

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case Number: A559/2011

in the matter between:

AECI Limited and Six Others

Appellants

And

Magrieta Dreyer

Respondent

JUDGMENT DELIVERED 13 AUGUST 2012

Baartman,J

- [1] On 16 December 1995, a sulphur fire broke out in Macassar, in the Western Cape. The respondent alleged that she had suffered damage to her property (**material claim**) arising from the fire. On 23 April 1996, the respondent signed a release form ("kwytskelding") in which she accepted R500 in full and final settlement of any claim she might have arising out of the fire. Subsequently, the respondent developed medical problems that she alleged were attributed to the fire. Her claim for medical damages was met with a special plea in which the appellants alleged that the respondent had compromised

any further claims she might have had. The magistrate at Somerset West dismissed the special plea. This is an appeal against that dismissal. The magistrate reasoned the dismissal as follows:

"Having heard the evidence and having read through the transcript and heads of arguments, I am satisfied that the following is fair and just.

The reason for the court concluding as follows is based fundamentally on the principal that the matter should be ventilated and adjudicated in an appropriate forum. The court is not convinced on the argument put forward by the defendant that sufficient grounds currently exist to close the door of the court for the plaintiff to have its case ventilated and adjudicated."

- [2] It was common cause that the respondent completed a claims form that made provision for both medical and material claims. However, the respondent only completed the material claims section. The respondent met with Brett Herselman (**Herselman**), an insurance assessor-loss adjudicator, and in his presence signed the release form. At the time the respondent signed the release form, she had no medical complaints. It is the respondent's case that Herselman "...specifically held out to her that medical claims are specifically excluded and that the amount of R500 is only to cover her material damages such as curtains". The appellants have denied that Herselman misrepresented the nature of the release.
- [3] The following are the common cause surrounding circumstances:
- (a) The first appellant, AECI Limited, was the holding company of a group that included the second appellant, AECI Operating Services (Pty) Ltd, and the third appellant, Cape Explosives Works Limited. The fourth to seventh appellants held managerial positions within the group.

- (b) The first appellant owned and operated a chemical plant in Somerset West and the second appellant was responsible for the management of the site.
- (c) Since 1967, the first appellant has been stockpiling tons of sulphur on the site. Between 13 and 15 December 1995, grass fires broke out in the area near the stockpile. On 16 December, a further fire broke out which ignited the stockpile and consumed approximately 7 250 tons of sulphur.
- (d) The fire caused a sulphur dioxide cloud over the town of Macassar where the respondent lived. During the night of 16 December many residents were evacuated. However, despite the evacuation, many residents presented with adverse physical reactions directly related to the sulphur dioxide exposure.
- (e) Many residents suffered damage to person, property or both.
- (f) A judicial commission of enquiry held that the first appellant had been negligent in failing to prevent the fire. In January 1996, the first appellant/the group started a claims evaluation process through which affected residents could settle their claims directly with it/them. (I presume the group's insurers.)
- (g) The evaluation process was conducted at the first appellant's premises. The process was mainly as follows:
 - (i) A claimant would collect and complete a claim form;
 - (ii) Claimants would wait in line to consult 1 of 4 claim adjudicators. In the consultation, the claim would be settled either in full and final settlement or by a conditional release. The latter release form was employed when the possibility of future medical claims were foreseen – when a claimant either presented with a medical condition, complained of symptoms or requested his/her medical claim to be excluded.

(iii) Those claimants who settled their claims received cheque payments on the day of settlement. The process was popular and approximately 2 000 claimants settled their claims via this process.

(iv) At least 1 notice board, Herselman testified to more, was put up in the area where the process was conducted to inform claimants that they were not obliged to settle their claims via the process because they were also entitled to seek independent legal advice or contact the Macassar Crisis Committee for assistance.

[4] The release form that forms the subject of this application suggested that the parties to it intended to put an end to all claims arising from the fire. This is so because the release form contained the following:

(a) An acknowledgment that the respondent accepted the amount of R500 in full and final settlement of any claim of whatsoever nature against the appellants arising from or in connection with the fire.

(b) A declaration that the respondent had not been induced to sign the release by any representation.

(c) A warranty that the respondent knew that the compromise precluded her from making any further claims against the appellants arising from the fire.

