REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 4567/2009

In the matter between:

FRANCOIS JOHANNES WIUM **Plaintiff**

and

FREDERICK ARIJS **Defendant**

JUDGMENT DELIVERED 28 MAY 2104

SAVAGE AJ

[1] On 9 March 2009 the plaintiff, Mr Francois Johannes Wium, instituted action against the defendant, Mr Frederick Arijs, for payment of the amount of R1 200 000.00, interest at the statutorily prescribed rate calculated from 15 December 2008 and costs.

[2] The relevant background to the matter is as follows. On 25 March 2008 the parties entered into a written agreement of sale in Cape Town in terms of which the plaintiff sold to the defendant his interest in a close

corporation holding certain immovable property in Stellenbosch ('the property'). A second agreement was entered into on the same date between the parties in terms of which *inter alia* the defendant would pay R1 200 000.00 ('the capital amount') to the plaintiff if the plaintiff successfully obtained certain subdivision and rezoning rights in respect of the property. On 2 December 2008 the plaintiff obtained these rights when an appeal was finalised by the Western Cape Department of Environmental Affairs and Development Planning and he thereafter sought payment of the capital amount. The defendant failed to adhere to an undertaking to pay on 28 February 2009 and the plaintiff thereafter sued the defendant for payment.

[3] The action was defended and an application for summary judgment opposed. On 15 April 2009, the day before the summary judgment application was to be heard, the defendant paid the capital amount to the plaintiff. The application was postponed and on 7 May 2009 summary judgment was refused with the defendant granted leave to defend the action. There is no dispute between the parties that payment of the capital amount was due to the plaintiff and the amount paid. The matter proceeded to trial in respect only of the plaintiff's claim for interest and costs.

[4] In his plea the defendant averred that on 15 April 2009 the plaintiff concluded an oral agreement of compromise with the defendant, represented by his attorney, Mr Herman Botes ('Mr Botes'), in terms of which the plaintiff undertook to withdraw his action against the defendant if the capital amount was paid on 15 April 2009. As a result, the defendant claimed he was not liable to pay interest and costs to the

plaintiff. The plaintiff denied the existence of any compromise agreement and persisted in his claim for interest and costs.

[5] The evidence of the defendant was that Mr Botes had spoken telephonically to the plaintiff on 15 April 2009, confirmed that payment of the capital amount had reflected in his firm's trust account the previous day and that payment would be made to the plaintiff the same day. Mr Botes stated that the plaintiff informed him that he would withdraw his action. After he was informed that the summary judgment application would proceed the following day, at 16h46 on 15 April 2009 Mr Botes sent an email to the plaintiff's attorney, Mr Andries Maree, recording that:

> '*…Jou klient het my vanoggend geskakel om te hoor oor die betaling van die kapitale bedrag, tydens welke gesprek hy onderneem het om jou instruksies te gee om die aksie terug te trek'*.

[6] At 08h17 on 16 April 2009 Mr Maree replied:

> '*…Hy beweer daar is NOOIT in julle gesprekke melding gemaak van rente of regskoste of betaling in volle en finale vereffening of kapitale bedrag nie en moes hy aanvaar julle sal die rente en koste ook betaal of minstens aanbied.*
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> *Hoe dit ookal sy, dit sou sekerlik beter gewees het as jy enige "finale skikking" met my bevestig het, want jou siening van wat gebeur het verskil heelwat van Frans se seining daarvan.*
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> *Sonder benadeling van Frans se regte en bloot in 'n poging om die saak te skik, sal Frans 'n additionele R50 000,00 aanvaar in volle*

en finale vereffening van sy eis en rente en regskoste, op voorwaarde dat dit vanoggend 'n bevel van die hof gemaak word en betaalbaar is binne 7 dae…'

[7] Mr Botes conceded in cross examination the words 'capital amount', 'interest' or 'costs' had not been used in the telephone discussion, nor had a final settlement of the claim been discussed and no reference was made to a compromise agreement. He accepted that the plaintiff in an email on 10 March 2009 had raised concern regarding interest lost given the non-payment of the capital amount. Nevertheless, it was argued for the defendant that a compromise existed as a result of which the plaintiff had undertaken to withdraw the action. Furthermore, issue was taken with the fact that the plaintiff elected to retain the capital sum and utilised the monies in spite of being aware that there existed a dispute with regards to interest and costs.

