

SOUTH AFRICA / JUDGMENT

Scania Finance Southern Africa (Pty) Ltd v GJ Vermaak Vervoer (Pty) Ltd and Another (40986/2014) [2020] ZAGPPHC 359 (12 August 2020)

[2020] ZAGPPHC 359

COURT

North Gauteng High Court, Pretoria

BEFORE

Sardiwalla

CASE / FILE NUMBER

40986/2014

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

SAFLII

Note: Certain

personal/private details of parties or witnesses have been
redacted from this document in compliance with the law
and SAFLII

Policy

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

Case

No.:40986/2014

In

the matter between:

SCANIA
FINANCE
Plaintiff
SOUTHERN
AFRICA (PTY) LTD
And
GJ
VERMAAK VERVOER (PTY) LTD
First defendant
GABRIEL
JOHANNES VERMAAK
Second defendant

JUDGMENT

SARDIWALLA J

INTRODUCTION

- [1] This is an action wherein the plaintiff claims payment in the sum of R6,986,748.29 plus interest being the balance due in terms of a consolidated agreement concluded on 31 December 2010 in respect of 36 leased trucks and trailers.
- [2] The defendant initially raised a raised a special plea of lis pendens in that the proceedings instituted in the Ermelo magistrates' Court under case number 1744/2013 against the First Defendant was still pending and related to the same cause of action.
- [3] During the period of 2017 a plethora of communications were exchanged between the parties relating to a settlement proposal. These communications gave rise to a second special plea by the Defendants and related to an agreement of compromise.
- [4] It was agreed between the parties that the special plea of compromise falls to be heard 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.

BACKGROUND

- [5] On 2 February 2017, the defendants' offered to settle the disputes between the parties. On 9 February 2017 the Plaintiff addressed the correspondence with a counter proposal on the following terms:

"1.....

- 2. It is our instructions to make a counter proposal for payment by your clients to our client in the amount of R 1, 500,000.00 (One Million Five Hundred Thousand Rand) together with interest thereon at the linked prime overdraft lending rate of Standard Bank plus a margin of 5%(five percent).

3. Our client is amenable that the amount of R 1 500,000.00 together with the interest thereon be paid over a period of 30 months.
4. Should this offer be acceptable to your clients, our client would require the parties to conclude a formal settlement agreement, which settlement agreement should be made an order of Court.
5. Furthermore our client would require a warranty from your clients that they do not have any other assets, other than disclosed to our client in the credit application to our client.
6. This counter proposal shall be open for acceptance until close of business Monday, 13 February 2017".

[6] As a reply to the above letter, on 10 February 2017 the defendant's attorneys of record addressed a letter to the plaintiff's attorney of record in the following terms:-

"Our clients have instructed us to accept your client's without prejudice offer (payment in the amount of R1 500,000.00 plus interest thereon at the prime overdraft lending rate of Standard Bank plus 5% payable over a period of 30 months) being in full and final settlement of all claims between the parties. We look forward to hearing from you."

[7] On 10 February 2017 the plaintiff's attorneys of record replied on the following terms:

"Thank you for your letter.

We shall prepare the settlement agreement and send same to you for your clients' consideration as soon as possible".

[8] On 15 February 2017 the plaintiff's attorneys of record emailed a draft settlement agreement to the defendant's attorneys of record in the following terms inter alia;

"INDEBTEDNESS AND PAYMENT

6. As at the date of signature hereof, the defendants acknowledges their joint and several indebtedness to the Plaintiff in the amount of R 6 986 748.29 (the Capital amount").
7. The Defendants shall pay the Plaintiff, in full and final settlement of the disputes in the amount of R1 500,000.00{one million five hundred thousand rand) together with interest thereon at the linked prime overdraft lending rate of Standard Bank, plus a margin of 5% (hereinafter referred to as the "settlement amount").
8. The settlement amount shall be paid to the Plaintiff, by the dendants jointly and severally as follows:
 - 8.1 In 30 (thirty) equal monthly instalments, the first instalment payable on or before 28 February 2017;
 - 8.2 Each monthly instalment shall include payment of:

8.2.1. the amount of R 50, 000.00 (fifty thousand rand) plus interest due at the time of payment, as stipulated in clause 8.2.2 below;

8.2.2 interest shall be calculated on a daily basis, at a rate equal to the linked prime overdraft lending rate of Standard Bank, plus a margin of 5%.

