Republic of South Africa

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE No: A 178/09

In the matter between:

CHRISTOPHER JAMES BLAIR HUBBARD **Appellant/Defendant**

and

GERT MOSTERT **Respondent /Plaintiff**

JUDGMENT DELIVERED : 3 NOVEMBER 2009

MOOSA, J:

The Special Plea

[1] On 8 May 2006, the Respondent (hereinafter referred to as the Plaintiff) sued the Appellant (hereinafter referred to as the Defendant) for the sum of R59 381,47 being the balance of the contract price arising from a building contract concluded between the parties. The Defendant filed a Special Plea. In terms of such plea, the Defendant pleaded that he had tendered to the Plaintiff a cheque dated 18 November 2005 in the sum of R26 171,64 in full and final payment, which cheque was presented for payment and was

in fact honoured on 19 November 2005. The Plaintiff accordingly accepted the tender of the said cheque in full and final settlement of his total claim.

The Settlement Agreement

[2] It was agreed between the parties that the Special Plea would be adjudicated first. After hearing evidence of both parties, the court dismissed the Special Plea with costs. The parties thereafter concluded a settlement agreement in terms of which the Defendant *inter alia*: (a) acknowledged that he was indebted to the Plaintiff in the sum of R50 000,00 together with interest and costs, (b) consented to judgment thereto; (c) undertook to pay the judgment amount within five days from judgment date provided he did not lodge an appeal against the judgment of the court dismissing the Special Plea with costs within 10 days of signing the settlement agreement and (d) agreed that the judgment amounts will immediately become payable should he lodge an appeal and it fails. The Settlement Agreement was made an order of the court on 25 June 2008.

The Preliminary Application

[3] This court is also seized with a preliminary application for the condonation of the late lodging of the record and the re-instatement of the appeal. This application is opposed by the Defendant. In terms of Rule 50(1) of the Uniform Rules of Court an appeal shall be prosecuted within 60 days after it has been noted, failing which such appeal shall be deemed to have lapsed. This court has a discretion to grant an indulgence on consideration of all the circumstances of the case. This court agreed to hear both the application for condonation and the appeal simultaneously as one of the considerations relating to the application for condonation is whether or not there are reasonable prospects of success on appeal.

The Facts

[4] The facts are briefly as follows. In and during November 2004, the parties concluded a building contract in terms of which the Plaintiff agreed to construct a dwelling for the Defendant. The agreed contract price was R368 000,00. A further term of the agreement was that the building would be completed and handed to the Defendant by 15 April 2005. Should the Plaintiff fail to do so by that date, he shall be liable to the Defendant for a penalty calculated at the rate of R270,00 per day for the duration of the delay ("the first contract"). During the course of the construction, the Defendant wanted certain changes to be effected to the dwelling and a second contract was concluded for such extras ("the second contract"). The costs for the extra work, according to the Plaintiff, amounted to R50 625,11, but according to the Defendant amounted to R42 109,00.

The Findings Of The Trial Court

[5] The trial court, in dismissing the Special Plea, found that there was no consensus that the Plaintiff accepted the cheque in full and final payment of his claim. In other words the court found that there was no *animo contrahendi* that an agreement of compromise (*transactio*) was concluded between the parties when he retained and deposited the cheque.

The Grounds of Appeal

[6] The appeal is based on the grounds that the Magistrate erred in finding:

(a) that the Plaintiff did not accept the cheque presented to him by Defendant *"in full and final payment"* of his claim with the necessary *animus contrahendi;*

(b) that the Defendant's evidence that he gave the cheque to the Plaintiff on the understanding that the acceptance thereof would amount to the full

settlement of his (Plaintiff's) claim, was not the correct version;

(c) that the depositing of the cheque is not an indication that he consented to the agreement.

The Legal Issue

[7] The crisp legal issue the court has to decide on the evidence is, whether, objectively construed, the tender by the Defendant and the acceptance and deposit by the Plaintiff, of the cheque *"in full and final payment"* compromises the claim of the Plaintiff and if so, to what extent. In determining that question, the court must decide whether the tender was made *animus contrahendi,* that is, with the intention of concluding a compromise or *animus solvendi,* that is, with the intention to pay an admitted debt. (**Harris v Pieters** 1920 AD 644 and **Absa Bank Ltd v Van de Vyver NO** 2002 (4) SA 397 (SCA).)

[8] In order to resolve the issue, the ordinary principles of the law contract, apply. A compromise or *transactio* can be described as the settlement of a disputed obligation by agreement. Such agreement can either be expressed, implied or tacit. According to the Law of Contract, both an offer and acceptance can be either expressed, implied or tacit. Both an implied or tacit offer can be inferred from conduct (**Timoney and King v King** 1920 AD 133 at 141).

