REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

9/9/2020

DATE SIGNATURE

Case No.: 27338/2017

In the matter between:

DENBY, MARK GARY Plaintiff

and

EKURHULENI METROPOLITAN MUNICIPALITY Defendant

JUDGMENT

Gilbert AJ

1. This judgment concerns the court's jurisdiction to make an order based upon the agreement of the parties' legal representatives but where one of the parties had not agreed to the order.

2. The plaintiff was injured on 21 January 2016 at approximately 04h30 when his bicycle struck a pothole whilst he was cycling along a road in Kempton Park. He was thrown over the handlebars of his bicycle and landed on the tarmac, suffered injuries and was admitted to hospital. He instituted an action for damages against the Ekurhuleni Metropolitan Municipality, on the basis that it owned or controlled the road and was under a duty to *inter alia* maintain and repair the road.

3. On 27 March 2019 the issue of merits were settled 50% in favour of the plaintiff, and an order to that effect was made by the court.

4. The action was enrolled for trial for 31 August 2020 for the determination of the usual heads of damages: past medical and hospital expenses; future medical and hospital expenses, treatment and modalities; general damages; and loss of earnings and earnings capacity.

5. Various medico-legal and actuarial expert reports were exchanged, which resulted in joint expert minutes between four of the five sets of experts instructed by the plaintiff and defendant respectively.

6. A joint memorandum by the legal representatives recorded that an extensive pre-trial meeting had been held recently where the parties had (i) limited issues, (ii) identified the facts and opinions in respect of which no dispute existed, (iii) actively engaged, verified and determined the quantification of the separate heads of damages, (iv) considered, debated and agreed on the factual and legal basis of the quantification of the damages; (v) resolved that there was no further factual or legal *lis*

which could possibly require determination by a court; and (vi) agreed that there was no discernible *lis* between the expert witnesses or the parties in respect of the issues to be determined.

7. The joint memorandum also referred to an attached exhibit, which the parties consented to being entered into the record of proceedings as real evidence, which admitted and confirmed agreement on the quantification of all heads of damages, and which contained an amount that the parties' legal representatives would jointly seek that the defendant be ordered to pay.

8. The joint memorandum also recorded that as a result of the agreements reached between the parties during the pre-trial proceedings and the admitted facts and opinions contained in the exhibits, the legal representatives (i) did not foresee that any oral evidence or further legal arguments or submissions would be required during the trial; (ii) would request an order that the exhibits and pre-trial minute be entered into the record of proceedings and that the action be disposed of on the contents of the exhibits, pre-trial minute and the parties' joint submissions; and (iii) that subject to the court's discretion, would jointly seek an order in terms of an attached draft order of court.

9. Uniform Rule 37[1] and the related provisions of the Practice Manual[2] and Directives[3] require of the parties to constructively engage with each other

[1] Such as Uniform Rules 37(4) and 37(6)(g).
[2] See Chapter 6.12, paragraph 4 of the Practice Manual for this Division (October 2018), which expressly provides that: *"Parties have a continuous obligation to seek to narrow issues and to comply with the substantive requirements of Rule 37…".*
[3] See paragraphs 6 to 8 and paragraph 10 of the Judge President's Practice Directive 2 of 2019.

in pre-trial proceedings to narrow the issues that remain in dispute. In doing so, the parties' legal representatives had reached the conclusion, as recorded in a recent pre-trial minute, that "*there is no discernible lis between the expert witnesses or the parties in respect of the issues to be determined*".

10. But the pre-trial minute also recorded the difficulty that presented itself: "*the defendant's legal representatives are unable to obtain instructions from the defendant, however after having applied their mind to the facts, expert reports, case law and the legal aspects of the case, the defendant's legal representatives agreed to the evidence and content set out in [the joint memorandum].*"

11. The defendant's legal representatives found themselves in the invidious position that they were unable to obtain instructions from their client to agree to a consent order but in the discharge of their professional legal duties both to the court and their client to engage constructively with the plaintiff's legal representatives in pre-trial proceedings, including in the making of appropriate concessions and admissions, had concluded there remained no discernible *lis* between the parties to be litigated.

12. It is in these circumstances that the legal representatives for the parties had agreed upon a joint memorandum, together with supporting exhibits, culminating in the parties' legal representatives jointly seeking of the court to make an order for payment in terms of a draft order that the parties' respective legal representatives had agreed upon but which the defendant had not.

13. The issue that arises is whether the parties' legal representatives can jointly agree to seek an order where it has been expressly recorded in a document before the court that the defendant's legal representatives have no mandate to settle the matter on those terms.

14. This raises the parameters of a legal representative's mandate from his or her client. Naturally, a legal representative cannot settle the matter contrary to the express instructions of his or her client. This is different to the present situation where there are no such express instructions not to settle the matter.

