

SOUTH AFRICA / JUDGMENT

Gracos Brick (Pty) Ltd v Botes (1531/12) [2014] ZANWHC 28 (11 September 2014)

[2014] ZANWHC 28

COURT

North West High Court, Mafikeng

BEFORE

Kgoele

CASE / FILE NUMBER

1531/12

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IN

THE NORTH WEST HIGH COURT

MAFIKENG

CASE

NO.: 1531/12

In

the matter between:

GRACOS

BRICKS (PTY)

LTD.....Plaintiff

and

CORNELIA

MARIA WILHEMINAH

BOTES.....Defendant

KGOELE

J

CIVIL

MATTER

DATE

OF HEARING : 28 JULY 2014

DATE

OF JUDGMENT: 11 SEPTEMBER 2014

FOR THE PLAINTIFF

: Adv. De Villiers-Golding

FOR

THE DEFENDANT : Adv. Cowley

JUDGMENT

KGOELE J:

A.

INTRODUCTION

- [1] This is an action wherein the plaintiff claims payment in the sum of R120 000.00 and R119 200.00 being the balance due in terms of an agreement of purchase in respect of a ZL50 front-end loader.
- [2] The action was initially instituted at the North Gauteng High Court. The defendant filed his plea wherein he raised two special pleas, that of (1) lack of jurisdiction and (2), matter had been settled between the parties. The North Gauteng High Court upheld the first plea and transferred the matter together with the latter plea to this Court.
- [3] On 19 March 2014, the Honourable Madame Judge President Leeuw ordered that the special plea falls to be decided separately from the merits of the matter. The only issue to be determined at this stage is therefore the special plea and thus, whether the action has been settled or not.

B. BRIEF BACKGROUND

- [4] In and during August 2010, the defendant purchased a ZL50 front-end loader from the plaintiff in an amount of R319 000.00. The defendant made payment of an amount of R80 000.00 to the plaintiff in and during August 2010. The balance of the purchase price was payable by the defendant to the plaintiff by way of two post-dated cheques (“the cheques”), one dated 30 November 2010 for the sum of R120 000.00 and the other dated 30 December 2010 for the sum of R119 200.00.
- [5] The plaintiff is the legal holder of the cheques as payee. The cheques were drawn by the defendant on her bankers, ABSA Bank, and duly presented for payment in terms of Section 43A of the Bills of Exchange Act 34 of 1964, as amended.
- [6] The cheques were dishonoured by non-payment and endorsed by the drawer’s bank as “payment stopped” on 10 January 2011. Notwithstanding demand, the plaintiff alleges that defendant has failed, alternatively refused to make payment to the plaintiff in the aforesaid amounts or any part thereof.
- [7] On 6 April 2011 Provisional Sentence Summons were issued against the defendant and was served on the 6th May 2011. On 20 May 2011 the defendant’s attorneys of record addressed correspondence to the plaintiff’s attorney of record in the following terms:-

“1.

2.

3.

3.1 under the circumstances our client hereby offers to return the relevant machine to your client as settlement of the claim for payment on the two cheques attached in your particulars of claim;

3.2 In addition, our client is prepared to waive the amount of R80 000.00 which has already been paid as a compensation for the use of the machine.

4. Please indicate urgently whether your client accepts the offer whereafter it can be arranged that the machine be uplifted from our client's premises.

5. We however confirm that the offer is made subject thereto that if the offer is accepted, it is accepted as a quid pro quo for payment in terms of the two relevant cheques."

[8] As a reply to the above letter, on 23 May 2011 the plaintiff's attorneys of record addressed a letter to the defendant's

attorney of record in the following terms:-

"My client is willing to accept return of the front end loader and cancel the agreement between our respective clients subjected thereto that:-

1. My client reserves the right to claim such damages and it is capable of processing in law against your client and;
2. My client pending the outcome of the litigation referred to in 1 above retains all amounts paid to date.

I await to hear from you."

[9] On 24 May 2011 the defendant's attorneys of record addressed correspondence to the plaintiff's attorneys of record in the following terms:

"1. We refer to your letter of your "Without Prejudice" letter of the 23rd of May 2011 in respect of your client's claim in respect of 2 cheques under case number 21304/2011.

2. We therefore confirm that the matter has been settled on the following terms:-

2.1 The agreement between the parties is cancelled by agreement and the front-end loader will be returned to your client Gracos Bricks. Your client will collect the front-end loader from our client at its own costs.

2.2 Your client will not have any further claim in respect of the 2 cheques and the matter under case number 21304/2011 will be settled and withdrawn.

