IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE
CASE NO 724/99

In the matter between

ABSA BANK LIMITED **Appellant**

and

MARTHA MARIA VAN DE VYVER N.O. **Respondent**

CORAM: HOWIE, ZULMAN et NAVSA JJA

Date heard: 25 February 2002

Delivered: 22 March 2002

Offers of payment in full settlement.

J U D G M E N T

HOWIE JA

HOWIE JA

[1] This case is about an amount paid by cheque, professedly in full and final settlement. The respondent is executrix of her deceased husband's estate. The appellant is the successor in title of the erstwhile Trust Bank Limited, having acquired its assets and assumed its liabilities. When the deceased died in October 1996 his debts included the respective sums owing on two overdrawn current accounts at Trust Bank, Grahamstown. To secure those debts (and other amounts he owed Trust Bank) the deceased had caused several mortgage bonds to be registered over landed property he owned at Port Alfred.

[2] To recover what was owing on the current accounts the respondent sued the appellant in the High Court at Grahamstown. In her defence the respondent pleaded that the claim for payment of the accounts had been

settled by the appellant's acceptance of an offer of compromise. The appellant replicated that there had been no existing dispute susceptible of settlement, that it had disclaimed having accepted the cheque in question in settlement and that the alleged settlement was in conflict with a non-variation clause in the mortgage bonds.

[3] The learned trial Judge (Froneman J) concluded that a pre-existing dispute was not an essential requirement for settlement and that the alleged settlement, which was not contrary to the terms of the bonds, had been effected as alleged. The claim was therefore dismissed. The appeal is with the trial Court's leave.

[4] In presenting his case counsel for the appellant, realistically, did not persist in the contention that there had been no pre-existing dispute. The evidence reveals that the deceased ceded an insurance policy on his own life to Trust Bank as security in respect of all his indebtedness to it, including the

two overdrawn accounts. Payment of the premiums and, with them the policy, had been allowed to lapse. The respondent blamed the appellant for this state of affairs and the appellant, posthumously, blamed the deceased. What is plain is that receipt by the appellant of the policy's proceeds would have reduced the combined indebtedness on the two accounts considerably. If nothing else, the quantum of that indebtedness was very much a matter in dispute when, under cover of a letter dated 16 July 1997, the respondent's attorney sent the appellant the cheque.

[5] The letter reads as follows:

> "i/s: BOEDEL WYLE JH VAN DE VYVER
> REKENINGNOMMER: 04049441385
> EN REKENINGNOMMER: 04049231381
> Ons verwys na bogenoemde twee bankrekeninge gehou by u instansie.
> 'n Metropolitan Lewenspolis, Sertifikaatnommer TL 26714 uitgeneem oor die lewe van Wyle JH Van de Vyver is aan u bankinstansie gesedeer as sekuriteit ten opsigte van sy oortrokke fasiliteite by u instansie. Uitbetaling van hierdie polis is geweier as gevolg van die feit dat die premies nie tot datum van dood van die oorledene betaal is nie. Wyle Mnr JH Van de Vyver het 'n debietorder by u

instansie onderteken ten opsigte van die betaling van die betrokke premies. Die onus was op u bankinstansie om toe te sien dat sodanige premies betaal word.

In die lig van bogenoemde word 'n bedrag van R180 000-00 (EEN HONDERD EN TAGTIG DUISEND RAND) in volle en finale vereffening ten opsigte van rekeningnommer 04049231381 en rekeningnommer 04049441385 aangebied.

Ons sluit dan hierby ons tjek ten bedrae van R180 000,00 (EEN HONDERD EN TAGTIG DUISEND RAND) in en sien uit om van u te verneem."

[6] The appellant answered as follows by letter dated 8 August 1997:

"Ondersoek is ingestel om welke rede premies op Metropolitan Polis nie tot datum van dood betaal is nie.

Pencor Wholesalers CC, rekeningnommer 01-01481115-6 is gedebiteer met betaling van premies. Eerste premie ten bedrag van R240-00 is op 1 Maart 1990 gemaak, waarna maandelikse premies ten bedrag van R120-00 gemaak is tot September 1991 toe rekening in opdrag van oorledene gesluit is.

