IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE HIGH COURT, KIM BERLEY)

Case No: 2/2018

Heard On: 31/07/2019

Delivered: 16/08/2019

In the matter between:

ALETTA SIBINA SAUER **Applicant**

AND

THE ROAD ACCIDEND FUND **Respondent**

JUDGMENT

COETZEE AJ

[1] The trail was set down for hearing on 29 and 30 July 2019. As the parties was engaged in negotiations, the matter did not commence on 29 July 2019 and stood down to 30 July 2019.

[2] At the commencement of the trail on 30 July 2019 the parties, by agreement handed me a document titled *"Stated case* as *agreed between the parties"* ("the stated case"). I was asked to adjudicate the issues as set out in the stated case.

[3] In terms of paragraph 4 of the stated case I was requested to order a separation of issues in terms of Uniform Rule 33(4) to the effect that the issues as set out in paragraphs 3.3 and 3.4 of the stated case will be determined on

the basis of a stated case and in accordance with the facts as set out in the states case, and that all other issues are to stand over for determination at a later stage.

[4] I granted the request and ordered the separation.

[5] Save for paragraphs 3.1, 3.2, 3.3 and 4, the relevant paragraphs of the stated case reads as follows:

"1 The plaintiff has instituted action against the defendant for the payment of damages suffered by her as a *result of injuries sustained in* a *motor vehicle accident on 4 April 2014.*

2 The defendant is defending the said action and by way of a special plea has raised the defence that:

2.1 the plaintiff's claim has been settled by way of a *settlement agreement signed by the plaintiff on 14 June 2016;*

2.2 the said agreement was *in full and final settlement of the plaintiff's claim against the defendant; and*

2.3 as a *result of the said settlement agreement the plaintiff* was *in law not entitled to institute action for damages* as a *result of the accident referred to above.*

3 The plaintiff has replied, inter alia, as *follows to the abovementioned allegations by the defendant:*

3.1 ……..

3.2 ……..

3.3 ……..

3.4 The defendant failed to comply with the terms of the agreement and therefore repudiated the agreement and which repudiation was accepted by the plaintiff who cancelled the agreement and as a *result of which the agreement* was *of no force and effect anymore.*

4 ......

5 The following facts are common cause between the parties:

5.1 During or about March 2015 the plaintiff, in terms of the provisions *of Act* 56 *of 1995, submitted* a *claim to the defendant for damages suffered by her as* a *result of* a *motor vehicle accident.*

5.2 *On 14 June 2016 the plaintiff, who acted in person and without legal representation, signed the document titled "Offer and Acceptance of Settlement".*

5.3 *The said "Offer and Acceptance of Settlement", duly signed by the plaintiff, was received by the defendant on* 16 *June 2016.*

5.4 *In terms of section B of the said "Offer and Acceptance of Settlement" the capital amount of the settlement was payable to the plaintiff within 120 days from date of receipt of "Offer and Acceptance of Settlement" by the defendant.*

5.5 *The said period of 120 days elapsed on 14 October 2016.*

5.6 *On 5 July 2016, after obtaining legal advice and upon instructions by the plaintiff, her attorney sent* a *letter to the defendant.* (The contents of which appears in paragraph 7 hereunder).

5.7 7 *The defendant did not reply to the letter dated 5 July 2016.*

5.8 *On 3 December 2016 the capital amount of the settlement was paid into the plaintiff's bank account.*

5.9 *On 6 December 2016 and upon instructions by the plaintiff her attorney dispatched another letter to the defendant.* (The contents of which appears in paragraph 8 hereunder)."

[6] In opening Mr van Niekerk, on behalf of the plaintiff, abandoned, for purposes of his argument, the averments contained in paragraphs 3.1, 3.2, and 3.3 of the stated case and informed me that plaintiff will only rely on the averments contained in paragraph 3.4.

[7] It is convenient to quote both letters dated 5 July 2016 ("the first letter") and 6 December 2016 ("the second letter"):

<u>The first letter</u>

"INSAKE: MEV ALETTA SIB/NA SAUER, ID NOMMER: 670610121089/ PADONGELUKKEFNDS/ EIS NOMMER: 2006/12253677 /04/0

Ons verwys na bogenoemde aangeleenthied en beestig dat ons hierin optree namens en op instruksie van Mev Aletta Sibina Sauer, ID nommer […..] wie 'n klient van ons firma is.

