

**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**



CASE NO: 60272/2013

DATE OF HEARING: 18 MAY 2015

DATE OF JUDGMENT: 29 MAY 2015

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

.....
DATE

.....
SIGNATURE

In the matter between:

AL MPHAGO CIVIL CONSTRUCTION CC

Plaintiff

and

SIMONS NHLAPO

First Defendant

MZUZEPHI NHLAPO

Second Defendant

J U D G M E N T

AVVAKOUMIDES, AJ

1. On 3 November 2012 at Vereeniging a motor collision occurred between a vehicle bearing registration letters and numbers [.....], driven by A. L. Mphago, and a vehicle bearing letter and registration numbers [.....], driven by the first defendant in the course and scope of his duty to the second defendant.
2. The parties agreed at the pre-trial conference to separate the issue of merits and quantum and having regard to the defendants' special plea before me, I am of the view that it is indeed convenient and expedient under the circumstances for the issues to be separated. Consequently I make an order that the merits and quantum are separated.
3. The plaintiff's *locus standi* has been admitted as also the vicarious liability of the second defendant for any negligence that may be proved on the part of the first defendant. The plaintiff submitted that inasmuch as the defendants' counterclaim is bad in law and cannot be raised against the plaintiff, this renders the plaintiff's claim what is commonly referred to as a "one percent claim".
4. This, the plaintiff explains is because the plaintiff is a corporate entity and contributory negligence cannot be raised against a corporate entity. The defendants did not join the driver of the plaintiff's vehicle. As a result the plaintiff submitted in opening address that the defendants' counterclaim can

attract no other order than absolution from the instance with costs. The defendants in opening address submitted that they would address the court on the issue of the counterclaim at the appropriate stage of the proceedings.

5. The trial proceeded on the special plea raised by the defendants. The special plea alleges that on 26 March 2013, the plaintiff and the defendants, duly represented, concluded an oral agreement in terms of which the defendants admitted liability on the basis of a 55% / 45% apportionment in favour of the plaintiff and the defendants accepted liability to make payment to the plaintiff in the sum of R239 814.00. The special plea specifically lists two terms of the oral agreement, namely; the apportionment and the amount to be paid by the defendants to the plaintiff.
6. The defendants, bearing the onus of proof and duty to begin on the special plea, called one witness, namely Mr David Hugo. (See: *The Torch Moderne Binnehuis Vervaardiging Venn (Eiendoms) Beperk v Husserl* 1946 (CPD) 548 & *Hubbard v Mostert* 2010 (2) SA 391 (WCC) para 11 where Moosa J held as follows: "*It is a trite principle of our law that the person who alleges the compromise bears the onus of establishing the compromise*").
7. He testified that he is an attorney of this court, duly admitted as such on 16 April 1996. He practices for his own account and he acts for, and receives instructions mainly from Clarendon Transport Underwriters (CTU) which is an Underwriting Manager of Hollard Insurance Company. CTU deals primarily in insurance cover for taxis and busses. Mr Hugo testified that he deals with Outsurance virtually on a daily basis. It is common cause that Outsurance is

the insurer of the plaintiff's vehicle and CTU is the insurer of the second defendant's vehicle.

8. Mr Hugo testified that, on 26 March 2013 he received a telephone call from one Mrs Jeanine Portela who was a claims clerk at Outsurance. It is also common cause that the telephone conversation between Mr Hugo and Mrs Portela was recorded and both parties presented a transcription of such recording. The parties are agreed that the two transcripts differ slightly and in a non-material manner. Mr Hugo's transcript was prepared by his secretary and he later corrected some aspects thereof. He testified that the voice recording of the telephone conversation was sent to him in digital format by Outsurance. He testified that the transcript is 100% accurate and he is satisfied with the version appearing in Exhibit "B" at pages 28 to 33 thereof.
9. Mr Hugo testified on portions of the transcript more particularly, and after a long debate about the merits of the collision, he and Mrs Portela at page 33 of the bundle exchanged the following dialogue:

JP: David so let's meet each other in the middle you are at 50 and I'm at 60 can we like meet at 55 and then we are both happy?

DH: 55/45?

JP: Yes

DH: Ok uhm I, look I can swing that.

JP: Thank you I would appreciate that.

DH: Allright.

JP: Thanks so much David, and then uhm tell me when you will have a moment to draft the release for us? When will we actually receive the release?

DH: Look I'll just confirm that it's in order but between you and me it's going to be in order, uhm so I'll hopefully have the release to you this afternoon otherwise first thing tomorrow morning.

