

IN THE HIGH COURT OF SOUTH AFRICA
(FREE STATE PROVINCIAL DIVISION)

Case No. : 1386/2007

In the matter between:-

OOSTHUYSEN BEATRIX

First Applicant

OOSTHUYSEN YOLANDE

Second Applicant

versus

OOSTHUYSEN PETRUS JOHANNES

First Respondent

ROAD ACCIDENT FUND

Second Respondent

CORAM:

H.M. MUSI J

HEARD ON:

30 AUGUST 2007

DELIVERED ON:

13 SEPTEMBER 2007

Summary: Application for transfer of action from one court to another in terms of section 3 of the Interim Rationalisation of Jurisdiction of High Courts Act, No. 41 of 2001 – respondent pleading the existence of a contract prohibiting transfer – whether binding agreement concluded and effect thereof on the application.

JUDGMENT

H.M. MUSI, J

- [1] This is an application based on section 3 of the Interim Rationalisation of Jurisdiction of High Courts Act, No. 41 of 2001, for transfer of the action instituted by the applicants against the first respondent in this Court to the Transvaal Provincial Division of the High Court. The background to the matter is set out hereunder.
- [2] On 12 April 2002 the second applicant was a passenger in a motor vehicle driven by the first respondent when the first respondent's motor vehicle became involved in a collision with another motor vehicle on the outskirts of Bloemfontein. The second applicant sustained severe injuries in the accident as a result of which she became a paraplegic. She and her mother, the first applicant, who had apparently expended money on the second applicant's medical treatment, instituted action in the TPD against the Road Accident Fund, the second respondent, for damages on the basis of the alleged negligence of the driver of the motor vehicle that collided with the first respondent's motor vehicle and that of the driver of an unidentified motor vehicle that allegedly caused the first respondent's motor vehicle to collide with the other motor vehicle. No negligence on the

part of the first respondent was averred and hence the first respondent was not joined in that action.

[3] Subsequently and apparently on advice of their attorneys, the applicants instituted action in this Court against the first respondent for damages on the basis that there had been negligence on the part of the first respondent that causally contributed to the accident. The first respondent is defending the action and has filed a plea, attributing the accident solely to the negligence of the driver of the unidentified motor vehicle.

[4] The applicants now seek to have the action instituted in this Court transferred to the TPD to be consolidated with the action instituted there. I shall henceforth refer to the first respondent simply as the respondent and to the second respondent as the RAF.

[5] A number of considerations have been given for the need to transfer and consolidate the actions. It is contended *inter alia* that the convenience of the parties demands that this be done, given that the applicants are resident in Pretoria, the

RAF has its principal place of business in Pretoria, the attorneys of both the applicants and the RAF are all in Pretoria and that the respondent is in fact represented by his insurer's attorneys, who are based in Johannesburg. It is also pointed out that there is a serious risk of duplication where the same witnesses, who will testify in the TPD case, may be required to again testify in this Court and that the costs would escalate. In argument, counsel for the applicants cited authority on the principles that would guide the court in considering this type of application. See *inter alia* **MPOTSHA v ROAD ACCIDENT FUND AND ANOTHER** 2000 (4) SA 696 (C); **NONGOVU NO v ROAD ACCIDENT FUND** 2007 (1) SA 59 (TPD).

- [6] In resisting the application the respondent denies that considerations of convenience favour transfer of the action. He says that the nature of the scene of the accident, which he has inspected, is such that the court hearing the matter would need to conduct an inspection *in loco* and that, coupled with the fact that he and the driver of the vehicle with which he collided are all in Bloemfontein, militates against transfer. However, the main ground upon which the

respondent opposes the application is that there is an agreement concluded by the applicants and himself through their attorneys to the effect that the action in this Court would not be proceeded with “until and unless the action against the second respondent fails and that the action against the first respondent would be withdrawn should the action against the second respondent succeed in its entirety”.

