

*agreement- Held: conduct of the parties clear enough to show intention-
Held: Application dismissed with costs.*

Annotations:

REPORTED CASES

Naidoo v Marine & Trade Insurance No. Ltd Pty 1978(3) SA

KDL Residential CC v Empire Earth Investment 17 (Pty) Ltd

Wasmuch v Jacobs 1983(3) SA 629 (SWA) 633D

MMC Construction Co. (Pty) Ltd v Southern Lesotho Construction (Pty) Ltd & Others
(CIV)1/2005 [2005] LSCA 5 (20 April 2005)

Raffles v Wichelhaus 2, Hurl & C 906 (1864).

Rodolph v Lyons 1930 TPD 85 91

Wells v Devani -2019 UKSC 4

BOOKS:

The Law of Contract in South Africa 5th Edition

[1] In this matter, two motor vehicles got involved in a collision on the 27th April 2020. It was a Toyota Yaris with registration number AR336 and a Toyota Fortuner with registration number M0114. The former vehicle belonged to the Lesotho Council of NGO'S (LNC). The Applicant was at all material times the insurer of the Toyota Yaris. The parties are pitted against each other over the storage costs after the Toyota Fortuner was taken to the Respondent's workshop for assessment of it being damaged.

[2] This application was lodged on urgent basis by the Applicant on the 20th July 2020, seeking the following reliefs:

1. Dispensing with the rules regarding modes and periods of service and dealing with this matter on urgent basis.
2. The Respondent shall, against the provision of a security bond in the amount of M80,200.00 release the motor vehicle to the Applicant, described as: Toyota Fortuner motor vehicle, Vehicle registration number:RDB625J,VIN:AHTYZ59G608010817,Engine number:1KD5019262, Registration number M0114.
3. Should the Respondent fail to present the vehicle against receipt of the security bond, the Sheriff of the Court is authorized to attach and remove the vehicle to the premises of the Applicant, which costs shall be borne by the Respondent.

4. The Respondent shall not be entitled to any further costs in respect of the disputed claims from date of service of the Application on the Respondent.
5. Respondent to pay the costs of the application.
6. Further and/ or alternative relief.

[3] This application is opposed. On the 26th October 2021, the matter was argued holistically. No interim reliefs were issued.

[4] The Applicant was at all material times the insurer of the Toyota Yaris motor vehicle. On the 27th May 2020 after the collision of the said vehicles, Lesotho Council of the NGO'S (LNC) made a demand for repair or replacement of its vehicle to the Applicant's insured vehicle. After the insured vehicle received the demand letter, it forwarded same to the Applicant to handle LNC's claim. It is common cause that LNC thereafter submitted its claim together with documentation which included a quotation for repairs from the Respondent. What had led to the assessment of damages to the vehicle and storage costs are pitted against.

[5] On the 29th July 2020, the Applicant received a letter from Respondent's lawyer demanding payment of M4,800.00 for

assessment costs and M48,100.00 (M650.00 per day) in respect of storage costs as reflected by Annexure "B". The Applicant's case is that it never requested the Respondent to assess the damaged Toyota Fortuner and disputed ever having an agreement in relation to storage costs. Therefore, Applicant is asking this Court to order for release of the said vehicle. Applicant contended further that Respondent's conduct in holding the said vehicle is tantamount to self-help. Applicant has further offered an amount of M80,200.00 as security bond to avoid escalating of storage costs.

[6] On the other hand, Respondent's argument is that, the Toyota Fortuner was brought into its workshop on the 19th May 2021 by one Vusi Matsoso and that the Applicant was not present at the time the vehicle was taken to the workshop, he therefore has no knowledge of what had transpired. It is Respondent's case that, the parties had entered into an agreement which was verbal relating to the assessment of damaged Toyota Fortuner as well.

[7] Before going into the law and principles governing contracts, I would deal with the point of law that was raised by the Applicant regarding the notice to strike out. According to Advocate Cronje,

the averments in the Respondent's answering affidavit are inadmissible as they are being made without prejudice, hence application to strike them out. In his answering affidavit, the Respondent had referred to the two letters which were addressed by Applicant's Counsel where he submitted that Applicant made an admission in that an offer was made in respect of the assessment and storage costs. **See annexure NS3.**

The letter reads:

"we confirm that we have been instructed herein by our clients' to offer your client M13,474.08 in full and final settlement of your client's claim for storage costs. The long delay in the finalization for this claim was occasioned by the insured, however, in the interests of arriving at an amicable resolution, we have made an offer for the full period.

In the absence of a contractual agreement between our client and your client, we have calculated our offer based on an average daily storage of M1187.14, being a reasonable and fair market rate. Kindly note that this offer is made without prejudice of rights on the part of our client, without admitting liability, and solely in an attempt to settle this matter".