2.3 Gracos Bricks reserves the right to claim such damages and is capable of processing in law against CMW Botes, any claim for damages.

2.4 Gracos Bricks, pending the outcome of the litigation (referred to above), retains all amounts paid to date in respect of the purchase of the front-end loader

2.5 CMW Botes reserves the right to institute any counter claims they may have.

3. Under the circumstances please file your notice of withdrawal in respect of the case number 21304/2011 and confirm when the front-end loader will be collected from our client.” (Emphasis added).

[10] On 8 June 2011 the plaintiff’s attorneys of record in reply to the above addressed correspondence to the defendant’s attorneys of record in the following terms:-

“This matter and your letter dated 24 May 2011 refers.

The matter is not settled on the basis of the contents of your aforesaid letter as alleged by you and instead the contents of your said letter merely constitutes a counter offer, in as much as you have included additional conditions therein, which were not of paragraph 2.1, 2.2 and 2.5 of your aforesaid

letter.

Our instructions are that our client rejects your client’s aforesaid counter-offer and that the litigation between the parties must proceed.

....” (Emphasis added)

[11] The defendant persisted in this Court with her second special plea, that the action has been settled. The defendant further, denies liability to pay and has instituted a counter claim in the form of damages for loss of income, despite the plea of settlement. The dispute before this Court of whether the matter has been settled between the parties revolves around the contents of all the four letters quoted above.

C. THE DEFENDANT’S CASE

[12] The defendant contends that the alleged agreement of settlement came about as a result of a series of correspondence which comprises of an offer by the defendant on 20 May 2011, followed by a counter-offer by the plaintiff on 23 May 2011, which offer was accepted by the defendant on 24 May 2011.

[13] Defendant called Willem Andrian Durand, the attorney of record who acted for the defendant in this matter to give evidence on its behalf. He testified mainly about the letters which they wrote to the plaintiff. In particular he explained that paragraph 2.1 of their letter dated 24 May 2011 is confirmation that restitution should take place because of the agreement which had been cancelled by agreement. Further that paragraph 2.2 is merely making it clear that the two cheques in issue in this matter, by virtue of the agreement will be settled as they are the causa between the parties, which means that the matter will be withdrawn. Lastly that, the last sentence in paragraph 2.1 that deals with the fact that the plaintiff will collect the front-end loader together with paragraph 2.5 as a whole are not part

of the agreement, they are a consequence of an agreement and a reservation of rights that accrued to the defendant ex lege. The defendant closed his case without calling a further witness. The plaintiff did not call any witnesses to testify on its behalf.

[15] The defendant's counsel submitted on behalf of the defendant that on the facts it is clear that the plaintiff only has a problem with three paragraphs of the letter dated 24 May 2011 to wit:-

2.1 The agreement between the parties is cancelled by agreement and the front-end loader will be returned to your client Gracos Bricks. Your client will collect the front-end loader from our client at its own costs.

2.2 Your client will not have any further claim in respect of the 2 cheques and the matter under case number 21304/2011 will be settled and withdrawn.

2.5 CMW Botes reserves the right to institute any counter claims they may have.

[16] He emphasised that para 2.1, is the conclusion in law, it is not necessarily an agreement nor a condition. Furthermore that paragraphs 2.2 and 2.5 are just reservation of the rights and consequences flowing from the agreement reached.

[17] He further submitted that the nature of the agreement reached as far as the contents of the letters exchanged is concerned constitute a compromise. He conceded to the fact that in paragraph 2.1 the last part thereof is a new term. He emphasizes the fact that although this may be regarded as such, it does not invalidate the settlement agreement as it follows logically that upon acceptance by the plaintiff of the return of the front loader, the front loader will either be returned by the defendant and/or the plaintiff will collect it, which is a natural consequence that follows when contracts are cancelled. He quoted the case of JRM Furniture Holdings v Cowlin 1983 (4) SA 541 (W) as a support for the basis that, if this new term amounts to an unreasonable demand, it can be ignored.

[18] He lastly referred to the case of Shell SA (Pty) Ltd vs Corbit and Another 1986 (4) SA 523 as a basis to expand on the above submission wherein it was held that:-

"Held further that the Court also had to have regard to the fact that the contract was a commercial document executed with the clear intention that it should have commercial operation and that it should not lightly be held to be ineffective or expected to be drafted with the precision of language required in a more formal instrument". (quoted from the headnote).

[19] He concluded by saying that the special plea that the matter has been settled between the parties should be upheld with costs.

