REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO. 2546/2001

In the matter between:

JOHANNA FREDERIKA NELL **Applicant**

and

LOUISE POTGIETER **Respondent**

JUDGMENT

GORVEN J

[1] The applicant instituted action against the respondent for monies lent and advanced. It was claimed that the sum of R200 000.00 had been loaned on 29 February 2000 and was repayable by no later than 28 February 2001, along with interest at a rate equal to that charged by the applicant's bankers. The respondent defended the action, admitting receipt of R200 000.00 but claiming that this was a donation, not a loan. The action was set down for trial on 4 & 5 February 2002. It was settled on 4 February 2002 by way of a written settlement agreement signed by the applicant and the respondent. In terms of the settlement agreement the respondent undertook to pay the applicant the sum of R224 796.35 on or before 1 December 2002 and interest on that sum at the rate paid on that sum, which had been deposited in an account, by the respondent's bankers. The respondent was also obliged under the agreement to retain the capital and interest in that bank

account and not to withdraw from the account or close it without the consent of the applicant. A clause of the settlement agreement provided as follows:

> The parties agree that the matter set down for trial on the 4th and 5th of February 2002 be postponed *sine die* in anticipation of Defendant's performance date and Defendant agrees that non-compliance with any terms of this agreement, will entitled (sic) the Plaintiff to apply for judgment in terms of Rule 41(4).

[2] When the matter came before court on 4 February 2002, it was noted that the matter had been settled and the action was adjourned *sine die*. It is common cause that the respondent has not paid the money referred to in the settlement agreement and also that she has not kept it in the designated account.

[3] On 5 May 2009 the applicant launched an application in terms of Rule 41(4) of the Uniform Rules of Court for the settlement agreement to be made an order of court. Rule 41(4) provides as follows:

> Unless such proceedings have been withdrawn, any party to a settlement which has been reduced to writing and signed by the parties or their legal representatives but which has not been carried out, may apply for judgment in terms thereof on at least five days' notice to all interested parties.

[4] There is no dispute that the rule applies. There is no dispute that the settlement agreement was reduced to writing and properly signed according to the rule. There is no dispute that it has not been carried out. There is no dispute that the requisite notice period was given. The opposition rested on two grounds, viz.:

1. That the claim had prescribed.
2. If it is found that the claim had not prescribed, that the applicant waived compliance with the terms of the settlement agreement.

It is common cause that the onus on both of these defences rests on the respondent. It was also conceded by both parties during argument that, if the prescription defence failed, the matter would have to be referred for the hearing of oral evidence to resolve the factual dispute as to whether or not the applicant waived compliance with the terms of the settlement agreement. This was so even taking into account the terse manner in which the respondent had dealt with the facts giving rise to her assertion of a waiver.

[5] The respondent submitted that the settlement agreement amounted to a compromise and, accordingly, since the debt became due on 1 December 2002, the claim had prescribed by the time the application was served on her.

[6] Mr Coertzen, who appeared for the applicant, founded his submissions on the prescription defence on a dictum in the case of *Munnikhuis v Melamed N.O.*[1]. In this matter an action had been instituted and settled. The settlement agreement provided that the action would be withdrawn and this was done. The settlement agreement was sued on and the defence of prescription was raised. Before dealing with the facts of the case, the court, per Wunsh J, said the following:

> In pursuance of this settlement, Nick withdrew the proceedings. This method of closure, in contrast to an indefinite postponement, or making the settlement an order of Court, entailed that he was unable later to utilise the provisions of Rule 41(4) to apply for judgment in terms of the settlement. In the events that have happened, the settlement, and in particular clause 18 of it, bound Nick and Joan contractually only. The result is that in terms of s 11(a) of the Prescription Act 68 of 1969... a three-year period of prescription, and not 30 years, is applicable.

[1] 1998 (3) SA 873 (W) at 878B-C

[7] The thirty year period referred to in the dictum was presumably a reference to the period which would have applied had judgment been granted in the action or on the settlement agreement pursuant to Rule 41 (4). S11 (a)(ii) and s11 (d) of the Prescription Act, No 68 of 1969 ("the Prescription Act") provide as follows:

> The periods of prescription of debts shall be the following:
>
> (a) thirty years in respect of- …
>
> (ii) any judgment debt…
>
> (d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.

The common law position prior to the codification of the law relating to prescription was that the period of prescription for *transactio*, into which category certain settlement agreements fall, was 30 years.[2] It appears that the prescriptive period relating to *transactio* is now governed by s11 (d) of the Prescription Act, falling into the category of "any other debt".[3] Neither party contended otherwise.