8.2.3 to the bank account of the Plaintiff with the following banking particulars: Scania Finance Southern Africa (Pty) Ltd, First National

Bank, Account number [...], Branch Code: 255005;

8.2.4 by no later than the last business day of the month.

.....

ORDER OF COURT AND FULL AND FINAL SETTLEMENT

14. No indulgence, leniency or extension of time which any party may grant or show to any other party, shall in any way prejudice such party or preclude such party from exercising any of its rights in the future.
15. This agreement is not to be construed as a waiver and/or novation of any of the Plaintiff's rights against the Defendants, which remain reserved.

WARRANTY

18. The Defendants herewith provide the Plaintiff with a warranty that they do not have any other assets or claims, other than as disclosed to the Plaintiff in the First Defendant's credit application to the Plaintiff.
19. In the event the Plaintiff obtains knowledge of the Defendants breach of clause 18 above, the Plaintiff shall be entitled to payment of the full capital amount together with interest thereon at a rate equal to the prime overdraft lending rate of Standard Bank, plus a margin of 10% calculated from 17 October 2012 to date of final payment, less any payments made.

GENERAL

20. This agreement is concluded on the mutual supposition that the Defendants are objectively unable to satisfy the Plaintiff's monetary claims in any of the actions, that no prospect exists that they would be able to do so within 10 Calendar years reckoned from date of this agreement being signed by or on behalf of the Defendants and that the Plaintiff relied on the truth of the disclosures by the Defendants with regard to either of the monetary inability and prospects in concluding this agreement, which shall be construed as a resolute condition".
- [9] On 21 February 2017 the Defendants replied to the settlement agreement with various amendments to the settlement agreement which ultimately was a deletion of paragraphs 6, 8.2.2, 15, 19 and 21 referred to above.

[10] On 22 February 2017 the Plaintiff attorney of record replied;

"We are in receipt of your clients' proposed amendments to the draft settlement agreement.

We shall take instructions and revert by close of business on Monday, 27 February 2017".

[11] On 18 July 2017 the Plaintiff attorney addressed the settlement proposal in its correspondence stating the following:

"1. Our client has requested us to ascertain whether your clients is still amenable to settling the matter on the basis previously proposed by our client.

2. We attach hereto a copy of the last draft of the settlement agreement.

3. Should your client not be willing to settle the matter and should we not hear from yourselves in this regard within 7 days, we hold

instructions to again set the matter down for trial".

[12] On 4 August 2017 the Defendants replied to the Plaintiff's letter dated 18 July 2017 in the following terms;

"1. Your letter dated 18 July 2017 bears reference.

2. We confirm that our clients accept the settlement offer, however we request that the date of the first payment be amended to 7 October

2017, in light of the considerable amount of time that has passed since the initial drafting of the settlement agreement.

3. We look forward to hearing from you".

[13] On 25 August 2017 the Plaintiff's attorney replied to the Defendants correspondence in the following terms;

"1. We acknowledge receipt of your letters dated 4 August 2017 and 15 August 2017.

2. We note your clients rejection of the settlement offer and the counterproposal relating thereto.

3. in order for our client to consider its position further, your clients are requested to provide our client with the following:

3.1 the financial records reflecting your clients financial position as at date hereof;

3.2 a proposal in respect of providing our client with security in respect of your clients' obligations".

[14] On 28 August 2017 the Defendants replied to the Plaintiff's letter dated 25 August 2017 in the following terms;

"1. Your letter dated 25 August 2017 has reference.

