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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

PETER JOHN PRICE APPELLANT

and

JEANETTE ANNE PRICE RESPONDENT

CORAM : NESTADT, KUMLEBEN JJA et NICHOLAS AJA

HEARD : 27 AUGUST 1990

DELIVERED : 11 SEPTEMBER 1990

J U D G M E N T

KUMLEBEN JA/...

KUMLEBEN JA:

The respondent applied on notice of motion in the Eastern Cape Division of the Supreme Court for an order:

"Declaring as valid, the acceptance by (Respondent) of (Appellant's) Notice in terms of Rule 34 by virtue of her delivery of a Notice in terms of Rule 34(6) on the 27th day of October, 1989."

The application was opposed. After hearing argument the court (Cooper J) made an order as prayed, with costs, and subsequently granted the appellant leave to appeal to this court.

The application arose from divorce proceedings.

The respondent had instituted action against her husband, the appellant, for divorce and certain ancillary relief including custody of the minor

children and maintenance. The respondent was at all material times represented by counsel, Mr Lang, instructed by her attorney, Mr de la Harpe. The appellant's legal representatives were her counsel, Mr Lowe, and Mr Burman, his instructing attorney.

The case was set down for trial on 26 October 1989. Before and during that day attempts were made to settle the action in order that the matter could proceed as an undefended divorce. Late that afternoon Mr Burman handed Mr de la Harpe a written offer of settlement. It was dated 26 October 1989, made without prejudice "in terms of Rule 34" and was signed by Mr Burman. Its proposals covered all the disputed issues. It was common cause that Mr Burman had the necessary authority to make such an offer on behalf of his client and that it was, as it purported to be, one in terms of the said Rule.

The offer was considered by the respondent and her legal advisers. She did not accept it at that stage: rather it was decided that Mr Lang should approach the other side to discuss the matter further. That evening Mr Lang and Mr Burman had a lengthy meeting regarding the offer but their deliberations did not result in a settlement of the action. (I shall for convenience simply refer to their discussion as "the meeting".) Attempts at settlement the following morning were equally unavailing. The trial therefore started on 27 October 1989 and the respondent was still giving evidence when the court rose. The case could not continue the next day and was adjourned. The respondent reconsidered her position and instructed Mr de la Harpe to accept the written offer. This he did on 27 October 1989 by delivering to the appellant's attorneys a notice which read:

"NOTICE IN TERMS OF RULE 34(6)

Sirs,

BE PLEASED TO TAKE NOTICE that the Plaintiff hereby accepts the Defendant's offer of settlement as set out in his Notice dated the 26th of October, 1989 in terms of the provisions of Rule 34.

DATED at GRAHAMSTOWN this the 27th day of October, 1989

(Signed) D H DE LA HARPE"

It emerges from correspondence which followed that it was the appellant's contention that the offer had been rejected before delivery of the said notice and that therefore the purported acceptance was of no force or effect. Hence the application to court for the declaratory order.

The first question raised in the court a quo, and argued before us, is a factual one: whether Mr Lang at the meeting made a counter-offer on behalf of the respondent, amounting impliedly to a rejection of the written offer. In this regard, having considered

the available evidence, Cooper J concluded that:

"In my view advocate Lang's approach to the respondent's attorney amounted to no more than a request to modify or vary respondent's offer, it was not a counter-offer incorporating a rejection of the respondent's offer and did not have the effect of terminating the respondent's written offer."

The second question raised, and considered in the alternative in the court a quo, was whether, on a proper construction of Rule 34, a plaintiff is permitted to accept an offer within the time prescribed by the Rule notwithstanding any prior communication rejecting it. This question too was answered in favour of the respondent, the learned judge deciding that:

"Rule 34(6) confers upon a plaintiff an unqualified right to accept an offer within a period of 15 days of receipt of the notice of the defendant's offer and since this provision supersedes the common law, a plaintiff is not precluded from negotiating with or making an offer

to the defendant during the 15 day period at the risk of forfeiting his rights."

The relevant provisions of sub-rules (1),

(5), (6) and (7) of Rule 34 read as follows:

"(1) In any action in which a sum of money is claimed, either alone or with any other relief, the defendant may at any time unconditionally or without prejudice make a written offer to settle the plaintiff's claim. Such offer shall be signed either by the defendant himself or by his attorney if the latter has been authorised thereto in writing.

(5) Notice of any offer ... in terms of this rule shall be given to all parties to the action"

(6) A plaintiff ... may within 15 days after the receipt of the notice referred to in sub-rule (5) ... accept any offer"

(7) In the event of a failure to pay ... within 10 days after delivery of the notice of acceptance of the offer ... the party entitled to payment ... may, on five days written notice to the party who has failed to pay ... apply through the registrar to a judge for judgment in accordance with the offer ... as well as for the costs of the application."

In regard to the first question, namely, whether there was a counter-offer, one knows as a matter of common experience that frequently an offer of settlement is followed by bargaining, counter-proposals and discussion before finality is reached; or the attempt at settlement is abandoned, with or without an offer at that stage subsisting. In such a case it is often difficult to determine, in the absence of explicit rejection, whether, and if so at what point, the initial offer was impliedly rejected (by counter-offer or otherwise) and, if rejected, whether it was thereafter repeated and thus revived. In each case the answer is a matter of inference to be drawn from the proved or admitted facts.

