

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 5346/2009

In the matter between:-

ANN SHIRLEY GRENFELL-DEXTER

First Plaintiff

WOLFGANG KURT LEHMANN

Second Plaintiff

MARTHA MARIA SWART

Third Plaintiff

LEONARD WILLIAMS

Fourth Plaintiff

and

HENRED FRUEHAUF (PTY) LTD

Defendant

HEARD ON:

17 MAY 2011

DELIVERED ON:

8 SEPTEMBER 2011

JUDGMENT

K.J. MOLOI, J

- [1] In this matter the plaintiffs claimed as against the defendant payment of certain amounts said to represent interest on the awards made by the Labour Court in its order dated 14 October 2005. According to the plaintiffs the interest claimed was based on an oral agreement entered into by the parties through their legal representatives on 2 July 2009. The defendant had paid the amounts as ordered by the Labour

Court together with the interest thereon on 11 September 2009 up to and including 6 May 2009 and refused to pay the interest up to and including the 2nd July 2009. According to the defendant the settlement agreement was concluded on 6 May 2009 and not 2 July 2009 and that it was consequently not liable to pay interest accruing from 7 May 2009 to 2 July 2009 (nor 11 September 2009 the date of actual payment).

[2] The plaintiffs had successfully sued the defendant in the Labour Court for certain monies due to them in respect of severance packages after being laid off their employment. The Labour Court ordered that interest be paid on the calculated amount from date of judgement (being 14 October 2005) to date of payment. The defendant noted an appeal to the Labour Appeal Court.

[3] Before the appeal could be heard, the plaintiffs, through their attorney, Mr. Lock and the defendant, through their attorney, Mr. Snyman, entered into settlement negotiations telephonically regarding the basis of the settlement. This exercise was driven by the outcome of another similar matter that was finalised in the Labour Appeal Court, the DA

COSTA AND OTHERS matter wherein the defendant was involved. As a result and on 4 May 2009 the plaintiffs' attorney wrote to the defendant's attorney as follows:

'Our office received instructions that the pending Labour Appeal Court matter can be settled on the following basis:

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

In response to that settlement proposal, (an offer) the defendant's attorney replied as follows on 6 May 2009:

"We do not understand what you mean by 'interest is facilitated'. If it means interest is capitalized and then further interest added, the proposal is rejected. Your client would in any event not be entitled to such kind of interest in law. 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 168 920.7;

2. Our client will pay interest on the above amount at the prescribed rate in the Prescribed Rules of Interest from 14 October 2005, being the date of judgment, to date of payment.
3. Each party will pay its own costs of the matter.”

The letter was concluded with the words:

“We await to hear from you.”

[4] On 7 May 2009 the plaintiffs’ attorney wrote to the defendant’s attorney as follows:

“We refer to the above matter as well as your letter dated 6 May 2009. Although writer fervently believes that the outcome of this pending appeal will follow a similar fate as the preceding **MADIKOR** appeal that served under Appeal Court case reference number JA 24/2007, writer shares the view that it is best to bring the current dispute to fruition.

In this regard it is confirmed that the numeric proposal 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.”

On 29 May 2009 the plaintiffs’ attorney wrote a further letter to the defendant’s attorney in the following words:

“We refer to the abovementioned matter as well as your previous correspondence more specifically dated 6 May 2009 and our subsequent reply thereto. From your client’s failure and/or neglect to facilitate payment as proposed, it is presumed that your client is no longer desirous to settle the pending dispute.

We will now attend the Labour Court to ascertain the next available date for purposes of adjudicating the pending appeal.”

- [5] Following upon a telephone communication between the two attorneys and on 2 July 2009 the plaintiffs’ attorney wrote the following letter to the defendant’s attorney:

“We refer to the abovementioned matter as well as the telephone conversation between the writer and your Mr. Snyman and confirm that the dispute that served under Labour Appeal reference number JA 66/06 has been settled on terms of

the following:

1. Your client is to make payment of the following severance packages:

1.1	A.S. Grenfell-Dexter	R 73 916.61
1.2	W. Lehman	R654 079.53
1.3	M.M. Swart	R98 146.48
1.4	L. Williams	R342 777.55

and

2. Interest on the above amounts shall be payable from 14 October 2005 to date of payment;
3. Each party is to pay its own costs;
4. Tax directives alternatively individual tax reference numbers will be provided to your client for each payment, abovementioned;
5. Pursuant receipt of the tax directives alternatively individual tax, reference numbers, your client will deduct and pay over to the Receiver of Revenue the necessary tax so regulated in terms of the tax directive alternatively in terms of the applicable taxation table as released by the Receiver of Revenue, as the case may be.

We undertake to revert back to you upon receipt of the necessary tax directives alternatively individual tax reference numbers.”

On even date the defendants' attorney responded by letter as follows:

"We refer to the above matter and our discussion yesterday.

We confirm that the matter is [settled] on the basis as set out in our letter of 6 May 2009, which is again attached for your ease of reference, as you seem not to have received the same. We can provide you with proof of telefax should you so wish.

We confirm that all we need is either tax directives or income tax reference numbers of the four individual applicants, and payment can be made. In this case, the four individual amounts are quantified.

We confirm that once our client has made the settlement payments, we shall withdraw the appeal set down for 11 September 2009. Therefore do not make any preparations now for the appeal.

