REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

REPORTABLE
Case number: **042/07**

In the matter between:

BE BOP A LULA MANUFACTURING &
PRINTING CC Appellant

and

KINGTEX MARKETING (PTY) LTD Respondent

CORAM: **HARMS ADP, NAVSA, LEWIS JJA, HURT and MALAN AJJA**

HEARD: **20 NOVEMBER 2007**

DELIVERED: **29 NOVEMBER 2007**

Summary: Compromise - cheque sent in 'full and final settlement of account' – whether offer of compromise – deposit of cheque – whether acceptance of offer of compromise

Neutral citation: This judgment may be cited as *Be Bop a Lula v Kingtex* [2007] SCA 162 RSA.

JUDGMENT

MALAN AJA:

[1] This is an appeal with leave of this court against the judgment of the full court of the Cape High Court,[1] dismissing the appellant's appeal against the judgment of the trial court (Traverso DJP), and upholding the respondent's claim. The appeal concerns the rejection of the appellant's defence of compromise based on the deposit and payment of a cheque marked 'full and final settlement of account' and sent to the respondent. This judgment overrules the judgment of the court a quo.

[2] The appellant ordered 60 000 T-shirts from the respondent, a garment manufacturer. Forty thousand were delivered and invoiced at R1 003 104,35. Four payments were made and a credit passed leaving a balance of R229 846,07. The T-shirts were ordered to enable the appellant to sell them to Adidas, its customer. They were delivered late and a dispute arose as to their quality. Meetings were held but the appellant eventually repaired some of the garments and sold the remainder to Adidas at half price. On 19 February 2002 the appellant sent a letter to the respondent headed 'Credit Request', proposing in this way to recoup its losses on the Adidas contract by claiming a discount of R122 649,18 to be deducted from the balance owing. The appellant sent its cheque for the balance, R107 196,89 with this letter as well as a letter headed 'Final Reconciliation', also dated 19 February 2002, to the respondent. The

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[1]Reported as *Be Bop a Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd* 2006 (6) SA 379 (C).

cheque was post-dated 28 February 2002. The cheque was deposited for special clearance by an employee of the respondent and paid on 28 February 2002. On 1 March 2002, the respondent's attorneys faxed a message to the appellant purporting to reject the offer of compromise, and suggesting that the appellant stop payment of the cheque but stating that, should this not be possible, the money would be held in trust pending an action by the respondent to recover the full balance owing. This letter was faxed to the appellant after business hours on Friday 1 March 2002 and came to the notice of the appellant's member, Mr Webster, only on Monday 4 March 2002. He called the bank to ascertain whether it was still possible to stop payment of the cheque and, on learning that it was not, wrote to the respondent's attorneys on that day informing them that it was too late to stop payment and that if the respondent wished to pursue its claim for the balance the appellant would counterclaim for loss of profits on the T-shirts short delivered and for damages for late delivery. The proceeds of the cheque were paid into the respondent's attorneys' trust account on 8 March 2002 and R12 750,89 was deducted in respect of fees owed by the respondent to his attorneys. The balance of R94 446 was paid over to the respondent's new attorneys on 30 June 2002 and appropriated to legal fees in other matters in which they acted for the respondent.

[3] The Credit Request refers to 'Rejects Delivered To Adidas At Half Price' and sets out their value totalling R52 702 to which the cost of 're-examining', 'repairs' and value added tax is added, leaving a balance of R122 649.18 for which a credit is requested. The letter states that most of the defects related to 'spirality' and that all garments were re-examined except 2819 'uniform'. The repairs related to 'uneven hems' which were 'unpicked, trimmed straight, and re-hemmed'.

[4] The Final Reconciliation shows the total of R1 003 104.35 invoiced by the respondent, four payments made as well as a credit note passed by the respondent, leaving a balance owing of R229 846.07. From this amount is then deducted the amount of the Credit Request, R122 649.18 leaving a balance 'due' at 28 February 2002 of R107 196.89. This was also the amount of the cheque dated 28 February 2002

which was payable to the respondent or bearer and bore the words ‘full and final settlement of account’ underlined and written at the foot of the cheque across its face.

[5] Mr Wang, a director of the respondent, testified that the cheque was deposited on 28 February 2002 for special clearance according to company policy, without his knowledge and when he was not present at the office. After he received information of the cheque and its deposit he consulted with the respondent’s attorneys. The consultation led to the letter of the respondent’s attorneys dated 1 March 2002 recording the following:

‘We address this letter to you on behalf of our client who has approached us for advise [sic] 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 of 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 to 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.’

[6] The appellant’s response was sent by fax at 9h15 on Monday 4 March 2002. It recorded that the respondent’s attorneys’ fax was received only at 8h15 on Monday 4 March 2002 because the office closed early on the previous Friday and stated that the

cheque went through the appellant's bank account on 28 February 2002 and that it was too late to stop its payment. The appellant added that '[it] therefore accept[s] that by depositing the cheque, your client accepted the condition of it being in full and final settlement.'