[8] Section 15(1) of the Prescription Act provides: "The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt". Once process has been served, the rules of court govern the continuance of the action.[4] Mr Coertzen submitted that, because the action was adjourned *sine die* in

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[2] *Voet* 2.15.24; See generally LR Caney: *A Treatise on the Law relating to Novation* (2 ed) at 61

[3] *Loc cit*

[4] He referred in this regard to *Kuhn v Kerbel & Another* 1957 (3) SA 525 (A) at 534A. In this matter Hoexter JA said the following, at 534F-G: "The authorities quoted show that the Roman Law was not adopted in Holland and that there was no time limit within which an action had to be concluded. I have already pointed out that the Prescription Act appears in this respect to be in consonance with our common law. It renders a right unenforceable in a court of law after the lapse of a certain time, but it does not purport to deal with the time within which an action must be concluded." In this case the relevant Act was that of 1943. A part of the section providing for the interruption of prescription on various listed grounds, including the service of process, said that prescription "shall begin to run *de novo* from the date when the interruption occurred". Accordingly, three years after the service of the summons, the defendant sought leave to introduce a special plea that the claim had become prescribed. The court refused leave on the basis that it would not disclose a defence.

anticipation of the performance by the respondent of her obligations under the settlement agreement, the running of prescription remained interrupted.

[9] As a first enquiry it is necessary to analyse the nature of the settlement agreement. Mr Oberholzer, who appeared for the respondent, submitted that it falls within the category of a *transactio*, often referred to by the English law name of compromise. The test for whether an agreement amounts to a *transactio* was dealt with in *Cachalia v Harberer & Company*[5] where Solomon J (as he then was) said the following:

> Now what is a *transactio?* I take the definition given by Grotius, who defines it as an agreement between litigants for the settlement of a matter in dispute.[6]

He went on to assess whether it amounted to a *transactio* in the following manner:[7]

> If, however, we examine the terms of the arrangement which was come to, it appears to me to contain all the essentials of a compromise of a lawsuit. Each party in this arrangement abated some of his previous demands. Each party receded to some extent from the position formerly taken up.

[10] The question arises, then, whether the settlement agreement relied upon by the applicant amounts to a *transactio*. In my view it does. In the language of the *Cachalia* case, both parties abated their positions. The respondent modified her position that the payment of R200 000.00 amounted to a donation and agreed, contrary to her previous stance, that monies were owing to the applicant. The applicant not only extended the time for payment but accepted a different interest rate and appears to have required payment of something less than the original sum claimed.

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[5] 1905 TS 457 at 462

[6] For the purpose of this judgment this definition suffices but Caney explains, with reference to the old authorities, that it is not necessary for a lawsuit to have commenced. Caney *op cit* at 54

[7] At 462

[11] The significance of this enquiry is that, as stated in *Cachalia's* case and accepted thereafter, a *transactio* "whether embodied in a judgment of the court or extra-judicial has the effect of *res judicata*, and is an absolute defence to an action on the original contract".[8] The underlying reasoning was explained with reference to the old authorities by de Waal J in *Estate Erasmus v Church*[9] as follows:

> The effect of a compromise is dealt with by Domat in the same volume [Vol 1], sec 1086 – "Transactions," he says: "have a force equal to the authority of things adjudged, because they are in the place of a judgment, which is so much the stronger because the parties have consented to it; and because the engagement which delivers the parties from a lawsuit is altogether favourable. Voet (2.15.21) says that the effect of a compromise is that it destroys a lawsuit and has the force of *res judicata*.

In *Western Assurance Co v Caldwell's Trustee,*[10] Innes CJ explained that the old authorities recognised three types of special plea, declinatory, dilatory and peremptory. A *transactio* fell into the third category since, "if established and valid, [it] is an absolute defence to the action compromised. It has the effect of *res judicata*." He went on to show that it is one of the exceptions to the rule that a defence which arose after *litis contestation* cannot be pleaded and that it most certainly could be relied upon as a defence to the original claim.

