REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 1153/2015

In the matter between:

CHARL WILHELM RALL **PLAINTIFF**

And

PROFESSIONAL PROVIDENT SOCIETY INSURANCE COMPANY (NAMIBIA) LTD **DEFENDANT**

Neutral citation: *Rall v Professional Provident Society Insurance Company (Namibia) Ltd (I 1153-2015) [2015] NAHCMD 209 (9 September 2015)*

Coram: Schimming-Chase AJ
Heard: 11 August 2015
Delivered: 9 September 2015

Flynote: Practice – Judgments and Orders – Summary Judgment – Opposition to – Requirements – Defendant required to show and satisfy the court that he has a *bona fide* defence to the claim – Material facts upon which defences based must be disclosed with sufficient particularity and completeness to enable the court to decide whether *bona fide* defence disclosed – Not required to disclose all details as would be the case in trial proceedings – Conversely, summary judgment is an extra-ordinary and stringent remedy and should only

be granted if there is no doubt that the plaintiff has an unanswerable case.

Costs – Offer and Acceptance – distinction between an offer of compromise and an unconditional tender, for purposes of prevention of liability for costs discussed.

Costs – When granted in application for summary judgment – Defendant tendering a portion of the claim in affidavit resisting summary judgment – Plaintiff indicating in heads of argument that a triable issue made out on a portion of the plaintiff's claim.

Summary: Plaintiff sued the defendant for some N$3.2 million representing interest payments due and payable to the defendant in respect of certain long-term insurance benefits that were owed to and eventually paid by the defendant to the plaintiff. This included a claim for capital and interest outstanding in respect of certain accident benefits which the defendant also accepted were payable to the plaintiff. Defendant made an offer to pay a certain amount before proceedings were instituted in full and final settlement of plaintiff's claim. Defendant also made a tender in the opposing affidavit for an amount of N$1,532,600.18. The plaintiff indicated in its heads of argument (filed in terms of Rule 71(5)) that it would only take judgment in the amount of N$1,532,600.18 as tendered, and apply for summary judgment in the amount of N$83,714.75. The court found (applying the legal principles distinguishing a tender from an offer of compromise) the offer in full and final settlement was not an unconditional settlement but an offer of compromise. Apart from the letter being without prejudice, it was apparent that the plaintiff would have had to accept the amount "offered" when it was clear that the plaintiff still had a portion on which he would sue. Summary judgment was refused in the amount of N$83,714.75 although the defendant was sparse in the issue in its papers because it could not be said that there was no doubt that the defendant had an unanswerable case.

ORDER

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1. Summary judgment is granted in favour of the plaintiff in the amount of N$1,532,600.18.

2. Summary judgment is refused in respect of the balance of the plaintiff's claim and the defendant is granted leave to defend.

3. Costs of the summary judgment application are awarded in favour of the plaintiff, only up to and including the date of 24 July 2015, such costs to include the costs of one instructing and two instructed counsel.

4. The costs subsequent to 24 July 2015 are reserved for determination by the trial court.

5. The defendant shall file its plea within 10 days of this order being granted.

6. The matter is postponed to 8 October 2015 before Mr Justice Miller AJ for a case management conference.

JUDGMENT

SCHIMMING-CHASE, AJ

[1] This is an application for summary judgment.

[2] The plaintiff sues the defendant for N$3.221,259.51, representing interest payments that he alleges are due and payable to him by the defendant in respect of certain long term insurance benefits that were owed to and eventually paid by the defendant to the plaintiff. Six separate claims are set out in the particulars of claim of which five encompass interest payments. This summary judgment application is in respect of those five claims.

[3] Claims one to four flow from a judgment of this court (referred to below) relating to an earlier dispute between the parties involving the defendant's

liability to pay interest on the aforesaid benefits, and a subsequent dispute between the parties concerning the allocation of payments, in particular whether the initial payments made by the defendant to the plaintiff were made in respect of capital or interest, and whether the plaintiff had the right to unilaterally appropriate payments towards interest instead of capital.

[4] It is necessary to give a short background on the common cause facts in this matter.

[5] The plaintiff, an admitted legal practitioner, concluded a written agreement of insurance with the defendant, a registered long-term insurer. In terms of this agreement, the plaintiff was insured in the event that he became permanently disabled or incapacitated such that he would be unable to continue with his profession.

