IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: A963/2005

In the matter between:

BE BOP A LULA MANUFACTURING & PRINTING CC Appellant

and

KINGTEX MARKETING (PTY) LTD Respondent

JUDGMENT: 25 AUGUST 2006

VAN ZYL J:

INTRODUCTION

[1] This is an appeal, with leave of the court *a quo* (Traverso DJP), against the judgment upholding the claim in convention of the respondent, as plaintiff, against the appellant, as defendant. There is no cross-appeal in regard to the successful claim in reconvention of the appellant against the respondent. Mr S P Rosenberg SC appeared for the appellant and Mr J Viljoen for the respondent. The court expresses its appreciation to them for their respective presentations in this matter.

[2] The claim in convention was directed at payment of the amount of R122 649,18, being the balance owing in respect of certain T-shirts sold and delivered by the respondent, a company doing business in Pretoria West, to the appellant, a close corporation with its main place of business in Parow. According to the respondent's particulars of claim the appellant had purchased T-shirts from it in the amount of R229 846,07, but had paid only R107 196,89 in respect thereof, hence leaving the aforesaid balance payable.

[3] In its plea the appellant denied being liable to the respondent in the amount claimed, averring that a large proportion of the T-shirts supplied to it by the

respondent had been defective. In the alternative it pleaded that it had tendered the aforesaid amount of R107 196,89 in full and final settlement of the respondent's initial claim of R229 846,07. This constituted a plea of compromise, which in fact became the primary issue between the parties in the trial and, indeed, remains so in the present appeal.

[4] The appellant's claim in reconvention, which was conditional on the trial court's rejecting the plea of compromise, was for payment of the amount of R80 000,00. This constituted damages suffered by it in that the respondent had supplied only 40 000 of the 60 000 T-shirts it had purchased from the respondent. Inasmuch as the appellant had an agreement with one of its customers, namely Adidas, in terms of which it would on-sell these garments to Adidas at a profit of R4,00 per T-shirt, the respondent's failure to supply the appellant with 20 000 T-shirts had caused it to suffer a loss of profit in the said amount of R80 000,00.

THE EVIDENCE

[5] The nub of the appellant's case in regard to the compromise issue is that it paid the respondent a cheque dated 28 February 2002 in the amount of R107 196,89. The cheque was signed by a member of the appellant, one Mr B D Webster ("Webster"), who had inserted the words "Full and Final Settlement of Account" directly below his signature on the front of the cheque. The respondent subsequently deposited the cheque, thereby accepting it in full and final settlement of its claim.

[6] The respondent's argument to the contrary was, in essence, that the forwarding of the cheque by the appellant to the respondent did not constitute an offer of compromise by the appellant in that the appellant did not seriously intend that it be regarded as such. Alternatively, even if the appellant had thus intended, the deposit of the cheque by the respondent did not constitute an acceptance of such offer.

[7] Much of the evidence presented to the trial court turned upon certain correspondence between the parties. The cheque in question was in fact accompanied by two letters, both of which were dated 19 February 2002 and were sent by Webster, on behalf of the appellant, to the respondent.

[8] The first letter related to a "credit request" of R122 649,18 arising from the sale of "rejects" to Adidas at half price and from the cost of "re-examining" and repairing faulty garments. In this regard the letter stated that the majority of the "rejects" had a "spirality" defect, while the repairs related to "uneven hems" which were "unpicked, trimmed straight and re-hemmed".

[9] The second letter related to a "final reconciliation" with reference to the calculation of the balance of R229 846,07 claimed by the respondent. From this amount the credit request of R122 649,18 was deducted, leaving a final balance, according to the appellant, of R107 196,89. This was then the amount of the cheque paid by the appellant to the respondent in "full and final settlement of account".

[10] The respondent rejected the appellant's credit request and reconciliation in a letter dated 1 March 2002 from its attorneys to the appellant, the body of which reads as follows:

We address this letter to you on behalf of our client who has approached us for advice and attention herein. Our instructions are to place the following facts on record:

1. Our client sold garments to yourselves of which the total amount due and owing amounts to R229 846,07.
2. On the 19th of February 2002 our client received a letter requesting a credit request with which our client disagrees and places in dispute.
3. On the 28th February 2002 our client received a cheque from yourselves in favour of our client in the amount of R107 196,89, furthermore with the wording thereon "in full and final settlement of the account".

Our instructions now are to inform you as follows:

1. Our client does not accept this payment in full and final settlement and if you do not agree with our client's claim of R229 846,07 you must arrange for stop payment on the said cheque.
2. Should you put stop payment on the said cheque our client will then proceed with his action against yourselves for the full amount outstanding and owing of R229 846,07.