[8] The evidence of the plaintiff was that he had telephoned Mr Botes on 15 April 2009 to enquire regarding payment and was informed that he would be paid that day. There was no discussion of interest and costs, nor that payment was to be a full and final settlement of his claim and payment was not accepted on the basis that he would waive or abandon his claim to interest and costs. The plaintiff understood that the action would be withdrawn after the capital amount, interest and costs had been paid, although he was unsure as to whether he had mentioned the withdrawal of the matter. He emphasised that he understood that interest and costs would be quantified by the attorneys.

[9] It was argued for the plaintiff that the probabilities did not favour the defendant in that the plaintiff would not telephone the defendant's attorney to offer to compromise his own claim. Furthermore, this unusual

bargaining process was not confirmed in writing. No compromise was reached and the presumption against waiver must operate to the benefit of the plaintiff.

Evaluation

[10] For a compromise to have been reached such as to terminate a legal obligation '*the proposal, objectively construed, must be intended to create binding legal relations and must have so appeared to the offeree*'.[1] This binding legal relation arises either where there exists consensus between the parties or '*where there is no real agreement between the parties…one of them is reasonably entitled to assume from the words or conduct of the other that they were in agreement*'.[2] The existence of a compromise as a form of novation must be clearly and unambiguously proved as a question of fact to be determined from the circumstances,[3] with the onus on the party alleging the compromise to prove it. Where it is shown not to exist the purported compromise is void and has no effect on the subject matter of the dispute.

[11] From the evidence of both Mr Botes and the plaintiff it is clear that no reference was made during their telephonic conversation to payment of the capital amount being in full and final settlement of the claim, nor was interest or costs discussed. An agreement to pay the capital amount objectively construed did not amount to a proposal made by the defendant to settle the claim without payment of interest and costs when no mention

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[1] DT Zeffertt "Payments In Full Settlement" (1972) 89 *SALJ* 35 at 38; *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at paras 16-17 per Nienaber JA.
[2] *Be Bop a Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd* 2008 (3) SA 327 (SCA) at para 10 with reference to RH Christie *The Law of Contract in South Africa* 5ed (2006) 24 ff and *Sonap Petroleum SA (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (AD) at 238I–240B.
[3] *Paterson Exhibitions CC v Knights Advertising and Marketing CC* 1991 (3) SA 523 (AD) at 529D

was made of payment being in full and final settlement, nor of interest and costs. Confirmation that payment would be made to the plaintiff could not therefore, objectively on the facts, have amounted to an offer, whether expressly or tacitly made, to settle the matter on terms different to that sought in the particulars of claim. The defendant was therefore not reasonably entitled to assume from the words or conduct of the plaintiff that the parties were in agreement as to the terms of a compromise.

[12] On the basis that it is unusual for persons to give up rights gratuitously unless there is a reason for their conduct, where such rights are given up, waiver must be proved.[4] In *Borstlap v Spangenberg*[5] Corbett AJA, as he was then, stated that:

'*Dit is herhaaldelik deur ons Howe beklemtoon dat duidelike bewys van 'n beweerde afstanddoening van regte geverg word, veral waar op 'n stilswyende afstanddoening staat gemaak word. Dit moet duidelik blyk dat die betrokke persoon opgetree het met behoorlike kennis van sy regte en dat sy optrede teenstrydig is met die voortbestaan van sodanige regte of met die bedoeling om hulle af te dwing*.'

[13] There was no such indication made by the plaintiff that he intended to waive his right to payment of interest and costs. The plaintiff's undertaking to withdraw his claim on receipt of payment was clearly one made without a clear understanding of his rights and the effect of such withdrawal. Mr Botes, a practising attorney of many years standing, obtained such an undertaking from the plaintiff personally in circumstances in which he knew the plaintiff to be legally represented.