[6] The plaintiff sustained a brain injury during a cycling accident in March 2009 which rendered him permanently incapacitated. During October 2010, the plaintiff lodged a claim with the defendant for compensation in the form of a disability lump sum payment, a permanent incapacity benefit and an accident benefit.

[7] On 11 February 2011, the defendant rejected the plaintiff's claim. The plaintiff objected to the rejection of his claim, and on 8 February 2012, the defendant formally acknowledged full liability for payment, and undertook to pay the plaintiff 100% benefits, effective 27 February 2011.

[8] The defendant however disputed its liability to pay interest on the benefit amounts claimed by the plaintiff. This culminated in litigation between the parties resulting in a judgment of Ueitele J delivered on 22 August 2014,[1] in terms of which the defendant was ordered to pay the plaintiff the following in respect of interest:

8.1. interest at the rate of 20% per annum calculated from

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[1] Rall v Professional Provident Society Insurance Company (Namibia) Ltd (A 224/2013) [2014] NACHNAD 249 (22 August 2014).

28 February 2011 on an amount of N$8,332,929.00 or the portion of that amount that remained outstanding from time to time subsequent to that date and up to the date that the full capital amount of N$8,322,929.00 is paid to the plaintiff;

8.2. interest at the rate of 20% per annum on all premiums repaid to the plaintiff subsequent to 27 February 2011 from the date that the defendant received the premium until the date on which the defendant repaid the premiums to the plaintiff. (This related to disability premiums and permanent incapacity premiums);

8.3. *mora* interest at the rate of 20% per annum on all the incapacity payments made to the plaintiff, which are outstanding from time to time as from 27 February 2011 up to the date that the defendant paid them to the plaintiff.

[9] The interest liability of the defendant as a result of this judgment accordingly has four components, namely

9.1. a disability lump sum payment;

9.2. the repaid disability premiums as from 27 February 2011;

9.3. the repaid permanent incapacity premiums as from 27 February 2011; and

9.4. monthly incapacity payments paid late as from 27 February 2015.

[10] In its fifth claim, the plaintiff sues the defendant for capital and interest outstanding in respect of certain accident benefits which the defendant accepted were payable to the plaintiff, and which it only paid as from July 2013. The capital and interest outstanding claimed is for the period February 2011 to July 2013 together with interest at the *mora* rate of 20% per annum.

[11] The particulars of claim further allege there is a dispute between the parties regarding the allocation of payments firstly to interest and then to capital

in respect of the lump sum disability benefit, the sums payable and interest calculations in respect of the lump sum disability and permanent incapacity benefits, the sums payable and interest calculations in respect of premiums, and the sum payable (inclusive of interest) and the interest rate applicable in respect of the accident benefit.

[12] The main issue for determination relates to the interest payable in terms of claims one to four, and the capital and interest payable in respect of the accident benefits (claim 5).

[13] In its opposing affidavit, the defendant confirmed the facts that led to the judgment of this court referred to in paragraph [8] above, as well as thefour components of its interest liability as a result of the judgment. The defendant also confirmed the existence of the accident benefit which did not form part of the aforesaid litigation, but for which it also applied the same rate of 20% per annum in respect of interest for all payments that were paid late as from 27 February 2011.

[14] The essence of the defendant's defence is that the parties differ in their calculation of the interest payable in terms of the court order referred to above. The defendant alleged that subsequent to the court order, it calculated its interest liability to the plaintiff, and according to its calculations, the interest liability owing to the plaintiff amounted to a total of N$1,964,631.09, calculated as follows:

14.1. in respect of the disability lump sum payment, the capital amount of N$8,332,929.00 was paid in full on 8 March 2012. Interest was calculated from 27 February to 8 March 2012 at 20% per annum, resulting in a total of N$1,716,811.67 in respect of interest for the disability lump sum benefit;

14.2. interest at the rate of 20% per annum was calculated on all permanent incapacity monthly payments due to the plaintiff which were paid subsequent to the due date for the relevant period. The interest due was calculated in the amount of N$216,760.87;

14.3. in respect of the accident benefit, the total interest due "on the respective 21 payments made subsequent to the due date and for the period February 2011 to October 2012 amounts to a total of N$17,747.60";

14.4 in respect of both disability and permanent incapacity premiums deducted and subsequently repaid to the plaintiff:

14.4.1 the total interest due by the defendant to the plaintiff in respect of 14 disability premiums for the period from February 2011 to March 2012 was calculated as N$1,202.78;

14.4.2 the total interest due by the defendant to the plaintiff in respect of 11 incapacity premiums for the period February 2011 to December 2011 was calculated at N$12,108.17.