- [7] During argument I expressed the view that any attorney with experience in third party litigation would know that you cannot risk excluding a party like the respondent in an action based on the facts of this case and I wondered why was the respondent not joined in the TPD case. The answer to this question is to be found in the genesis of the agreement pleaded by the respondent. In his answering affidavit the respondent produced a copy of a letter written by the attorneys acting on behalf of the applicants to his attorney, who deposed to the respondent’s answering affidavit. The letter is dated 10 December 2004 and is marked annexure “EGL1”. It explains why was the respondent not joined in the case against the RAF. The reason therefor is that the applicants’ attorneys were confident that they would prove

that the accident was due to the negligence of the driver of the unidentified motor vehicle in respect of which the second applicant's claim is unlimited. It is acknowledged in the letter that if it should turn out that the accident was due to the negligence of the respondent, then the RAF would be liable only for R25 000,00, in which event the balance of the claim would have to be recovered from the respondent personally and particulars of his short term insurance were requested for the purpose. The letter makes it clear that summons would be issued against the respondent as a precautionary measure and that it will be served purely in order to forestall prescription. The proposal is then mooted that as soon as the notice of intention to defend is served, further steps in the action could be kept in abeyance to await the outcome of the case in the TPD and that should the latter case succeed on an unlimited claim basis, then the action against the respondent would be withdrawn.

- [8] Subsequent to the letter of 10 December 2004 a formal proposal was communicated to the respondent's attorneys proposing that the matter in this Court be kept in abeyance on the basis set out above. It is contained in a letter dated

18 April 2005 addressed to the respondent's attorneys by the Bloemfontein correspondents of the attorneys for the applicants. It appears in the papers as annexure "Y03". The attorneys for the respondent responded by letter dated 10 May 2005 which is marked annexure "EGL2" in the following terms:

"Ons verwys na bostaande en wens u mee te deel dat dit ons instruksies is dat ingestem word tot die voorgestelde reëling."

They thereby accepted the proposal.

- [9] In argument I posed the question whether, if these correspondences evidence a binding agreement, this Court could ignore such agreement and grant the application if it is of the view that the interests of justice would be better served by consolidating the actions in the TPD. Counsel for the applicants was candid that such course is not open to this Court. That means that if it is found that there was such a binding agreement that would be the end of the application. On the other hand, the applicants, whilst agreeing that they made the relevant proposal, which would constitute an offer,

aver that they never received annexure “EGL2”, which would constitute an acceptance. They, therefore, contend that no agreement came into being. Even then they contend that even if an agreement had been reached, it is not a binding agreement.

[10] In my view, the balance of convenience favours transfer of the action against the respondent to the TPD. The real issues to be determined are:

- (a) whether the offer contained in annexure “Y03” was accepted in the sense that the acceptance contained in annexure “EGL2” did reach the applicants’ attorneys; and
- (b) whether a binding agreement came into being or whether this was merely a gentleman’s agreement between attorneys, as counsel for the applicants contended.

[11] The first issue can be readily determined. These are motion proceedings and where there are disputes of fact the rule stated in **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) SA 623 (A)

applies. The question of whether annexure “EGL2” was received by the attorneys for the applicants stands to be resolved on the basis of the averments contained in the respondent’s answering affidavit together with the averments made in the founding affidavit of the applicants which the respondent admits. The version of the respondent is that the respective firms of attorneys in Bloemfontein use Docex to exchange correspondence and that the letter in question was properly delivered to Docex for forwarding to the attorneys for the applicants. In this regard the respondent has filed affidavits detailing all the steps normally taken in the process and verifying that the letter was duly delivered to Docex on 10 May 2005. It is trite that where an offer is communicated through the post a contract comes into being upon posting of the letter of acceptance. See **CAPE EXPLOSIVES WORKS LTD v SOUTH AFRICAN OIL AND FAT INDUSTRIES LTD (1)** 1921 (CPD) 244; **KERGEULEN SEALING AND WHALING CO LTD v COMMISSIONER FOR INLAND REVENUE** 1939 (AD) 487. *In casu* Docex had been appointed for exchange of correspondences between the Bloemfontein attorneys of the parties herein and the contract

would have come into existence upon delivery of the letter of acceptance to Docex.