Indien 'n rekening gesluit word, rus die onus op die kliënt indien daar debietorders op die rekening deurgaan om alternatiewe reëlings te tref vir betaling van premies.

Die tjek ten bedrae van R180 000-00 kan dus nie as volle en finale vereffening beskou word nie aangesien die uitstaande bedrag baie meer beloop.

Ons bevoordeel ons regte deur die tjek op rekeningnommer 04-04944138-5 met die grootste uitstaande balans in te betaal.

Ons vertrou dat u dit in orde sal vind."

[7] The evidence reveals that the appellant deposited the cheque on 8 August 1997 and applied the proceeds in reduction of what was owing on the larger of the two overdraft debts. In short, it appropriated the money. The record does not establish when the appellant's letter was posted. Accordingly one cannot conclude that posting preceded deposit. And there was at no stage any offer to return the cheque.

[8] In this regard the appellant's counsel made the concession, both at the trial and in this Court, that if the respondent's attorney's letter of 16 July 1997 amounted to an offer of compromise then the deposit of the cheque and the appropriation of its proceeds constituted acceptance of the offer.

[9] The elements of effective acceptance may constitute a question of law but the question whether those elements have been proved is one of fact. (*Burt, N.O. v National Bank of SA, Ltd.* 1921 AD 59 at 62 and *Paterson*

Exhibitions CC v Knights Advertising and Marketing CC, 1991 (3) SA 523 (A) at 529 C-D.) Of significance here is that on a material number of occasions it has been held that where a creditor receives payment offered in full settlement and keeps the money, such retention is enough to constitute acceptance and bar proceedings for any balance of the claim notwithstanding the creditor's efforts to qualify the acceptance. See *Andy's Electrical v Laurie Sykes (Pty) Ltd* 1979 (3) SA 341 (N) and the cases quoted at 343 B-C. In *Paterson Exhibitions* at 529 B-C the correctness of those cases was not questioned but at 529 C-D, with reference to *Burt's* case, it was stressed that although acceptance may usually be inferred from the creditor's retention of the money, acceptance must always be a question of fact depending on all the circumstances. In the latter case, the debtor proposed settlement by offering one current cheque and five post-dated cheques. The creditor accepted the current cheque but not the offer of the others. The

Court held (at 528 D-F) that there could only have been acceptance if the offer had been accepted in its entirety. The creditor's response was therefore a rejection despite retention of the proceeds of the current cheque. In the present case, by contrast, there was a simple offer of one cheque the proceeds of which were retained. Nothing took the matter outside the ambit of cases such as *Andy's Electrical.* Counsel's concession that acceptance occurred was, therefore, correctly made.

[10] Turning to the crucial question whether the letter of 16 July 1997 was an offer of compromise, it is appropriate to begin by observing that compromise is the settlement of disputed obligations by agreement: Christie, *the Law of Contract in South Africa*, 4th edition, 529. The case law of particular relevance to payment offered "in full settlement" or "full and final settlement" begins with, and is mainly centred upon, what was said in *Odendaal v Du Plessis* 1918 AD 470 and *Harris v Pieters* 1920 AD 644.

In *Odendaal* the defendant's plea in a damages action tendered an amount "in settlement" of the claim. The trial court awarded the plaintiff no more than was tendered and he was ordered to pay costs incurred after the date of tender. The question for decision by this Court was whether the tender afforded the defendant effective protection against an adverse costs order. Put the other way, did it subject the plaintiff to the risk of such an order? This entailed examination of the law concerning a tender "in settlement" or "in full settlement". After consideration of English and Roman-Dutch sources it was held that to afford such protection (or carry such risk) a tender had to be unconditional in the sense that it embodied no condition to which the creditor could legally object. The expression "in full settlement" in a tender inevitably imported the condition that if the creditor accepted the tender and balance of the claim would be abandoned. However, this was

not a condition to which the creditor could in law object. Therefore the operative effect of the tender was not destroyed by the quoted words.

