

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Reportable: Yes
Of interest to other judges: Yes

Case No.: 5268/19

DATE

SIGNATURE

In the matter between:

Roger Wimpey

Plaintiff

and

HBS Africa Consulting Engineers (Pty) Ltd

Defendant

JUDGMENT

Vally J

Introduction

[1] The plaintiff issued summons out of this Court calling upon the defendant to accept liability for non-payment of an amount due to him in terms of a contract concluded between himself and the defendant, alternatively to defend itself against the claim of the plaintiff. The defendant, applying rule 34(1)¹ of the Uniform Rules of Court (the rules), responded with a tender that was intended to settle the claim of the plaintiff. The tender was prepared and

¹ The tender makes reference to rule 33(4) rather than 34(1). This is clearly a typographical error as rule 33(4) has no bearing on this case.

issued by its attorney of record. The tender was accepted by the plaintiff. Despite the tender and its acceptance by the plaintiff the defendant initially failed, and now refuses, to comply with its obligations arising from the tender. As a result, the plaintiff applied to this Court in terms of rule 34(7) of the rules for judgment in the matter. Having been advised of the application the defendant elected to oppose it.

The basic facts

[2] The plaintiff in his summons claimed R557 942.12, alternatively R256 695.63 plus VAT. Should either of his claims be upheld, he asked that it be supplemented with an interest payment of 10% per annum calculated a *tempore morae* as well as with a payment for costs of suit.

[3] The defendant's rule 34(1) tender served on 27 March 2019 reads thus:

“TAKE NOTICE that the above mentioned Defendant herewith unconditionally tenders in full and final settlement of the Plaintiff’s claim as follows:

1. Payment to the Plaintiff in the sum of R256,695.63 (the Plaintiff has disclosed in writing by email on the 19th of March 2019 that it [sic] is not a VAT vendor and is therefore not entitled to VAT in terms of the Value Added Tax Act).
2. Interest on the aforesaid sum of R256,695.63 at the rate of 10% per annum (simply [sic] interest) from date of service of the summons (being the *temporae morae* interest).
3. Cost of suit of the summons issued on the 13th of February 2019.

TAKE NOTICE FURTHER THAT the Defendant’s offer is in full and final settlement of the Plaintiff’s claim in respect of capital, morae interest and party and party costs.”

[4] The tender, which was clear, crisp and unqualified, was signed by the defendant's attorney, Mr Anthony Berlowitz (Mr Berlowitz) of Anthony Berlowitz Attorneys.

[5] On 2 April 2019 the plaintiff's attorney, Mr Kyle Bowles (Mr Bowles) of Hogan Lovells (South Africa) Incorporated, responded formally in terms of rule 34(6) stating that the plaintiff accepted the unconditional tender.

[6] At this point a reasonable observer would have concluded that the litigation between the two parties had come to an end. After all, the defendant had unconditionally tendered a payment in full and final settlement of all claims and the plaintiff had accepted the unconditional tender. But, alas, this was not to be.

[7] Having accepted the tender Mr Bowles penned an email on 8 April 2019 to Mr Berlowitz alerting him to the fact that the unconditional tender had been accepted and asking him when payment could be expected. On 10 April 2019 Mr Berlowitz replied thanking Mr Bowles for the email and informing him that he (Mr Berlowitz) had *"urgently forwarded onto client and will discuss with him telephonically today or tomorrow"*. The next day, 11 April 2019, Mr Berlowitz wrote to Mr Bowles stating that they would appreciate receiving Hogan Lovells' Trust Account banking details *"to assist our client"*, and that his client *"has however requested us to record that there originally were arrangements made for the delivery and checking of the architectural drawings ... where after payment will be made "* [sic]. Two hours later Mr Bowles replied

reminding Mr Berlowitz that the unconditional offer did not contain any requirement for architectural drawings to be delivered and checked, and that in terms of the provisions of rule 34(6) payment was due on 16 April 2019. He further informed Mr Berlowitz that should payment not be forthcoming by that date he held instructions to apply to this Court in terms of rule 34(7) for judgment in the matter. On 16 April 2019 Mr Berlowitz wrote a lengthy email to Mr Bowles essentially informing Mr Bowles that the defendant no longer believed itself liable to the plaintiff.

[8] The failure to make payment as per the unconditional tender and the contents of this email constitute the cause upon which this application rests. It is, therefore, prudent to quote the entire contents of the email. They read:

“We refer to the above matter and confirm that our client is arranging payment in terms of the tender.

Our client does however need some commitment from your client to provide it with the correct drawings as it simply does not make sense to pay your client for something that they have not received and/or the quality is not as originally specified. This was clearly stipulated in the earlier correspondence.