[15] In support of these calculations, the defendant provided annexures. The defendant further averred that all interest calculations were made using the capital amounts due from time to time multiplied by 20% per annum divided by 365, and finally multiplying same with the number of days that the respective capital payments were made after the due date. The calculations were made for simple interest.

[16] The defendant further alleged that of the aforesaid interest liability (N$1,964,631.09), which constituted its entire indebtedness to the plaintiff, the defendant had already made two payments towards interest to the plaintiff, namely the amounts of N$77,819.08 on 8 March 2012 and N$354,211.83 on 5 November 2012. The plaintiff received these two amounts but did not want to accept them as interest payments, as a result of which he offered to pay the amounts back to the defendant. However to date, the plaintiff has not repaid these amounts to the defendant. As a result, these amounts needed to be deducted from the defendant's total interest liability, resulting in an indebtedness of N$1,532,600.18.

[17] Apart from the above two payments, the defendant alleged that all payments made by it to the plaintiff were expressly made towards capital.

[18] The defendant stated that the plaintiff had informed it that all payments would first be applied to reduce interest and thereafter to reduce capital. In this regard, the defendant stated that at all relevant times (and until the above judgment was given), it denied its liability to pay any interest and made it clear to the plaintiff that all payments (except the two payments referred to above) were made towards capital. The defendant submitted that the plaintiff could not apply the payments made to interest first, and that it was accordingly not for him to unilaterally decide where to apply payments that were specifically made by it towards capital.

[19] The defendant also stated that on 17 October 2014 the amount of N$1,657,254.65 was offered to the plaintiff in writing in settlement of its entire interest liability. The plaintiff refused to accept the aforesaid payment and proceeded to institute legal action instead.

[20] From the plaintiff's response to the defendant's offer of 17 October 2014 (which I deal with in more detail below), the defendant alleged that the only issue in dispute between the parties was whether the payments made by the defendant to the plaintiff should first have been applied towards interest and then towards capital, and whether it had the right to determine how payments were to be allocated.

[21] The defendant repeated its offer to pay the amount of N$1,532,600.18, which was tendered in the affidavit resisting summary judgment and submitted that the plaintiff had no case for the remainder of the relief sought. It also submitted that the plaintiff was not entitled to costs for the summary judgment application as the offer for the above amount was unconditionally made prior to the proceedings being instituted, namely on 17 October 2014 and because the plaintiff was apprised of the defendant's *bona fide* defence before it launched the summary judgment application. In the result, it was further submitted, the application for summary judgment amounted to an abuse of court process, warranting a special costs order against the plaintiff as well as an order staying the main proceedings pending payment of such costs as contemplated by rule 60(11)(b).

[22] At the hearing of the application for summary judgment Mr Frank SC,

assisted by Mr Dicks, appearing for the plaintiff, submitted that the plaintiff would only seek summary judgment in the amount of N$1,532,618.00 (as tendered in the opposing affidavit) as well as the amount of N$83,714.75 in respect of the accident benefit capital and interest claim for which Mr Frank submitted, the defendant did not raise a triable defence on its papers. Mr Frank conceded that the defendant had raised a *bona fide* defence on the balance of the amount claimed.

[23] As regards the question of costs, Mr Frank submitted that the plaintiff is still entitled to his costs in the summary judgment application in spite of the letter dated 17 October 2014 relied on by the defendant, because the offer contained therein was not a tender to pay, but an offer of compromise.

[24] Mr Tötemeyer SC, appearing for the defendant together with Ms van der Westhuizen correctly submitted that due to the acceptance by the plaintiff of the amount tendered in the opposing affidavit, and considering the total claim of the plaintiff for some N$3.2 million, only two issues remain in contention between the parties. They are:

(a) whether summary judgment should be granted in respect of the accident benefit in the amount of N$83,714.75; and

(b) the issue of costs.

