**FREE STATE HIGH COURT, BLOEMFONTEIN**
**REPUBLIC OF SOUTH AFRICA**

Appeal No. : A100/2012

In the appeal between:

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| **WOLFGANG KURT LEHMANN** | First Appellant |
| **MARTHA MARIA SWART** | Second Appellant |
| **LEONARD WILLIAMS** | Third Appellant |

and

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| **HENRED FRUEHAUF (PTY) LTD** | Respondent |

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**CORAM:** HANCKE, AJP *et* KRUGER, J *et* THAMAGE, AJ

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**HEARD ON:** 11 NOVEMBER 2012

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**JUDGMENT BY:** HANCKE, AJP

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**DELIVERED ON:** 15 NOVEMBER 2012

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[1] This is an appeal against the judgment and order granted by the Court *a quo* on 8 September 2011 (Moloi J), whereby he dismissed the appellants' claim with costs. Leave to appeal was refused and the appeal comes to this court in terms of an order granted by the Supreme Court of Appeal on 27 March 2012. This appeal only concerns the second to fourth plaintiff as the first plaintiff passed away.

[2] The plaintiffs instituted a claim against the defendant for the payment of interest. It is the plaintiffs' case that the defendant failed to pay interest in accordance of the terms of a verbal settlement agreement, and as such breached the terms of the said agreement. It is the plaintiffs' case that the agreement was concluded on or about 2 July 2009. The plaintiffs claim interest for the period 7 May 2009 to 2 July 2009 in respect of the severance packages which the Labour Court ordered the defendant to pay them, and which amounts the plaintiffs subsequently agreed to pay to them.

[3] It is common cause that the defendant paid interest in respect of the said severance packages for the period 14 October 2005 to 6 May 2009 to the appellants.

[4] It is the defendant's defence that no settlement agreement was concluded on 2 July 2009 and that a written settlement agreement was concluded on 6 May 2009 in terms of which the parties had agreed that interest would be calculated on the said severance packages from 14 October 2005 to "date of tender of payment". It had tendered payment on 6 May 2009 to the plaintiffs and as such the plaintiffs were not

entitled to interest after 6 May 2009. When the trial started the court, at the request of the parties, ordered that the merits and quantum be separated and that the following three issues to be decided first:

(i) When was the settlement agreement concluded (either May 2009 or July 2009); and

(ii) What were the terms of the said agreement in respect of the interest to be paid by defendant to the plaintiffs; and

(iii) Up to what date must the defendant pay interest?

(iv) If interest on the severance packages was payable beyond 6 May 2009, until what date must interest be calculated on the severance packages that the respondent had to pay to the appellants?

[5] During the trial it was the defendant's case that although the written settlement agreement provided that interest is payable until date of payment, the latter phrase actually meant that interest would only be calculated until date of conclusion of the settlement agreement, being 6 May 2009

as Mr Snyman, who testified on behalf of the defendant, understood that payment would occur on 6 May 2009.

In that regard he testified as follows:

> "Well, that is not correct, the term of the agreement was that interest would accrue to date of payment. But I have already explained to you that I understood by date of payment and how date of payment would work and how it would have practically unfold if your clients had done their job and had gotten the tax directives."

[6] It appears from the record of the proceedings that the Labour Court ordered the defendant to pay certain severance packages to the plaintiffs, together with interest from date of judgment *to date of payment*, plus legal costs. The defendant appealed against the said order to the Labour Appeal Court.

[7] On 10 March 2009 the defendant's attorneys faxed a letter to the plaintiffs' previous attorneys by means of which the defendant offered to settle the matter on the basis that, firstly, the defendant pays the severance packages, as ordered by the Labour Court, within seven days and,

secondly, each party pays its own costs. At that stage there was no tender to pay interest in respect of the said severance packages.

[8] On 4 May 2009 Mr Lock (from Lock Attorneys), on behalf of the plaintiffs, faxed a letter to Mr Snyman, on behalf of the defendant, in which he indicated that the plaintiffs were willing to settle the matter on the basis that:

> "1. Each party pays its own legal costs;
>
> 2. Your client is liable for the proper compliance with the Labour Court order and includes payment of capital as well as interest;
>
> 3. Interest to accrue until full payment of all outstanding capital as well as interest is facilitated."