We await to hear from you as to what arrangements your client intends making with regard to delivery of the drawings (we would suggest a simultaneous transfer of the drawings and the funds) failing which any application for judgment will be opposed.”

[9] The first sentence conveys the message that the defendant regards itself bound by the tender, which as we know was unconditional. But the rest of the contents are unequivocal that the defendant does not regard the tender as being unconditional. Instead it holds that the obligation accepted by it in terms of the tender is subject to the plaintiff supplying it with “*the correct drawings ... as originally specified*”. What was originally an unconditional offer

has now in the mind of the defendant and Mr Berlowitz metamorphosed into a conditional offer.

[10] The plaintiff rejected the change of stance by the defendant. On the same day, Mr Bowles informed Mr Berlowitz to this effect and further pointed out that the change of stance was inconsistent with the terms of the unconditional tender. Mr Bowles also alerted Mr Berlowitz to the fact that should payment not be forthcoming as per the provisions of rule 34(6), he was under instruction to, without further notice, bring the present application. Seven days later, Mr Berlowitz sent another lengthy email indicating in no uncertain terms that the defendant understood the tender to be conditional upon the plaintiff supplying it with the drawings which had to be acceptable to the defendant. On 25 April 2019 Mr Bowles, in the interests of finality, proposed to Mr Berlowitz that the defendant pay the tendered amount and immediately upon receipt of the monies the plaintiff, notwithstanding the fact that he had performed his obligations as per the contract, would supply the drawings by placing them in a Dropbox. He would also furnish the defendant with the key to the Dropbox. On 2 May 2019 Mr Berlowitz informed Mr Bowles that the defendant rejected the proposal, thus indicating that the defendant would not be paying the plaintiff anything. On 6 May 2019 this application was launched.

[11] The application was supported with a founding affidavit deposed to by Mr Bowles. The defendant was alerted to it by my office. It elected to oppose it and filed an answering affidavit to that effect. The answering affidavit was

deposed to by Mr Graham Huff (Mr Huff), the managing director of the defendant.

The defendant's opposition and analysis of the case

[12] We know from Mr Berlowitz's email of 16 April 2019 that the defendant did not see the tender as an unconditional one. Consistent with this stance Mr Huff averred in his answering affidavit that the defendant made:

“an offer to the plaintiff in terms of rule 34(4) to settle the plaintiff's claim. The offer which was made, must be read within the context and the purpose of the offer. It is a tacit term of that offer that the plaintiff, who alleged performance in its particulars of claim, must tender performance, before the defendant makes payment to it [sic], in terms of the defendant's offer.”

[13] The answering affidavit goes on to spell out background information, such as how the plaintiff and the defendant came to conclude a contract between themselves, the terms of that contract, a failure on the part of the plaintiff to perform his obligations in terms of the contract and the efforts of the defendant to resolve the dispute after the issuing and acceptance of the tender. It concludes in the following manner:

- a. The unconditional tender is withdrawn;
- b. A request is made for the matter to proceed to trial;
- c. A revised conditional tender is issued; and,
- d. A dismissal of the application is called for together with an order for costs on a punitive scale.

[14] There are a number problems with the case of the defendant. Firstly, its tender was unconditional. Secondly, it was accepted. Thirdly, it initially

regarded itself bound by the terms of the unconditional offer. Then when payment was due it decided to claim that the tender was no longer unconditional and refused to pay. This was clearly a *volte face* on the part of the defendant. Fourthly, when faced with the difficulty of having to explain its *volte face*, the defendant, by way of an email from its attorney, adopted the stance that it was not unconditional without ever explaining why the adjective “*unconditional*” was used. In the answering affidavit, too, it failed to furnish any explanation for the inclusion of this adjective, which according to all dictionaries means “*unqualified*” or “*absolute*” or “*without conditions or reservations*”. Instead, the defendant tried to withdraw the tender and replace it. Again, if it was not unconditional why was there a need to withdraw it and replace it? The defendant, quite frankly, was trapped in a web of its own making and, in its quest to escape, chose to reprobate its earlier approbation – which according to it was not an approbation. The defendant’s approach is not only irrational, it is simply disingenuous.

