THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 349/18

In the matter between:

GRIDMARK CC **APPELLANT**

and

RAZIA TRADING CC **RESPONDENT**

Neutral citation: *Gridmark CC v Razia Trading CC* (349/18) [2019] ZASCA 18 (25 March 2019)

Coram: Cachalia, Majiedt, Van der Merwe and Mocumie JJA and Dlodlo AJA

Heard: 19 February 2019

Delivered: 25 March 2019

Summary: Contract: whether compromise was effected.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Kose AJ, with Saldanha J concurring, sitting as court of appeal):

1 The appeal is upheld with costs.

2 The order of Western Cape Division of the High Court is set aside and replaced with the following order:

'(a) the appeal is upheld with costs;

(b) the order of the magistrates' court is set aside and replaced with an order dismissing the special plea with costs.'

JUDGMENT

Dlodlo AJA (Cachalia, Majiedt, Van der Merwe and Mocumie JJA concurring)

[1] This is an appeal with the special leave of this court against the whole of the judgment and order handed down by the Western Cape Division of the High Court, Cape Town (sitting as a court of appeal) on 6 June 2017.

[2] The appeal calls for the interpretation of correspondence exchanged between the parties. The question for determination is whether such correspondence altered the contract originally entered into by the parties resulting in a compromise alleged by the respondent. The appellant denied that such compromise came into existence.

Background

[3] The appellant sold its business, Yorkers Superette, to the respondent on 15 February 2013. The agreed purchase price was R850 000.00.

[4] The agreement stipulated that payment of the purchase price was to be made as follows:

(a) R500 000.00 to be transferred within 5 days of acceptance into the account stipulated in the contract.

(b) The balance of R350 000.00 was to be paid in four consecutive payments in equal parts per month on 15 April 2013, 15 May 2013, 15 June 2013 and 15 July 2013.

[5] On 25 February 2013, the parties signed an addendum to the agreement in terms of which the balance of the purchase price was reduced to an amount of R302 209.33. The payments of this amount would be on the same terms as originally agreed to by the parties.

[6] It is common cause that the respondent paid the R500 000.00. It, however, failed to pay the balance of R302 209.33 in four equal monthly payments as agreed.

[7] The following payments were, however, made:

(a) R10 000.00 on 15 April 2013;

(b) R20 000.00 on 16 April 2013; and

(c) R20 000.00 on 18 April 2013.

The above payments left an outstanding balance of R252 209.33.

[8] A dispute arose between the parties as to whether the balance of R252 209.33, was payable. On 4 May 2013, the respondent wrote to the appellant offering to settle the dispute by paying the amount of R150 000.00 to the appellant in full and final settlement. Payment was to be made in equal instalments on 15 May 2013, 15 June 2013 and 15 July 2013.

[9] On 6 May 2013, the appellant responded to the offer as follows:

'We do not deem it necessary to deal with the full contents of your letter save to say that it is our client's submission that he duly complied with the terms of the agreement between the parties and reserve the right to claim the full balance of the purchase price for the sale of the business. In order to finalize all disputes between the parties our client would be willing to accept payment of the amount of R150 000.00 *if payment is received before close of business on Friday, 10 May 2013*.' (emphasis added)

The respondent failed to pay the R150 000.00 by 10 May 2013.

[10] Instead, in a letter dated 11 May 2013, Mr Hossain on behalf of the respondent offered to pay the amount of R150 000.00 in two instalments: R50 000.00 on 15 May 2013 and R100 000.00 on 5 June 2013. The appellant rejected the offer. Despite this, on 14 May 2013 the respondent's attorneys wrote to the appellant's attorneys saying that it will proceed as follows:

'. . .

[O]ur client will be making a deposit into your client's banking account in the amount of **R50 000.00** on **15 MAY 2013**. This will be followed by a further deposit of **R30 000.00** on **20 MAY 2013**. The balance of **R70 000.00** will be deposited directly into your client's banking account on/or before **5 JUNE 2013**.

This is the best our client can do and we trust that you find it as such in order. We will appreciate it if you could confirm in writing that your client accepts this offer as such. We really feel that the parties are not far from each other and surely a few days will not sink the ship…'

On 15 May 2013, the appellant's attorneys, responded by emphatically rejecting the respondent's proposal in these terms:

'Ons erken ontvangs van u skrywe van 14 Mei 2013 en **heg** hierby aan 'n akskrif van 'n skrywe wat ons voorneme was om aan u kliënt te stuur.

Ons kliënt dring derhalwe aan op betaling van die volle uitstaande balans en is u kliënt se aanbod nie aanvaarbaar nie.'