3. Should you however not put stop payment to this cheque our client will pay this amount into our trust account pending the outcome of the dispute regarding the balance owing and payable to our client.

We reiterate that the payment is not received in full and final settlement of your outstanding account with our client and that you have ample time if you disagree with the amount of our client's claim to reverse this situation.

We await your reply herein.

[11] In a letter dated 4 March 2002 the appellant's Mr Webster replied thus:

Your fax sent at 16.12h 01/03/2002 was received at 8.15h 04/03/2002. As Kingtex are aware, we close at 15.15h on Fridays. My cheque i.f.o. Kingtex Marketing, for R107 196,89, was issued on 19/02/2002 and dated 28/02/2002. This cheque was deposited and went through my bank account on 28/02/2002, and my bank informs me that it is now too late to stop payment.

I therefore accept that by depositing the cheque, your client accepted the condition of it being in full and final settlement.

My credit request to Kingtex was not just a bogus claim, but an actual breakdown of my direct costs incurred in salvaging their inferior quality. Mr Wang was fully aware that we were incurring these costs, to reduce his damages, and that we would be claiming back these costs on completion of these orders.

If your client wishes to pursue this matter further, I intend to put in a counterclaim for loss of profit on 20 000 units short delivered, and for late delivery costs.

[12] Mr Shao-Un Wang, a director of the respondent, testified that the cheque in question had been received and deposited in the respondent's account on 28 February 2002 without his knowledge. On becoming aware of it the following day, he had immediately instructed his attorney to write the letter dated 1 March 2002, in terms of which he made it clear that he did not accept the cheque in full and final settlement. He confirmed that he had required the appellant to stop payment of the cheque, failing which it would be placed in the trust account of his attorneys pending finalisation of the matter. It would appear that his attorneys had subsequently appropriated a portion of the amount deposited in their trust account for the payment of legal fees in another matter.

[13] In his evidence on behalf of the appellant, Mr Webster confirmed the contents of his letter of 4 March 2002, more particularly that he had endorsed the cheque in question to the effect that it was in full and final settlement of the respondent's

account. In this regard he testified that, arising from the defective merchandise, he had claimed a credit from the respondent in the amount of R122 649,18. This he had deducted from the amount of R229 846,07, leaving a balance of R107 196,89. On 19 February 2002 he had sent the respondent a cheque in this amount, post-dated to 28 February 2002, together with the aforesaid letters dated 19 February 2002. The cheque was post-dated because the money was due only at the end of the month.

[14] On receipt of the respondent's letter dated 1 March 2002, Mr Webster further testified, he telephoned his bank to establish whether it was still physically possible to stop the cheque. His bank informed him that it could not be done because the cheque had been put through "special clearance" on 28 February 2002. He had then immediately written his aforesaid letter dated 4 March 2002 to the respondent. Of some significance in this regard was the following testimony:

Would I be correct in assuming that if the bank manager would have indicated to you that it was possible to stop payment of the cheque we wouldn't be arguing about the principle, full and final settlement today. --- Possibly. I only asked the bank a question based on the fact that the lawyers instructed me to stop the payment.
You were requested to stop payment … --- Yes, but the request came through too late.
You attempted to stop the cheque? --- I found out if it was feasible.
Had it been possible at that stage we wouldn't have been arguing the principle today? --- Correct, I would have stopped it and then I would have had to put my counterclaim in before the money was spoken about further.

[15] In her judgment Traverso DJP held that, although the deposit of the cheque would normally be regarded as acceptance of an offer of compromise, the evidence was to the contrary. With reference to the letter dated 1 March 2002 and to Mr Webster's attempt to stop the cheque, the learned judge held that it was clear that he had exhibited no intention of holding the respondent to the cheque.

MAIN SUBMISSIONS ON BEHALF OF THE PARTIES

[16] Mr Rosenberg's main submission on behalf of the appellant was that Mr Webster's enquiry relating to the possibility of stopping the cheque did not derogate

from the fact that the appellant's offer of compromise had already been accepted by virtue of the deposit of the cheque. The respondent was not entitled to accept the cheque subject to the condition that it would be held in trust. In any event it had not only failed to reimburse the appellant with the amount of the cheque, but had also appropriated a portion of it. This confirmed its acceptance of the offer of compromise.

[17] Mr Viljoen, in turn, argued that Mr Webster had not made an offer to compromise with the serious intention of binding the respondent. If this had been his intention, he would simply have rejected Mr Wang's request to stop payment of the cheque. Instead he had approached his bank in order to establish whether the cheque could be stopped. Had it been possible, that would have been the end of the matter. And even if there had been an offer, Mr Viljoen submitted, Mr Wang, who had at all relevant times represented the respondent and been in control of its accounts, could not accept an offer of which he bore no knowledge. When he did acquire such knowledge he acted without delay, making it quite clear, in the letter of 1 March 2002, that he did not accept the cheque in full and final settlement of the appellant's indebtedness to the respondent.