This problem is usually encountered and discussed in reference to offer and acceptance in the field of contract. In this regard in Williston on Contracts (Third Edition) Vol 1 paragraph 51 (pages 164 - 167) it

is stated that:

"When an offer has been rejected it ceases to exist, and a subsequent attempted acceptance is inoperative, even though the acceptance is made within a time which would have been sufficiently early had there been no rejection.

Any words or acts of the offeree indicating that he declines the offer or which justify the offeror in inferring that the offeree intends not to accept the offer, or give it further consideration, amounts to a rejection. This principle is most commonly illustrated where a counter-offer or a conditional acceptance which amounts to a counter-offer is made by the offeree. This operates as a rejection of the original offer.

The reason is that the counter-offer is interpreted as being in effect a statement by the offeree not only that he will enter into the transaction on the terms stated in his counter-offer, but also by implication that he will not assent to the terms of the original offer. An answer purporting to accept upon condition is not an acceptance but is in effect a counter-offer, because it states in substance that the offeree will contract on the terms of the original offer if some addition or subtraction is made from them, but implies that otherwise he will not contract.

It is not true, however, that any communication from the offeree other than an unequivocal

acceptance is necessarily a rejection. Thus an inquiry by the offeree in regard to the possibility of other terms is not a counter-offer either in the form of a conditional acceptance or otherwise, and does not reject the offer; nor does a statement by the offeree that he will 'delay coming to determination;' nor does a request for a qualification of the offer coupled with an unqualified acceptance not dependent on the granting of the request; nor does mere silence of the offeree, although inaction may be consistent with an intention not to accept."

And Corbin on Contracts (Vol 1 para 89 pages 378 - 379), dealing more pertinently with the nature of a counter-offer, points out that:

"In the process of negotiation concerning a specific subject matter, there may be offers and counter offers. One party proposes an agreement on terms that he states; the other replies proposing an agreement on terms that are different. Such a counter proposal is not identical with a rejection of the first offer, although it may have a similar legal operation in part. In order to deserve the name 'counter offer,' it must be so expressed as to be legally operative as an offer to the party making the prior proposal. It is not a counter offer unless it is itself an offer, fully complying with all the requirements that have been previously discussed."

This rather detailed exposition by these American writers of the legal position relating to the formation of a contract conforms to what has been said in our law on the subject. (See, for instance, East Asiatic Co. (S.A.) Ltd v Midlands Manufacturing Co. (Pty) Ltd 1954(2) S.A. 387 (C) 390 G and Watermeyer v Murray 1911 AD 61 at 67.)

I turn to the facts of this case. In examining them two considerations are to be borne in mind. First, the respondent's cause of action is not founded on contract. In Frenkel, Wise and Co Ltd v Cuthbert 1946 CPD 735 Ogilvie Thompson A.J. said at 742:

"Payment into Court is in my view a procedural, rather than entirely a contractual, matter. Once the defendant elects to invoke Rule 24, the machinery provided by that Rule comes into operation and regulates the rights of the parties."

This observation was made when discussing Rule 24 (Cape) which made provision for payment into court by way of an offer of settlement. The Cape Rule was superseded by Uniform Rule of Court 34, which in turn was replaced on 27 November 1987 by the Rule in its present form. The dictum nevertheless holds good and applies in the instant case. The respondent's claim for the relief sought is based squarely on the provisions of this Rule and the allegations that there has been compliance therewith. Second, as was emphasized by Miller J in Hart v Pinetown Drive-in Cinema (Pty) Ltd 1972(1) S.A. 464 (D) at 469 C - E:

"...where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are

absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound."

(See too Prok Africa (Pty) Ltd and Another v NTH (Pty) Ltd and Others 1980(3) S.A. 687(W) 692 H.)

These observations apply similarly to answering affidavits and the allegations they ought to contain.

It is against the background of these two considerations that one must examine what is said - and not said - in the affidavits placed before court.

Mr de la Harpe in his founding affidavit - the only affidavit lodged in support of the application - alleged that there had been offer and acceptance in accordance with Rule 34. These averments were all that was necessary for the respondent's cause of action, that is, for the relief claimed.

This affidavit went on (unnecessarily) to deal with instructions given by the deponent to Mr Lang before the meeting and what was afterwards discussed between them. It is plain that these averments can throw no light on what occurred at the meeting: they in any event lend no support to the proposition that the offer was rejected or a counter-offer made at the meeting.

There was no affidavit from Mr Lang. The appellant filed an answering affidavit in which he gave some account of what happened at the meeting, which of course he did not attend. There is, however, a supporting affidavit of Mr Burman in which he states: "I prepared (Appellant's) Affidavit in this matter and accordingly confirm all the facts set out therein." The attorney's affidavit is no more than confirmatory and alleges no further facts regarding what took place at the meeting. His evidence is thus reflected in, and

restricted to, what the appellant has to say on the subject in the following paragraphs of his affidavit:

"5.2 As will appear from the confirmatory Affidavit of my Attorney, Daryl Burman, it is correct that Advocate Lang approached him at or about the time stipulated, and stated that Applicant wished to avoid the house having to be sold and that, accordingly, I should increase my offer of maintenance.