[25] The amount of N$1,532,600 having already been tendered by the defendant, I firstly deal with whether summary judgment should be granted on the amount of N$83,714.75, after which I deal with the question of costs.

[26] Mr Frank submitted that the defendant has failed to put forward any meaningful defence to this claim in its opposing affidavit. His argument was based on the following: The plaintiff's claim is for capital amounts due as well as interest outstanding with reference to certain annexures to the particulars of claim which contain a detailed list including calculations on capital and interest. From the annexures, it is apparent that certain capital amounts were outstanding according to the plaintiff from February 2011 to July 2013. In its opposing papers, the defendant tendered an amount of N$17,747.60 as interest

on the outstanding accident benefit. This was included in the amount tendered (N$1,532,600.18) comprising “21 payments” made subsequent to due dates. When comparing the annexures to the particulars of claim to the annexure to the opposing affidavit, the parties are *ad idem* that all payments were due as at February 2011. However, the annexures to the particulars of claim deal with capital amounts outstanding up to July 2013 in respect of the accident benefit, whereas the annexure to the opposing affidavit only deals with capital amounts paid by the defendant up until October 2012. There is no explanation by the defendant for its failure to pay or include in its calculations the outstanding capital due from November 2012 to July 2013, which amounts to N$83,714.75.

[27] Mr Tötemeyer argued that a triable issue is indeed disclosed by the defendant in respect of the capital amounts claimed. He submitted that it was at all material times clear, and the defendant had specifically averred, that all capital amounts due to the plaintiff had been settled, even before the plaintiff launched the proceedings giving rise to the judgment of Ueitele J. He further submitted that a consideration of the defendant’s opposing affidavit and the relevant annexure evidencing the defendant’s calculations in respect of the accident benefit, that what is dealt with therein is the late payments in respect of the accident benefit for which the defendant concedes it is liable for interest. On the defendant’s version, nothing was due (as capital) for November and December 2012, as claimed by the plaintiff, hence the insertion of a zero amount in its annexure for the relevant period. Furthermore, on the plaintiff’s own version, accident benefits were paid by the defendant in July 2013, yet a capital amount plus interest is claimed for the month of July 2013 in the particulars of claim in spite of that payment. On this basis it was argued that at least 3 of the capital amounts said to be owed in respect of the accident benefit may not be owed, and as a result, summary judgment should be refused on that basis.

[28] In terms of rule 60(5)(b), a defendant opposing a summary judgment application must disclose fully the nature and the grounds of its defence and the material facts relied on. Of crucial importance is the comprehensive disclosure of the material facts upon which the defence is based with sufficient particularity and completeness to enable a court to decide whether a *bona fide* defence is

disclosed.[2] This is particularly so as the evaluation of the defendant's opposing affidavit frequently entails not a consideration of what the defendant has said, but of what he did not say.[3]

[29] Similarly, because summary judgment is such an extra ordinary remedy, it should only be granted if there is no doubt that the plaintiff has an unanswerable case. This, at least, is the approach taken in our jurisdiction to applications for summary judgment.[4]

[30] The plaintiff's claim set out in the particulars of claim in respect of the accident benefit is as follows:

> "19.1 Defendant accepted that an accident benefit was payable to the plaintiff as from the effective date and has been paying such benefit as from July 2013. A capital amount is outstanding in the period February 2011 to July 2013, together with interest from 20 February 2011 to date at the *mora* rate of 20% per annum.
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> 20. In respect of the accident benefit the plaintiff is therefore entitled to the sum of N$349,877.87 as per annexure "M" (compound interest), alternatively N$335,330.66 as per annexure "N" (simple interest) hereto, together with interest from 20 February 2015 to date of payment at the *mora* rate of 20% per annum.
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> 21. The defendant, despite demand, fails and/or refuses to pay the above sum to the plaintiff."

[31] Annexures "M" and "N" contain the calculations in support of the amount of interest and capital claimed by the plaintiff. The annexures also contain a column indicating the capital amounts "due" between February 2011 and July 2013. There is also an indication of a substantial capital payment by the defendant during July 2013.

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[2] Di Savino v Nedbank Namibia Limited 2012(2) NR 507 SC at paras 23-31

[3] Van Niekerk, Geyer, Mundell-Summary Judgment - A Practical Guide Service Issue 9, March 2010 at para 9.5.2.; Kassim Brothers (PvT) v Kassim 1964(1) SA 651 (SC) at 653 B.