THE RELEVANT LEGAL PRINCIPLES

[18] The institution of compromise (*transactio*) has been a part of our common law since Roman times, where it was dealt with in *D* 2.15 and *C* 2.4 under the title *De transactionibus*. It was an agreement in terms of which the parties to an obligation settled a dispute arising from such obligation. The dispute had to relate to a doubtful issue in respect of which the outcome of litigation was uncertain or not yet finalised. See *D* 2.15.1: *Qui transigit, quasi de re dubia et lite incerta neque finita transigit*.

[19] Once *consensus* had been reached on the settlement of the dispute, the original obligation would be discharged and a new obligation, based on the terms of the

settlement, would come into existence. It could thus be regarded as a form of novation (*novatio*). That there was in fact a great similarity between *transactio* and *novatio* appears from Roman-Dutch sources such as Voet 46.2.3, where it is said that the principles applicable to the one apply also to the other. On the difference between compromise and novation in Roman-Dutch law see Wessels *Law of Contract in South Africa* (edited by A A Roberts, 1937) ("Wessels *Contract*") par 2458 and 2471. It should be noted in this regard that De Groot *Inleidinge* 3.4.2 renders the Latin *transactio* as *dading*. Van Leeuwen *Roomsch Hollandsch Recht* 2.5.23, on the other hand, deals with the topic under the rubric *Van verdrag en overkomst*. Vinnius and Noodt, however, retain the Latin term in their treatises on compromise, entitled respectively *De transactionibus* and *De pactis et transactionibus*.

[20] In the sphere of contract the ordinary principles relating to the determination of contractual *consensus* will apply in establishing whether or not an offer of compromise has been made and accepted. See *Kei Brick & Tile Co (Pty) Ltd v A M Construction* 1996 (1) SA 150 (E) at 159D-E; *Absa Bank Ltd v Van de Vyver* 2002 (4) SA 397 (SCA) par [17] at 404J-405A. This will generally be the case when an offer has been accepted with a view to creating reciprocal obligations in respect of which both parties unequivocally demonstrate their intention to be bound. I shall return to this later (see par [27] below).

[21] Among the important questions to be considered when establishing whether an agreement of compromise has been concluded is, firstly, whether or not a disputed and uncertain prior claim is in existence. If there is indeed such a claim, the next question is whether the parties have abated or receded from their original stance, in the sense that they have made some or other sacrifice, forfeiture or concession with a view to compromising the original claim and the defence thereto. See Voet 2.15.1;

Wessels *Contract* par 2459; R H Christie *The Law of Contract in South Africa* (5th edition, 2006) ("Christie *Contract*) 456. This approach appears from a number of early cases such as *Meyer v Low* (1832) 2 Menzies 8, *Van Schalkwyk v Pienaar's Trustees* (1898) 15 SC 288 at 296 and *Cachalia v Harberer & Co* 1905 TS 457 at 462. It has also been considered in several more recent cases. See *Dennis Peters Investments (Pty) Ltd v Ollerenshaw and Others* 1977 (1) SA 197 (W) at 202F-G; *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others* 1978 (1) SA 914 (A) at 921A-D; *Trust Bank van Afrika Bpk v Ungerer* 1981 (2) SA 223 (T) at 225F; *Tauber v Von Abo* 1984 (4) SA 482 (E) at 485F-486B.

[22] A useful definition of compromise, which takes cognisance of this approach, appears in *Karson v Minister of Public Works* 1996 (1) SA 887 (E) at 893F-H (*per* Leach J):

It is well settled that the agreement of compromise, also known as *transactio*, is an agreement between the parties to an obligation, the terms of which are in dispute, or between the parties to a lawsuit, the issue of which is uncertain, settling the matter in dispute, each party receding from his previous position and conceding something, either by diminishing his claim or increasing his liability … It is thus the very essence of a compromise that the parties thereto, by mutual assent, agree to the settlement of previously disputed or uncertain obligations …

[23] The effect of a compromise is to put an end to the disputed and uncertain prior claim in the same way as if the matter were finally adjudicated upon (*res judicata*). See *D* 2.15.9.1; *C* 2.4.20; Voet 2.15.21; Wessels *Contract* par 2470; *Cachalia v Harberer & Co* (*supra*) at 464; *Mothle v Mathole* 1951 (1) SA 785 (T) at 789A-C; *Van Zyl v Niemann* 1964 (4) SA 661 (A) at 669H-670A; *Dennis Peters Investments (Pty) Ltd v Ollerenshaw and Others* (*supra*) at 202E-F; *Jonathan v Haggie Rand Wire Ltd and Another* 1978 (2) SA 34 (N) at 38F-H.

