REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1326/2011

In the matter between:

COSMOS SINFWA SINFWA **PLAINTIFF**

and

THOMAS SHIPAHU **DEFENDANT**

Neutral citation: *Sinfwa v Shipahu* (I 1326/2011) [2013] NAHCMD 127 (16 May 2013)

Coram: PARKER AJ
Heard: **18 – 19 March 2013**
Delivered: **16 May 2013**

Flynote: Compromise – *Transactio* – Nature, purpose and legal effect of – *In casu* compromise settled by the parties extinguishes *ipso jure* the cause of action being delict which the plaintiff pleads – The plaintiff does not plead contract which the compromise brought about in the stead of delict which may have existed previously between the parties – Accordingly the plaintiff's action based on delict dismissed with costs.

Summary: Compromise – *Transactio* – In an action arising from a collision of two motor vehicles driven by the parties the plaintiff pleaded delict – But on the same day the collision occurred the parties agreed that the defendant should repair the plaintiff's motor vehicle – Court finding therefore that a compromise was settled by the parties and it extinguished *ipso jure* the cause of action being delict which the

plaintiff pleaded and he did not reserve his right to rely on delict which may have existed previously – The court held that the compromise has the effect of *res judicata* – Consequently the court concluded that the plaintiff's action based on delict should fail – Accordingly the court dismissed the plaintiff's action with costs.

ORDER

The plaintiff's action is dismissed with costs.

JUDGMENT

PARKER AJ:

[1] The plaintiff's action is in respect of a delictual claim for damages in the amount of N$79 717,28, arising from a collision that occurred between a motor vehicle (Opel Astra 1998 model with registration number N2292W) driven at the material time by the plaintiff and a motor vehicle (Toyota Hilus Bakkie with registration number N17754W) driven at the material time by the defendant Thomas Shipahu. Upon agreement between the parties the citation is amended accordingly to indicate that the defendant is Thomas Shipahu.

[2] It is the plaintiff's averment that 'the collision was caused solely by the negligent driving of the defendant in that he, inter alia, (a) at a corner on a right turn and as a result thereof drove into the lane of the plaintiff, (b) failed to keep a proper lookout for other traffic, (c) failed to apply his brakes timeously or at all, and (d) drove the said vehicle at an excessive speed having regard to the circumstances.

[3] In his plea, the defendant denies the plaintiff's averment. The defendant's plea is that the collision 'was caused by the sole negligence of the plaintiff who was negligent in the following respects: (a) he failed to keep a proper lookout and drove

into the defendant's lane, (b) he drove the vehicle at an excessive speed 'inapposite to the prevailing circumstances', and (c) he failed to apply his brakes timeously or at all. The defendant sets up alternative pleas. The first is that if the court found that the defendant was negligent, his negligence was not the cause of the collision. The second alternative is that if the court found that the defendant's negligence was the cause of the collision, the defendant says that the defendant's negligence was not the sole cause of the collision and that the plaintiff's negligence also contributed to the collision, wherefore the defendant prays for the apportionment of damages. The further alternative is that the defendant while not acknowledging 'fault and liability; paid the plaintiff N$12 000,00 (in 2009) and N$1 000,00 (in 2010) to defray the cost of repairing the plaintiff's motor vehicle 'in full and final settlement of any dispute between the parties'. The significance of the last alternative plea will become apparent in due course.

[4] As is usually the situation in motor vehicle collision cases, in the instant case, too, the evidence led in support of the plaintiff's claim and the evidence led in support of the defendant's defence are mutually destructive to each other. 'In such a case', I said in *Hendrik Haininga v Mesag Mulunga* Case No. I 884/2011 (judgment delivered on 24 July 2012) (Unreported), para 2 –

> 'The proper approach is for me to apply my mind not only to the merits and demerits of the two sets of versions but also their probabilities, and it is only after so applying my mind that I would be justified in reaching the conclusion as to which version to accept and which to reject (*Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR 556). That is the manner in which I approach the resolution of the versions on the opposite sides of the suit given by the witnesses on certain crucial matters.'

[5] In this case, too, that is the manner in which I approach the resolution of the opposite versions of the evidence placed before the court. Having done that I make the following findings.