[12] Besides, the inference can be drawn that the letter was indeed received by the attorneys for the applicants on the basis of the following. The letter was posted on 10 May 2005 and if it had not been received, one would have expected the applicants' attorneys to have written a further letter or letters seeking a response to their proposals. In the event, no enquiry whatsoever was made and a period of some four months elapsed before the next letter dated 9 September 2005 followed wherein the applicants' attorneys suddenly changed stance and sought to withdraw the offer, admittedly on advice of their senior counsel. Is it by chance that the applicants kept the matter in abeyance for so long? In all probability the matter was kept in abeyance precisely because the letter of acceptance had been received. As counsel for the respondent submitted, the version of the applicants does not exclude the possibility that the letter was received but was somehow mislaid.

[13] The cardinal question is whether the agreement reached is a binding contract. The applicants contend that it could not have been the intention of the parties to be bound by what was merely an arrangement. Counsel for the appellants referred *inter alia* to **ROBINSON v RANDFONTEIN ESTATES GOLD MINING CO. LTD** 1921 (AD) 168 for an example of an agreement which was not intended to be legally binding, because of the absence of *animus contrahendi*. Counsel also contended that this was merely a gentleman's arrangement between attorneys that was not intended to be binding on the parties. Counsel also submitted that since it is the respondent who is relying on the agreement, he bears the onus of proving it. In dealing with the latter point, counsel for the respondent submitted that annexures "Y03" and "EGL2" constitute a complete memorial of the terms of the agreement and that therefore the parole evidence rule applies. He submitted that there was a clear and unambiguous offer which was accepted and that a binding agreement has been shown.

[14] I have given the background to the agreement purely in order to put the agreement in its proper setting. From this it is

clear that the proposal emanates from two sources. Firstly, the applicants did not want to sue the respondent (the second applicant's brother) and the summons against him was issued on the advice of their attorneys as a precautionary measure in case the claim against the RAF did not succeed on an unlimited claim basis. That explains why it was proposed that the case against the respondent should not be proceeded with until the claim against the RAF was finalised. Secondly, the applicants' attorneys were confident that they had a good case against the RAF and believed that the case against the respondent would ultimately fall off. The letter containing the proposal is evidence of this and contains a clear and unambiguous proposal that should the case against the RAF succeed as envisaged

“... sal die aksie onder saaknommer 773/2005 teruggetrek word.”

Only if the case against the RAF failed

“... sal die aksie onder saaknommer 773/2005 voortgesit word.”

The letter incorporates clear terms, which if accepted would leave no doubt as to what was agreed upon. It is a firm offer that fits comfortably with the description of an offer given by Levy J in the following terms in **WASMUTH v JACOBS** 1987 (3) SA 629 (SWA) at 633 E:

“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 offeror.”

The instant matter is clearly distinguishable from the offers alleged in matters like **ROBINSON v RANDFONTEIN ESTATES GOLD MINING CO. LTD**, *supra*.

[15] I have already indicated that the offer emanates from the reluctance of the applicants to sue the respondent and it can be inferred from its language and background facts that they intended it to be binding and indeed implemented it for some time until advised of the risk of sticking to it. In her replying affidavit the second applicant concedes as much when she says

“Nowhere in my founding affidavit did I suggest that the intention was initially otherwise than to stay the FS action pending the outcome of the TPD action.”

This was not a gentleman’s agreement between attorneys. The attorneys were merely implementing the mandates of their respective clients when they concluded the agreement.

- [16] Counsel for the applicants also argued that for a contract to be valid and binding the parties must intend it to have legal consequences. He suggested that the contract would have had no legal consequences since the respondent could not be able to recover damages in the event of it being breached. The answer to this is that recovery of damages is not the only remedy available to the innocent party upon breach of contract. One of the remedies is to refuse to accept repudiation and to insist on holding the defaulting party to the contract (specific performance) or he/she can obtain an interdict to prevent a breach or threatened breach of the contract. See generally R H Christie, **The Law of Contract in South Africa**, 5th Edition page 330 – 334.

[17] As to the proof of the contract, I agree with counsel for the respondent, that the annexures “Y03” and “EGL2” constitute a complete written memorial of the terms agreed upon. The language used is plain and unambiguous and there can be no doubt as to what the parties intended. Therefore the integration rule applies and no further evidence was needed to establish the contract.

[18] I conclude that the agreement concluded by the parties herein is a binding contract. In the premises, the applicants are not entitled to a order sought and the application is dismissed with costs.

H.M. MUSI, J

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