

SOUTH AFRICA / JUDGMENT

Mpanza v Road Accident Fund (11065/2007) [2010] ZAKZDHC 64 (17 November 2010)

[2010] ZAKZDHC 64

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Swain

CASE / FILE NUMBER

11065/2007

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IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO. 11065/2007

In the matter between:

ALOSIA PHIWOKUHLE MPANZA PLAINTIFF

and

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT Delivered on 17 November 2010

SWAIN J

- [1] What is before me for decision, is a special plea raised by the defendant, in answer to a claim by the plaintiff for compensation as a consequence of injuries which the plaintiff alleges she suffered in a motor vehicle accident on 13 December 2003.
- [2] The special plea raises as a defence that the claim of the plaintiff which was initially instituted in the Magistrates' Court, was settled by way of an offer made by the defendant to the plaintiff, to pay the plaintiff the sum of R55,000.00 together with payment of the plaintiff's taxed or agreed party and party costs on the Magistrates' Court scale, up to the date of tender, which was dated 29 November 2006. The offer specified that payment of the sum of R55,000.00 would be made "on the 28th of the month following acceptance".

- [3] It is common cause that by notice dated the same date as the offer, the plaintiff accepted the offer and that as a consequence the plaintiff's claim was settled and the plaintiff's cause of action was compromised.
- [4] By way of a replication, the plaintiff in reply to the special plea, alleged however that on 14 June 2007 the plaintiff's former attorneys, cancelled the settlement agreement by virtue of the defendant's repudiation of the agreement in failing to make payment of the amount of R55,000.00.
- [5] It is common cause that the defendant received the notice of cancellation, but Mr. Mukadam, who appeared for the defendant, argued that the purported cancellation was invalid, as it had not been preceded by a letter of demand by the plaintiff, calling upon the defendant to perform within a specified time and thereby placing the defendant in mora.
- [6] 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.

Christie – The Law of Contract in South Africa

5th Edition pg 507

- [7] It is then necessary to decide whether time was of the essence in the contract because if it was, the breach is of a sufficient magnitude to justify the creditor in cancelling without prior demand, because the remedy of cancellation follows as of right from the serious breach.

Christie supra at pg 507

- [8] The enquiry is whether it ought to be concluded from the nature of the contract and the surrounding circumstances, that time was of the essence. What is looked for is a tacit term, the nature of which is that the failure to perform by the specified time, entitles the other party to cancel. Whether there is such a tacit term is a question of fact, which is determined by the evidence.

Christie supra at pg 507 and authorities there cited

- [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 pg 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.

- [11] An additional argument which Mr. Mukadam sought to raise was that the attorneys for the plaintiff, who wrote the letter of cancellation, were not authorised to do so at the time. This argument was founded upon the fact that annexed to the letter of cancellation, written by Messrs Acutt & Worthington dated 04 June 2007, was a notice of termination of their mandate by the plaintiff, dated 11 January 2007. Reference is made in the letter of cancellation to the termination of their mandate and the defendant is directed to address future correspondence to the new attorneys. The letter of cancellation contains the statement that "your offer is no longer acceptable to our former client" as the defendant is in breach of the settlement agreement.
- [12] It is trite law that a denial of the authority of an agent to act on behalf of the principal, must be expressly pleaded. It was therefore incumbent upon the defendant to file a rejoinder to the plaintiff's replication, in which this issue was raised. Mr. Mukadam, appreciating this difficulty then asked for the matter to be adjourned to enable the defendant to file the necessary pleading, tendering the costs of the adjournment. Mr. van Niekerk opposed any adjournment of the matter, arguing that the defendant had not raised this issue at the Rule 37 conference and had raised this issue for the first time in argument. When regard is had to the fact that the defendant has been in possession of the documentation, which forms the basis for this claim, since June 2007 and the replication of the plaintiff was filed as long ago as February 2008, and in the absence of any explanation by the defendant as to why this defence was not raised before, I am not persuaded that the request for an adjournment by the defendant should be granted.
- [13] In any event there seems to be little merit in allowing the defendant an opportunity to raise this defence, because as pointed out by Mr. van Niekerk, even if it were held that the letter of cancellation was invalid on this ground, the conduct of the plaintiff in instituting the present action, is confirmation of her intention not to be bound by, and to cancel the settlement agreement, on the ground of the defendant's breach of its terms. The plaintiff, by way of an appropriate amendment to her replication, would be able to raise this aspect as an alternative to her reliance upon the letter of cancellation. The fact that according to Mr. Mukadam, the defendant tendered payment of the amount set out in the settlement agreement on Friday 12 November 2010, could have no bearing upon the matter, as the present action was instituted as long ago as 05 October 2007.

In the result the order I make is the following:

The defendant's special plea is dismissed.

The action on the remaining issues is adjourned to a date to be arranged with the Registrar.

The defendant is ordered to pay the plaintiff's costs incurred in arguing the special plea.

SWAIN J.

Appearances: /

Appearances:

For the Plaintiff : Mr. G. O. van Niekerk S C

Instructed by : S I Mbhele & Associates Durban

For the Defendant : Mr. T. Mukadam

Instructed by : Riaz Haffeeje Attorneys Durban

Date of Hearing : 15 November 2010

Date of Filing of Judgment : 17 November 2010

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