The second letter **(NS4)** reads:

.....we are pleased to advise that client has instructed us to make advised offer of 18,500.00 in full and final settlement of your claim for storage costs. This offer is made on the basis of daily rate of M250.00 for storage fee as per our discussion.

Kindly note that this offer is made without prejudice of rights on the part of our client, without admitting liability and solely, an attempt to settle the matter.”

[8] It is on the basis of the two above mentioned letters that the Applicant asked that answering affidavit of the Respondent referring to them be struck out as inadmissible evidence. Advocate Cronje cited the case of ***Naidoo v Marine and Trade Insurance Co. Ltd. Pty***¹ where the court held that correspondence conducted ‘without prejudice’ in *bona fide* efforts of both parties to an action to settle the plaintiff’s claim is in accordance with general evidence, wholly inadmissible”. **See Law of South Africa Vol.9 page 290.**

He also referred to the case of **KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd** where the court held that “the

¹ 1978 (3) SA 666

policy as I indicated earlier, is to promote the settlement of disputes without resort to litigation, and was discussed at length by Trollip JA in **Naidoo v Maine & Trade Insurance Co Ltd 1978(3) SA 666(A). Referring (at 674A-B)** to a statement made by Lord Mansfield in the 19th century that ‘it must be permitted to men to “buy their peace” without prejudice to them, if the offer did not succeed; and such offers are made to stop litigation without regard to the question whether anything or what is due, Trollip JA said that the origin and the rationale for the without prejudice rule was public policy .

[9] In **Naidoo**² the Respondent, a third-party insurer, wrote a number of without prejudice letters to the attorney of Mr. Naidoo (the plaintiff), admitting that it was on risk as the insurer of the negligent driver. Settlement negotiations failed and in subsequent proceedings the insurer denied that it was negligent driver’s insurer. Naidoo in his replication asserted that the insurer was estopped from denying the admission. The trial court found that the correspondence was inadmissible as the letters were written without prejudice to the insurer’s rights. Trollip AJ, finding that the letters had been written without prejudice, said at 677B-D:

² supra

“Such correspondence, once respondent objected to its being adduced in evidence, was wholly inadmissible. The rationale of the rule is public policy: parties to disputes are to be encouraged to avoid litigation and all the expenses(nowadays, very high), delays hostility, and inconvenience it usually entails, by resolving their differences amicably in full and frank discussions without the fear that, if the negotiations fail, any admissions made by them during such discussions will be used against them in the ensuing litigation”

[10] In his submissions, Advocate Sekatle argued that such information is not privileged and /or obtained by a criminal act or otherwise improperly. He contended that the Court in the circumstances has discretion. He argued further that the Respondent had relied on the information given by the Applicant as shown in both annexures **NS3** and **NS4** and therefore Applicant cannot claim privilege over those annexures.

[11] Just like in the case of **Naidoo** (*supra*), there were letters written to the other party ‘without prejudice’ in trying to settle the disputes

between the parties. Similarly, in *casu*, Applicant wrote two letters to the Respondent's Counsel, (annexures NS3 and NS4 respectively) in trying to settle the disputes over the assessment damages and storage costs. Such letters were written without prejudice as such is reflected on them. Based on the authority of ***Naidoo v Marine and Trade Insurance Co. Ltd. Pty***, the Court is inclined to grant that the averments in the answering affidavit of the Respondent on the basis that such averments in and annexures to the answering affidavit be struck out as are inadmissible since they were made without prejudice.

[12] Coming into the merits, the salient issue is whether in the circumstances there was an agreement relating to the assessment of the damaged Toyota Fortuner as well as its storage costs.

[13] The law is that for a contract to be enforceable, it must consist of an offer and acceptance. The offer requires a manifestation of willingness to enter bargain. Therefore, an offer requires some act that gives another person the power to create contractual relationship between the parties. For a special purpose of analysing transaction to decide whether an agreement has been

reached, and if so, where and when the word “offer” has acquired some characteristics of a term of art.