[12] It is settled law that, where a *transactio* is concluded, the plaintiff can only fall back on the original cause of action if the settlement agreement expressly or by necessary implication reserves the right to do so.[11] There is no express reservation

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[8] At 464. See also *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A) at 922B-C
[9] 1927 TPD 20 at 24f
[10] 1918 AD 262 at 270-271
[11] *Van Zyl v Niemann* 1964 (4) SA 661 (A) at 669H-670A

of such a right in the present matter. The words, “necessary implication” refer to a tacit term as was explained by Corbett JA (as he then was) in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration*.[12] He went on to set out the test for whether or not a tacit term must be imported into a contract as follows:

> The practical test to be applied - and one which has been consistently approved and adopted in this Court - is that formulated by SCRUTTON, L.J., in the well-known case of *Reigate v Union Manufacturing Co.*, 118 L.T. 479 at p. 483:
>
> > "You must only imply a term if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that you can be confident that if at the time the contract was being negotiated someone had said to the parties: 'What will happen in such a case?' they would have both replied: 'Of course, so-and-so. We did not trouble to say that; it is too clear.'"
>
> This is often referred to as the "bystander test".[13]

[13] Mr Coertzen submitted that such a term was necessarily implied by the recordal in the agreement that the action was to be adjourned *sine die* rather than withdrawn “in anticipation of Defendant’s performance date…” Such a provision can only be needed to give business efficacy to the agreement by allowing the applicant to benefit from the provisions of Rule 41(4). Had it been done in order to allow the applicant to fall back on the original cause of action, it is unlikely to have set out only one consequence of a breach. It is instructive that the balance of clause g following from that mentioned by Mr Coertzen provides “Defendant agrees that non-compliance with any terms of this agreement, will entitled (sic) the Plaintiff to apply for judgement in terms of Rule 41(4)”. Of course, even if the agreement was silent

[12] 1974 (3) SA 506 (A) at 532C-D
[13] At 533A-C

on this point, the right to utilise Rule 41(4) arises by virtue of the rule. There was no need for the parties to agree it. Setting out such agreement lends force to the opposite interpretation to that contended for by the applicant, namely, that the parties were specifying that right which would become available to the applicant in the event of a default. It is difficult to imagine in the light of this stipulation that, had either party been asked at the time what the applicant would be entitled to do in the event of default, they would unanimously have asserted that she could fall back on the original cause of action. If this were what was intended, it would have required the applicant to set the matter down for trial once more when a simple, expeditious, procedure had been agreed for her to obtain judgment on 5 days' notice without either the costs implication or the uncertainty inherent in litigation. I am therefore of the view that no such term can be imported. This means that the *transactio* did not reserve the right to fall back on the original cause of action and had the effect of *res judicata*.

[14] The applicant sought to rely on the judgment of Galgut J (as he then was) in *Barbour v Herf.*[14] This case involved a confession to judgment in terms of Rule 31(1). The learned judge mentioned that such confessions to judgment were often accompanied by contemporaneous agreements giving rise to obligations failing which the confession to judgment may be filed and judgment sought thereon in accordance with the rule. He made it clear that what is sought and may be granted in any confession to judgment must be judgment on the claim or claims in the

[14] 1986 (2) SA 414 (N)

summons and not on a new cause of action.[15] Mr Coertzen sought support for the applicant's contention in the following *dictum* dealing with Rules 31(1) and 41(4):

> There may well be cases where an application for judgment might equally fall within the ambit of both subrules. I can see no reason in principle why in such a case the plaintiff cannot make use of either subrule, subject of course to the power of the Court to make a special order for costs if the more expensive procedure is adopted for no good reason.[16]

Mr Coertzen submitted that it is only if the action remains alive after a settlement agreement incorporating a confession to judgment has been concluded can judgment be given on the confession to judgment. Where, therefore, the plaintiff had an election to proceed by either Rule 31(1) or Rule 41(4), he submitted, the conclusion of such settlement agreement does not affect the interruption of prescription brought about by the service of process in the original action.

[15] In this regard it is necessary to make two observations. First, Galgut J had earlier dealt with the position where a settlement agreement had been concluded in the following terms:

> Broadly speaking it is of course perfectly correct to say that, if the true cause of action is founded on an agreement of settlement, then Rule 31 (1) cannot apply. But this statement requires qualification. If the agreement of settlement which is

[15] At 419I. For a fuller exposition, see *Citibank NA v Thandroyen Fruit Wholesalers CC and Others* 2007 (6) SA 110 (SCA). Here an application had been brought for the liquidation of the first respondent. It was settled by way of a settlement agreement in terms of which, amongst other things, the respondents acknowledged themselves to be jointly and severally indebted to the applicant in an amount of money and signed confessions to judgment in that amount. When they defaulted under the settlement agreement, the applicant filed the confessions to judgment and sought judgment in terms of Rule 31(1). This was granted but an application to rescind the judgment was launched and granted on the basis that it was not competent under Rule 31(1) since the judgment was not on the claim in the original summons which, in terms of the definition in the Rules, included a Notice of Motion. The original applicant counter-applied, in the event of rescission being granted, for payment in terms of the settlement agreement. The Supreme Court of Appeal upheld the granting of the rescission application but overturned the refusal of the counter application for judgment on the settlement agreement since it clearly constituted a separate cause of action.