[4] Mauno Haindongo t/a Onawa Wholesalers v African Experience (Pty) Ltd 2006(1) NR 56 at 59E-60F.

[32] The defendant's defences are described as follows:

> "8.5 In addition to the aforesaid, there is also an accident benefit which did not form part of the aforesaid litigation, but for which the defendant applies the same rate of 20% per annum in respect of interest for all accident benefit payments that were paid late as from 27 February 2011. This, together with the four components referred to in paragraph 8.4 above, constitute the five components of interest due by the defendant to the plaintiff as set out below and subject thereto."

and further:

> "8.6.2 Furthermore, in respect of the accident benefit, as is set out in annexure "B" hereto, the total interest due, at the rate of 20% per annum on the respective 21 payments made subsequent to the due date and for the period from February 2011 to October 2012 amounts to a total of N$17,747.60."

[33] It is apparent from the plaintiff's particulars of claim that the accident benefit claimed by him includes a capital amount which he alleges is outstanding for the period February 2011 to July 2013 together with interest from 2011 to date at the *mora* rate of 20% per annum. As I understand this claim, according to the plaintiff, the particular capital amount was outstanding up until July 2013, after which payment was made by the defendant. The defendant does not dispute that the capital amounts are payable, nor does it dispute the timeframe within which the capital amounts were payable. All it says however is that in respect of the accident benefit the total interest due at the rate of 20% per annum "on the respective 21 payments made subsequent to the date and for the period from February 2011 to October 2012" amounts to N$17,747.60.

[34] The opposing affidavit is silent on the period between November 2012 and July 2013. There is no allegation that these capital payments are not due, only a general allegation that all capital had been paid. There is also no clear allegation that the capital amount paid in July 2013 formed part of the payments owed between November 2012 and July 2013. It would have behoved the defendant to at the very least have set out the reasons why it calculates

outstanding capital as at October 2012 and why no capital amounts are payable post October 2012 to July 2013.

[35] I hold the view that it is not sufficient to argue that certain amounts should not be included when there are no allegations in the papers as to why they should not be included. At the same time, a substantial capital payment appears to have been made by the defendant during July 2013 and it is not clear for which period these payments were or what parts of the outstanding amounts they covered. In the result, I cannot say that I have no doubt that the defendant has an unanswerable case on this aspect.

[36] Considering the stringent remedy of summary judgment, I find that the defendant has, by the skin of its teeth, made out a triable issue in relation to the N$83,714.75 and summary judgment is accordingly refused.

[37] This now brings me to the question of costs. Mr Tötemeyer submitted that the plaintiff should not be awarded any costs because the letter dated 17 October 2014 contained an unconditional offer by the defendant to pay its liability interest in full, but the plaintiff refused such an offer. Furthermore, the plaintiff knew (irrespective of whether he agreed with the veracity of the defence) that the defendant would rely on a defence that would entitle it to leave to defend in respect of the balance of the claim, yet the plaintiff proceeded to apply for summary judgment.

[38] In the alternative, and should the court find that the letter dated 17 October 2014 did not contain an unconditional offer warranting a refusal of costs from that date, it could not be disputed that such tender was made on 24 July 2015 in the defendant's opposing affidavit. In the result, the defendant should not be entitled to costs post 24 July 2015 and instead, the defendant should be awarded costs subsequent to this date for its opposition to the application.

[39] I was also reminded that as the heads of argument had been delivered on the same day by both parties, the defendant had not had sight of the plaintiff's heads of argument before filing its own, and was not aware that the balance would be conceded until that date. It was pointed out that a substantial

portion of the defendant's heads of argument was devoted to the issue of appropriation of interest and capital, which as a result of the defendant's concession has become academic.