[24] In this regard it must be borne in mind that compromises are to be strictly interpreted in that they exclude anything which was probably not contemplated by the

parties at the time they reached the compromise. See De Groot *Inleidinge* 3.4.7 and Schorer's note thereto, as referred to in Wessels *Contract* par 2460. The party alleging a compromise bears the *onus* of proving it. See *The Torch Moderne Binnehuis Vervaardiging Venn. (Edm.) Bpk v Husserl* 1946 CPD 548 at 550; *Marendaz v Marendaz* 1953 (4) SA 218 (C) at 226H-227A; *Tauber v Von Abo* 1984 (4) SA 482 (E) at 485F. Inasmuch as it constitutes a form of novation involving the waiver or diminishing of claimed rights, it requires clear and unambiguous proof.

[25] In determining whether or not a compromise has been effected, the court will have regard to the substance rather than the form in which it is couched or the description given to it by the parties. This accords with the principle that, in construing contracts, one must look at the intention of the parties rather than at the words used by them. See *D* 50.16.209: *In conventionibus contrahentium voluntatem potius quam verba spectari placuit* (also rendered as *non quod dictum est sed quod factum est inspicitur* - "regard is not had to what has been said but to what has been done"). It is likewise in line with the well-known legal maxim that greater weight is attached to what is done than to what is purportedly done: *plus valet quod agitur quam quod simulate concipitur*. See *C* 4.22.2; *C* 4.29.17; *Zandberg v Van Zyl* 1910 AD 302 at 309; *National Employers' General Insurance Co Ltd v Springbok Timber & Hardware Co (Pty) Ltd* 1969 (3) SA 444 (W) at 447A.

[26] A difficulty which has arisen in this regard is that the concepts of "compromise" and "tender" have been terminologically confused. See D Zeffertt "Payments 'In Full Settlement'" in SALJ 89 (1972) 35-48, where the learned author considers relevant cases and submits that the effect of the words "in full settlement" may constitute either an offer of compromise of a disputed claim, or a payment purporting to settle an account in full. He explains the distinction thus (at 37):

It will be submitted that if the offer is one of compromise, its acceptance by an alleged creditor will extinguish his claim, whether the claim is liquidated or unliquidated. If it is a payment, the creditor may, with impunity, retain what has been paid; he may take the words 'in full settlement' [as] *pro non scripto* and sue for the balance.

[27] In discussing this submission Zeffertt quite correctly emphasises (at 38) that an offer to compromise must, objectively construed, be intended to create binding legal relations and must have appeared so to the offeree. For the offer to be effective it would, in the usual case, be subject to the condition that, if it should be accepted, the dispute would be settled and the claim in question extinguished. Although the offeror may designate the mode of acceptance, the acceptance of the offer should be clear and unambiguous, be it by words or conduct. This would depend on the facts of each case, which should be considered carefully, particularly where the debtor makes an offer of settlement in respect of a liability which he partially admits. Zeffertt points this out with great clarity in his conclusion (at 48):

There is no magic formula which the law provides to resolve all practical difficulties which arise where the debtor admits partial liability and pays his admitted liability. In each case you must look to the context. In each case you must look to the evidence. You must scrutinize the facts and then, in the light of the criteria set out in the cases, categorize what has happened so as to be able to decide whether an offer of compromise has been made or payment of an amount which the debtor merely regards as reflecting the extent of his indebtedness.

[28] A precursor to this approach appears from the judgment of Innes CJ in *Burt NO v National Bank of South Africa Ltd* 1921 AD 59 at 62, where the learned Chief Justice observes:

That is a matter which must always depend upon the declarations and conduct of the alleged acceptor, viewed in the light of relevant circumstances. Every case must be decided on its own facts; the object being in each case to ascertain whether the parties were *ad idem*. No doubt the acts of the person concerned are a most important element in arriving at the result. Often they are decisive; but not always; there may be other circumstances which preclude the usual inferences.

See also *Steenkamp v Union Government* 1947 (1) SA 449 (C) at 457; *Andy's Electrical v Laurie Sykes (Pty) Ltd* 1979 (3) SA 341 (N) at 343F-G; *Paterson*

Exhibitions CC v Knights Advertising and Marketing CC 1991 (3) SA 523 (A) at 529D; *Karson v Minister of Public Works* 1996 (1) SA 887 (E) at 895D; *Absa Bank Ltd v Van de Vyver NO* 2002 (4) SA 397 (SCA) at 402B-E.