[5] In the matter of **Wilson Bayly Holmes (Pty) Ltd v Maeyane and Others** 1995 (4) SA 340 (T) 345, the court held:

"The contract in the present case was one of compromise. The nature of such a contract is that it is concluded because the rights of the parties are uncertain, and they choose not to resolve that uncertainty. By the very nature of such a contract, there can be little room for finding that the parties must have intended their contract to

depend upon the existence of one or other of the factors to their respective rights. It is precisely to avoid testing them that they compromise.

However, the question is not whether the appellant would have compromised had it been aware of one or other circumstance which excused it from liability. If the parties would have contracted even if they had known that the particular state of affairs did not exist, then clearly it cannot be said that they intended their contract to depend thereupon, but the converse is not equally true. The real enquiry in each case is whether this was a risk which they took."

- [6] It follows that the parties to the release entered into an agreement of compromise or settlement. I accept that the respondent did not know that she would develop a medical problem due to her exposure to the sulphur fire. However, that uncertainty did not preclude a valid agreement of compromise from coming into existence. Agreements of compromise are intended to bring to an end the uncertainty parties face prior to concluding an agreement of compromise. (See **Gollach & Comperts v Universal Mills & Produce Co** 1978 (1) SA 914 (A))
- [7] However, if as the respondent alleged, Herselman misrepresented the agreement, she may avoid the consequences of the agreement. I deal below with the evidence led at the trial to determine whether there was any misrepresentation. (See **George v Fairmead** 1958(2) SA 465 (A) at 471 A-D; **Brink v Humphries & Jewell (Pty) Ltd** 2005 (2) SA 419 (HHA) para [2])

EVIDENCE LED IN THE COURT A QUO

- [8] The witnesses testified 15 years after the event and expected memory lapses occurred. The respondent confirmed that she had applied for compensation for the damage she had suffered in the fire via the process provided by the appellants.

- [9] The respondent and her husband, William Dreyer (**Dreyer**), met with Herselman who enquired into their respective damages. Herselman assessed the damage to the respondent's household items at R400. However, when she pointed out that the family had had to evacuate the house, Herselman added R100 for the inconvenience the family had suffered. The respondent said that Herselman explained both the process and the release form that she signed.
- [10] The respondent said that although she had no medical complaints at the time, Dreyer had asked Herselman what would happen should they develop medical problems in the future. She said that Dreyer had worked for "Sonchem" and knew that they could develop medical problems in the future. In response to Dreyer's query, Herselman said that he was only dealing with their material claims. He therefore gave them the impression that they would still be able to claim should they develop medical problems in future. The respondent said that she did not read the release form but that Herselman had explained it to her.
- [11] Dreyer confirmed that they both saw Herselman on 23 April 1996. Dreyer said that he had claimed R1 800 for damage he had suffered. However, Herselman had thought his claim was inflated therefore he received only R500. Furthermore, Dreyer said that although neither he nor the respondent had any medical complaints on the day, he had enquired from Herselman what their position would be should they later develop medical problems. Dreyer said that his concern had stemmed from his experience with sulphur dioxide which he had acquired through previous employment. Dreyer said that he had posed the question 3 times because he was surprise (*verbaas*) when Herselman told him that the claims that they were finalising only pertained to their material claims. He therefore repeated the enquiry because he wanted certainty because he knew the exposure could cause medical problems later.

[12] Herselman had no independent memory of his consultation with the couple; instead, he relied on the process generally followed in the claims adjudication process.

(a) The process lasted 6 months during which approximately 2 000 claimants applied and had their claims processed.

(b) He confirmed his handwriting on the respondent's claim form and assumed a discussion had preceded finalisation of the settlement.

(c) He confirmed that the insert of a claim for food was in his handwriting. He was sure that he would have taken that initiative following a discussion with the couple during which he would have established that they had been out of their house for 1 night, which would have led him to assume that they had to have eaten out.

(d) Herselman was certain that he had explained that the amount offered was in full and final settlement of all claims arising from the fire.

[13] Herselman said that the claim form had made provision for both medical and material claims. If a claimant had not completed the medical section but had presented with symptoms he would have clarified their medical condition and would have noted on the claims form that they did have medical complaints. He referred to 3 claim forms, those of Mrs Pholonskie, Mr Prins and Mrs Jones, as examples of the process followed where a claimant had medical complaints. In each of the examples, the claims adjudicator had indicated that the claim had been settled in respect of the material damages only.