[6] From the pleadings, it is clear – as I have indicated previously – that the plaintiff's cause of action is delict. On all the conspectus of the evidence and having applied my mind not only to the merits and demerits of the two sets of versions but

also to their probabilities I find that on the same day of the collision the defendant offered to repair the plaintiff's motor vehicle which was damaged. The plaintiff accepted the offer and so gave possession of his motor vehicle to the defendant in order for the defendant to have it repaired. Mr Van Vuuren, counsel for the plaintiff, submitted that the only reason why the defendant paid N$17 750,00 for repairs to the plaintiff's vehicle is that the defendant 'knew that he caused the collision'. That may be so; but it also goes to show indubitably that after the collision the parties entered into a compromise or a settlement (*transactio*) so as to prevent or avoid litigation.

[7] On the purpose and legal effect of compromise Gubbay CJ stated in *Georgias v Standard Chartered Finance Zimbabwe Ltd* 2000 (1) SA 126 (ZSC) at 139A-B:

> 'The purpose of compromise is to end doubt and to avoid the inconvenience and risk inherent in resorting to the methods of resolving disputes. Its effect is the same as *res judicata* on a judgment given by consent. It extinguishes *ipso jure* any cause of action that previously may have existed between the parties, unless the right to rely thereon was reserved.'

Thus, whether extra-judicial or embodied in an order of court, a compromise has the effect of *res judicata*. (*Gollach & Comperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others* 1978 (1) SA 914 (AD)) *Gollach & Comperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others* is cited with approval by the Supreme Court in *Metals Australia v Amakutuwa* 2011 (1) NR 262 (SC) at 268G-H.

[8] It has also been said that a compromise is a substantive contract which exits independently of the cause of action that gave rise to the compromise; and what is more, being a contract, the general rules of pleading a contract applies. (L T C Harms, *Amber's Precedents of Pleadings*, 6th ed (2003) p 85)

[9] I have held that the parties entered into an extra-judicial compromise whereby it was agreed that the defendant would repair the plaintiff's vehicle. The compromise therefore extinguished *ipso jure* any cause of action (ie delict) that previously may have existed between the parties. Moreover, the compromise exists independently of

the cause that gave rise to the compromise, that is, the collision. And what is more; there is nothing in the pleadings or in the evidence establishing that the plaintiff reserved in the compromise his right to rely on delict.

[10] On the efficacy and sensibleness of compromise, relying on a passage from *D v National Society for the Prevention of Cruelty to Children* [1977] 1 ALL ER 589 (HL) at 606e-f, Gubbay CJ observed in *Georgias v Standard Chartered Finance Zimbabwe Ltd* at 140J-141A:

> '(It) is only the rare case which has to be fought out in court. Many potential disputes, civil especially, are obviated or settled on advice in the light of the likely outcome if they had to be fought out in court. This is very much in the interest of society; since a lawsuit, though a preferably way of settling a dispute to actual or threatened violence, is wasteful of human and material resources.'

(See also *Metals Australia v Amakutuwa* at 268G-269A.)

[11] In the instant case, there is a valid compromise; the plaintiff did not reserve his right to rely on delict. The plaintiff has not instituted action to enforce the compromise in which case the general rules of pleading a contract would apply. In this action the plaintiff has pleaded delict, but the compromise has extinguished *ipso jure* that cause of action, and such extra-judicial compromise has the effect of *res judicata*. Mr Kamanja, counsel for the defendant, submitted that 'the delict has become overtaken by the events of the agreement'. I accept counsel's submission. I should say that the 'original cause of action is superseded by the compromise'. (See *Green v Rozen* [1955] 1 WLR 741 at 746; *Metals Australia v Amakutuwa* at 269A).) That being the case, in the present proceeding it cannot be the burden of the court to look into the compromise to see whether the parties' obligations under their agreement have been carried out because the plaintiff, as I have found previously, has not pleaded contract: contract is not the cause of action in this proceeding.

[12] For all the aforegoing reasoning and conclusions, in my judgement the plaintiff's action should fail; and it fails. Accordingly, I dismiss the plaintiff's action with costs.

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C Parker

Acting Judge

APPEARANCES

PLAINTIFF :	J Van Vuuren Of Krüger, Van Vuuren & Co., Windhoek
DEFENDANT:	A E J Kamanja Of Sisa Namandje & Co. Inc., Windhoek