[16] At 420F-G

> concluded contemporaneously with the execution of the confession amounts to a novation of the original cause of action set out in the summons, then the confession can ordinarily not be used for the purposes of obtaining a judgment in terms of Rule 31 (1), for the simple reason that, for the subrule to apply, the confession must be one which confesses (in whole or in part) "the claim contained in the summons." Even where there has been a novation, however, Rule 31 (1) may nevertheless still be applicable. This occurs where the novating agreement contains an express or tacit term that should the defendant fail to fulfil any one or more of his obligations in terms thereof, the plaintiff will be entitled, or may elect, to take judgment, not in terms of the agreement, but in terms of plaintiff's cause of action as set out in the summons. By this means the plaintiff will have stipulated for himself the right to fall back on the original cause of action, and therefore on the confession.[17]

He therefore distinguished between settlement agreements which do not novate the debt claimed in the summons and those which do. He thereafter distinguished between those settlement agreements which novate without more and those which are subject to a term entitling the plaintiff to fall back on the original cause of action.

[16] Secondly, the aspect dealing with whether or not an applicant can proceed in terms of either rule clearly did not deal with a *transactio* which did not reserve the right to fall back on the original cause of action. I have already found that the present settlement agreement amounted to a *transactio* which is a strong form of novation.[18] I have also found that the settlement agreement did not contain a term, either express or tacit, reserving to the applicant the right to fall back on the original cause of action. In addition, there was no confession to judgment which accompanied the settlement agreement. The *dictum* relied upon does not apply. On

[17] At 417E-H
[18] Caney *op* cit at 44

the contrary, because the settlement agreement amounted to a *transactio,* it has the effect of *res judicata* on the original dispute. This means that the submission by Mr Coertzen that, since the original claim has not been withdrawn, the cause of action arising from the settlement agreement cannot prescribe, is not supported by the reasoning in *Barbour's* case. The position where the right was reserved to file a confession to judgment may well be dealt with by s 15(3) of the Prescription Act but, since this is not the situation before me, it is unnecessary to deal with it.

[17] The settlement agreement gives rise to a new, distinct debt. It alone regulates the rights and obligations of the parties. Under it the debt was due no later than 2 December 2002. There is no legal principle in favour of prescription in respect of the new debt being interrupted by way of process served in respect of the debt rendered *res judicata*. This is also made clear by the wording of s 15(1) of the Prescription Act requiring for an interruption service of process *whereby the creditor claims payment of the debt*. It would be contrary to legal principle to allow service of process in the original claim to interrupt prescription in respect of a distinct cause of action in respect of a debt not in existence at the time of service of process claiming a different debt entirely.

[18] The provisions of Rule 41(4) are designed to provide an incentive to settle disputes in a way which does not disadvantage a plaintiff. If the rule had not been promulgated a plaintiff would, in the event of a breach of a *transactio* which did not reserve the right to fall back on the original cause of action, have to commence *de novo* to recover the new debt. What Rule 41(4) does is provide a summary

procedure for this. It does not create substantive rights and obligations; it is purely procedural.

[19] It was submitted on behalf of the applicant that the requirement that the action must not have been withdrawn shows that the legislature intended to preserve the position prior to the conclusion of the settlement agreement, viz. that prescription had been interrupted. There could be a number of reasons why this aspect of the rule was included. For one thing, there would need to be a fresh action or application if the action had been withdrawn because the action would not revive on breach of the settlement agreement. The provision also operates practically in using the same case number, providing for service on the same address nominated in the action and the presence in the court file of the pleadings, notices and orders showing what had taken place in the action. There is certainly nothing in this provision to suggest that it was intended to interrupt prescription in respect of a new debt brought into being after the action was instituted. The submission is therefore not sound.

[20] In the light of the above reasoning, the debt under the settlement agreement became due on 2 December 2002. It had accordingly prescribed by the time the application was served on the respondent.

In the event, the application is dismissed with costs.

Date of Application : 30 October 2009

Date of Judgment	:	9 November 2009
Counsel for the Applicant	:	Adv Y Coertzen Instructed by Botha Duvenage & Ihlenfeldt c/o Woodhead Bigby & Irving Incorporated.
Counsel for the Respondent	:	Mr J T Oberholzer of Johan Oberholzer & Company