A person is said to make an offer when he puts forward a proposal with the intention that by its mere acceptance without more, a contract should be formed. The intention, of course may be express or implied. **See: The Law of Contract in South Africa 5th Edition by RH Christie at page 29.**

In *Wasmuch v Jacobs*³ Hevy J said:

“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 intention that when it is accepted, it will bind the offeror”

[14] While the Applicant disputes the existence of any agreement between the parties, significantly, in their answering affidavit, at paragraph 4, Respondent indicated that the vehicle was brought by one Vusi Matsoso to his workshop on the 19th May 2020, and this averments were not denied or rebutted by the Applicant. It is clear that there is a dispute of fact in this case, namely the existence of an agreement. Applicant denies ever been any agreement between the parties, while on the other hand,

³ 1983(3) SA 629 (SWA)633D

Respondent insisted the existence of such. In **MMC Construction Co (Pty) Ltd v Southern Lesotho Construction (Pty) Ltd and Others**,⁴ F.H Groskopf held that:

“The legal position is clear. Where in proceedings on notice of motion, disputes of facts have arisen on affidavits, a final order, whether it be an interdict or some form of relief, may only be granted if those facts averred in the applicant’s affidavit which have been admitted by the respondent, together with facts allegedly by the respondent, justify such an order.”

[15] According to the law of contract, every enforceable contract consists of an offer, acceptance, and consideration. The offer requires a manifestation of willingness to enter bargain. Therefore, an offer requires some act that gives another person the power to create contractual relationship between the parties. For the special purpose of analysing transaction to decide whether an agreement has been reached and if so, where, and when the word “offer” has acquired some characteristics of a term of art. A person is said to make an offer when he puts forward a proposal with the intention that by its mere acceptance without more, a contract should be

⁴ (CIV)1/2005) [2005] LSCA 5 (20 April 2005)

formed. The intention, of course may be express or implied. **See The Law of Contract in South Africa 5th Edition by RH CHRITIE** page 29.

In **Wasmuth v Jacobs**⁵ Levy J said:

“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 intention that when it is accepted, it will bind the offeror.

[16] For acceptance, the general rule is that a contract invites acceptance in any manner and by means reasonable under circumstances, unless the language and circumstances clearly indicate otherwise. Meeting of the minds is a phrase in contract law used to describe the intentions of the parties forming the contract. It refers to the situation where there is a common understanding in the formation of the contract. **See Raffles v Wichelhaus 2, Hurl & C. 906 (1864).**

An unaccepted offer obviously cannot create a contract since it emanates from the offeror alone and the necessary agreement cannot be held to exist without some evidence of the state of mind of the offeree. Hence the general rule that no contract can come

⁵ 1983 (3) SA 629 (SWA) 633D

into existence unless the offer is accepted. *See Rodolph v Lyons*⁶.

[17] In *Wells v Devani*⁷ Mr. Wells developed a block of flats, which he initially struggled to sell. He mentioned this to a neighbour, who put him in a contract with Mr. Devani. Wells and Devani spoke on the phone; Devani explained that there was an estate agent and that his commission would be 20% plus value added tax. There was no discussion of the circumstances in which that commission would fall due. Devani subsequently introduced a purchaser to Wells, who bought the flats; however, Wells refused to pay Devani any commission. As a result, Devani issued court proceedings.

At first instance, the Judge found for Devani by implying term on payment. The Court of Appeal, finding for Wells, found that there was an “incomplete bargain” and that therefore, there was no binding contract into which the term could be implied.

[18] The case reached the Supreme Court where the Court explored circumstances of a binding contract. The Court emphasized that:

⁶ 1930 TPD 85 91

⁷ 2019, UKSC 4

“the Courts are reluctant to find an agreement is too vague or uncertain to be enforced where it is found that the parties had intention of being contractually bound and have acted on their agreement.”

The Court held that, Wells and Devanis' words and conduct were clear enough to show intention; there had been no need to imply a term into the agreement (as the Judge of first instance had done). Furthermore, while the parties had not discussed the precise event that would trigger the payment of commission, it would have been naturally understood that the payment would be due on completion.

[19] In *casu*, the Applicant is denying existence of any agreement between the parties in relation to the issues pertaining to assessment of damaged Toyota Fortuner as well as storage costs. While Applicant is denying that there was never an agreement, significantly, they are not denying that the said vehicle was brought into the workshop of the Respondent by one Vusi Matsoso. Respondent had submitted that at that time when the vehicle was brought to the workshop, the Applicant was not in the picture, therefore they cannot dispute that. Accepting the Applicant's version to be true, it certainly seems strange that the said vehicle

could be brought into someone's premises without any agreement.
Their conduct was clear to show intention.

[20] The facts are clear enough to show that there had been an agreement even though such was not reduced into writing. While the parties might have not made a written agreement, it would have been naturally understood that the payment assessment of damages as well as storage costs would be due upon completion of the assessment.

[21] In the result, the Court makes the following order:

- a) The application to struck out is granted.
- b) The main application is dismissed.
- c) Costs of suit are awarded to the Respondent.

T.E. MONAPATHI

JUDGE

For Applicant	:	Adv.Gronjie
For Respondent	:	Adv. Sekatle