

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal number: 1897/2008

In the Appeal between:

MS RADEBE

Applicant

and

ROAD ACCIDENT FUND

Defendant

CHUENE ATTORNEYS

Third Party

HEARD ON: 21 APRIL 2015

JUDGMENT BY: N.M. MBHELE, A.J

DELIVERED ON: 09 JULY 2015

INTRODUCTION AND BACKGROUND

- [1] Plaintiff is Mhlekezi Selina Radebe, who acts in her personal capacity in a delictual claim against the defendant arising from injuries she sustained in a motor vehicle collision on 10 February 2006, (the collision).
- [2] It is the Plaintiff's case that the defendant is liable to compensate her in terms of the provisions of the Road Accident Fund Act, 56 of 1996 (the

Act) for her damages arising from the aforementioned collision. Plaintiff's injuries were sustained as a result of the wrongful and negligent driving of the insured driver, a certain MP Hlongwane.

[3] As a consequence the plaintiff has suffered damages in the form of post and future medical, hospital and related expenses, and general damages.

[4] In addition to its plea on the merits, the defendant filed a special plea. When the matter came up for hearing, the parties reverted to an agreement they had earlier during the course of the pre-trial conference held in this matter and which is set out in paragraph 4 of the pre-trial minutes as follows:

“Dat die hof op hierdie stadium versoek sal word om slegs die verweerder se spesiale pleit soos vervat in paragrawe 1 tot 6 van die verweerder se verweerskrif te bereg en dat alle ander geskilpunte uitgestel sal word *sine die*”.

[5] **The issues**

The defendant filed a special plea *inter alia* stating the following:

5.1 On 05 May a claim against the defendant was lodged on behalf of the Plaintiff due to injuries sustained by the Plaintiff in a motor vehicle collision which occurred on 10 February 2006.

5.2 The claim was lodged on behalf of the Plaintiff by Choeu Chuene Attorneys (the third party) duly authorised to do so in terms of the special power of Attorney signed on 20 February 2006.

5.3 The Plaintiff is Mhleka Selina Radebe with identity number:
[.....].

5.4 On 23 October 2006, the Defendant made an offer of settlement to the Plaintiff's Attorneys in the amount of R 8000.00.

5.5 The Plaintiff's accepted the offer on behalf of the Plaintiff by means of a letter of Acceptance dated 17 November 2006.

5.6 Payment was effected on Plaintiff's Attorneys on the 28th November 2006.

5.7 The Plaintiff's current claim for payment of damages suffered as a result of injuries sustained in a motor vehicle collision which occurred on 10 February 2006, is a claim for the same thing, on the same grounds against the same party. Defendant pleads that the Plaintiff's present claim has been finalised and paid in full.

[6] The matter is before me for adjudication of the Defendant's special plea. On 04/ 02/2013 the defendant filed a Notice to the third party, joining Choeu Chuene Attorneys to the proceedings as a third party. The Plaintiff filed a replication wherein she stated that she never instructed Choeu Chuene Attorneys to represent her in lodging a damages claim against the defendant. She further states that she never signed a Power of Attorney as alleged by the Defendant.

[7] The parties agreed that the Defendant bears the onus to prove and has a duty to begin.

Defendant's case.

- [8] In support of its case, the defendant called Zodumo Noqayi, a litigation officer in the defendant's employ at the Cape Town branch . She testified to the effect that her daily duties involve settlement of claims lodged by Plaintiffs' Attorneys against the defendant. She further testified that when she received Plaintiff's summons, she drew the file and noticed that the plaintiff's claim based on the same facts and cause of action was settled by the defendant's Pretoria branch during 2006. The matter was previously handled by another claims handler. She only handled the matter at the time she received the summons and she is not conversant with the circumstances surrounding the offer that was made on 23 October 2006. After acceptance of offer money was paid into Choeu Chuene Attorney's Trust Account.

Plaintiff's Case

- [9] Plaintiff testified in support of her case. She testified to *inter alia*, the fact that she was a passenger in a taxi that was involved in an accident during 10 February 2006. Around March 2006 she approached Mr. Kruger of Breytenbach and Mavuso Attorneys and instructed him to lodge a claim with the defendant for personal injuries. She signed the Road Accident 1 form and the Power of Attorney on 29 March 2006 at the offices of Breytenbach and Mavuso . She never instructed the third party to lodge a claim on her behalf with the Defendant. She has never met anyone from the Third party's offices and the Power of Attorney that is said to have been signed by her on 06 May 2006, she bears no knowledge thereof. She has never been to Johannesburg in her whole life and as such all the documents that are alleged to have been signed by her through the third party, are foreign. She admits that she at some stage had to change her signature. This was done as per the advice from the bank

after her bank card was stolen and money was withdrawn from her account.