[40] To determine whether the correspondence of 17 October 2014 is an offer of compromise or an unconditional tender, the terms of the correspondence needs to be analysed. The exercise of doing so does not necessarily make the distinction easy to discern. As stated above, the plaintiff's stance is that this letter contained an offer of compromise and not an unconditional tender, and that the effect of a valid tender to prevent liability for costs is that the plaintiff must know that he can get the money and that the defendant is willing to pay. Reliance was placed on the matter of B & R Investments (Pty) Ltd v Laubsher[5] where the following was succinctly stated:

> "At common law there can be no doubt that a mere offer to pay is not a tender sufficient to protect a debtor from the costs of litigation. Apart from exceptional cases (…) the debtor must offer payment 'met open beurs en klinkende munt' and must tender money in kind."[6]

Reliance was also placed on the distinction between tenders and offers of compromise as dealt with succinctly in the case of Kei Brick & Tile Co (Pty) Ltd v AM Construction[7], where Froneman J set out the distinction between tenders and offers of compromise utilising the ordinary accepted principles relating to offer and acceptance as follows:[8]

> "In general, payment (or performance) of a debt can only be effected by agreement between the parties. (See Saambou-Nasionale Bouvereniging v Friedman 1979 (3) SA 978 (A) at 993A-C; Italtile Products (Pty) Ltd v Touch of Class 1982 (1) SA 288 (O) at 292H-293F.) Payment is therefore not a unilateral act by the debtor which can be imposed by him on the creditor. If the debtor's offer of payment corresponds to the exact terms and extent of the debt and is accepted by the creditor, the debt is extinguished and the result is full payment

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[5] 1951 (2) SA 567 (T) at 570F-G

[6] Loosely translated 'with open wallet and hard

[7] 1996 (1) SA 150 (ECD) at 159B–160F

[8] At 159B-160F.

of the debt. If the creditor does not accept such a proper offer of payment, he lapses into mora, with all its attendant consequences.

Where the debtor's offer of payment does not correspond fully to the exact terms and extent of the alleged debt owed to the creditor, the creditor is entitled to reject it and insist on proper payment. No question of *mora creditoris* comes into play at all. If, however, the creditor accepts such an offer of payment, it would result in the whole debt being extinguished. The result of this would then be categorized as a compromise. In line with general principles relating to offer and acceptance, partial acceptance should be impermissible and would in effect amount to a rejection of the offer, which may, in turn, be construed as a counter-offer by the creditor to be accepted or rejected again by the debtor. Unless, however, there is agreement between the parties, there can be no valid payment of the alleged debt or part thereof. (See De Wet and Van Wyk (op cit at 264-5) and cf Van Breukelen en 'n Ander v Van Breukelen 1966 (2) SA 285 (A) at 290G-H; Tractor & Excavator Spares (Pty) Ltd v Lucas J Botha (Pty) Ltd 1966 (2) SA 740 (T).)

Where an offer of payment is made which does not correspond exactly with the terms and extent of the alleged debt, the reason or motive for the offer may either be that the debtor denies liability completely, but wishes to dispose of the matter nevertheless, or that the debtor admits partial liability, but disputes the correctness of the total amount alleged to be owing. If, in the latter case, the offer of payment is in the amount which the debtor considers is due to the creditor, it will invariably be intended as payment of what the debtor considers to be the extent of his liability or, in other words, as an admission of partial liability. But that fact in itself cannot be decisive of the enquiry whether an offer of payment in terms less than the original alleged debt is intended to cover the whole of the original debt or not. As stated by Didcott J in Andy's Electrical v Laurie Sykes (Pty) Ltd (supra at 344B-D):

> 'Bluntly, and in my respectful opinion too simplistically, these (cases) have distinguished offers of compromise from payments of admitted debts, as if the one sort of transaction necessarily excluded the other. Such decisions are apt to be misunderstood unless one is careful, as Prof Zeffertt was, to treat the payments of acknowledged debts to which they referred as mere payments, unaccompanied by offers of compromise. The real dichotomy is then evident between an offer to settle the whole claim by the payment of a particular amount, for which

> liability may or may not simultaneously be conceded, and the payment of a sum admittedly due on the footing that the rest of the claim is not covered and remains in issue.'
>
> Seen from this perspective, the proper enquiry is whether the debtor's offer of payment can objectively be seen to cover the whole debt allegedly owed to the creditor or not, and whether it was accepted by the creditor as such. I may add that in my view, where an offer of payment is made by a debtor in an amount less than the debt he allegedly owes the creditor and it appears that the debtor considers the offer of payment to represent the extent of his liability to the creditor, it almost invariably implies that his offer of payment is in respect of his total liability to the creditor and that he does not intend paying anything more. (Compare Tractor & Excavator Spares (Pty) Ltd v Lucas J Botha Ltd (supra at 743A).)"