Ons klient het op die 14 Junie 2016 die Padongelukkefonds se aanbod wat per koerier aan haar gestuur is onderteken. Na konsultasie met die skrywer op 30 Junie 2016 het sy *instruksie gegee dat ons die aanvaarding van die aanbod terugtrek en wel om die volgende redes:*

1. *Ons klient het nie enige insae gehad in die verslae wat deur die verskeie deskundiges gedoen is nie en kon dus nie 'n ingeligte besluit neem oor die bepaling van die omvang van die skade wat sy as gevolg van die beserings wat sy tydens die motorongeluk opgedoen het nie.*
2. *Ons klient het nie 'n uiteensetting gekry vanaf die Padongelukkefonds van hoe die bedrag wat getender is saamgestel en bereken is nie. Slegs die algemene skade en verlies aan inkomste asook 'n sertifikaat is getender, sonder om aan te dui hoe dit bereken is.*
3. *Ons klient het geen uiteensetting en/of verslag van 'n aktuaris ontvang van hoe die berekening gdegoen* is *ten opsigte van haar toekomstige verlies aan inkomste nie.*
4. Ons *klient* se *skade substansieel meer* is as *wat u getender het.*
5. *U watnvoorstelling teenoor ons klient gepleeg het.*

Ons *ontvang skriftelike bevestiging dat u die kansellasie van die aanvaarding van die aanbod aanvaar voor of op 18 Julie 2016. lndien u sou versuim om ons skriftelik van u aanvaarding van* ons *klient in kennis te stet, sat ons voortgaan om 'n Hooggeregshof aansoek op te stet vir 'n verklarende bevel dat die ooreenkoms gekanseller* is *en van nul en gene waatde is.*

Aangeheg vind u:

1. Ons *maandaat (sic).*
2. *Die getekende aanbod wat* ons *klient hiermee kanselleer.*

Ons *verneem dringend van u."*

<u>The second letter</u>

"I/S: ALETTA SIB/NA SAUER/ DIE PADONGELUKKEFONDSI EISNR: 2006/12253677/04/0, IDENTITEITSNOMMER: […..]

Ons verwys na bogemelde aangeleentheid asook 'n skrywes gerig aan u op die 1ste Julie 2016 wat per geregistreerde pos sowel as per hand aan u gelewer waarin ons u in kennis gestel het dat ons op instruksie van Mev Aletta Sibina Sauer, wie 'n klient van ons firma is die aanvaarding van die aanbod wat u aan haar gemaak het terugtrek.

Ons verwys u daama dat ontvangserkenning van hierdie skrywe gedoen het op die 5de van Julie 2016.

Ons klient het ons in tussen laat weet dat u op die 2de van Desember 2016 die bedrag van R739 120.02 in haar bankrekening in betaal het. Weens die feit dat ons reeds aan u aangedui het dat Mev Sauer die aanbod wat sy aanvaar het terugtrek versoek ons dan driengend hiernee bankbesonderhede om bovermelde bedrag aan u terug te betaal ten einde ons klient die kans te gee om haar skade deur middel van haar prokureurs behoorlik te ondersoek en indien nodig by wyse van 'n aksie van u te vorder.

Ons verneem dringend van u hierin.,,

[8] The contents of the first letter clearly indicates that the plaintiff wanted to opt out of the settlement agreement for the reasons set out in the letter and these reasons do not form part of the issue I am to decide. Notably, however, is that the plaintiff indicated that if the defendant does not accept plaintiff's cancellation, the High Court would be approached for a declaratory order

declaring the settlement agreement cancelled. No process was instituted for such a declarator.

[9] Mr van Niekerk submitted that the defendant was *in mora* as from 15 October 2016, as payment of the settlement amount was due on 14 October 2016. For this submission he relied on *Mpanza v RAF* [2010] JOL 26508 (KZD).

[10] In this regard the learned Judge, in the Mpanza-decision, said the following:

"It is *trite law that when* a *time for performance is fixed, the debtor's failure to perform by that time* is a *breach and no demand is necessary to make it* so."

Swain J then, correctly in my view, finds that in order to cancel the settlement agreement, the time for performance should be of essence and this must be determined from the nature of the contract and the surrounding circumstances. *(Mpanza (supra),* paragraph 8)

[11] The learned Judge then considered the following circumstances, which are almost identical to the facts in the present matter and found that time was of the essence. With his finding I agree. He then summarized the circumstances as follows:

"[9] In the present case as *pointed out above, the surrounding circumstances to the settlement agreement were that the plaintiff sought compensation for injuries she allegedly sustained some three years before. In addition, no provision was made in the agreement for the payment of interest to the plaintiff in the month before payment was due. Also of significance is that payment to the plaintiff was not to be delayed until the plaintiff's legal costs were finalised, whether by way of taxation, or by way of agreement.*

[10] Considering all of the above I am satisfied that time was of the essence in respect of the date for payment by the defendant, and consequently no demand placing the defendant in mora was necessary before the plaintiff cancelled the agreement. It must have been a *tacit term of the compromise that its effectiveness was conditional upon it being carried*

out. It is inconceivable that where, as in the present case, the defendant had failed to make payment some six months after the due date, the plaintiff's remedies could be restricted to enforcing the compromise. (Christie, supra, at 461) In the result the plaintiff validly cancelled the settlement agreement and the compromise of the plaintiff's cause of action was rescinded, allowing the plaintiff to proceed on the original cause of action."

[12] The Mpanza-decision is, however, to be distinguished from the present matter in that the settlement agreement and the intention to cancel the agreement was communicated to the defendant at a stage when no payment was made. The facts of the present matter differ as payment was made whilst the settlement agreement was still in force.