[29] If a debtor makes an offer of compromise "in full settlement" of the creditor's claim, and accompanies it with a cheque in the amount offered, the creditor will, under normal circumstances, be regarded as having accepted the offer should he deposit the cheque in his account. See *Neville v Plasket* 1935 TPD 115 at 120 and *Van Breukelen en 'n Ander v Van Breukelen* 1966 (2) SA 285 (A) at 290D-H. This will be the case even if the deposit of the cheque and appropriation of the proceeds should be accompanied by what Didcott J calls "the incantation" that it is done "without prejudice" to any further rights the creditor may have. See *Andy's Electrical v Laurie Sykes (Pty) Ltd* (*supra*) at 343A-B.

[30] On the other hand, the facts and circumstances of a case where an offer of compromise is attended by payment of a cheque "in full settlement" may indicate a totally different situation, as Christie *Contract* 457 states with eminent perspicuity:

The simple proposition that compromise is a contract, and whether or not it has been entered into is therefore to be tested in the same way as with any other contract, is not quite applicable to one very common type of case. When a debtor sends his creditor a cheque for less than the amount claimed, but expressly states that it is sent in full settlement, the effect of the cases is to favour the debtor and to decide that a compromise has been effected if the debtor has indicated that he intends to compromise and the creditor has cashed the cheque, even if (and this is the important point) the creditor makes it clear in cashing the cheque he is not agreeing to the proposed compromise. There can be no quarrel with this result if, in sending the cheque, the debtor has unambiguously stated that the cheque is sent as an integral part of his offer to compromise, and that the cashing of the cheque will be taken as an acceptance of that offer. It is trite that an offeror may prescribe the method of acceptance, and this would be a legitimate exercise of that power. But it is equally trite that an ambiguous offer will be construed *contra proferentem*, and it should therefore follow that if the debtor cannot prove that the creditor ought reasonably to have interpreted the letter and cheque as an offer of compromise, the creditor is entitled to cash the cheque as a payment on account and sue for the balance.

The reason why our present law does not conform to this simple and satisfactory pattern is that it has been built on the wrong foundations. The sending of a cheque in full settlement may raise not only the issue of whether there is an offer to compromise, which becomes material if the cheque is cashed, but the quite separate issue of whether there has been a valid tender, which becomes material if the cheque is refused. Unfortunately the lines of cases on these two issues have become intertwined, largely due to two early Appellate Division decisions, but the Supreme Court of Appeal is successfully untying the knot.

[30] The first of these decisions was *Odendaal v Du Plessis* 1918 AD 470, in which the issue was whether a tender in settlement of any damages the plaintiff might have suffered was sufficient to protect the defendant against liability for costs subsequently incurred. After distinguishing between the tender of English law and the offer (*oblatie*) and "judicial deposit" (*consignatie*) of Dutch law, Innes CJ held that the South African “doctrine of tender” was not based on English law. It was in fact rooted in Roman-Dutch law, which required that a "tender" should be unconditional. In this regard the learned Chief Justice stated (at 478-479):

Tender was akin to payment, and no condition to which the creditor had a right to object could be coupled with the one any more than with the other. Strictly regarded, an offer made “in settlement” or “in full settlement” is conditioned upon the creditor abandoning the balance of his claim. The offer is made upon terms that he shall admit its sufficiency; it can only be accepted on such admission; and it is therefore conditional. But regarded in the light of Roman-Dutch law the condition is inherent in the very nature of the tender, and is sanctioned by the procedure of the Courts. It is not, therefore, a condition to which the creditor can object, and it does not destroy the validity or operative effect of the tender. …Where the obligation is denied, tender is in essence an offer of compromise. …And in such a case … a stipulation that the offer is in full settlement would ordinarily be implied.

[31] In the second early case emanating from the Appellate Division, namely *Harris v Pieters* 1920 AD 644, the question was whether a creditor who had cashed a cheque sent in full settlement could sue for the balance. The trial court relied on *Odendaal v Du Plessis* (*supra*) in finding for the creditor. On appeal, however, Innes CJ distinguished the *Odendaal* decision and stated (at 649-650):