5.3 The amount initially requested was an additional approximately R1 800,00 per month on which amount Mr Burman sought clarification.

5.4 This was clearly a counter-offer made for my consideration and certainly not merely an enquiry.

5.5 At the end of a lengthy negotiation, Mr Burman advised Advocate Lang that, despite the protestation of Advocate Lowe, who had then just joined the meeting, to the effect that my original offer was more than generous in view of my financial position, he was prepared to put to me the suggestion that I should increase my offer of maintenance by R600,00 per month on condition that Applicant would agree that she would never be entitled to claim an increase in maintenance."

The averment in para 5.4 must be left out of account.

It is an inference or conclusion, not a statement of

fact. (Cf. Willcox and Others v Commissioner for Inland Revenue 1960 (4) S.A. 599 (A) 602 and Radebe and Others v Eastern Transvaal Development Board 1988(2) S.A. 785 (A) 792 H - 793 D.)

What then are the facts alleged by the appellant in his answering affidavit? In sum they are the following: (i) Mr Lang "stated" to Mr Burman that the offer of maintenance should be increased; (ii) Counsel initially "requested" that the additional amount should be "approximately" R1 800,00 per month; (iii) Mr Burman advised Mr Lang that, although the offer was more than generous, he (Mr Burman) was prepared to suggest to the appellant that he should increase his offer by R600,00 per month on condition that the respondent agrees to waive any claim for maintenance for herself in the future; and (iv) the meeting was a lengthy one. (It follows from this last

allegation that what is said in (i) to (iii) above is either a cryptic summary of what took place or no more than a partial account.)

Thus on analysis one notes that (i) and (ii) above are the only communications on the part of Mr Lang from which a counter-offer or rejection could conceivably be inferred. But viewed jointly or severally no such conclusion can possibly be reached: they do not hint at a counter-offer, as described by Corbin (supra) or at all. They are couched in language which points the other way. There is therefore simply no evidence indicating, even prima facie, that a counter-offer intervened between the written offer and its formal acceptance in terms of the Rule.

In the course of the debate before us, the onus of proof in another context was raised. It was

contended that in an action on contract, should it be denied that an agreement was concluded, the plaintiff would bear the onus of proving its formation by offer and (effective) acceptance. There is indirect authority for this view. In Dave v Birrell 1936 TPD 192 Greenberg J at 196 cited with approval the statement in Phipson on EVIDENCE, 7th ed. 30 and 31 that

"where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegation rests on him"

and the learned judge added at 197, with reference to the plea and onus in that case:

"The defendant's plea is not a confession and avoidance but is (or rather contains within it) a denial of one of the essential elements of plaintiff's cause of action and the onus therefore rested on plaintiff."

(See too Kriegler v Minitzer and Another 1949(4) SA

821(A) 827 and 828; and Da Silva v Janowski 1982(3) S.A. 205(A) 219 A-C.) It was submitted that similarly the onus of proof was upon the respondent in the present case to prove that the offer existed at the time of its acceptance. In the light of these decisions one may assume that, had the respondent sought to base her cause of action on a contract, the onus of proof - in the true sense (see South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977(3) S.A. 534(A) 547H - 548B) - would have been upon her to prove the contract, i.e., offer and (valid) acceptance. But even in such a case a defendant would be required to raise the issue that the offer came to an end before acceptance and adduce some evidence to that effect. That is so since, ordinarily and without more, offer followed by acceptance results in the conclusion of a contract. However, I have already drawn attention to the fact

that the respondent in this case does not rely on a contract for her cause of action and that what is alleged by the appellant cannot be construed as an averment or assertion that a counter-offer intervened.

Mr de Bruin, who represented the appellant in this court, at one stage tentatively submitted that the fact that the respondent continued with the trial after the written offer had been made, lent some support to the submission that it had been rejected. There is no substance in this contention. During the 15 day period within which a plaintiff may as of right accept the written offer in terms of the Rule, he may - depending on when the offer is made - be obliged to plead or in some other manner proceed with the litigation. Thus no adverse inference may be drawn from his doing so. (One need hardly add that should judgment be given before acceptance, the offer self-evidently can no longer

stand).

In the result I find on the facts that an offer and its acceptance in terms of Rule 34 were proved by the respondent and that she was therefore entitled to the order sought. In the circumstances it is unnecessary to consider whether the right to accept in terms of the Rule is forfeited should there be an implied rejection of the offer (by counter-offer or otherwise), or an explicit rejection, by or on behalf of a plaintiff during the said 15 day period or for that matter at some later stage.

The appeal is dismissed with costs.

M. E. Kumleben
M E KUMLEBEN
JUDGE OF APPEAL

Nestadt JA)
Nicholas AJA) - agree