[13] The plaintiff was, as of right, entitled to cancel the agreement immediately on non-payment. As cancellation is a juristic act, the election to cancel has to be communicated to the repudiating party. (Cf *Swart v Vosloo* 1965 (1) SA 100 (A) at 105G and 115E - F.) I shall deal with communication *infra.*

[14] Plaintiff relies on defendant's repudiation of a material term of the settlement agreement being the non-payment on an agreed date, which repudiation the plaintiff elected to accept and consequently cancelled the settlement agreement. The election to accept defendant's repudiation as well as the communication of this election could therefor only have taken place subsequent to the date of defendant's failure to make payment on 14 October 2016. This follows that any election to cancel could only have been made after 14 October 2016. In view of this, the contents of the first letter is of no consequence in regard to the issue I am to decide.

[15] Brand JA, in South African Forestry Co Ltd v York Timbers Ltd 2005 (3) SA 323 (SCA) (with reference to Datacolor International (Pty) Ltd v lntamarket (Pty) Ltd 2001 (2) SA 284 (SCA at 249H) said the following:

Repudiation occurs where one party, without lawful grounds, indicates to the other party, by word or conduct, a *deliberate and unequivocal intention that all or some of the obligations arising from the contract will not be performed in* *accordance with its true tenor (see eg Datacolor International (Pty) Ltd v lntamarket (Pty) Ltd 2001 (2) SA 284 (SCA) at 294H-I; Meta/mil (Pty) Ltd v AECI Explosives and Chemicals Ltd (supra) at 684-685B*

[16] The only conduct on which the plaintiff relies for constituting a *"deliberate and unequivocal intention that all or* some *of the obligations arising from the contract will not be performed in accordance with its true tenor"* is the non-payment of the settlement amount on the due date.

[17] The test to be applied is whether the defendant, in not making payment on the due date, acted in such a way as to lead to the reasonable conclusion that he did not intend to fulfil his part of the agreement. In the words of Nienaber JA in *Datacolor International (Pty) Ltd v lntamarket (Pty)* Ltd 2001 (2) SA 284 (SCA) paragraph *[16]:*

"Repudiation is accordingly not a *matter of intention, it is* a *matter of perception. The perception is that of* a *reasonable person placed in the position of the aggrieved party. The test is whether such* a *notional reasonable person would conclude that proper performance (in accordance with* a *true interpretation of the agreement) will not be forthcoming. The inferred intention accordingly serves* as *the criterion for determining the nature of the threatened actual breach."*

And in [18]

"The conduct from which the inference of impending non- or ma/performance is to be drawn must be clear cut and unequivocal, i.e. not equally consistent with any other feasible hypothesis."

[18] Considering the nature of the settlement agreement and m particular the non-reciprocal nature thereof I am of the view that a notional reasonable person in the position of the plaintiff would conclude that proper performance (in accordance with a true interpretation of the agreement) would not be forthcoming and that the defendant showed a deliberate and unequivocal intention not to perform.

[19] The question remains whether the payment of the settlement amount deprived the applicant of the right to accept or reject the defendant's repudiation, which right she acquired when the defendant failed to make payment timeously.

[20] For the proposition that the plaintiff was deprived of her right to cancel, the defendant bears the onus to prove, on a balance of probabilities, that plaintiff waived or retracted such right. (See *Hepner v Roodepoort-Maraisburg Town Council* 1962 (4) SA 772 (SCA) at, 778 G-H and 779 A (also reported as [1962] 4 All SA 510 (A))

[21] Based on the facts set out in the stated case it cannot be found that the plaintiff, either explicitly or by conduct waived her right to cancel as her conduct in refusing acceptance of the payment is plainly inconsistent with the waiver of her right to cancel.

[22] Mr van Niekerk submitted that the second letter constitutes an election to cancel the settlement agreement and relied on *Datacolor International (Pty) Ltd v lntamarket (Pty) Ltd 2001 (2) SA 284 (SCA) paragraph 28, where the learned Judge held as follows:*

"In particular, the innocent party need not identify the breach or the grounds on which he relies for cancellation. It is settled law that the innocent party, having purported to cancel on inadequate grounds, may afterwards rely on any adequate ground which existed at, but was only discovered after the time (cf Putco Ltd v TV & Radio Guarantee Co *(Pty) Ltd and other related cases 1985 (4) SA 809 (A) at 832C-D).*

[23] In rejecting payment by the defendant, the plaintiff made her attitude with regard to her right to cancel clear and I am of the view that she communicated her cancellation, at the very least implicitly, to the defendant.

[24] **It follows that the special plea is dismissed with costs.**

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W J COETZEE

ACTING JUDGE-NORTHERN CAPE DIVISION, KIMBERLEY

On Behalf of the Plaintiff:	*Adv J Van Niekerk (SC)*
Instructed by:	*Elliott Maris*
On Behalf of the Defendant:	*Adv* Thomas *(SC)*
Instructed by:	*Robert Charles Attorneys*