[9] Watermeyer ACJ in **Reid Bros (SA) Ltd v Fischer Bearings Co Ltd** 1943 AD 232 at 241, discussing the question of acceptance by conduct, made the following observation:

> *"Now a binding contract is as a rule constituted by the acceptance of an offer, and an offer can be accepted by conduct indicating acceptance, as well as by words expressing acceptance. Generally, it can be stated that what is required in order to create a binding contract is that acceptance of*

an offer should be made manifest by some unequivocal act from which the inference of acceptance can logically be drawn."

[10] Malan AJA, in **Be Bop a Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd** 2008 (3) SA 327 (SCA) at para [10], in approving the views of Watermeyer ACJ above, perhaps not in so many words, said:

"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… Although, generally, a contract is founded on consensus, contractual liability can also be incurred in circumstances where there is no real agreement between the parties but one of them is reasonably entitled to assume from the words and conduct of the other that they were in agreement."

[11] It is a trite principal of our law that the person who alleges the compromise bears the onus of establishing the compromise. (**The Torch Moderne Binnehuis Vervaardiging Venn (Edm) Bpk v Husserl** 1946 CPD 548.) Whether a compromise has been established will depend on the facts of each case. In such case the court will have regard to the declaration and the conduct of the parties concerned. The cheque in *"full and final payment"* will be objectively construed in the context of the evidence and background of the dispute between the parties to ascertain whether it was intended to effect a compromise or to pay an admitted liability. (**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 de Vyver NO** (supra) at 402B-E.) An offer of compromise will be strictly interpreted. An offer must be clear and unambiguous. An ambiguous offer will be construed *contra preferentem* and if the Defendant cannot prove that the Plaintiff reasonably ought to have interpreted the cheque as an offer of compromise, the Plaintiff is entitled to cash the cheque as payment on account and sue for the balance. (**The Law of Contract** 5th Edition: R H Christie at 456-459 and **Karson v Minister of Public Works** 1996 (1) SA 887 (E) at 896C-D.)

The Evaluation

[12] I will now apply the facts in this case to the legal principles enunciated above to determine whether or not a compromise (*transactio*) has been affected. It is common cause that the Defendant handed to the Plaintiff a cheque dated 18 November 2005 in the sum of R21 171,64 and which was endorsed "*in full and final payment*". On the afternoon of 18 November 2005, the Plaintiff telephoned the wife of the Defendant and informed her that he intends to accept the cheque and deposit same. The Plaintiff deposited the cheque for payment on 19 November 2005 and which was duly honoured. The Plaintiff testified that he banked the cheque unconditionally and did not accept responsibility for the endorsement on the cheque because he required the money to pay for material. There is a dispute as to what transpired on 18 November 2005 when the Defendant handed the cheque to the Plaintiff. According to the Plaintiff, the Defendant came to his house and handed him a cheque in an envelope and said: *"vat dit of los dit"*. He denied the version of the Defendant that he (the Defendant) told him that there were three different ways of resolving the issue. On 21 November 2005, the Plaintiff removed all his equipment and material from the site.

[13] It is common cause that the parties concluded a second contract for certain extra work that the Defendant required the Plaintiff to perform. Such extra work superceded the completion date. The parties did not stipulate a completion date in the second contract nor extended the completion date in the first contract. The Defendant was accordingly not entitled to claim any deduction in respect of the non-compliance with the penalty clause in the first contract.

[14] The Defendant in his Plea states that taking into consideration the amount owing by Plaintiff in terms of the penalty clause, the total amount owing by him to the Plaintiff was R348 723,64, which amount was paid in full to the Plaintiff. Such amount is lower than the original contract price and could accordingly not have included the costs for the extras. His plea that the total amount owing to the Plaintiff was R348 723,64 is inherently incorrect. The Defendant does not state what amount he claimed in terms of the penalty clause.

[15] The agreed contract price was R368 000,00 which was reduced by an amount of R10 520,.00 in respect of certain material supplied by the Defendant to the Plaintiff. The balance was accordingly R 357 480,00 to which must be added the extras amounting to R50 625,11, making a total contract price of R408 105,11. The Defendant in his Plea alleges that the price for the extras amount to R42 109,00 and in support thereof annexes two quotes one amounting to R25 803,00 and the other to R16 306,00. The first quote sets out only the costs for material and does not include the costs of labour. The only reasonable inference the court can draw is that the difference, between extras stipulated

by the Defendant of R50 520,00 and the amount of R42 109,00, as stipulated by the Defendant, amounts to labour costs in respect of the installation of the cupboards.

[16] I am supported in this conclusion by the fact that the parties reached a settlement in terms of which the Defendant acknowledged liability to the Plaintiff in the sum of R50 000,00 should he not institute an appeal or, having instituted an appeal, fails in such appeal. The amount so acknowledged is substantially consistent with the amount owing in respect of the extras. The parties entered into at least two contracts. The one was the first contract in respect of the dwelling and the other was the second contract in respect of the extras. The Defendant when he tendered the cheque *"in full and final payment"* did not stipulate whether such payment was in respect of the first contract or in respect of the second contract or in respect of both.

