I am confident that you and Norbert (i e Norbert Schulze, RDM's chief executive officer) can work through or past the obstacles in the way so that we can restart and focus on next year's event'.

This is entirely consistent with Mr Bowles' version of the exploratory nature of the undertakings given on 7 April 2010.

[27] It is true that the Mr Bowles' version as to what he had undertaken to do at the meeting of 7 April 2010 was not always exactly the same but this is consistent with the vague, indeterminate and provisional nature of what appears to have been agreed at that meeting. It is also consistent with the version conveyed by the letter from the attorneys acting for the close corporation dated 31 August 2010, in response to the letter of demand from RDM's attorneys, dated 25 August 2010:

‘We deny that the Agreement was varied as alleged or at all. We are instructed that our client, on a completely without prejudice basis, and as a gesture of good faith in order to maintain its business relationship with your client, undertook to negotiate terms with its suppliers and/or subcontractors in order to reduce the cancellation fee. Our client further undertook to attend to a reconciliation in this regard, and provide your client with the details of a refund, if any. Our client attended to the aforegoing and informed your client that it was prepared to refund the sum of R491 886.00 to your client on a without prejudice basis. It subsequently transpired however that your client was dissatisfied with the aforegoing refund and demanded a repayment of a larger portion of the said deposit’.

[28] The undertaking referred to therein given was not to agree to a statement and debatement of account. The word ‘debate’ nowhere features in this letter. A ‘statement and debatement of account’ is a specific remedy that one would expect would have been set out in terms. In the absence of a fiduciary relationship between parties, I find it very much more difficult to be persuaded that persons agreed to something that is, as a statement and debatement of account undoubtedly is, onerous and intrusive of the commercial privacy and confidentiality not only for the party required to do so but also its own customers and suppliers. Moreover, the undertaking in this instance was given on a ‘without prejudice basis’.

[29] There is a string of authority in this court that the mere fact that an undertaking has been given or even an agreement reached between parties is not necessarily enforceable: the agreement may be merely provisional and subject to further developments before a binding agreement is reached. See, for

example, *Lambons (Edms) Beperk v BMW (Suid-Afrika) (Edms) Beperk*;[9] CGEE *Alsthom Equipments et Enterprises Electriques, South African Division v GKM Sankey (Pty) Limited*;[10] *Pitout v North Cape Livestock Co-operative Limited*.[11] This is often known as an 'in principle' agreement. See, for example, *Titaco Projects (Pty) Limited v AA Alloy Foundry (Pty) Limited*,[12] which judgment was confirmed on appeal.[13] The undertakings which were given by Mr Bowles were clearly given in the course of negotiations which had, as their aim, the overall settlement of the issue. It is clear, on the probabilities, that the parties had intended on 7 April 2010 that there would be further negotiations between them before a bargain was struck.

[30] In *Doyle v Fleet Motors PE (Pty) Limited*[14] it was set out that a party seeking the rendering of an account and debate thereof should aver 'any contractual terms and circumstances having a bearing on the account sought'.[15] There was no averment as to how the account may reckon with any payments due to the appellant. RDM was silent throughout as to whether it accepted that payment may be due to the appellant. In the circumstances, this is a serious deficiency. There was no agreement as to the fees to be paid to the appellant or what possible compensation there would be for the appellant as a result of the variation. RDM has been coy about this throughout. Besides, there is no objective yardstick by which the 'reasonableness' of Mr Bowles' fees could have been measured.

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[9] *Lambons (Edms) Beperk v BMW (Suid-Afrika) (Edms) Beperk* 1997 (4) SA 141 (SCA) at 153.
[10] CGEE *Alsthom Equipments et Enterprises Electriques, South African Division v GKM Sankey (Pty) Limited* 1987(1) SA 81 (A) at 92A-F
[11] *Pitout v North Cape Livestock Co-operative Limited* 1977 (4) SA 842 (A) at 850D-G.
[12] *Titaco Projects (Pty) Limited v AA Alloy Foundry (Pty) Limited* 1996 (3) SA 320 (W) at 334D-G.
[13] *AA Alloy Foundry (Pty) Limited v Titaco Projects (Pty) Limited* 2000 (1) SA 639 (SCA) at 649A.
[14] *Doyle v Fleet Motors PE (Pty) Limited* 1971 (3) SA 760 (A).
[15] At 762G.

[31] The finding that that the parties concluded a final and legally binding agreement on 7 April is one which I cannot support: such agreement as may have been reached between the parties was tentative, exploratory and provisional at best for RDM.

[32] As RDM rejected the appellant's offer to settle, the close corporation counterclaim of R420 000- for the payment of outstanding VAT (Value Added Tax) must succeed.

[33] The court below should have dismissed the RDM's action and upheld the close corporation's counterclaim with costs. The appeal should have been upheld with costs.

NP WILLIS

JUDGE OF APPEAL

APPEARANCES

For Appellant:	J F Roos SC Instructed by: Robyn Edmunds Attorneys, Johannesburg E G Cooper Majiedt Inc, Bloemfontein
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