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IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

Case No: 56873/12

In the matter between

ADV. T MPHELELA obo S..... Z.....

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

URGENT

[2] Plaintiff's legal representatives had lodged a claim for compensation with the defendant in terms of the provisions of Section 24 (5) of the Act.

[3] On 14 September 2012, the Defendant wrote to the Plaintiff's attorneys offering to settle the child's claim by paying R174 254 -83. The offer included the claimant's taxed or agreed party and party costs. The plaintiff's attorneys signed the discharge form accepting the offer on behalf of the minor child on 18 September 2012. Pursuant thereto, an amount of R174 254-83 was paid to the plaintiff's attorneys.

[4] The plaintiff's attorneys sent a letter to the defendant, dated 20 September 2012 with heading "revocation/avoidance of acceptance (Z..... T.E)". The contents of the letter read as follows:

"Kindly take heed that we have received an amended mandate from our client (Z....) to revoke and/or avoid the offer (which was erroneously accepted through our letter dated 18 September 2010) on the basis that Legal Costs were not offered and also that the quantum proffered is not adequate.

Further, it is our mandate to issue summons and eventually litigate the matter to finality, which bears the prospect of attaining a higher capital amount.

In casu, we hereby declare the aforesaid offer to be null and void and if you hold a view contrary to the latter declaration, kindly revert on or before the end of today".

[5] In due course the plaintiff issued summons against the defendant, seeking to claim larger damages for the minor child's loss of support and maintenance in the amount of R1 245 400-00.

[6] The defendant raised a special plea that the plaintiff's claim was settled and finalised in that an offer of settlement was made and accepted in full and final settlement on 18 September 2012 and payment duly effected on 19 September 2012.

[7] The main issue to be adjudicated by this Court arises out of the defendant's special plea and is whether the agreement settling the claim for damages should be recognised as binding or be set aside.

[8] In seeking to set aside the settlement agreement, plaintiff's Counsel¹ submitted that the settlement agreement was void or voidable due to the "honest mistake" made by the plaintiff's attorneys and more importantly that the offer was prejudicial to the interest of the child and in this regard relied on the case of **Road Accident Fund v Mvhill No 2013 (5) SA 426 (SCA)**. Counsel argued that the offer was accepted prior to the attorney receiving the actuarial report that indicated that the damages were much greater than the accepted amount. The actuarial report as well as the industrial psychologist report were made available to the defendant after the offer of settlement.

¹ Advocate M Ramoshaba

[9] The defendant's Counsel² submitted that the settlement agreement constitutes a *transactio* and referred the court to the case of **Georgias v Standard Chartered Finance Zimbabwe Ltd 2000 (1) SA 126 (ZSC)**³, wherein it was explained as follows:

“Compromise or transactio is the settlement by agreement of disputed obligations, or a lawsuit the issue of which is uncertain. The parties agree to regulate their intention in a particular way, each receding from his previous position and conceding something - either diminishing his claim or increasing his liability”.

[10] Defendant's counsel relied on **Nagar v Nagar 1982 (2) SA 263 (ZH) at 268 E -H**, wherein the court held that 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.

A compromise induced by fraud, duress, *Justus error*, misrepresentation or some other ground for rescission, is voidable at the instance of the aggrieved party, even if made an order of court, (see **Gollach and Gomperts (1967) (Pty) Ltd and Others 1978 (1) SA 914 (A) at 922 H**).

[11] Defendant's counsel argued that in *casu* there is no suggestion that the *transactio* was obtained fraudulently but that it should be set aside on the ground of mistake by the plaintiffs attorney. The plaintiff purported to cancel the *transactio* on the basis that the offer was “*erroneously accepted*” on the basis that *legal costs*

² Advocate C Snoyman

³ At 138 T - 140 I

were not offered and that the quantum proffered [was] not adequate". The legal costs were in fact offered in the settlement offer. Counsel further argued that if the plaintiff's attorney was of the opinion that quantum proffered was inadequate, then the plaintiff's attorney was under no obligation to accept the offer. Furthermore, the plaintiff's acceptance of the offer cannot constitute a mutual mistake or any other ground of *Justus error*, which would avoid the *transactio*. He argued that there is no *Justus error* and that the *transactio* cannot be set aside and this matter, be regarded as *res judicata*. He submitted that the action should accordingly be dismissed with costs.

[12] A settlement not only does away with the inherent uncertainties of litigation but also limits the escalation of costs and brings about an immediate payment rather than one forthcoming at some future uncertain stage. It is clear that in accepting the offer of settlement, the plaintiff's attorney breached a statutory duty to ensure that a reasonable compensation was made to the minor child by obtaining the necessary experts' reports.

[13] In **Gollach v Gomperts v Universal Mills and Produce Co.***supra*, the court held that a unilateral mistake must also be reasonable in the sense that it must be *justus error*. No definite criteria can be given to establish what is or what is not a *Justus error*. The field of unilateral mistake is very narrow, where it has not been induced by the other party. At very least it would have to be *justus*. See **National and Overseas Distributors Corporation v Potato Board 1958 (2) SA at p 479 E - H.**

[14] I am not aware of any reason why **justus error** should not be a good ground for setting aside such a consent judgment, and therefore also an agreement of compromise, provided that such error vitiated true consent and did not merely relate to motive or to the merits of the dispute which it was the very purpose of the parties to compromise. **Natal Bank v Kuranda 1907 T H at pp 167-8.**

[15] An error is **justus** when it is reasonable or excusable in all the circumstances of the particular case. That is, the further question must be asked whether a reasonable person would have been misled. See **Brink v Humphries and Jewell (Pty) Ltd 2005 (2) SA 419 (SCA) para 8.** A mistaken party may rescind from the contract even if the mistake was caused by his own negligence, where the other party ought, as a reasonable person to have been aware of the mistake, for the latter cannot claim reasonably to have been mistaken as to the intentions of the former. **Brink v Humphries and Jewell (Pty) Ltd 2005 supra.**

[16] Counsel for the appellant correctly argued that the offer accepted by the plaintiff's attorney is prejudicial to the interest of the child. Despite the advantages attendant upon settling the claim before the issue of summons, in my view the agreement falls to be rescinded. I also take my cue from the **Road Accident Fund v Mvhill No Case (supra).** The prejudice to the minor child in **casu** is obvious; the amount of an innocent minor's claim against the defendant would be diminished by reason of the fault of the legal representative.

[17] Although a court should always be cautious in interfering with compromises seriously concluded, there is in my view, such substantial prejudice to be suffered by the minor child that the settlement agreement cannot be allowed to stand.

Accordingly, the following order is made;

a) the special plea is dismissed;

b) costs are reserved to be determined by the trial Court.

D.S. MOLEFE
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of plaintiff

Adv. M Ramoshaba

Instructed by

Mamokgalake Chuene Attorneys

Counsel on behalf of defendant: Adv. C Snoyman

Instructed by

Sishi Incorporated Attorneys

Date Heard

20 March 2014

Date Delivered

1 April 2014