Whether a tender or a payment is intended is a matter to be settled upon the facts of each case. And, in considering these facts, it may be well to bear in mind that the words “in full settlement” (or any similar expression) are more likely to be used as a mere assertion of the debtor’s contention, and not as a condition of acceptance in cases where the money is placed in the hands of the creditor than in cases where it is not. If the evidence shows only a tender, the rights of the parties will depend upon the principles already discussed. But if payment is intended, then further considerations arise. For payment must be made in the exact terms and to the exact extent of the relative obligation. The debtor cannot vary the amount of his payment, nor can he engraft upon it any condition not contained in the contract or implied by law. When money is delivered to the creditor in payment of a liability which the debtor admits, accompanied by the statement that it is paid in full settlement, he is not bound to accept it as such. He may, of course, waive his rights and do so. But he is entitled to reject the condition. On the assumption that the debtor intends to pay the liability, which he admits, and delivers the money with that intention, the condition which he seeks to attach is wholly inoperative save with the creditor's assent. And if the creditor withholds his assent and repudiates the condition, he may in my opinion retain the money and sue for the balance. For the position is this: The obligation is discharged to the extent of the payment; the debtor who pays cannot compel the creditor to donate his claim for the balance. And if the creditor refuses to do this, his right to that claim remains unaffected by the receipt of the money … The test in all these cases, therefore, is this: Was there a tender accompanied by money or cheque, or was there payment with an attempt to annex a condition? In the former case, if the tender is refused the money should be returned; in the latter, if the condition is rejected the money can be retained and the balance claimed. The result of the test must depend upon the intention of the parties in each case as shown by their statements and conduct.

[32] In his concurring judgment De Villiers JA adopted a somewhat different approach when he stated (at 654-655):

Now the phrase "in full settlement" is ambiguous and may mean one of two things. A debtor, in offering a sum in full settlement may intend to tender the amount unconditionally, only adding the words "in full settlement" by way of emphasising his contention that the amount tendered covers the whole of his liability. In that case the offer is made *animo solvendi*. Or he may intend to offer the amount on condition that the creditor by accepting it should forgo his claim for the balance. In the latter case the offer is made for the purpose of entering into a new contract with the creditor, *animo contrahendi* therefore. If this is clear from the terms of the offer and the creditor accepts the offer on those terms he cannot, of course, proceed. But I agree with the view that in cases of doubt the construction should be against the debtor, for he had it in his power to make his meaning clear.

[33] In the case of *Burt NO v National Bank of South Africa Ltd* (par [28] above) Solomon JA, in his concurring judgment, criticised this *dictum* and observed as follows (at 67) on the question of whether or not the words "in full settlement" were ambiguous:

It is true that in the later case of *Harris v Pieters* it was stated in one of the judgments that the words "in full settlement" are ambiguous and do not necessarily imply the condition stated above. In my opinion, however, those words are perfectly plain and can have only one meaning. The tender is made for the purpose of settling the action, and neither the person who makes the offer nor the person who accepts it can possibly have any misconception as to its meaning. If, therefore, a plaintiff unreservedly accepts an offer made in those terms, he must be taken to accept it, with the condition attached that he shall abandon the balance of his claim, and in these circumstances it is, to my mind, inconceivable that he can both retain the money and at the same time be allowed to sue for the balance of the claim.

[34] According to Christie *Contract* 458 three possibilities emerge from *Harris v Pieters*, namely an offer of compromise with denial of liability, a tender with admission of liability and payment with admission of liability. This "scheme of things", he suggests, "bristles with difficulties". In practice the only concern is whether the debtor intends an offer of compromise, with or without an attendant admission of liability, or makes a payment by cheque, which the creditor may cash without forfeiting his right to sue for the balance owing. There is no question of a tender or of any condition attaching to the offer or the payment. This only leads to a situation, the learned author opines (at 459), which "falls below the standard of clarity in exposition at which the law ought to aim".

[35] The Appellate Division gave renewed consideration to this situation in *Paterson Exhibitions CC c Knights Advertising and Marketing CC* 1991 (3) SA 523 (A). In that case the respondent successfully sued the appellant for provisional sentence on five post-dated cheques which, on presentation, had been dishonoured by non-payment. They had been sent under cover of a letter in which the appellant disputed the amount claimed by the respondent, but sought to settle the matter "amicably and speedily". It hence enclosed a cheque, which was immediately payable, and the five post-dated cheques, which together totalled the full amount claimed by the respondent, stating that it was "in full and final settlement" of the respondent's alleged claim. The respondent accepted and deposited the initial cheque "without prejudice", but refused to accept the post-dated cheques "as a basis of settlement".