[9] Thereafter, on 6 May 2009, Snyman faxed a letter to Lock inquiring what was meant by "interest is facilitated" and further indicating that if it meant that the defendant had to pay compound interest, then the appellants' offer was rejected, but more importantly Mr Snyman's letter stated:

> "Once again, and in order to resolve this matter, and that there is no doubt as to the terms of the settlement, our client's final proposal is:
>
> 1. Our client will pay the capital amount of the claim which is a total amount of R1 168 920.17;
> 2. Our client will pay interest on the above amount at the prescribed rate in the Prescribed Rate of Interest Act from 14 October 2005, being the date of judgment, to date of payment;
> 3. Each party will pay its own costs of the matter.
>
> We wait to hear from you."

[10] During the trial Snyman testified on behalf of the defendant that the wording of his letter (namely "our client's final proposal") was "unfortunate" and that he actually intended to accept the counteroffer made by Lock on 4 May 2009, by means of his letter dated 6 May 2009. As such he maintained that the settlement agreement had been concluded on 6 May 2009.

[11] Mr Ebersöhn, on behalf of the plaintiffs submitted that the Court *a quo* erred in finding that the settlement agreement was concluded on 6 May 2009 and also in accepting

Snyman's explanation that the wording of his own letter was "unfortunate" and as such that the letter 6 May 2009 in fact constituted an acceptance of the offer contained in Lock's letter dated 4 May 2009. In this regard he submitted that the letter 6 May 2009 did not purport to accept the plaintiffs' counteroffer dated 4 May 2009. The letter clearly states that "our client's final proposal is...". He argued that this signifies that the defendant made a settlement offer or a revised settlement offer and that the letter even asks for a reply. I agree with this argument.

[12] The unexpressed subjective intentions in writing a letter are irrelevant and that a court must ascertain how a reasonable person would have understood the contents of the said letter. See **BOERNE v HARRIS** 1949 (1) SA 793 (A) at 801. Mr Grobler, for defendant, contended that there was no written agreement between the parties and that both parties adduced evidence as to what the agreement was. He relied on the last sentence in the penultimate paragraph of **BOERNE v HARRIS** at page 801 where the court said:

> "I leave out of consideration the case where the recipient, to the knowledge of the sender of the letter, is equipped with the necessary knowledge or ability."

What Mr Grobler has in mind with this submission is that Lock and Snyman were both aware of the requirements of a tax directive or tax number, and there was no uncertainty as to the terms of the agreement between them as at 6 May 2009. This assumption does not account for Lock's reference to costs in his letter of 7 May 2009, which on the face of it introduces a new term, even if one ignores the 14 day stipulation.

[13] Another problem with Mr Grobler's submission that an agreement came into being on 6 May 2009, is that the acceptance of an offer must be unequivocal and unambiguous. In **JRM FURNITURE HOLDINGS v COWLIN** 1983 (4) SA 541 (W) Nestadt J stated the following at 544 A – B:

> "The trite rule relevant in this regard is that the acceptance must be absolute, unconditional and identical with the offer. Failing this, there is no *consensus* and therefore no contract."

[14] It is important to have regard to the contents of Lock's letter dated 7 May 2009, which reads as follows:

> "In this regard it is confirmed that the numeric proposals set out in your letter, *supra*, is acceptable on the proviso that payment of the debt amount, capital as well as costs, be facilitated within 14 days from date of this letter.
>
> We await your reply."

[15] It appears that Lock's letter of 7 May 2009 did not unconditionally accept the terms of the letter dated 6 May 2009 in that, firstly, it requires from the defendant also to pay the legal costs and, secondly, the payment to be made within 14 days from 7 May 2009. On an interpretation benevolent to the defendant of the 14 day provision, it is a resolutive condition, meaning there was an agreement on 7 May 2009, which would fall away if payment is not made within 14 days. As it is worded the 14 day clause introduces a new term into the contract, thereby constituting a counter offer. It is clear that the so-called acceptance is not unconditional and amounts to a variation of the offer, which can be interpreted as a counter-offer. See **<u>GAAP POINT OF SALE (PTY) LTD</u>**

**v VALJEE AND OTHERS NNO** 2011 (6) SA 601 (KZD) at 605 B – C.

[16] Apart from the fact that the letter 7 May 2009 stated the condition that payment must be made within 14 days, the said letter purported to accept the terms of the offer made on 6 May 2009 (which included a term that each party pays its own costs), but on the other hand the said letter required the defendant to pay the plaintiffs' legal costs.

[17] It follows therefore that in view of the fact that Lock's letter dated 7 May 2009 did not unconditionally and unambiguously accept all the terms of Snyman's letter dated 6 May 2009 no settlement agreement was concluded on 7 May 2009. The next question is until when is the defendant liable to pay the plaintiffs' interest?