D. PLAINTIFF'S CASE

[20] Counsel for the plaintiff submitted that it cannot by no stretch of imagination be contended that the defendant's letter dated 24 May 2011 constitutes anything else other than a counter offer to settlement proposals contained in the plaintiff's letter of 23rd May 2011, therefore no settlement agreement was concluded.

- [21] She argued that the alleged acceptance of the offer made by the plaintiff in the letter dated 23 May 2011 does not correspond with the offer made. She further contends that the letter dated 24 May 2011 is nothing other but a “Yes, but” There is according to him simply no proof, on a balance of probability, that an agreement was concluded as contended for by the defendant.
- [22] She referred the Court to the book of “The Law of Contract in South Africa: 6th Edition” at page 65-66 wherein in the words of Christie, on the requirements of an acceptance of an offer the following was said:-
- “One aspect of the rule that acceptance must be clear and unequivocal or ambiguous is that the acceptance must exactly correspond with the offer. “Yes, but “ does not signify agreement, so any attempt to vary the terms of an offer while purporting to accept it or destroy the validity of the acceptance, which will normally best be interpreted as a counter-offer.” (Emphasis added)*
- [23] She further referred the Court to the remarks by Greenberg JA at page 801 in the case of Boerne v Harris 1949 (1) SA 793 wherein he said that the letter “must unequivocally convey to the recipient, using ordinary reason and knowledge, that it is intended to be such an exercise. It must leave no room for doubt. The recipient is not required to apply any special knowledge or ingenuity in ascertaining the meaning of the letter”.
- [24] She persisted that when looking at paragraph 2.1 of their letter dated 24 May 2011, the first sentence is a “yes”, whilst the second sentence is a “new term”. In addition she maintained that the two sentences contradict each other. Furthermore that the last sentence is not in accordance with the terms of “returning” set out in this letter, as the word return means, “you must give it back”.
- [25] She indicated that she no longer take issue with paragraph 2.2 of their letter as it is common cause between the parties, but that paragraph 2.5 thereof is contentious in the sense that it could not be implied or read in the plaintiff’s letter. She maintained that reservation of rights should be discussed before it can be incorporated in an agreement. According to her there is clearly no consensus between the parties therefore there was no settlement agreement or compromise reached between the parties.
- [26] As far as the JRM Furniture Holding case is concerned she indicated that Christie in his book “The Law of Contract in South Africa; 6th Edition on page 67 discussed this case further and said that:-
- “Where, as in the Hoffmann and Carvalho and ACC Bio Kafee cases, they followed one another immediately in the same letter, it would be natural and proper to read the letter as a whole and therefore regard the acceptance as invalid due to non-correspondence with the offer”.*

According to her the JRM furniture Holding case does not therefore assist the defendant in any case. She finally requested the court to

dismiss the special plea with costs which costs should include the travelling and subsistence costs occasioned by the adjudication of the special plea.

E.

ANALYSIS

[27] It is trite law that a compromise is a settlement by agreement of disputed obligations, whether contractual or otherwise.

Compromise is a form of novation. It differs from the ordinary novation in that the obligations novated by the compromise must previously have been disputed or uncertain, the essence of compromise being the final settlement of the dispute or uncertainty.

[28] The party who alleged that a compromise has been reached bears the onus to prove same, clearly and unambiguously, as with any other waiver or novation. See: Christie at page 473 and the authorities referred to therein.

[29] When ascertaining whether an agreement has been concluded, the most common technique is to establish whether there has been an acceptance of an offer. See: Christie Page 30

[30] The requirement of exact correspondence between acceptance and offer is a question of substance and not form. See: Christie Page 66

[31] In *Boerne v Harris* 1949 (1) SA 793 (A) Schreiner JA at page 809 said:

“I have said that an acceptance to be effective must be clear and unequivocal or unambiguous. But that does not mean, in my

opinion that it must necessarily be so free from blemish as to be beyond the need for the interpretation or construction”.

[32] After analysing the contents of the letters exchanged between the parties that constitutes the basis for the issue before this Court, I fully agree with the defendant’s counsel that the nature of the contract that is depicted therein is a compromise because it is clear from the wording of the letters that the parties did not agree that it is a full and final settlement of the issue between them, as they reserved their rights to claim for damages. It equates a settlement by agreement of disputed obligations in respect of a contract they concluded of the front-end loader machine.