[14] However, the record contains 21 examples of claimants who signed release forms similar to the respondent's, 7 of which were limited to material claims only. Herselman therefore showed that the claim

adjudicators had received instruction to entertain medical claims and had in appropriate circumstances indicated that a claim was settled only in respect of the material damages.

- [15] I accept that the respondent developed medical problems after she had accepted the R500 and had signed the release form. This court does not have the benefit of the trial court's credibility or factual findings because the magistrate did not deal with the evidence led at all. In the matter of **Stellenbosch Farmers' Winery Group Ltd and Another v Martell et cie and Others** 2003(1) SA 11 (SCA), Nienaber JA described the evaluation process applicable to this matter.

"...[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii),

(iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail "

[16] I have applied the above test to the evidence, but without the benefit of the trial court's credibility or factual findings. The respondent has alleged that she was misled, it follows that she bears the onus to prove that she was misled. In the court *a quo*, the appellants began leading evidence that procedure had been adopted as a matter of convenience and did not change the onus. For the reasons that follow, I am of the view that the respondent failed to meet the onus:

(a) The respondent did not have any medical complaints when she settled her claim. She did not raise any medical concerns with Herselman. She said that Herselman had asked what damages she had suffered and she indicated her material damages. Nevertheless, the respondent in her reply to the appellants' request for further particulars said that she had "a cough, chest tightness and a whistling sound every evening" at the time when she met with Herselman. The respondent was unable to explain her reply; instead, she confirmed that she did not have those symptoms at the time.

(b) The respondent said that she had developed medical problems approximately 7½ months after the fire. That evidence was in

contrast to the medical report she filed, dated 27 August 2002 prepared by Prof EM Irusen, from which the following appears:

"1) Cough, chest tightness and episodic wheezing.

The subject was perfectly asymptomatic before the disaster.

Soon after her exposure she developed cough, chest tightness and a whistling sound in the chest every evening. ..."

- (c) The respondent was unable to explain the contradictions between her evidence and the medical report.
- (d) She confirmed that Herselman had explained the release form prior to her signing it but that she did not read it herself. There appears to have been no reason for her failure to read the release form.
- (e) I accept that Dreyer was aware that exposure to sulphur could cause medical problems to develop post the exposure. There is therefore nothing untoward in him enquiring into the fate of belated medical claims. Herselman said, on Dreyer's version, that they were only dealing with material claims. Dreyer said that Herselman's answer had surprised him but he was unable to explain why. He was further unable to explain why it was necessary to have repeated his enquiry 3 times.
- (f) I accept that there was at least 1 notice board informing prospective claimants of their options.
- (g) I find it improbable that Dreyer, considering his professed knowledge, would in those circumstances have signed a release form and stood by while his wife did the same.
- (h) Instead, the more probable version is that the respondent indicated to Herselman that she only had a material claim and that was the basis on which she settled her claim after Herselman had explained the content of the release form.

[17] The respondent presented with no medical symptoms that would reasonably have required Herselman to enquire into possible medical complaints. There is no evidence that Herselman induced the respondent either intentionally or innocently into signing the release form. It follows that the respondent is bound by the terms of the release.

CONCLUSION

[18] I, for the reasons stated above, propose the following order.

- (a) The appeal is upheld with costs. The magistrate's order dismissing the special plea is set aside and replaced with the following order:
 - (i) The special plea succeeds;
 - (ii) The plaintiff's claim is dismissed with costs.



Baartman J

SUPPLEMENTARY JUDGMENT

Blignault J

[19] I have read the judgment of Baartman J and I agree with the orders proposed by her and her reasons. I accordingly confirm that orders are granted as proposed by her.

[20] I wish to comment further on one aspect of the matter, namely the judgment and reasons furnished by the magistrate. The judgment, described as a finding, is quoted in para [1] above.