[18] It is common cause that on 1 July 2009 a telephone discussion took place between Snyman and Lock. Subsequent to this conversation Lock faxed a letter to Snyman dated 2 July 2009 in which he referred to the said

telephone conversation and in which he confirmed that the dispute “has been settled on terms of the following”:

1. The defendant will pay the severance packages due to the plaintiffs;
2. The respondent will pay interest on the said packages calculated from 14 October to date of payment;
3. Each party to pay its own legal costs;
4. The plaintiffs will provide tax directives to the defendant, alternatively their income tax numbers.

[19] It is important to note that Snyman’s letter dated 2 July 2009, which was faxed to Lock, *inter alia*, stated that “we confirm that the matter is in fact (settled) on the basis as set out in our letter dated 6 May 2009...” which letter provided that the defendant “will pay interest on the above amount at the prescribed rate... to date of payment”.

[20] It follows therefore that the plaintiffs, on a balance of probabilities, proved that the defendant is liable to pay interest on the severance packages until 2 July 2009. It is common cause that no payment was made on 6 May 2009

and only effected on 11 September 2009. The finding of the Court *a quo* that interest is payable until date of payment means something different, namely that interest is payable until date of conclusion of the agreement, is therefore not justified in the circumstances. It is evident from Snyman's own letters dated 6 May 2009 and 2 July 2009 that the term is that interest is payable until date of payment of the capital amounts. At no stage do any of these letters state that a different meaning or interpretation should be given to this clear and unequivocal term. See **RAND RIETFONTEIN ESTATES LTD v COHN** 1937 AD 317 at 326.

[21] It follows from the aforegoing that the plaintiffs are entitled to interest until 2 July 2009. The defendant is therefore liable to pay interest on the capital amounts until 2 July 2009, which is before the date of payment (11 September 2009). The appeal must therefore succeed.

[22] As far as costs are concerned there are two remaining issues to consider. First, the submission by Mr Grobler that Volume 4 of the record, which comprises approximately 67 pages of argument before the Court *a quo*, should not have

been included in the appeal record. He submitted that volume 4 had been incorporated unnecessarily and that the appellant should be penalised with a special order of costs. In reply Mr Ebersöhn submitted that in the plaintiffs' petition to the Supreme Court of Appeal the allegation was made by the plaintiffs that the Court *a quo* erred in its judgment when it held that it was agreed in the written arguments that interest would only be payable up to date on which the agreement was concluded.

[23] The plaintiffs alleged that they never agreed to the aforesaid in either their main heads of argument or their replying heads of argument. These allegations were disputed by the defendant in its answering affidavit. He therefore submitted that the plaintiffs had no other choice than to include the said heads of argument to substantiate the plaintiffs' allegations. I agree with Mr Ebersöhn's submission in this regard. It follows that the incorporation of the said heads of argument was necessary and that no special order of costs is warranted in the circumstances.

[24] Second, Mr Ebersöhn submitted that Lock was a necessary witness, that he be declared as such and that the costs should include his reasonable travelling and accommodation costs. I agree with this submission. See **TEXAS CO (S.A.) LTD v CAPE TOWN MUNICIPALITY** 1926 AD 467 at 489; **SQUIER v DALMEYER** 1978 (1) SA 1167 (C) at 1168 E – F.

[25] The following orders are made:

1. The appeal is upheld with costs.
2. The Court *a quo*'s order is substituted with the following order:
   - 2.1 It is declared that the second, third and fourth plaintiffs and defendant entered into the settlement agreement on 1 July 2009.
   - 2.2 In terms of the said agreement the defendant had to pay interest on the respective severance packages from 14 October 2005 to date of payment.
   - 2.3 The defendant is ordered to pay interest to the second, third and fourth plaintiffs on their respective severance packages at the rate of

15,5% per year calculated from 7 May 2009 to 2 July 2009.

2.4 The determination of the quantum of the second, third and fourth plaintiffs' claim is postponed *sine die*.

2.5 The defendant is ordered to pay the second, third and fourth plaintiffs' costs on a party-and-party scale. The plaintiffs' witness, Mr Lock, is declared to be a necessary witness.

**S.P.B. HANCKE, AJP**

I agree.

**A KRUGER, J**

I agree.

**S J THAMAGE, AJ**

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| On behalf of the appellants: | Dr G J Ebersöhn<br>Instructed by:<br>Ebersöhn Attorneys<br>c/o Naudes<br>BLOEMFONTEIN |
| On behalf of the respondent: | Adv S Grobler<br>Instructed by:<br>Snyman Attorneys<br>c/o Honey Attorneys<br>BLOEMFONTEIN |

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