[33] When looking at the wording of the plaintiff’s first letter, the unnumbered sentence on their letter dated 23 May 2011, especially the words “My client is willing to accept return of the front-end loader and cancel the agreement between our respective clients”, one can simply realise that these words are not different to what is suggested in paragraph 3.1 of the first

letter that the defendant wrote. The defendant's first letter was couched as follows: "our client offers to return the relevant machine to your client as settlement of the claim for payment on the two cheques attached in your particulars of claim." The offer made in the first part of the sentence is exactly the same as the accepted terms in the plaintiff's letters. The same can be said in regard to the latter part that deals with "as settlement of the claim for payment on the two cheques" It is clear that the defendant wished the matter of the two cheques, which is the subject of the main claim before this court to be finalised. The plaintiff when reacting to this did not use the words, "willing to accept the return as settlement of our agreement", but also in the same breath chose to use different words in addition to what was requested by the plaintiff by saying "accept return of the front loader and cancel the agreement between our respective clients."

Clearly the latter part of this sentence conveys the intention that the agreement will therefore end when the front-end loader is returned, the obvious consequence thereof will be that there will no longer be any contract existing between the parties, it is the end of it. This view is strengthened by the fact that in paragraph 1 of the same letter the plaintiff made it a condition that this will happen subject to it reserving its right to claim damages, which is also an obvious consequence that arises in terms of the law. [Emphasis added].

- [34] Furthermore, paragraph 2 of the defendant's letter corresponded with paragraph 3.2 of the plaintiff's first letter, which is an additional offer the plaintiff made to the defendant.
- [35] The paragraphs analysed above captures and describe the main intention of the two parties irrespective of the other additions made thereto.
- [36] Although there are some additions to the parties' respective letters, there is basically no difference as to what is suggested in the first letter of the defendant and the first reply of the plaintiff. The gist or crux of the two letters is clear and remains: "to return the front-end loader as settlement of the two cheques, and the contract will be cancelled, subject to the rights of parties to claim damages".
- [37] Assessing the arguments of the plaintiff's counsel before this Court, it seems that there are only two aspects that stands in the way of or which disturbs what can be termed as consensus between the parties, which are paragraphs 2.1 and 2.5 of the second letter of the defendant dated 24 May 2011. This last part of the paragraph 2.1 that deals with "Your client will collect the front-end loader", does not necessarily in my view contradicts what the defendant offered in the same paragraph of the first sentence thereof, that is, to return it as submitted by plaintiff's counsel. My reasoning stems from the contents of paragraph 3.1 and 4 of their first letter dated 20 May 2011. Whilst I accept that paragraph 3.1 offers the return of the front-end loader, paragraph 4 qualifies the returning thereof by saying "after the acceptance of the offer it can be arranged that the machine be uplifted from our premises". By inserting this contentions part of paragraph 2.1, the defendant was still pursuing what he suggested in paragraph 4 of his first letter to wit "the machine is to be uplifted". Even if I might be wrong with my interpretation of the contents of the contents of these paragraphs, I

remain unpersuaded that based on a careful reading of Christie, together with Hoffman and the JRF matters referred to above, this latter part of this paragraph cannot be allowed to upset the intention of the parties which is to accept the return and cancel the agreement. These so called “matching paragraphs” makes the argument of the plaintiff untenable that there was no agreement to settle the issue of the two cheques between the parties.

[38] In the case of Hillas & Co Ltd v Arcos Ltd [1932] UKHL 2; 147 LTR 503 at page 514 Lord Wright said the following:-

“Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defects”.

[39] The same approach was followed by Price J in the Hoffman and Carvalho v Minister of Agriculture 1947 (2) SA 855 matter quoted above at page 860 where he said the following:-

“In the case of Scammel & Nephew Ltd v Ouston (1941 AC 251 at 254 and

255) it is stated that the Courts are very willing to treat a contract as having been concluded if the parties think they have made a binding contract (as they undoubtedly did in this case). Where parties intend to conclude a contract, think they have concluded a contract, and proceed to act as if the contract were binding and complete, I think the Court ought rather to try to help the parties towards what they both intended rather than obstruct them by legal subtleties and assist one of the parties to escape the consequences of all that he has done and all that he has intended

[40] The remarks quoted in these two decisions are apposite in this matter. Applying these remarks in casu, there can be no doubt that the agreement to settle was intended by both parties. After all the other paragraphs that the plaintiff is worried about, paragraph 2.5 of their second letter is clearly a reservation of a right that the defendant has in terms of the law and as correctly submitted by the defendant’s counsel, it cannot be regarded as a new term. It clearly equates what the plaintiff’s also reserved. Clearly the plaintiff cannot approbate and reprobate at the same time.

F. ORDER

[41] Consequently the following order is made

41.1 The special plea raised by the defendant is upheld with costs.

A.M. KGOELE

JUDGE OF THE HIGH COURT

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MAHIKENG

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