2. We record our surprise at the contents of your aforementioned letter.
3. From previous correspondence herein it is clear that the dispute between our respective clients became settled by way of correspondence. The said correspondence between our offices is dated 9 and 10 February 2017 and is attached for ease of reference.
4. In terms of the above, the amount of R 1 500, 000.00 plus interest thereon at the prime overdraft lending rate of Standard Bank plus 5% is payable by the Defendant to the Plaintiff over a period of 30 months, in full and final settlement of all claims between the parties ("the settlement").
5. Naturally, any written agreement entered into by the parties has to be conform to the terms as set out in the abovementioned offer and acceptance.
6. Our offices received a proposed deed of settlement from your offices on or about 15 February 2017. The terms of the proposed deed of settlement however did not accord with the terms of the settlement reached between the parties.
7. Our office subsequently effected certain amendments to the proposed deed of settlement to bring it in line with the settlement. This letter and marked up deed of settlement were forwarded to your office on 21 February 2017.
8. Your office thereafter failed to respond to our letter save for setting down your bill of costs pertaining to a previous cost order for taxation even though the matter had been settled.
9. It is only on 19 July 2017 that your offices responded to our marked up version of the deed of settlement. It appears that your client was satisfied with our initial marked up version of the deed of settlement which correctly reflected the settlement.
10. Upon perusing your letter and the deed of settlement, it became apparent that the dates reflected in the deed of settlement are longer practicable or applicable due to the effluxion of time. The deed of settlement provided for the first instalment to be effected by our client on or before 7 March 2017, which is a date that has long since passed.
11. In the result, our offices on 4 August 2017 confirmed our client's agreement with the deed of settlement save for the date on which the instalments due by our client must commence. It was for his reason proposed that the payment of the instalments by our client commences during October 2017.
12. Our indication that the due date of first instalment must be 7 October 2017 is consistent with the above, should the matter be placed on the draft orders roll.
13. Your notion that the settlement offer has been rejected by our client is, with all due respect, incorrect intends holding your client to the settlement.

14. In addition to the aforesaid, we record our client's surprise and astonishment at your client's repeated enrolment of the matter for taxation, under circumstances where a settlement has already been reached months ago.

15. In light of the aforesaid we demand that the matter be removed from taxation roll immediately. Should your client proceed with the

taxation, the amount will naturally be set off against any payments due to your client in terms of the settlement.

16. In light of the foregoing we await the signed deed of settlement forwarded to your office on 21 February 2017 with the required

changes to the date of applicable to the commencement of the instalments, being 7 October 2017.

[15] Thereafter the Defendants sent a letter dated December 2017 stating the following:

"1. We refer to the settlement between the parties in respect of the above matter.

2. We confirm that we have received payment of the taxed costs from our client and that payment of same will be effected into your trust account in due course.

3. Kindly note that the abovementioned payment will be:

3.1 Effected without prejudice to our client's rights and without admission of liability.

3.2 Deducted from the settlement amount of R 1 500,000.00 plus interest at the prime overdraft lending rate of Standard Bank plus 5%.

As the settlement was reached in full and final settlement of claims between the parties, and specifically the High Court matter under case number 40986/2014, which is the subject matter of the taxed costs".

[16] The last communication between the parties was on 14 December 2017 when the Plaintiff addressed the Defendants correspondence in the following terms;

"1. We acknowledge receipt of your letter dated 13 December 2017.

2. We have previously addressed the issue of settlement with you. Your clients' interpretation is disingenuous. The matter has not been settled and our client intends proceeding herein.

3. We await your clients' proof of payment.

4. Our failure to deal with each and every allegation contained in your letter under reply should not construed as an admission and our client's rights remain reserved".

[17] The Defendants persisted in this Court with their second special plea, that the action has been settled. The Defendants in the main action 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 letters quoted above.

THE DEFENDANT'S CASE

[18] The Defendants contend 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 2 February 2017, followed by a counter-offer by the Plaintiff on 9 February 2017, which offer was accepted by the Defendants on 10 February 2017. It is the Defendants submission that the matter accordingly became settled on that date.

[19] Counsel for the Defendants referred this Court to the book of "The Law of Contract in South Africa: 5th Edition" 2006 at page 29 where according to Christie:

"A person is said to make an offer where he puts forward a proposal with the intention that by its mere acceptance, without more, a contract should be formed. The intention, of course, may be express or implied.

.....

What distinguishes a true offer from any other proposal or statement is the express or implied intention to be bound by the offeree's acceptance.

Jansen JA advised for clarity in the future this intention should be equated with *animus contrahendi*."

[20] Counsel further referred this Court to Christie at page 35:

"The most satisfactory analysis of such cases is to isolate the offer and ascertain whether the evidence shows that the offeree knew or ought to have known that it was intended to be accepted on a provisional basis only, and that the conclusion of a binding contract was to be dependent on agreement on further points. This question was well expressed by Corbett JA in *Pitout v North Cape Livestock Co-op Limited* 1977 (4) SA 842 (A) 850 D:

"was the undertaking an offer made, *animus contrahendi*, which upon acceptance would give rise to an enforceable contract, or was it merely a proposal made... while the parties were in the process of negotiating and were feeling their way towards a more precise and comprehensive agreement? This is essentially a question to be decided upon the facts of the particular case."