10. During the telephone conversation Mr Hugo and Mrs Portela briefly discussed the quantum without mentioning any accurate and specific amounts. On 27 March 2015 a letter, dated 26 March 2015, was sent by Mr Hugo to Mrs Portela and to her team leader, Ms Frylinck, as follows:

"We refer to various previous correspondences and the discussion between the writer and Jeanine Portela this afternoon.

We refer to our letter of the 12th February 2013 and the quantum set forth therein and confirm that it has been agreed that the matter has been settled on the basis of a 55/45 apportionment in your insured's favour.

We therefore *enclose our Release in the sum of R239 814.00."

11. The letter of 12 February 2013 was sent to one Tebogo of Outsurance at a time that the supporting documentation in respect of the quantum was not readily available, certainly not on the plaintiff's side. The letter simply dealt with figures then at hand and in respect of salvage values that were arrived at by applying percentages instated of actual values of the respective salvage. Mrs Portela testified that she had not had sight of this letter. In the well-known

case of Erasmus v Davis 1962 (1) SA (A) the Appellate Division, as it was then known, held that evidence based on a percentage of the pre-collision value of a vehicle was insufficient to establish the post collision value of such vehicle. It is clear that the parties' assessors reports that different (albeit slight) percentages were applied to arrive at the salvage values in respect of the plaintiff's and second defendant's vehicles. In any event I cannot find any evidence of whatsoever nature indicating that that there was a "meeting of minds" in respect of the quantum. The release form is standard in nature and the same as that used in the insurance industry. It reflects, inter alia, that:

"Subject to the approval of the Hollard Insurance Company Limited, I/we AL MPHAGO do hereby accept the sum of R239 814.00 (in words) in full and final settlement"

12. Further on the release form provides that such payment shall not constitute an admission of liability and is made solely to effect a compromise. The banking details to be inserted on page 2 thereof are left blank and it is clear and common cause that if the release had been accepted, Outsurance would have inserted its banking details and signed and returned the release to Mr Hugo.
13. Mr Hugo testified further that he received an email from Mrs Portela on 26 March 2013 at 15h46 pm stating that: ".....in our earlier telecom please can (sic) forward the release to either myself or Chrisna on the above mentioned matter.
Your reference: C2874"

14. CTU relied on the aforesaid telephone conversation and the letter dated 26 March 2013 enclosing the release to plead a compromise by way of a special plea in the action brought by Outsurance in the name of the plaintiff against the defendants. It argued on behalf of the defendants that the court should have regard to the time line in the following order:

14.1 The letter of demand by Outsurance to the defendants dated 23 November 2012. This demand enclosed the assessor's report in respect of the plaintiff's vehicle.

14.2 Mr Hugo's letter dated 12 February 2013 wherein he dealt with the quantum on both sides but based the apportionment thereon on 70% / 30% in favour of the defendants and in which he applied the said apportionment on figures in respect of the plaintiff's vehicle and on two assessors reports in respect of the second defendant's vehicle. It is worth mentioning that as at 12 February 2013 Outsurance did not have sight of the assessors' reports in respect of the second defendant's vehicle.

14.3 The email dated 5 March 2013 sent by Mr Hugo to Ms Frylinck dealing with the delay in addressing the matter pursuant to a request from the managing director of CTU, one Mr. Fivaz.

14.4 The telephone conversation of 26 March 2013.

14.5 The emails commencing 15 April 2013 and thereafter.

15. It is unnecessary to deal the time line. The defendants argued that if the court has regard to all of the above in totality, the conclusion would be that a settlement had indeed been arrived at. Under cross examination Mr Hugo testified that it is unusual for him to deal with Outsurance direct because he normally deals with their attorneys. Under cross examination Mrs Portela was adamant that in her view if the parties had settled on a 50/50% apportionment it would mean that each would be responsible for their own damage. Her version as that as long as she could obtain an offer on an apportionment favouring the plaintiff it would suffice as an offer. It never occurred to her that if the one party's quantum was larger than the other party's quantum, it would naturally follow that one party would have to pay the other. She was further adamant that there was no settlement and the sole purpose of her call to Mr Hugo was to obtain an offer of settlement for consideration.
16. The plaintiff's counsel pointed out, correctly in my view, that the general principles of the law of contract determine the position of the parties who have entered into a compromise relating to an insurance claim, for example whether the compromise constitutes a valid and binding agreement. Furthermore, the scope of the alleged compromise must be established by applying general rules of construction. Consequently it follows that there must be a valid offer and acceptance of the offer before the agreement could have been reached between the parties. In this regard he referred me to the decision in *Stirling v Federated Insurance Co. Ltd.* 1983 (1) SA 897 (W) and the authority in *General Principles of Insurance Law* MFB Reinecke et al 2005 page 331 par. 453.