[11] What is clear is that *Odendaal* had solely to do with tender as a procedural question in the context of litigation. The issue was not whether or to what extent a tender was an offer which, on acceptance, would give rise to a compromise, but whether non-acceptance of a tender impacted upon the matter of costs. Tender in the procedural sense is distinct from tender or offer as the necessary precursor to a contract of compromise. As De Villiers JA remarked in *Harris* at 654, with possibly unintended understatement, the use of the word "tender" in a double sense "is apt to lead to confusion". It has. The extent of the confusion and way to its eradication have been shown by Professor D Zeffert, *"Payments 'In Full Settlement' ",* (1972) 89 SALJ 35 and Professor RH Christie in his quoted

work at 531-533. Their respective analyses and exposition are clear and compelling.

[12] It was in the very case of *Harris*, in the judgment of Innes CJ, that the confusion originated. The distinction between the procedural and contractual meanings of "tender", if I may say so with due deference, was not entirely clearly maintained.

[13] In *Harris* two debts were in contention. One was admitted in full but liability for the other was denied. The debtor sent a cheque "in full settlement" of the first. When payment was sought in respect of the second, the debtor denied liability on the strength of his payment having been in full settlement of all indebtedness. The trial Judge upheld the debtor's contention. Innes CJ, considering that the trial Judge had failed to distinguish payment from tender (tender being an offer of payment) proceeded to explain (at 648) the decision in *Odendaal* as to what tender "in

full settlement" involved. He then pointed out (at 649) that the words "in full settlement" might sometimes be used, not to import the condition that acceptance would do away with the balance of the claim, but rather to emphasise the tenderer's view as to the extent of his liability. In the latter situation the words concerned would, for practical purposes, be meaningless and any balance of the claim could be claimed despite retention of the payment. It also made no difference, said the learned Chief Justice, whether the tenderer admitted any liability, adding that where all liability was denied the offer was in essence one of compromise and the position was clearer still.

[14] Turning from tender in full settlement (obviously in the sense meant in *Odendaal)* Innes CJ then discussed (at 649-650) the case where (quite outside the sphere of litigation) money was sent in full settlement with an admission of liability as to the extent of the remittance. Here there were

two possibilities. It was a question of fact whether the money was sent to accompany the tender and to be retained if the tender was accepted, or, on the other hand, whether it was sent in payment of an admitted liability, but purportedly subject to the condition inherent in the expression "in full settlement". In the former situation the principles in *Odendaal* applied. In the latter, additional considerations arose. Payment (as opposed to tender) had to be in the exact terms and to the exact extent of the obligation. The debtor could not vary the amount of the payment or impose a condition not in the parties' contract or implied by law. In the case of payment (i e of an admitted liability) "in full settlement" the creditor was entitled to ignore those words. He therefore had the right to reject the condition they imply, to keep the payment and to sue for any balance.

[15] There can be little doubt, in my respectful view, that in discussing a tender in the context of money sent in full settlement the learned Chief Justice was essentially, if not intentionally, referring to an offer of compromise. True, he had earlier in the judgment appeared to confine compromise to the case where an alleged debtor denied all liability but nothing suggests that he there intended to formulate a statement of universal application. There is, logically, no reason why compromise cannot be offered and attained even where the debtor has no defence. In other words even if the entire alleged indebtedness is owing why can there not be settlement at a lesser figure? Moreover the learned Chief Justice concluded the discussion (at 650) with the observation that whether one was dealing with a tender or with payment coupled to a non-binding condition, was a question of the parties' intention as shown by their statements and conduct. Little, if anything, further was needed, one would think, to convey that the

question envisaged was contractual. These views on the meaning of the relevant passages in the judgment of Innes CJ are supported, I consider, by the case of *Paterson Exhibitions*. There, liability was not denied; some liability was admitted; and the amount tendered equated to the full extent of the alleged debt. It was held (at 528 B-D) that an offer of compromise had been made. And at 529 B-C tender and offer of compromise were referred to as though they were one and the same thing.

[16] What the judgment of Innes CJ in *Harris* at 649-650 does serve to show clearly, in my view, is that the expression "in full settlement" is not in itself ambiguous but that its effect differs depending on the context in which it is used: *Karson v Minister of Public Works* (1996 (1) SA 887 (E) at 895 F-G. 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.