- [21] The matter before the magistrate was a special plea. The hearing was intended to dispose finally of the respondent's special defence that the appellant's claim had been settled. A fair amount of oral and written evidence was adduced by both parties.
- [22] In the circumstances the magistrate's statement that the matter *'should be ventilated and adjudicated in an appropriate forum'* does not make any sense at all. There are furthermore no reasons to support this finding.
- [23] The magistrate was requested to supply reasons for his finding. His response was: *'Nothing to add to the finding dated 19 July 2011'*.
- [24] In **Regent Insurance Co Ltd v Maseko** 2000 (3) SA 983 (W) the court dealt with an analogous set of facts. I do not propose to analyse that judgment in any depth. It is sufficient for present purposes to quote the following passages in the judgment:
- [25] At 989B-E:

'Die landdros se gedrag in hierdie saak verg kommentaar. Dit was 'n jammerlike versuim aan die landdros se kant dat daar geen behoorlike beredeneerde uitspraak verskaf is met behoorlike feitebevindinge soos die gebruik is nie. Veral in die geval soos die huidige waar botsende getuienis deur die getuies van die partye gelewer is, moet die verhoorlanddros in sy uiteensetting van die gronde waarop sy feitebevindings berus, vermeld waarom hy die getuienis van 'n sekere getuie of getuies aanvaar en die van ander verwerp. Hy moet redes verskaf vir die verwerping van getuienis, soos byvoorbeeld die inherente onwaarskynlikheid daarvan, selfweerspreking of weerspreking deur andere, die bestaan van betroubaarder getuienis of die indruk wat die getuie gemaak het asook redes vir die aanvaarding van ander getuienis soos dat daar in laasgenoemde nie weersprekings was nie, dat die getuies 'n goeie indruk gemaak het of dat dit waarskynliker is. As die verhoorlanddros

se redes vir uitspraak nie geloofwaardigheidsbevindings bevat nie, ontstaan daar onder andere die risiko dat 'n Hof van appèl die redes vir uitspraak verkeerd kan vertolk of bloot volgens die oorkonde oordeel en aldus beskouings omtrent geloofwaardigheid wat bereik is en in ag geneem behoort te word, buite rekening laat. Dit kan tot ongeregtigheid lei.'

[26] At 990C-E:

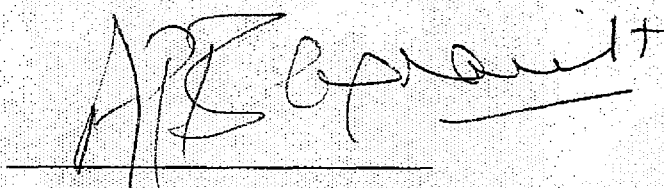
'Die skriftelike verklaring van die landdros ingevolge Reël 51(8) vorm 'n integrale en belangrike komponent van die appèlrekord. Reël 51 bepaal dat die appellant in sy kennisgewing van appèl met presiesheid moet bepaal welke punte op gesteun word vir die appèl. As dit gedoen is stel dit die verhoorlanddros in staat om sy verpligtinge ingevolge Reël 51(8) na behore na te kom. Die hele bedoeling van hierdie skema is om die spoedige en effektiewe afhandeling van appelle te bevorder deurdat die respondent met presiesheid in kennis gestel word ten opsigte van welke punte hy moet voorberei. Behoorlike nakoming van hierdie reëls stel dan ook die Hof van appèl in staat om spoedig, doeltreffend en koste effektief tot die hart van 'n appèl deur te dring en af te handel. Versuim om daaraan te voldoen ondermyn en vertraag effektiewe regsadministrasie.'

[27] At 990H:

'Die landdros se voormelde versuim kom egter op pligsversuim neer wat nader ondersoek behoort te word deur die gepaste liggaam, te wete, die Landdrostekommissie soos ingestel ingevolge die Landdrostewet 90 van 1993. Ek is dus voornemens om hierdie uitspraak aan daardie liggaam voor te lê vir verdere aandag en ondersoek.'

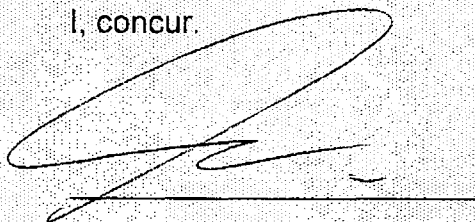
[28] In the present circumstances I intend to follow the same procedure as in the *Regent Insurance* case, namely to forward this judgment to

the Magistrates' Commission established in terms of the Magistrates Act 90 of 1993, for its attention and, if deemed necessary, further investigation.

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A P Blignault, J

I, concur.

A handwritten signature in dark ink, appearing to read 'ED Baartman', written over a horizontal line.

ED Baartman, J