She confirms that she did receive a letter from the third party, informing her that the third party would accept an offer on her behalf from the Defendant. She immediately took the letter to Mr. Kruger for further attention as she had no dealings with the third party. She never received any money from the third party. She further stated that she was bedridden for 3 months, and as such she could not have managed to travel to Johannesburg to instruct the Third Party.

The matter was adjourned while the plaintiff was still under cross examination by the third party. The third Party failed to appear in court in the next appearance date, and the parties requested the court to declare cross examination of the plaintiff closed. Documents brought before me showed that the third Party was well aware of the date of further hearing and in the absence of explanation of the third party's absence I declared the cross examination closed. Where after the Plaintiff closed its case.

Contentions by the Parties

- [10] In argument Mr. Coetzer, for the Defendant, submits, *inter alia*, that even though the Defence's witness could not provide an insight of how the Plaintiff's claim was settled, on phase value all documents accompanying the settled claim suggest that Plaintiff indeed instructed the third party to lodge a claim on her behalf, which it did. He further contends that the credibility of the Plaintiff is questionable in that she insisted that her signatures on different papers were similar when one could see through naked eyes that they are not the same. He further submitted that it is impossible for the third party to have come into possession of the Plaintiff's copy of identity document without her furnishing the third party with the same. He contends further that the

Plaintiff's claim that she sustained severe injuries cannot be reconciled with the medical expert report filed of record.

- [11] Mr. Cilliers, for the Plaintiff, submitted, *inter alia* that the Plaintiff was consistent that the signature appearing on the documents lodged by the third Party was not hers. The letter that was sent contradicts the offer that is said to have been accepted. He further contends that there is no evidence to show why the third party is not before court to substantiate the Defendant's claim. The fact that the Defendant has received no money from the third party since 2006 is an indication that the claim submitted by the third party was fraudulent.

There is no evidence from the third party to show how they came into acquisition of the Plaintiff's personal documents, including her I.D. book. The defendant, according to Mr. Cilliers, failed to discharge its onus.

- [12] The Parties are *ad idem* that the Plaintiffs' current claim arises from the same facts as those in the claim lodged by the third party, which was subsequently settled.

Settlement agreement is a contract, and for it to be binding, it must *inter alia*, satisfy the following elements:

- Consensus
- Capacity
- Formalities
- Legalities
- Possibility
- Certainty

“See the Law of Contract in South Africa. Dole Hutchinson et al P6.

The letter informing client of an offer made by the Defendant was written on 09 October 2006 by the third party, when the Defendant's offer was only made on 23 October 2006. Evidence before he shows that the said

letter contained no amount of offer. The letter was a confirmation of a conversation between the Plaintiff and an Attorney from the third party's office confirming acceptance of offer. There is no explanation as to which offer did the plaintiff mandate the third party to accept on her behalf, as the letter was written three weeks before the actual offer was made. In the light of the above, it cannot be said that the defendant entered into a valid settlement agreement with the plaintiff.

- [13] It is undisputed evidence before me that the Plaintiff never received any money from the third party. Mr. Coetzer argued that the Plaintiff was not a reliable witness; in that she contradicted herself in as far as her signatures were concerned. He argued that the only inference to be drawn based on the proven facts is that the Plaintiff did mandate the third party to lodge claim on her behalf. He invited me to apply the principles laid down in **Govan v Skidmore 1952 G) SA 732 (N)**, in support of his argument.
- [14] I am not of the view that total rejection of the Plaintiff's evidence is the only plausible and appropriate inference to be drawn from all the proven facts. There is no evidence before me to show that the third party was indeed acting on the mandate of the Plaintiff when it lodged a claim with the defendant, save that the third party was in Possession of the plaintiff's copy of Identity document, Power of Attorney and affidavit purported to have been signed by the Plaintiff. There is no evidence refuting plaintiff's version that she has never been to Johannesburg in her whole life and as such never appeared before any commissioner of Oaths in Johannesburg attesting to an affidavit.
- [15] It is no secret that there have been instances in which Attorneys have managed to access confidential documents of road accident victims

directly from the hospitals. Although there is no evidence before me to show that the third party was an 'ambulance chaser' in the instant matter, all facts before me, do not suggest that it had the mandate to lodge a claim on behalf of the Plaintiff.

[16] In assessing the probabilities holistically, the conclusion seems to be that the Plaintiff's version is more probable. The Defendant has not succeeded in discharging the onus it assumed when prosecuting its special plea. It follows that the special plea must fail.

[17] I would have failed in my duties if the conduct of the third party is left unattended. Since there is evidence that monies have been paid into the trust account of the third party and that such monies were never paid to the intended beneficiary, its conduct calls for in depth investigation by the Law Society of the Northern Provinces, being the regulatory body in the area where the third party is plying its trade.

The following order is made:-

1. The special plea is dismissed with costs;
2. The Registrar is directed to serve this order on the Law Society of the Northern Provinces;
3. The Law Society of the Northern Provinces is directed to investigate the third party for possible misconduct.

NM MBHELE, A.J

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