The Findings

[17] The onus is on the Defendant to prove that the offer of compromise has been effected in respect of the claims arising from both the contracts. It is trite that an offer of compromise must be strictly interpreted. An offer of compromise which is ambiguous will be interpreted *contra preferentem.* The Plaintiff was entitled to assume that the offer of compromise was in respect of the claim arising from the first contract and accept the cheque in full and final payment of the first contract. Objectively speaking, taking into consideration the evidence and the background of the dispute, there is nothing to suggest that the Plaintiff ought reasonably to have interpreted the offer of compromise to be in respect of both claims. In **Harris v Pieters** *(supra)* at 655, where similar facts and principles were involved, Juta JA said as follows:

> *"But I agree with the view that in case of doubt the construction should be against the debtor, for he had it in his power to make his meaning clear."*

The Plaintiff was therefore entitled to accept the payment in full and final settlement of the first contract. It appears to me that such compromise did indeed take place because there was a figure of R8 756,36 owing on the first contract that was compromised. With regard to

the second contract, an amount of R625,11 was compromised, but that occurred by agreement between the parties as reflected in the Settlement Agreement.

[18] In my view the Defendant has failed to discharge the onus of proving that the offer of compromise was in respect of claims arising from both contracts. In answer to the question that was posed earlier, I accordingly conclude that the amount owing in respect of the first contract has been compromised in terms of the offer of compromise as represented by the cheque for the sum of R 26 171,84 endorsed in full and final payment and not the entire claim as alleged in the Special Plea. The amount owing in respect of the second claim, that is the extras, has been compromised in terms of the Settlement Agreement that was made an order of the court *a quo*.

The Application for Condonation

[19] I now return to consider the application for condonation. I have mentioned earlier that one of the considerations for an application for condonation is the prospect of success of the appeal. It is clear from the judgment on the merits that the Defendant was partially successful on appeal. The failure to file the appeal record timeously, visits serious consequences on such appeal, in that the appeal is deemed to have lapsed. It appears that a number of role players contributed to the delay, least of all the Defendant's lawyers. I am of the view that, in the interest of the administration of justice condonation be granted.

[20] At the same time I am constrained to mention that the appeal was not launched timeously in terms of the rules. It also appears that no security for costs, as required in terms of the rules, was filed. It also does not appear that such shortcoming and omission were condoned. Insofar as it may be necessary, the condonation is granted.

The Appealability of the Judgment

[21] In view of the court's findings, it is not necessary to deal with the question of the appealability of the judgment of the court *a quo* arising from the Settlement Agreement. The matter has become moot.

The Costs

[22] I will firstly deal with the costs pertaining to the application for condonation. It is generally accepted that the person who seeks an indulgence pays the costs. In this case the application was opposed. I am of the view that the Plaintiff was justified in opposing the application. It appears that on a previous occasion when a similar application was brought, the Plaintiff did not oppose such application. I consider that a fair and equitable award as to costs in respect of the application is that the Defendant pays the costs of the application for condonation and that the Plaintiff bears the wasted costs occasioned by the opposition.

[23] Insofar as the costs occasioned in the Court *a quo* are concerned, the parties agreed in term of the Settlement Agreement, which was made an order of the Court, that the Defendant would pay the costs in the event of him not proceeding with the appeal or having proceeded with the appeal, but is not successful. In view of this court's findings it is not necessary for it to make a special order in respect of the costs incurred in the court *a quo*, as it is covered by the judgment granted in terms of the Agreement of Settlement.

[24] I now discuss the costs of the appeal to this court. The appeal has been a pyrrhic victory for the Defendant. It secured partial success for him. The judgment of the court *a quo*, dismissing the Special Plea with costs, is partially reversed. This court found, contrary to the court *a quo*, that the tender of the cheque in full and final payment had compromised

the claim arising from the first contract, but not the claim arising from the second contract. However, the Plaintiff was substantially successful in that it was awarded the claim arising from the second contract and as agreed to in the Settlement Agreement. In that regard the appeal was abortive insofar as the Defendant is concerned. In the final analysis, the result of the appeal was consistent with the terms of the Settlement Agreement. The Defendant, having concluded a Settlement Agreement was not justified in launching the appeal, although he reserved the right to do so. In that regard he took the risk and, in my view, should bear the costs of the appeal.

The Order

[25] The appeal is upheld. The order of the court *a quo* dismissing the Special Plea is set aside and the following order is made:

(a) the Special Plea is upheld insofar as the claim arising from the first contract has been compromised by the payment of the cheque dated 18 November 2005 in the sum of R26 171,64;

(b) the judgment granted by the court *a quo* in terms of the Settlement Agreement i e the “Skikkingsakte” is confirmed;

(c) the Defendant is ordered to pay the costs occasioned by the Application for Condonation and the Plaintiff is ordered to pay the wasted costs occasioned by the opposition and

(d) the Defendant is ordered to pay the costs occasioned by the appeal.

E MOOSA

MATOJANE, AJ: I agree.

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