

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

CASE NO: 82352/2014

In the matter between:

20/10/2016

SIZWE CITHA

Plaintiff

and

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	NO
(3) REVISED	
18/10/2016	
DATE	SIGNATURE

ROAD ACCIDENT FUND

Defendant

JUDGMENT

BRENNER AJ

1. This case involves a claim for damages for personal injuries sustained by Sizwe Citha ("Citha"), the plaintiff, against the Road Accident Fund ("the RAF"). Consequent upon a collision on 1 December 2009, Citha, a pedestrian, was hit by an unidentified motor vehicle, driven by an unknown driver. Citha suffered an open fracture of the right tibia.

2. The case was enrolled for trial on 17 October 2016 on both merits and quantum. At inception of the hearing, I was asked to rule whether it was competent for the RAF to withdraw an offer made to Citha in terms of Rule 34(1) and (5) of the Uniform Rules of Court.
3. The salient facts are as follows. On 14 October 2016, the RAF made an offer, in writing, without prejudice, without admission of liability, and in full and final settlement of Citha's claims. On the merits, it tendered an apportionment of 70/30 in Citha's favour, it rejected the claim for general damages, proposing its referral to the HPCSA, and offered an undertaking for future medical expenses. Costs on the party and party scale were tendered. The offer was termed "Revised offer of Settlement in terms of Rule 34(1) and (5), ("the offer").
4. On 17 October 2016, prior to the matter coming before court, the RAF's attorney served a notice of withdrawal of the offer. It was common cause that the offer was not accepted in writing before it was withdrawn. At Court, post the withdrawal of same, Citha's attorney purported to orally accept the offer. This occurred on the premise that the RAF was precluded by the provisions of Rule 34 from resiling from same.
5. The RAF's counsel argued that the offer was erroneously made, owing to a genuine mistake on the apportionment of the merits hence its withdrawal. Citha's counsel did not controvert this assertion. (I interpose to mention that it was not clear whether the RAF had authorized its attorney in writing to make the offer, this under Rule 34(1) of the Rules).

6. In **Erasmus, Superior Court Practice, Volume 2** at the commentary on Rule 34(6) at D1-447, the following is stated:

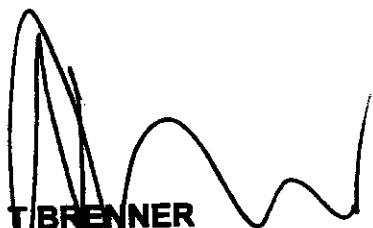
"This sub rule affords the offeree a *spatium deliberandi* whether or not to accept the offer or tender and during that period the offeror is not entitled to resile from the offer or tender. It has, however, been suggested that there may be "very exceptional cases" such as fraud, genuine error or that no legal basis exists for any claims by the plaintiff against the defendant, in which the defendant may withdraw its offer of settlement."

7. On the subject of Rule 34(6), the Honourable Mr Justice Cameron made the following comment in **Turbo Prop Service Centre CC v Croock t/d Honest Air 1997 (4) SA 758 (W) at p764H-I:**

"Although the reference by Ogilvie-Thompson AJ in the Frenkel, Wise case to "very exceptional" cases (for example, fraud or genuine error), was only a comment not forming part of the basis of his decision, it seems sound to me to assume that he was correct in envisioning that such exceptions may exist. In Ngwalangwala, Williamson JA likewise envisaged (albeit in the period after expiry of the stated period) that, if the defendant could aver that the payment was made "under a mistake of fact or was induced by fraud or that no legal basis exists for any claims at all by the plaintiff against him, "the payment into Court might be reclaimed".

8. The judgment in **Ngwalangwala v Auto Protection Insurance CO Ltd (In Liquidation) 1965 (3) SA 601A** dealt with payment into court under Rule 24, which was subsequently superseded by Rule 34, but both Rules were based on similar principles concerning offers to settle.
9. The ratio in **Frenkel, Wise & Co Ltd v Cuthbert 1946 CPD 735** made it plain, and this was approved in **Ngwalangwala** (at p608 F-G), that "in each case it is a matter for the discretion of the Court, to be exercised according to the particular relevant circumstances".

10. In the exercise of my discretion, I have taken note of the fact that Rule 34(6) does not express, in terms, the fact that an offer made thereunder is irrevocable for 15 days from the date it is made. Moreover, it does not expressly prohibit the offeror from withdrawing same within the 15 day period. At common law, unless an offer is expressly defined as irrevocable for a period of time, it may be revoked at any stage before acceptance. Vide **Christie's The law of contract in South Africa 6th edition at page 54.**
11. In casu, it was established that the offer was withdrawn, before its acceptance, owing to a genuine error. There was no suggestion to the contrary.
12. Accordingly, in the light of the above, the following order was made:
- 12.1 the withdrawal, on 17 October 2016, by the defendant, of its Rule 34(1) and (5) offer dated 14 October 2016, was valid;
- 12.2 the plaintiff was directed to pay the costs of the application to declare such withdrawal invalid.
13. By way of postea, it merits mention that, on 17 October 2016, in terms of a consent order the parties agreed on a merits apportionment of 40/60 in favour of the plaintiff. An undertaking to pay 40% of the plaintiff's future medical expenses was given. Quantum was reserved for determination at a later juncture. The defendant agreed to pay the plaintiff's costs of trial.



T. BRENNER
ACTING JUDGE OF THE HIGH COURT

Date Heard: 17 October 2016
For the Plaintiffs: Adv D Keet
Instructed by: TM Chauke Inc.
For the Defendant: Adv ZS Rasekgala
Instructed by: Du Toit Smuts & Mathews Phosa
Date of Judgment: 18 October 2016