15. In *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and another* 2010 (4) SA 122 (SCA) the trial court had stood down the matter to enable the parties to conduct a pre-trial conference. Consequent upon the pre-trial conference the defendant conceded the merits of the plaintiff's case as well as liability for some of the plaintiff's heads of damages. The parties also agreed that they would seek a postponement of the trial and the remaining disputed heads of damages would be determined in due course. This had been recorded in a pre-trial minute. When the trial resumed shortly after the pre-trial conference, the court declined to postpone the trial *in toto* but required that judgment be granted against the defendant on the admitted heads of damages. The court then granted an order based upon the admitted liability and postponed the trial in relation to the disputed heads of damages. Thereafter the defendant sought to rescind and set aside the order on the basis that its attorneys did not have a mandate to make admissions or to settle or compromise claims.

16. The Supreme Court of Appeal drew a distinction between settlement agreements reached outside the context of conducting the trial in the normal course of events (where generally a party may resile from agreements made by his attorneys without his knowledge) and those settlements consequent upon a rule 37 conference:

> "*[6] It is important to reiterate what was said at the outset - the issue in this matter is whether the appellant may resile from agreements made by his attorney, without his knowledge, at a rule 37 conference. The judgment does not deal with agreements reached outside of the context of conducting a trial in the normal course of events. The rule was introduced to shorten the length of trials, to facilitate settlements between the parties, narrow the issues and to curb costs. One of the methods the parties use to achieve these objectives is to make admissions concerning the number of issues which the pleadings raise. Admissions of fact made at a rule 37 conference, constitute sufficient proof of those facts. The minutes of a pre-trial conference may be signed either by a party or his or her representative. Rule 37 is thus of critical importance in the litigation process. This is why this court has held that in the absence of any special circumstances a party is not entitled to resile from an agreement deliberately reached at a rule 37 conference. And when, as in this case, the agreements are confirmed by counsel in open court, and are then made a judgment or order of a court, the principle applies with even more force.*"

17. Although the SCA further stated that "*it is settled law that a client's instructions to an attorney to sue or defend the claim does not generally include the authority to settle or compromise a claim or defence without*

the client's approval",[4] there remained uncertainty as to how this principle was to be applied. It is in this context that the SCA[5] referred to the distinction drawn by our courts, under the influence of English law, "*between settlements made outside of and those made during the course of litigation"* and that our courts *"appear to have accepted that the power to settle a claim is one of the usual and customary powers afforded a legal representative in the latter instance*". The SCA also summarised the position in relation to the actual authority of an attorney to transact on his client's behalf (as distinct from the position where the litigant is estopped from denying the authority of his attorney to settle or compromise a claim), that "*attorneys generally do not have implied authority to settle or compromise a claim without the consent of the client"* but that *"[h]owever, the instruction to an attorney to sue or defend a claim may include the implied authority to do so, provided the attorney acts in good faith*".[6]

18. The SCA further reasoned[7] that the usual and customary powers associated with the appointment by a defendant of a legal representative would include instructions to defend the claim, to draft a plea and to attend to all pre-trial procedures, including rule 37 conferences and that it followed that given the authority of a legal representative to attend a pre-trial conference, absent express instructions to the contrary, he or she would also have the authority to discharge what is required of him or her at the pre-trial conference which is making such admissions as are

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[4] At para 7 citing *inter alia Goosen v Van Zyl* 1980 (1) SA 706 (O) at 709 F-H.
[5] In para 8.
[6] In para 11.
[7] In para 17.

appropriate for purposes *inter alia* of narrowing the issues between the parties. If this resulted in there being no *lis* between the parties, then it would not be untoward for the legal representative to also agree to the invariable outcome of the consequence of those admissions.

19. As reasoned by the SCA[8] "*it could hardly be asserted that the admissions fell within his usual authority, but the settlement, which amounts to a string of admissions, not*."

20. Although *Kruizenga* is factually distinguishable on several grounds including that it was an application for rescission and what was primarily in issue was whether the defendant was estopped from subsequently denying its attorney's authority to conclude the settlement agreement (in the present instance there is an express recordal in the pre-trial minute that the defendant has not authorised the settlement of the matter and so there can be no question of any misrepresentation by the defendant's legal representatives to found an estoppel), the reasoning set out by the SCA is persuasive.

21. Applying that reasoning to the present instance, the defendant's legal representatives in the discharge of their duties under Uniform Rule 37 makes certain admissions and concessions and engaged constructively with the plaintiff's legal representatives to reach a position where the issues have been narrowed to such an extent that there was no longer any *lis* between the parties. The extensive joint memorandum with supporting documents detailing the various agreed facts including in

[8] In para 19.

relation to the expert evidence and referencing applicable case law demonstrates the extent of the constructive engagement between the parties. To find that the defendant's legal practitioners do not have the authority to take the final step of agreeing jointly to the court making an order in the amount to be paid that was the end result of that constructive engagement would defeat the purpose of the rule 37 engagements, which is to encourage settlements, and which would otherwise severely hamper the conduct of civil trials.[9]

22. I further find support for this approach in several of the authorities referred to in the *Kruizenga* judgment. In *Mfaswe v Miller*[10] the attorney's clerk was, with the knowledge of the client, sent to conduct a case on behalf of the client in the magistrate's court. On the day of trial the client was late in arriving at court, and the clerk, in order to avoid the consequences of default which would ensue if the case was called in his client's absence, compromised the case with his opponent. The client subsequently sued his erstwhile attorney for the full amount of the original claim on the basis that the matter had been settled without his consent. The then Supreme Court of Cape of Good Hope held that the clerk had acted *bona fide* in what he supposed to be the interests of his client and so the attorney was not liable in damages. Put simply, the attorney's clerk consenting to a settlement in a particular amount for the plaintiff was preferable to the plaintiff being non-suited as he was not present when the matter was called in court.