[21] It was the Defendants submission that the proposed settlement agreement provided by the Plaintiff was based on terms not agreed to in the Plaintiff's offer dated 9 February 2017 and therefore it proposed amendments to the settlement agreement. It is the Defendants submission that as the Plaintiff did not formally reject the proposed amendments in any of the correspondences between the parties that this implied that the Plaintiff had

subsequently accepted the terms of the proposed amendments and the matter became settled between the parties.

- [22] The Defendants also averred that as the payment date for the first instalment had lapsed due to the Plaintiff non response to the proposed amendments that the date for the first payment was to commence a month after the written agreement was signed. However, it avers that there was full agreement between the parties on all the other aspects therefore the agreement was not dependent on further agreed terms.

PLAINTIFF'S CASE

- [23] Counsel for the Plaintiff submitted that there was no acceptance by either party of an offer made by the other and that the offer that the Plaintiff made in its letter of 9 February 2017 was subject to a formality that a formal agreement be entered into and made an order of Court. Therefore, as no formal agreement was concluded there was no settlement agreement.
- [24] It was argued that the alleged acceptance of the offer made by the Defendants in the letter dated 10 February 2017 does not correspond with the offer made. It was submitted that the Plaintiff's offer dated 9 February 2017 contained three crucial elements namely, payment of a sum of R 1 500,000.00 with interest payable over a period of 30 months, that the Defendants provide a warranty that they have no other assets other than as disclosed to the Plaintiff when the credit application was made and the conclusion of a formal settlement agreement. It was further contended that the Plaintiff's letter dated 10 February 2017 created a further element namely that the settlement should be a full and final settlement of the disputes between the parties. It was argued that the Defendants attorney only referred to three of the four elements in that it failed to refer to the warranty that there were no other assets other than previously disclosed in its acceptance dated 10 February 2017 and on that the

offer was not accepted by the Defendants. Further that as the warranty was a material aspect to the conclusion of an agreement.

- [25] Counsel for the Plaintiff referred the Court to the book of "The Law of Contract in South Africa: 7th Edition" at page 125-129 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)

- [26] The Court was further referred to the case of *Bailes v Highveld Properties (Pty) Ltd* 1998 (4) SA 42 (N) where an offer included this phrase "... upon receipt of your written confirmation of these proposals I will arrange for the addendum to be prepared for signature". The Court held that a conclusion of written addendum was required before a valid contract could come

into being. Therefore, the equivalent sentence in the Plaintiff's letter of 9 February 2017 which reads: "Should this offer be acceptable to your clients, our client would require- the parties to conclude a formal settlement agreement, which settlement agreement would be made an order of court". It being common cause that the written agreement was not concluded and that the special plea should be dismissed with costs.

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[1].
- [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[2]. The requirement of exact correspondence between acceptance and offer is a question of substance and not form[3].
- [30] 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".
- [31] After a complete analysis of the contents of the letters exchanged between the parties that constitutes the basis of the special plea before this Court, I fully agree with the Plaintiff's Counsel that the nature of the contract that is depicted therein is not a compromise because it is clear from the wording of the Plaintiff's letter dated 9 February 2017 that the parties did not agree on the issue pertaining to the warranty. It equates a full and final settlement of the disputes to the conclusion of a formal agreement which is to be made an order of Court.
- [32] When looking at the wording of the plaintiff's first letter, especially the words "Should this offer be acceptable to your clients, our client would require the parties to conclude a formal settlement agreement, which settlement agreement should be made an order of Court. Furthermore, our client would require a warranty from your clients that they do not have any other assets, other than disclosed to our client in the credit application to our client", one can simply realise that these words are different to what is suggested in the first letter that the defendant wrote. The defendant's first letter was couched as follows: "Our clients have instructed us to accept your client's without prejudice offer (payment in the amount of R1 500,000.00 plus interest thereon at the prime overdraft lending rate of Standard Bank plus 5% payable over a period of 30 months) being in full and final settlement of all claims

between the parties. We look forward to hearing from you."