We await the abovementioned, so our client can process the payments."

The tax directives were provided to the defendants' attorney on 2 September 2009 and payment was effected on 11 September 2009.

- [6] The respective attorneys that were representing the parties during the negotiations i.e. Mr Lock, for the plaintiffs and Mr Snyman, for the defendant testified at the hearing. The relevant part of their evidence was that it was understood that the payment would be made as at the date of the settlement being reached and not necessarily on the date of the actual payment as per the Labour Court's ruling. The motivation for this point of view was, of course, the fact that from that date all what needed to be done was for the plaintiffs' to, supply the tax directives from the SA Revenue Services or provide their individual tax references for the calculation of the income tax to be deducted which formed the first charged on the payments due to them and only thereafter would payments be made to them individually. They agreed the tax deduction was the first charge and therefore the defendant would not be expected to pay interest for so long as the plaintiffs shall have not provided the tax directives nor tax reference numbers, to determine

their tax liability. As pointed out above the tax directives were provided to the defendant's attorney on 2 September 2009 and the actual payment was made to the plaintiff's attorney on 11 September 2009.

[7] The actual dispute was whether the settlement agreement was reached on 6 May 2009 as the defendant contended or on 2 July 2009 as per the plaintiffs. It was also agreed in written arguments that the court had to make a ruling on that issue, the date first, as interest would be payable only up to that date for reasons given above.

[8] To determine on which date the settlement agreement was reached one needs to follow the trajectory of the correspondence exchanged between the respective attorneys. The two witnesses called differ as to the final date of the settlement. According to Mr Snyman, for the defendant, the settlement agreement was reached on 6 May 2009 when he accepted the offer made by Mr Lock in his letter dated 4 May 2009. Mr Lock on the other hand, contended the settlement was reached on 2 July 2009. It was contended that Mr Snyman's letter of 6 May 2009

constituted an offer or counter offer which was not accepted by the plaintiff. Mr Snyman in his evidence testified that the use of the phrase "...our client's final proposal is" in his letter was unfortunate because he meant to clarify the position of what was agreed on as the rest of the sentence indicated. The court accept that explanation as no new offer was made save for repetition of what was offered in Mr Lock's letter dated 4 May 2009. This is so because what matters is the substance of what is said and not the form of the words used. Even if the acceptance is made with ... "a request which is not a stipulation of an additional provision does not deprive his acceptance of its normal legal effect, the conclusion of a contract."

The Principles of the Law of Contract, 6th edition by Kerr (2002) p 98 and **The JMR Furniture Holdings and Another v COWLIN** 1983 (4) SA 541 (W) AT 544g. One needs to look at what the settlement entails to determine at which date it was reached. The essentialia of the settlement are:

- (a) each party will pay own costs;
- (b) defendant would pay the severance packages as ordered by the Labour Court;
- (c) interest on the capital amount would be payable until the capital had been paid in full. (See par 6 above as

to what was meant thereby).

Theses have been consistent throughout.

- [9] The above is the core of the settlement and runs through all the correspondence until 2 July 2009. The argument that the defendant's letter dated 6 May 2009 was not acceptance of the plaintiff's' offer of 4 May 2009 because it sought the applicants' confirmation cannot hold water. The defendant categorically wanted an explanation of what was meant by "interest is facilitated" hence he concluded his letter by saying "we await to hear from you". The defendant explicitly stated that if the phrase "interest is facilitated" then, and only in that event, the offer was rejected. The acceptance of the offer without payment of compound interest was confirmed in the plaintiffs' letter dated 7 May 2009. In that letter the plaintiffs stated:

"In this regard it is confirmed that the numeric proposal set out in your letter, *supra*, is accepted on the proviso that payment of the debt amount, capital, as well as costs be facilitated within 14 days from date of this letter." (my underlining)

The underlined statement does not affect the essence of the offer that was accepted in so many words. The offer was made by the plaintiffs' in their letter dated 4 May 2009. It was accepted by the defendant in its letter dated 6 May 2009 and confirmed by the plaintiffs in the letter dated 7 May 2009. In it it was also agreed that interest would be paid and when, i.e. on the date of settlement. The defendant was thus entitled to ignore what the plaintiffs said in the underlined phrase as well as the contents of the letter dated 29 May 2009 as those were not part of the offer made on 4 May 2009 and accepted on 6 May 2009. That phrase could not constitute a revocation of the offer either as the offer was already accepted: **PHILLIPS v AIDA REAL ESTATE (PTY) LTD** 1975 (3) SA 198 (A) 207 – 208; **BUILDING MATERIAL MANUFACTURERES LTD V MARAIS** 1990 (1) SA 243 (O) 248 – 249.

- [10] The letter dated 2 July 2009 from the plaintiffs' attorney repeats the terms already agreed to on 6 May 2009 and further served to indicate that the payment was dependant on the provision of the tax directives. This is confirmed in a letter from the defendant's attorney reiterating the

acceptance of the offer made on 4 May 2009 and accepted on 6 May 2009. There is totally no suggestion of a new offer that was accepted on 2 July 2009 but emphasis of the need to provide tax directives without which there could be no payment done by operation of law. The date of the settlement agreement is the 6th of May 2009.

[11] The plaintiffs' claim is consequently dismissed with costs.

K.J. MOLOI, J

On behalf of plaintiffs:

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