17. In *Wasmuth v Jacobs* 1987 3 SA 629 (SWA) 633D Levy J stated that: “It is *fundamental to the nature of any offer that it should be certain and definite in its terms. It must be firm, that is, made with the intention that when it is accepted it will bind the offerer.*” The court went further and held that an ambiguous offer cannot be classified as an offer at par 633E-G: “*The Rules applicable to the interpretation of an offer, or, for that matter, of an acceptance of an offer, are not necessarily the same as the rules which are applicable in the interpretation of contracts. In Boerne v Harris 1949 1 SA 793 (A) at 799, after stating the aforesaid position, Greenberg JA added: Thus, although a contract, even if it be ambiguous, may be and generally is binding, the acceptance of the offer (or for that matter the offer itself) must be unequivocal, ie positive and unambiguous.*”
18. Both counsel referred me to several authorities dealing with the conclusion of contracts and the various principles relating thereto. The facts herein are however the determining factor. The defendants cannot escape the manner in which the special plea was phrased and they are bound to the special plea as it stands. After hearing the case for both parties and prior to the hearing of argument, the defendants applied for an amendment to the special plea by inserting an alternative date, namely the 27th of March 2013 as the date of acceptance of the offer. I indicated to the parties that I would consider the amendment after hearing argument on the special plea. I have considered the amendment but in my view nothing turns on the proposed amendment and I do not intend to deal with it, because of what follows hereunder.

19. At that stage it was clear that the allocated days for the trial were insufficient to finalize the trial in the event of the special plea being dismissed, and the parties agreed that I should postpone the trial sine die, pending my judgment on the special plea. After reserving my judgment and whilst I was preparing my judgment I called for counsel's heads of argument that they themselves had tendered on the various authorities on the point in issue. At my request I received these by email as well and noted that the defendant's counsel had copied his instructing attorney on the email to me. On 20 May 2015 the defendant's attorney deemed it fit to communicate with me directly on my personal email address as follows:

"The writer wishes to inform your Lordship that it is the intention of the Defendants' in the above matter to bring a formal and substantive application for the amendment of the Special Plea in the above matter.

The respectful request from the Defendants' at this stage is that you do not proceed to prepare your judgment at this stage and that same be held over until the application to amend has been argued.

The writer has not yet had an opportunity to discuss with Advocate Kloek when the application can be delivered, but we will revert shortly in this regard."

20. This letter was copied to the plaintiff's attorney and counsel for both parties. I find the defendants' attorney's conduct most unfortunate and distasteful, if not unprofessional. I have not been able to trace any authority to the effect that it

is simply inappropriate for an attorney to communicate in writing or otherwise with a judge about a case with which the judge is seized. In my view it should be simple common sense to refrain from doing so. In any event I requested that both counsel see me in my chambers where I was informed the defendants' had sought the opinion of senior counsel who had advised against any such application.

21. I now deal with the special plea raised. The crux of the defendants' special plea is that a settlement was reached between Mr Hugo and Mrs Portela on 26 March 2013, orally at Johannesburg or Pretoria and the relevant terms of such agreement was that the first and second defendants admitted liability on the basis of a 55% / 45% apportionment in the plaintiff's favour and that the first and second defendants accepted liability to make payment to the plaintiff in the sum of R239 814.00. This much is clear from the special plea.
22. The defendant's counsel in argument sought to persuade me that I should read the two terms of the settlement apart from each other and find that the settlement, although not dealing with the quantum, as is clear, nevertheless is a settlement of the merits in the case. I am not persuaded. On the facts, I must accept that the special plea was drafted after the transcript had been obtained and this being the case, and if this was the defendants' case on the merits only, the special plea would have read differently. Even if the transcript was not available at the time of drafting the special plea I cannot read into the plea what it does not contain. Even if I allowed the amendment of the date on which the offer was accepted, namely 27 March 2013, it would make no difference to the special plea.

23. Consequently, I make the following order:

The special plea is dismissed with costs.

AVVAKOUMIDES, AJ
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Representation for Plaintiff:

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Instructed by: VBH Attorneys

Representation for the Defendants:

Counsel

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