- [33] The offer made in the latter part of the paragraph is not exactly the same as the accepted terms in the Defendant's letters. The same can be said in regard to draft settlement agreement sent to the Defendants attorneys on 15 February 2017 to which it proposed amendments. It is clear that the matter was to be recorded formally and made an order of court as well as a condition that a warranty be provided by the Defendants relating to its assets and financial position as at date of the agreement. The Defendants when reacting to the Plaintiff's first letter used the words, "our clients have instructed us to accept your clients without prejudice offer", but also in the same breath chose to use different words in addition to what was requested by the plaintiff by saying "(payment in the amount of R1 500,000.00 plus interest thereon at the prime overdraft lending rate of Standard Bank plus 5% payable over a period of 30 months) being in full and final settlement of all claims between the parties".
- [34] It is clear that the latter part of the Plaintiff's first letter sentence conveys the intention that the agreement will therefore only be binding upon the conclusion of a written agreement and the submission of a warranty by the Defendants of its assets, the obvious consequence thereof will be that there will be no binding contract existing between the parties unless these conditions are fulfilled. This view is strengthened by the fact that the second letter the Plaintiff sent on 10 February 2017 in response to the Defendants' acceptance of the Plaintiff's proposed agreement was that "We shall prepare the settlement agreement and send same to you for your clients' consideration as soon as possible" therefore making it a condition that a binding contract would only come into being upon a written agreement being concluded which is also an obvious consequence that arises in terms of the law of contract.
- [35] Furthermore Plaintiff's letter dated 14 February 2017 confirms that the written agreement formed part of the Plaintiff's offer and conditions. The letter stated the following terms;
- "I refer to your telephonic discussion with my secretary earlier today.
- I confirm that the settlement agreement is drafted and is with our client for our client's consideration.
- We are hoping to send same to you before close of business today".
- [36] The paragraphs analysed above captures and describe the main intention of the two parties irrespective of the other additions made thereto. Although there are some additions to the draft settlement agreement, there is basically no difference as to what is suggested in the first letter of the Plaintiff. The gist or crux of the first letter is clear and remains: "Should this offer be acceptable to your clients, our client would require the parties to conclude a formal settlement agreement, which settlement agreement should be made an order of Court".
- [37] Assessing the arguments of the Defendant's counsel before this Court, it seems that the Defendant is disingenuous in its belief that a binding contract was created upon its acceptance of the Plaintiff's offer in its letter dated 10 February 2017 as the issue of the

commencement date of the first instalment had not been discussed at that stage and or finalised in those two letters. It could never have been the intention of the Plaintiff to not have the commencement date of the payments be agreed upon before a valid contract came into being. Further that the Defendant's rely on the amended agreement in its argument, which amended draft agreement clearly stipulates that the date of 7 March 2017 was to be the date of the first payment. If the Defendants allege that a valid agreement came into being in terms of the correspondences exchanged on 9 and 10 February 2017 and nothing more was required between the parties to settle the matter in full, then this begs the question why then the Defendants failed to make payment of its first instalment due on 7 March 2017 or even 7 October 201. It alleges that the first instalment date changed to 7 October 2017 as the Plaintiff only responded to its proposed amendments on 18 July 2017, which correspondence it alleges purports to agree to the Defendants proposed amendments. Significantly the Defendant offered no explanation for the failed payments in terms of the alleged written agreement concluded on either dates. I remain persuaded that these so called "matching paragraphs" makes the argument of the Defendants untenable that there was a settlement of the disputes 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 an agreement to settle was intended by both parties but the conduct of the parties subsequent to that intention demonstrate the parties also intended that a contract would only come into being upon the conclusion of a written agreement, which would subsequently be made an order of court. In any event the actions of the Defendants in not making the payment of the first instalment also demonstrate that

an agreement was not binding or complete.

ORDER

[41] Consequently the following order is made:

41.1 The special plea raised by the defendants is dismissed with costs.

C M SARDIWALLA

JUDGE OF THE HIGH COURT

APPEARANCES

Date of hearing

: 07 February 2020

Date of judgment

: 12 August 2020

Plaintiffs' Counsel

: Adv H A van der Merwe

Plaintiffs' Attorneys

: Senekal Simmonds INC

Defendants' Counsel

: Adv S G Maritz

Defendants' Attorneys

: VFV Attorneys

[1] See: Christie at page 473

[2] See: Christie Page 30

[3] See: Christie Page 66

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2020/359.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/unknown-plaintiff-v-unknown-defendant-compromise-and-settlement-agpphc-2020-40986-2014>

Prepared on 10 October 2026 · Esheria