Corbett CJ considered the relevant authorities and formulated the general principle applicable to cases such as this in the following terms (at 529B-D):

[W]here a creditor to whom a tender or an offer of compromise (accompanied by a tender of payment) is made accepts the same, he cannot thereafter sue for the alleged balance of his claim; and … where there has been such acceptance it does not assist the creditor to show that he purported to attach conditions or qualifications to his acceptance, such as that it was without prejudice to his rights to sue for the balance. Usually such acceptance may be inferred from the retention of the money which accompanies the tender or offer, but in every case it must be a question of fact depending on all the circumstances …

In the instant matter, however, the learned Chief Justice held (at 529D-E) that, despite the respondent's deposit of the one cheque and retention of the post-dated cheques, it had unequivocally rejected the appellant's offer of compromise. The respondent should in fact have returned the post-dated cheques inasmuch as it "could not reject the offer yet retain the tendered performance, as it purported to do" (at 528G).

[36] The most recent case on the topic emanating from the Supreme Court of Appeal was *Absa Bank Ltd v Van de Vyver NO* 2002 (4) SA 397 (SCA). In this matter the executrix of her deceased husband's estate sent a bank, to which the estate was indebted, a cheque in full and final settlement of its claim. The bank rejected the offer of settlement but nevertheless deposited the cheque and appropriated the proceeds. The trial court held that the bank, in so doing, had accepted an offer of compromise and was hence non-suited.

[37] On appeal the Supreme Court of Appeal pointed out (*per* Howie JA par [9] at 402B-F) that retention of a payment offered in full settlement of a claim would usually be sufficient to constitute acceptance of the offer, notwithstanding the creditor's efforts to qualify the acceptance. Whether there has indeed been such acceptance, however, "must always be a question of fact depending on all the circumstances". With reference to the cases of *Odendaal v Du Plessis* (*supra*) and *Harris v Pieters* (*supra*), Howie JA emphasised (par [11] at 403B-C) that a clear

distinction should be drawn between tender in the procedural sense and tender as a contractual offer of compromise.

[38] In the *Harris* case, Howie JA observed (par [12] at 403D-E), this distinction was not "entirely clearly maintained". The judgment of Innes CJ did show, however, that the expression "in full settlement" is not ambiguous as such, but its effect may differ depending on the context in which it is used. In this regard the learned Judge of Appeal stated (par [16] at 404G-I):

It is not inherently ambiguous because it always serves to do no more, legally speaking, than import the condition that on acceptance the creditor has no further claim to any balance of the debt. But, as a matter of language, and with regard to the two different situations in which it is employed, it is a question of fact whether the payment made is intended to effect a compromise or to pay an admitted liability. In the former situation the condition is binding if the offer is accepted. If the offer is rejected the money should be returned. In the case of a payment of an admitted liability the condition is not binding. The creditor may keep the money and sue for the balance.

[39] This led Howie JA to conclude (par [17] at 404J-405A) that the term "tender" should be confined to its procedural context. Outside that context one is "squarely in the realm of contract" which is concerned simply with the contractual principles of offer and acceptance. This could be explained thus (par [18] at 405B-C):

Sending one's creditor a cheque 'in full settlement' coupled with a denial of liability would almost certainly signify an offer of compromise. But there may be an offer of compromise if there is simply no admission of liability accompanying the payment. And one may have to do with an offer of compromise even if there is an admission of liability. In the latter instance the line between an offer of compromise and payment of an admitted liability would naturally be finer than in the other two cases.

[40] In this regard the learned Judge of Appeal cautioned (par [19] at 405D) that debtors who fail to make clear their intention of achieving a compromise "run the risk of having their words interpreted against them". This was a reference to the *contra proferentem* principle in terms of which an ambiguous offer would be construed against the party making the offer. See *Andy's Electrical v Laurie Sykes (Pty) Ltd*

(*supra*) at 345A-B; *Kei Brick & Tile Co (Pty) Ltd v A M Construction* (*supra*) at 157G; *Karson v Minister of Public Works* (*supra*) at 896C-D.

[41] When these authorities are considered, the following principles would appear to emerge:

(a) A tender which is not made for purely procedural reasons is usually intended as a contractual offer of compromise, in which event the ordinary contractual principles relating to offer and acceptance will be applicable. Despite a measure of terminological confusion arising from the application of both Roman-Dutch and English legal sources at an early stage of South African legal development, the distinction between procedural and contractual "tender" should be clear from the relevant facts and circumstances of each case.

(b) In considering whether a tender constitutes an offer of compromise the court must determine the true intention of the parties, and not be misled by what the one or the other of the parties may, by the use of particular terminology, purport to intend.

(c) The court must be satisfied that the parties have achieved *consensus* on all the relevant contractual requirements and have unequivocally intended to settle the dispute or disputes existing between them. More particularly it must be satisfied that the debtor has made an offer of settlement and that the creditor has accepted it. The party alleging a compromise bears the *onus* of proving it.