[17] To sum up: the term "tender" should be confined to the procedural context discussed and explained in *Odendaal*. Outside that sphere one is squarely in the realm of contract and I endorse, with respect, the suggestion of the learned Judge in the Court below - expressed not in this matter but in *Kei Brick and Tile Co (Pty) v AM Construction* 1996 (1) 150 (E) at 159 D-E - that one is then simply concerned with the principles of offer and acceptance.

[18] 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. In *Paterson Exhibitions*, for example, the admission was, in effect, no more than that something was owing, but without admitting how much or that the payment offered represented the admitted indebtedness.

[19] The caveat that requires mention, of course, is that debtors who express themselves inadequately in their intentions to achieve a compromise run the risk of having their words interpreted against them: Christie 533. There is therefore much to commend in the ways suggested by the learned

author at 533-534 and by Professor Zeffert at 48 of the Law Journal article, in which clarity can be promoted when offers of compromise are formulated.

[20] Having reached these conclusions there is no point, for present purposes, in referring to further case law. The question is whether the respondent's attorney's letter of 16 July 1997 was an offer of compromise.

[21] The evidence failed to establish what the overall indebtedness on the two overdrawn accounts was on that date. All that is on record is that counsel for the parties, who also appeared in this Court, were agreed that the total sum, taking the two accounts together (and presumably meaning all capital and interest) was in the region of about R370 000 or R380 000. (This was apparently the position during June 1997.) As mentioned already, the quantum was in dispute at the time of the letter because the respondent was of the view, it would seem, that it was the appellant's fault that it had lost the security of the insurance policy and that it should not look

to the estate for payment of the entire indebtedness. The proceeds of the policy, had it been maintained, would have been R150 000 but how soon after the deceased's death in October 1996 the appellant would have received payment one cannot determine. All one can say is that the proceeds would no doubt have been applied first to the interest and then the capital of the larger of the two debts and after that, until July 1997, interest (then at 22,25 per cent) would have accrued on a substantially smaller overall total than was in fact the case. No evidence and no calculations serve to show, however, that the sum of R180 000 offered by the respondent in the letter in issue corresponded closely, or even as a rough approximation, to what the overall indebtedness on the two accounts would have been had the appellant employed the insurance proceeds to best advantage. In other words, inference from the proved facts cannot demonstrate that R180 000 was the extent of the estate's undeniable liability at the relevant time.

[22] In addition, not only is there nothing to show that the respondent ever admitted liability in any specific sum, whether before the letter was written (or later, if that could be relevant) but the letter itself certainly contains no admission. Conceivably it implies that some amount is owing but what it plainly does not say, is that liability in the sum of R180 000 is admitted or that this represents the limit of the estate's indebtedness. The offered sum is expressed as a round figure and, instead of a culminating sentence indicative of the debtor's assertion of her own contention, one sees that the writer awaits the creditor's response.

[23] One is mindful of the comment in *Harris* (at 649) that where money accompanies an offer "in full settlement" it is more likely that one has to do with payment of an admitted liability than with an offer of settlement but, with respect, adding ready money to the offer could just as well be construed

as an endeavour to make the proposition more attractive and to persuade the creditor to accept.

[24] Counsel for the appellant contended that the letter was ambiguous in the light of the contents of a letter of 14 August 1997 in response to the appellant's letter of 8 August. The letter of 14 August reads as follows:

> "I/S: BOEDEL WYLE JH VAN DE VYVER: REKENINGNOMMERS 04-04944138-5 & 04-04923138-1.
> Ons verwys na bogenoemde aangeleentheid en u skrywe van 8 Augustus 1997 en wens as volg te berig.
> Die genoemde Metropolitan Polis is aan u bankinstansie gesedeer, Die feit dat wyle Mnr JH van de Vyver die betrokke rekening gesluit het waarop die maandelikse premies per debietorder moes deurgaan is nie 'n kriteria wat in die geval in aanmerking geneem moet word nie.
> Metropolitan lewens sou u bankinstansie verwittig het met betrekking tot die betaling van die premies aangesien die betrokke polis aan u gesedeer wat toe die oorledene die rekening in 1991 gesluit het.
> Die onus het dus op u bankinstansie gerus om wyle Mnr van de Vyvyer van die situasie in kennis te stel.
> Indien die polis nie aan u bankinstansie gesedeer was nie dan stem ons wel toe dat die onus op die kliënt gerus het om alternatiewe reëlings te tref vir die betaling van die premies.
> Indien die uitkeer bedrag van die polis in die bedrag van R150 000,00 (EENHONDERD EN VYFTIG DUISEND RAND) aan u bankinstansie uitbetaal is gedurende November 1996 sou die rente betaalbaar tot op datum gevolglik nie

> R7 000,00 tot R8 000,00 per maand beloop het nie. Die rente betaalbaar op die uitstaande balans van ongeveer R130 000,00 (EEN HONDERD EN DERTIG DUISEND RAND) sou dus in die omgewing van R2 300,00 (TWEE DUISEND DRIE HONDERD RAND) per maand beloop het.
>
> Die bedrag van R180 000,00 (EENHONDERD EN TAGTIG DUISEND RAND) aan u aangebied in volle en finale vereffening ten opsigte van rekeningnommers 04-04944138-5 en 04-04923138-1 is dus 'n baie realistiese aanbod in die omstandighede.
>
> Ons het dus geen keuse om die bedrag van R150 000,00 (EEN HONDERD EN VYFTIG DUISEND RAND) plus die bedrag van R42 300,00 (TWEE EN VERTIG DUISEND DRIE HONDERD RAND) vir skadevergoeding as gevolg van rente betaalbaar aan u van u te eis.
>
> Indien ons nie die bedrag van R192 3000,00 (EEN HONDERD TWEE EN NEGENTIG DUISEND DRIE HONDERD RAND) voor of op die 31ste Augustus 1997 ontvang nie sal ons sonder verdere kennisgewing dagvaarding teen u bankinstansie uitreik."

[25] Nothing in that letter shows, in my view, that the sum of R180 000 represented, either on 14 August or 16 July, the respondent's view of the estate's indebtedness or that indebtedness in that amount or any other sum was admitted. It therefore does not detract from what is said in the letter of 16 July. If anything it asserts that the respondent's attorney's earlier letter indeed contained an offer of compromise.

[26] Appellant's counsel suggested that it was uncertain from the letter of 14 August, and particularly the threatened damages claim, whether the respondent intended to persist with the contention that the overall debt should be reduced by the extent which the appellant would have benefited by the insurance proceeds. However, I think that the respondent's counsel was correct in submitting that the threatened claim for damages was in the nature of a conditional counterclaim in the event that the appellant refused to regard the overdraft indebtedness as finally settled.

[27] In my judgment, it is clear that the respondent's offer of 16 July 1997 was not an offer of payment of an admitted liability. On the contrary, its terms, read in the light of the relevant background circumstances, lead to only one proper construction and that is that it was an offer of compromise.

[28] Finally, there is the contention on behalf of the appellant that if there was a compromise it was ineffective because what it entailed was an

impermissible variation of the mortgage bonds, all of which stipulated that no variation of their terms would be valid without the written consent of the appellant.

[29] Each of the bonds provided security in respect of any sum owing at any time by the deceased to the appellant. It was submitted that compromise, in reducing the amount of the overdraft indebtedness (and thus reducing the total indebtedness covered by the bonds), varied the bonds by varying the amount secured and thereby the appellant's entitlement to claim the latter amount.

[30] There is no substance in this argument. In the first place the compromise left the terms of the bonds quite unaltered. They continued to apply in the exact same way to any sum owing at any time. Therefore they continued to apply to the balance after deduction of the compromise amount. It is extraordinary that a creditor should complain that the security it holds

has become less necessary than it was before. Secondly, payment of the secured indebtedness would also vary the amount secured. Were the argument right, payment, remarkably enough, would also be ineffective.

[31] In the result the appeal is dismissed with costs.

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CT HOWIE
JUDGE OF APPEAL

CONCURRED:

ZULMAN JA
NAVSA JA