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[9] *Kruizenga* at para 21.
[1010] (1901) 18 SC 172.

23. Applying analogous reasoning to the present situation, if the defendant's legal representatives did not seek to agree an appropriate order with the plaintiff's legal representatives, and so either had to withdraw as attorneys of record in the absence of instructions or to appear in court but leave it to the plaintiff to advance his case in which he sought damages significantly more than that to which plaintiff was prepared to agree with the defendant's legal representatives, would be seriously prejudicial to the defendant. The lesser evil, so to speak, was for the defendant's legal representatives understandably to agree with the plaintiff on suitable amounts of damages, consequent upon carefully considered concessions and admissions made during the course of pre-trial engagements, than to do nothing and let default judgment go against the defendant for a significantly larger amount. In the present instance the plaintiff in his amended particulars of claim sought damages of R10, 136, 453, whilst the amount that the parties' legal representatives had agreed upon was R1, 337, 793.

24. There is nothing on the papers to indicate that the defendant had expressly withheld from its attorneys the authority to do that which they are now doing. In *Dlamini v Minister of Law and Order and another*[11] the court after referring to *Mfaswe* with approval and the old English authority of *Matthews and another v Munster*[12] made the important observation that in *Matthews* the client did not put an end to the relationship between himself and his attorney, and so allowed the attorney to continue to act

[11] 1986 (4) SA 342 (D).
[12] (1887) 20 QB 141 (CA).

on his behalf,[13] which may include in the circumstances the power to settle the matter. In *Matthews* the defendant's counsel had settled the matter in circumstances where his client was not present when the settlement was made, but the defendant was nonetheless bound thereto notwithstanding his absence given that he had not put an end to the relationship of advocate and client which existed between himself and his counsel, and therefore his counsel had complete authority in that case which included binding his client by the settlement.

25. *Matthews* was also cited with approval in *Klopper v Van Rensburg,*[14] where a party was held to be bound by a compromise effected by his counsel at a time when he was not present. Similarly in *Alexander v Klitzke*[15] the court found that a mandate included making a *bona fide* compromise in the interests of the client, and that if the client wished to terminate that mandate, he should do so timeously.

26. In the present instance, by all accounts, the defendant has left it in the hands of its legal practitioners to deal with the matter. This, in absence of something to the contrary, would include making such admissions and confessions at a pre-trial conference as were appropriate, which would include the ultimate consequence of agreeing that an order be granted if that was the outcome of the pre-trial engagement.

27. I conclude that as the defendant's legal representatives had the authority to attend and do what was necessary and required of them in the

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[13] At 347 B/C.
[14] 1920 EDL 239.
[15] 1918 EDL 88 at 88, cited with approval in *Kruizenga* at 127F-128A.

discharge of their duties at a pre-trial conference, which included making admissions and concessions and even settling the matter, the defendant's legal representatives were entitled to take the position that they have as recorded in the joint memorandum and for them together with the plaintiff's legal representatives to jointly seek of the court to make an order in terms of the draft order presented to the court.

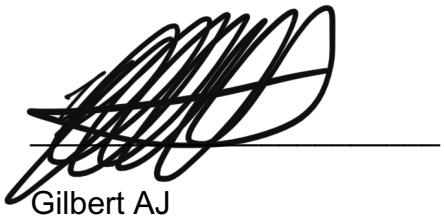
28. In the circumstances, I find that I am able to grant an order on the terms agreed to by the parties legal representatives, not because of a consideration by the court of the merits of the claim or because the defendant itself has agreed to that order, but rather on the basis set out above.

29. As there does appear to be a gloss in the various cases that a party's legal representatives must be acting *bona fide* in what they believe to be the interests of their client for the client to be bound by their actions,[16] I add that given the extensive nature of the joint memorandum and the pre-trial engagements between the parties, there is nothing to suggest that what the defendant's legal representatives have agreed to is anything other than *bona fide*. For example, as appears above, the amounts reflected in the draft order in respect of the various heads of damages are considerably less than what was claimed by the plaintiff in his amended particulars of claim. Reliance is also placed by the parties upon the joint minutes of the experts save in relation to the actuaries and

[16] See *Alexander v Klitze* above at 88; *Dlamini* above at 346J – 347A.

where it appears that the defendant's actuary's evidence prevailed over that of the plaintiff's actuary.

30. In the circumstances, an order is made, as per the parties' draft order marked "X".



Gilbert AJ

Date of hearing:	31 August 2020
Date of judgment:	9 September 2020
For the plaintiff:	Advocate P Uys
Instructed by:	Clive Unsworth Attorneys
For the defendant:	Advocate F Darby
Instructed by:	Schumann van den Heever & Slabbert Inc.