[15] Further, there is no provision in the rules for a tender issued in terms of rule 34(4) to be withdrawn. Even if this Court were to adopt the view that this Court, acting in the interests of justice, would allow for a withdrawal of the rule 34(4) tender in certain circumstances (despite the failure of the rules to provide for such an eventuality) – a view I do not at this stage adopt, as no case to this effect was made – there is still the added problem of whether the withdrawal could be allowed after the tender was accepted. In my judgment, once a tender issued in terms of rule 34(1) is made and accepted then the door to further litigation on the subject matter of the tender is permanently shut

on both the defendant and the plaintiff. A rule 34(1) tender, it must be remembered, is made by the defendant after having full regard to all the facts (the *facta probanda* in legal speak) the plaintiff relied upon for its cause of action. In almost all the cases, the defendant who makes the tender does so with the full benefit of legal advice and without any input from the plaintiff. In the words of Innes J (as he then was):

“Now no plaintiff is entitled to dictate to his opponent on the subject of tender. It is for the defendant to decide in his own interest whether he shall make a tender, and how he shall make it.”²

[16] Similarly with the plaintiff who elects to accept the tender. They both do so knowing the inconvenience, the expense and the risk they face with litigation should the tender not be made in the first instance, or not be accepted in the second. Once the tender is made the court will hold the defendant to it unless it is withdrawn before acceptance. This is so even if the true liability of the defendant is less than the amount tendered.³ Once the tender is accepted, the court is no longer required to make a determination on the matter as the dispute between the parties has been terminated. That after all is what the defendant hoped for by making the tender, and what the plaintiff granted by accepting it. In essence, the defendant through the tender offered to purchase peace; the plaintiff by accepting it granted peace.

[17] On this logic, once the tender is made and accepted, both parties must in the interests of justice abide by their election unless they can show special or exceptional circumstances for avoiding the consequences thereof.

² *Hurwitz v Rhodesia Railways Ltd.* 1912 AD 8 at 13

³ *Greer v McHarry* 1938 WLD 182 at 184

[18] No exceptional circumstances were shown by the defendant to allow for it to escape the consequences of its election. Instead, the defendant attempted to escape these consequences by claiming that the tender was not unconditional, which is not only incorrect but plainly false, and at the same time by attempting to withdraw it and replace it with a conditional one. This contradicts its contention that it was a conditional one – put simply, it makes no sense to replace it with a conditional one when it was supposedly conditional in the first place.

Application to strike out

[19] In its answering affidavit the defendant contended that the tender contained a tacit term to the effect that payment would only be made once the drawings were supplied and the defendant was satisfied with them. In his replying affidavit the plaintiff claimed that the tender and its acceptance constituted a new agreement which was independent of the original agreement on which he based his summons. The plaintiff went further and pointed out that on principles set out in the common law on tacit terms to a contract the defendant had failed to legally establish its case that the tender contained a tacit term. The defendant took issue with the averments concerning the principles of the common law and applied for these to be struck-off.

[20] For the defendant to succeed it must show that the material sought to be struck-out is vexatious, scandalous or irrelevant and that it would suffer

prejudice should it not be struck-off.⁴ Another complaint was that the plaintiff was attempting to make out a new case in the replying affidavit. The averments which are alleged to have been the basis of the new claim are what the defendant seeks to have struck-off.

[21] The plaintiff had not amended the case he made in his founding papers. He merely expanded on that case with reference to the contention of the defendant that a tacit term must be incorporated into the tender. Secondly, he identified the legal requirements to be met for a finding that a tacit term had been incorporated into a written contract. There is nothing untoward in this regard.

[22] There is nothing that is scandalous, vexatious or irrelevant in the replying affidavit warranting the application to strike out. Further and more importantly, the defendant suffered no prejudice by any of the plaintiff's averments in the replying affidavit.

[23] There is, therefore, no merit in the application to strike-out certain averments in the replying affidavit. Accordingly, the application is dismissed.

Costs

[24] The plaintiff asks for costs on an attorney and client scale. Given that the defendant in my judgment furnished no legitimate reason for not complying with the obligations it voluntarily assumed by making the tender; and given

⁴ *Maharaj and others v Mandag Centre of Investigative Journalism NPC and others* 2018 (1) SA 471 (SCA) at [14]

that it attempted to resile from the tender by adopting a plainly contradictory stance, I believe the plaintiff is entitled to an award of costs on an attorney and client scale.

Order

[25] The following order is made:

- a. The defendant is to pay the plaintiff the sum of R256 695. 63.
- b. The defendant is to pay the plaintiff interest on the aforesaid amount at the rate of 10% per annum to be calculated from date of summons to date of payment.
- c. The defendant is to pay all the plaintiff's costs, which costs are to be taxed on the attorney and client scale.

Vally J

Dates of hearing:	16 August 2019
Date of judgment:	16 August 2019
For plaintiff:	Ingrid Cloete
Instructed by:	Hogan Lovells (South Africa) Inc
For defendant:	R Cohen
Instructed by:	Anthony Berlowitz Attorneys