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[4] *Xenopoulos and another v Standard Bank of SA Ltd and another* 2001 (3) SA 498 (W) at 512E; Christie 6th ed at 457

[5] 1974 (3) SA 695 (A) at 704

This required of him at the least to draw the effect of the withdrawal to the attention of the plaintiff. Yet it is material that following the discussion held, Mr Botes neither recorded in his email to the plaintiff's attorney that there had been offered or agreed a settlement or compromise of the plaintiff's claim, nor that he had advised the plaintiff of the consequences of undertaking to withdraw the matter.

[14] To determine whether there exists an inferred waiver, Nienaber JA in *Road Accident Fund v Mothupi*[6] stated that the test is objective, adjudged from the perspective of a reasonable person in the position of the other party, that outward manifestations are relevant and uncommunicated reservations of no legal consequence. With no reference made to payment of the capital amount in full and final settlement, nor any reference to interest and costs, it cannot be inferred that the plaintiff waived his claim to such interest and costs.

[15] Furthermore, the retention by the plaintiff of the capital amount paid did not amount to the acceptance of an offer to compromise the claim given that no such offer had been made by the defendant. This matter is therefore distinct from *Be Bop a Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd*[7] in which on appeal it was found that the deposit of a cheque which bore the words 'full and final settlement of account' amounted '*…to an offer to the respondent to settle their dispute by payment of that amount which the latter could have accepted or declined, but on acceptance of which the dispute between the parties would be compromised*.'[8] *Absa Bank Ltd v Van de Vyver NO*[9] and *Andy's*

[6] 2000 (4) SA 38 (SCA) at paras 16-17
[7] 2008 (3) SA 327 (SCA)
[8] At para 11
[9] 2002 (4) SA 397 (SCA)

Electrical v Laurie Sykes (Pty) Ltd [10] are distinguishable on the same basis.

[16] The plaintiff could not have compromised his claim when the terms of such compromise had neither been offered to nor accepted by him. Had the defendant intended to offer payment in full and final settlement it was required of him to state as much or to ensure that outward manifestations of such offer to compromise on this basis were apparent to the plaintiff. The defendant's purported uncommunicated reservations are of no legal consequence.

[17] In *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* [11] in which awareness as to the existence of a contractual provision was in issue, Brand JA stated with reference to *Sonap Petroleum SA (Pty) Ltd (formerly known as Sonarep (Pty) Ltd) v Pappadogianis* [12] that '(i)*f a reasonable person in their position would have realised that Rust, despite his apparent expression of agreement, did not actually consent to be bound by the clause, this clause could not be said to be part of the agreement*'. Harms AJA in *Sonap Petroleum (supra)* [13] made reference to Blackburn J in *Smith v Hughes* [14]*:*

'If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon the belief enters into the contract with him, and thus conducting himself would be equally bound as if he had intended to agree to the other parties terms'.

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[10] 1979 (3) SA 341 (N)
[11] 2005 (4) SA 345 (SCA) at para 16
[12] 1992 (3) SA 234 (A)
[13] At 239G-H
[14] (1871) LR 6 QB 597 at 607

[18] Objectively construed, the plaintiff did not compromise his claim in accepting payment when the terms of such purported compromise had not been offered to him; nor can a finding be sustained that the plaintiff waived or abandoned his claim to interest and costs in return for payment. His undertaking to withdraw the action he had instituted on receipt of payment was clearly one made without *'behoorlike kennis van sy regte'*[15] but did not amount to a waiver of his claim to interest and costs. In such circumstances, it follows that with no compromise reached, the defendant is liable for payment of both interest on the capital amount and the plaintiff's costs.

Order

[19] For these reasons an order is made in the following terms:

1. The defendant, Mr Frederick Arijs, is to pay to the plaintiff, Mr Francois Johannes Wium, interest on the amount of R1 200 000.00 at the statutorily prescribed rate calculated from 15 December 2008.

2. The defendant is to pay the plaintiff's costs.

K M SAVAGE

Acting Judge of the High Court

Appearances:

[15] *Borstlap v Spangenberg (supra) per Corbett AJA*

Plaintiff: A Newton instructed by Van der Westhuizen Vos & Horn

Defendant: J de Vries instructed by Mostert & Bosman