[41] It is also well established that when an offer is made "without prejudice" it indicates an offer to compromise and not an unconditional offer. The learned authors Herbstein and Van Winsen summarise the position as follows:[9]

> "The difference between an unconditional offer and an offer made without prejudice is that an unconditional offer is regarded as being made with admission of liability in whole or in part, whereas an offer without prejudice is made without admission of liability and on condition that it is accepted in full and final settlement of the claim. When an offer of partial settlement is unconditional, the defendant may accept the offer and pursue the claim for the balance. When the offer is made without prejudice, acceptance of the offer puts an end to the matter."

[42] In light of the above authorities, Mr Frank submitted that

> 44.1. the letter indicates that it is an offer with reference to certain calculations;
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> 44.2. it refers to the defendant's "proposed settlement offer";

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[9] above at 617 fn 10.

44.3. it states that "in summary the offer will be ….; and

44.4. it seeks a response and does not indicate an unconditional tender to pay "met open beurs and klinkende munt".

44.5 it specifically states that the offer "is made entirely without prejudice and we reserve all our rights in terms thereto.

[43] Having considered the authorities and the letter, I find myself in agreement with Mr Frank's submissions that the letter was an offer of compromise and not an unconditional tender. The terms of the letter set out above make it apparent that there is a partial admission of liability and that interest is due. But apart from that, it is also apparent that acceptance of that calculation would be in "full and final settlement" as contained in the aforesaid correspondence. The fact that it is without prejudice together with a formal reservation of rights, is an important factor. The established principle that where an offer is not clear, it is construed *contra proferentem* and against the debtor was also correctly argued on behalf of the plaintiff. Christie states the position as follows:[10]

> "Debtors and their legal advisors of course have it in their power to make it crystal clear whether the cheque is sent as an integral part of an offer of compromise and is to be returned if the offer is not accepted, or whether it may be cashed without committing the creditor as it is intended merely to reduce the amount in issue (accompanied, as often as not, by the expressed or unexpressed hope that the creditor will then let the matter drop). The cases mostly result from the failure of debtors to make their intentions clear, and a debtor who fails to do so may find his letter construed *contra proferentem*."

[44] In light of the foregoing I find that whilst the letter of 17 October 2014 did not contain a tender as alleged by the defendant, the opposing affidavit of 24 July 2015 did, and the plaintiff had ample time before the delivery of heads of argument to inform the defendant of its stance. I am also mindful of the fact that the plaintiff, on his own version, knew of a dispute between the parties regarding

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[10] Christies's The Law of Contract in South Africa 6th ed at 477

the allocation of payments firstly to interest and then to capital in respect of the first four components of the defendant's interest claim. This is set out in the particulars of claim. I also agree with the submissions of Mr Tötemeyer to the effect that a substantial portion of the defendant's heads of argument was devoted to the apportionment argument. I hold the view that a "costs curtailing" approach to this matter would have been for the tender in the affidavit to be accepted, the defendant informed that leave to defend would be granted for a portion of the balance, and summary judgment applied for in respect of the N$83,214.75.

[45] However, I decline to hold the plaintiff liable for costs at this stage. As this is a summary judgment application, and the issues raised by the defendant will be ventilated at the trial. In the result I make the following order:

1. Summary judgment is granted in favour of the plaintiff in the amount of N$1,532,600.18.

2. Summary judgment is refused in respect of the balance of the plaintiff's claim and the defendant is granted leave to defend.

3. Costs of the summary judgment application are awarded in favour of the plaintiff, only up to and including the date of 24 July 2015, such costs to include the costs of one instructing and two instructed counsel.

4. The costs subsequent to 24 July 2015 are reserved for determination by the trial court.

5. The defendant shall file its plea within 10 days of this order being granted.

6. The matter is postponed to 8 October 2015 before Mr Justice Miller AJ for a case management conference.

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SCHIMMING-CHASE

Acting Judge

APPEARANCES

PLAINTIFF:	Mr Frank SC (with him Mr Dicks) Instructed by Du Pisani Legal Practitioners
DEFENDANT:	Mr Tötemeyer SC (with him Ms van der Westhuizen) Instructed by Engling, Stritter & Partners