[7] The respondent's attorneys acknowledged receipt of the previous letter on 7 March 2002 and replied that the respondent would deposit the amount of the cheque in their trust account 'pending the outcome of this dispute.' They also indicated that they would be proceeding to issue summons for the recovery of the full amount allegedly owing.

[8] Mr Webster confirmed in evidence the contents of his letter of 4 March 2002 and that he had endorsed the words 'full and final settlement of account' on the cheque. He testified how he had arrived at the figure claimed as a credit and the balance left owing by the appellant. On receiving the respondent's attorneys' letter of 1 March 2002 he telephoned his bank to inquire whether it was still possible to stop payment of the cheque. He was informed that it was not because the cheque had been put through special clearance. His evidence in chief in this regard is as follows:

'On receipt of that fax I then immediately sent back my reply fax to their attorneys, when I say immediately, that was after first phoning the bank to find out whether it was still physically possible to stop the cheque, and they said no, because it was put through special clearance on the 28th there was no chance of anything like that. That is why I immediately wrote the letter to [the respondent's attorneys] saying that in my opinion those conditions stood, which I thought was right at the time.'

Under cross-examination he testified as follows:

'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 have been 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.'

[9] In his judgment for the full court Van Zyl J observed that neither the Credit Request nor the Final Reconciliation that accompanied the cheque contained a reference to an offer of compromise or to the mode of acceptance. From this he inferred that the appellant merely intended to inform the respondent of the amount it believed it owed. The cheque, he concluded, was therefore tendered with a view to making payment and not for the purpose of making an offer of compromise. The inscription on the cheque was simply a confirmation of what the appellant believed it owed. But even if, he said, proceeding from the premise that a compromise required ascertaining the 'true intention' or actual consensus of the parties, the tender of the cheque could be seen as an offer of compromise, it was expressly rejected despite the cheque's having been deposited and paid. This rejection was confirmed by the respondent inviting the appellant to stop payment. He further found that the appellant did not regard payment of the cheque as an acceptance of the offer because Mr Webster attempted to stop payment when invited to do so by the respondent's attorneys. Referring to Mr Webster's evidence Van Zyl J said[2] that had the appellant 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 … that the respondent had, by depositing the cheque, "accepted the condition of it being in full and final settlement".'

He thus came to the same conclusion as did Traverso DJP in the trial court that the appellant had no intention of holding the respondent to the cheque but only formed that intention on learning that the cheque had been paid. The appellant moreover, Van Zyl J said, never objected to the proceeds of the cheque being put in the attorneys' trust account nor did it claim that the amount be repaid.

[10] The essential issue is whether an agreement of compromise was concluded: one is concerned simply with the principles of offer and acceptance.[3] The first question is whether the cheque accompanied by the Credit Request and Final Reconciliation constituted an offer of compromise. In other words, 'the proposal, *objectively* construed,

[2]Para 46 (para 47 of the reported judgment).

[3]*ABSA Bank Ltd v Van de Vyver* NO 2002 (4) SA 397 (SCA) para 17.

must be intended to create binding legal relations and must have so appeared to the offeree.'[4] Van Zyl J, however, proceeded from the premise that[5]

'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.'

He added:[6]

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 between them. More particularly it must be satisfied that the debtor has made an offer of settlement and that the creditor has accepted it.'

With respect, these conclusions have been stated too generally. Although, generally, a contract is founded on consensus, contractual liability can also be incurred in circumstances where there is no real agreement between the parties but one of them is reasonably entitled to assume from the words or conduct of the other that they were in agreement.[7] This is, as I will show, what happened in this case.

[11] The words inscribed on the cheque, 'full and final settlement of account', must be construed in the context of the two letters and the background of the dispute between the parties to ascertain whether it was intended to effect a compromise or to pay an admitted liability.[8] In the Credit Request the appellant sets out exactly how the amount of the credit requested is composed asking for a credit in that amount. This is surely an offer that the respondent could have accepted or declined. Read with the Final Reconciliation, the appellant again shows the amount due after taking the amount of the credit requested into consideration. The two letters set out clearly the extent to which the appellant asserts that it is liable. In this context the words 'full and final settlement of account' on the cheque can only amount to an offer to the respondent to settle their dispute by payment of that amount which the latter could have accepted or declined, but

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[4] DT Zeffertt 'Payments "In Full Settlement"' (1972) 89 *SALJ* 35 at p 38.

[5]Para 42(b).

[6]Para 42(c).

[7]RH Christie assisted by Victoria McFarlane *The Law of Contract in South Africa* 5ed (2006) 24 ff and see, in particular, *Sonap Petroleum SA (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) 238I–240B.