(d) Inasmuch as the offer may be conditional or be accompanied by an admission, or partial admission, of liability, it must be determined whether the offer to pay is intended as an offer of compromise or as an offer to pay what the debtor believes he owes the creditor. In other words, was it made with the intention of making payment (*animo solvendi*), or with the intention of concluding an agreement of compromise (*animo contrahendi*)?

(e) An agreement of compromise will have the effect of discharging the existing obligations of the debtor and the creditor's claim will be regard as finally adjudicated upon (*res judicata*). In its place a new agreement with reciprocal rights and obligation will, by way of novation (*novatio*), come into existence.

(f) In determining whether or not an agreement of compromise has been concluded, consideration will be given to whether the parties have made concessions or retractions concerning their respective claims and defences.

(g) When a debtor offers to make payment "in full and final settlement" of a creditor's claim, he may impose conditions as to the mode of acceptance, such as that the payment, or cheque, as the case may be, should be returned if the offer is not accepted. Should the offer be ambiguous, however, it will be construed against the debtor (*contra proferentem*).

(h) If a cheque, which has been offered as payment in full and final settlement of a disputed claim, should be deposited and the proceeds thereof appropriated, it will generally be regarded that the offer has been accepted, even if such acceptance has been done without prejudice. This is not a rule of thumb, however, since the facts and circumstances of the particular case may indicate that there has not been acceptance.

APPLICATION OF THE LAW TO THE FACTS

[42] When the legal principles set forth above are applied to the facts in the present matter, a clear picture emerges. What started off as an alternative plea became the main string to the appellant's bow. In order to persuade the trial court that the plea of compromise should be upheld, the appellant had to prove that its tender of the cheque

in question was intended as an offer of compromise and, if so, that such offer was accepted by the respondent. The trial court was not so persuaded and it is now for this court to consider whether it should have been.

[43] At the outset it must be remembered that the cheque bearing the inscription "full and final settlement of account" was sent to the respondent under cover of two letters, both dated 19 February 2002. These letters, as mentioned above (par [8] and [9]), dealt with a "credit request" and a "final reconciliation" respectively. Neither of them mentions a word about an offer of compromise or settlement of the dispute between the parties, and neither stipulates any condition as to the mode of acceptance required of the respondent. They simply demonstrate how the appellant has calculated the amount of the cheque, namely by deducting the amount of the credit claimed from the balance owing in terms of its account with the respondent.

[44] From this it would appear that the appellant's intention in sending these letters was to inform the respondent as to what it believed was the amount in fact owing to the respondent. The cheque was hence tendered with a view to making payment of this amount (*animo solvendi*), and not with the purpose of making a contractual offer of compromise (*animo contrahendi*), which would give rise to the conclusion of a new contract should the offer be accepted by the respondent. The inscription on the cheque, to the effect that it was being paid in full and final settlement of the respondent's account, was, in my view, simply intended as confirmation of what the appellant believed it owed the respondent.

[45] Even if the tender of the cheque should be regarded as an offer of compromise, the appellant faces insurmountable difficulties on the issue as to whether or not the offer was accepted. It is true that the respondent deposited the cheque and later arranged for it to be transferred to its attorney's trust account. On the other hand,

when it received the cheque and the accompanying letters, it responded, in the letter dated 1 March 2002 (par [10] above), by expressly and unequivocally rejecting the cheque as payment in full and final settlement of the appellant's indebtedness. It confirmed this rejection by inviting the appellant to arrange that payment on the cheque be stopped. This is simply not compatible with acceptance of any offer of compromise.

[46] That the appellant did not regard the payment of the cheque as an offer of compromise is supported by the fact that, when it was requested by the respondent to stop the cheque, it attempted to accede to this request. As appears from Mr Webster's testimony (par [14] above), had it succeeded in stopping the cheque, it would clearly not have placed any further reliance on the payment thereof as being in full and final settlement of its indebtedness to the respondent. It was only on being informed that the payment could not be stopped that it made the allegation, in its letter of 4 March 2002 (par [11] above), that the respondent had, by depositing the cheque, "accepted the condition of it being in full and final settlement".

[47] It may well be that the respondent should have repaid the amount of the cheque rather than arrange for it to be deposited in the said trust account. On the other hand the appellant at no stage objected to the proceeds of the cheque being placed in a trust account, nor did it demand that the amount of the cheque be repaid. It appears from these considerations that, even if the payment of the cheque should be construed as an offer of compromise, the respondent clearly did not accept such offer. It follows that I am in respectful agreement with Traverso DJP that the appellant failed to prove that the parties concluded an agreement of compromise

CONCLUSION

[48] In the event the appeal must be dismissed with costs.

D H VAN ZYL

Judge of the High Court

I agree.

B WAGLAY

Judge of the High Court

I agree.

T NDITA

Judge of the High Court