The attachment enclosed and referred to above inter alia, recorded:

'. . . Your offer in your letter of 11 May 2013 is not acceptable. It is therefore our instruction to proceed with collection of the full balance owing in terms of the agreement between the parties . . .'

[11] The respondent ignored the response and proceeded to make the following payments to the appellant:

(a) R50 000.00 on 15 May 2013;

(b) R30 000.00 on 20 May 2013; and

(c) R70 000.00 on 4 June 2013.

The above payments left a balance of R102 209.33.

[12] On 5 June 2013, the respondent indicated that it would make no further payments. The appellant viewed this indication as a repudiation of the contract. It accordingly instituted an action against the respondent in the George Magistrate's Court on 18 June 2013 for payment of the amount of R100 000.00 and abandoned the amount of R2209.33, which was also due, in order to bring the claim within the jurisdiction of the magistrates' court.

Was there a compromise?

[13] The onus is on the party alleging that a compromise has been effected.[1] Compromise being a form of novation involving the waiver of existing rights (or those claimed), it must be clearly and unambiguously proved.

[14] A compromise must be accepted by the other contracting party. As held in *JRM Furniture Holdings*,[2] the acceptance must be absolute, unconditional and identical with the offer. If the acceptance falls short of this, then the court is bound to hold that there was no consensus. That would mean no contract of any form came into existence.

[15] Thus, in his article, *Settlement and the law*,[3] Alan Rycroft states as follows:

'A settlement agreement (or compromise), being a form of contract, must comply with all general contractual requirements as regards consensus, certainty, legality and possibility of performance.'

[16] The offer of compromise must therefore be accepted in its terms in order to form a contract. The acceptance ought to be a mirror image of the offer in order to constitute a contract. In other words, the acceptance may not seek to add, subtract or modify any of the terms contained in the offer.[4] A counter-proposal must be regarded as a counter-offer. If that is the case, that would mean in simple terms that there is a new offer on the table. The issue then would be whether the offeror accepted the counter-proposal.

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[1] R H Christie *The Law of Contract in South Africa* 5 ed (2006) at 456.
[2] *JRM Furniture Holdings v Cowlin* 1983 (4) SA 541 (W) at 544A-B.
[3] A Rycroft 'Settlement and the law' (2013) 3 *SALJ* 187 at 189; S van der Merwe et al *Contract: General Principles* 3 ed (2007) at 538.
[4] M Nortje 'Quasi-mutual assent and the battle of the forms' (2018) *TSAR* 443 at 444.

[17] In the present appeal, the respondent's offer of 4 May 2013 elicited a counter-offer from the appellant to a term relating to performance and therefore to the parties' obligations. The appellant required complete performance by a specific date, which was contrary to respondent's offer of performance over time. There was therefore no agreement between the parties and thus no compromise.

[18] To buttress its case the respondent, relying on *Absa Bank*[5]*,* contended that the acceptance by the appellant of the payments made in terms of the proposal on 14 May 2013 constituted a valid acceptance of the offer to compromise that the respondent made. The facts in *Absa Bank* were different. A cheque was offered in full and final settlement contemporaneously with the offer to settle having been made, and the cheque was then deposited. The act of depositing the cheque created the impression of acceptance of the settlement offer. In the present matter, the original offer of settlement – unaccompanied by any payment – as outlined above, resulted in a counter-offer which was not accepted. While the dates on which payments were eventually made were suggested in the second and the third offers to settle, those two offers were expressly rejected by the appellant, resulting in there being no extant contract of compromise in terms of which the payments could have been appropriated. The contested payments were in fact only made after all three attempts to compromise had been unsuccessful. In fact, Mr Hossain, who testified for the respondent, admitted in cross-examination that correspondence exchanged between the parties made it clear that the offer had not been accepted. Additionally, the appellant's witness, Mr J Barnard, testified that the appellant's attorneys had written to respondent's attorney that the offer of compromise was not acceptable and that he insisted on payment of the full outstanding balance. This evidence was not contested.

[19] In the absence of a compromise the appellant was entitled to appropriate the further payments. This must be so because in terms of the original agreement of purchase and sale the appellant was still owed money towards the purchase price. The

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

argument that the payments received from the respondent should have been returned in the absence of a compromise is without merit.

[20] Accordingly the following order is made:

1 The appeal is upheld with costs.

2 The order of Western Cape Division of the High Court is set aside and replaced with the following order:

‘(a) the appeal is upheld with costs;

(b) the order of the magistrates’ court is set aside and replaced with an order dismissing the special plea with costs.’

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D V Dlodlo

Acting Judge of Appeal

APPEARANCES:

Counsel for Appellant:	A G Christians
	Instructed by:
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