[8]*ABSA Bank Ltd v Van de Vyver NO* above para 16.

on acceptance of which the dispute between the parties would be compromised.[9] The fact that the appellant admitted liability in a certain amount is no bar to the proposal being construed as an offer of compromise.[10]

[12] This is indeed how the respondent understood these three documents. They not only objectively constituted an offer of compromise but were also so understood by the very person they were addressed to. This is demonstrated by the letter the respondent's attorneys wrote on 1 March 2002. This conclusion is not affected by the fact that Mr Webster attempted to stop payment of the cheque on receiving this letter: it seems entirely probable that he would attempt to do so on learning that his offer of compromise was purportedly rejected. His conduct does not detract from the objective construction that has been placed on the three documents and, in any event, does not show that he formed an intention to compromise the matter only subsequent to the refusal. It means only that he would, on refusal of the offer, rely on his original cause of action. It is moreover trite that an offeror may prescribe the manner in which an offer may be accepted. The cheque accompanying the two letters formed part of the offer and amounts to an invitation to deposit the cheque to indicate its acceptance.

[13] The second question is whether the deposit of the cheque on 28 February 2002 and retention of the proceeds, albeit in the attorneys' trust account, and subsequent appropriation in payment of fees constitutes acceptance of the offer. Usually an acceptance may be inferred from the retention of the money or deposit of the cheque accompanying the offer[11] but, as was emphasised,[12] 'in every case it must be a question of fact depending on all the circumstances.'

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[9] *ABSA Bank Ltd v Van de Vyver NO* above para 16.

[10] *ABSA Bank Ltd v Van de Vyver NO* above paras 15-18.

[11] *Van Breukelen en 'n Ander v Van Breukelen* 1966 (2) SA 285 (A) 290 G-H; *Turgin v Atlantic Clothing Manufacturers* 1954 (3) SA 527 (T) 532G–533A; *Cecil Jacobs (Pty) Ltd v Macleod & Sons* 1966 (4) SA 41 (N) 48H-51A; *Louw v Granowsky* 1960 (2) SA 637 (SWA) 641 F-G; *Neville v Plasket* 1935 TPD 115 120.

[12] *Paterson Exhibitions CC v Knights Advertising and Marketing CC* 1991 (3) SA 523 (A) 529 D.

[14] In the present case the cheque was deposited by one of the respondent's employees following the respondent's policy to deposit cheques above a certain amount for special clearance and paid by the bank on the same day.[13] The proceeds of the cheque, however, were retained in the respondent's attorneys' trust account. The money, albeit in the trust account, was not held for the benefit of both parties. Neither was it held 'pending the outcome of the dispute'. In fact, fees and expenses were deducted and the balance transferred to the respondent's new attorneys and appropriated to fees. The respondent had to accept or reject the offer of compromise. It could not add any conditions to it and retain the money. It had no right to do so and should have paid the proceeds back to the appellant.[14] Any conditions attached to the acceptance are irrelevant[15] and by retaining the proceeds of the cheque and appropriating it the respondent became bound by the terms of the offer.[16] In these circumstances, although actual consensus between the parties may have been lacking, the appellant acted reasonably in relying on the impression that the respondent was accepting the offer of compromise and compromising its claim.[17]

[15] There was a conditional counterclaim by the appellant based on the short-delivery of certain T-Shirts which was successful in the amount of R80 000. The counterclaim can, however, not stand if the matter has been compromised as I have found. The problem is that the respondent did not lodged a cross-appeal (conditional or otherwise). This judgment can accordingly not deal with that issue.

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[13]This is therefore not a case such as *Blackie Swart Argitekte v Van Heerden* 1986 (1) SA 249 (A) where the employee who deposited a cheque sent in full and final settlement had no authority to settle the dispute, and where there was no evidence that the debtor believed that either the secretary or her employer had such authority. In the present matter the question of the respondent's employees' authority to compromise, or lack thereof, was cursorily dealt with in evidence. It was not argued before this court that the respondent's employee lacked authority.

[14]*Paterson Exhibitions CC v Knights Advertising and Marketing CC* above 528 G-H.

[15]*Tractor & Excavator Spares (Pty) Ltd v Lucas J Botha (Pty) Ltd* 1966 (2) SA 740 (T) 743 D-E; *Van Breukelen* above 290 G-H.

[16]Contrast *Burt v National Bank of SA Ltd* 1921 AD 59.

[17] Cf *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 (4) SA 345 (SCA) paras 16 and 17

[16] It follows that the appeal should be upheld with costs. The following order is made:

1 The appeal is upheld with costs;

2 The order of the court a quo is set aside and replaced by the following:

‘(a) the appeal is upheld with costs:

(b) the order of the court a quo is set aside and replaced with an order dismissing the claim with costs.’

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Malan AJA

Acting Judge of Appeal

CONCUR:

HARMS JA

NAVSA JA

LEWIS JA

HURT AJA