THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 463/2015

In the matter between:

ROELOF ERNST BOTHA **APPELLANT**

And

ROAD ACCIDENT FUND **RESPONDENT**

Neutral Citation:	*Botha v Road Accident Fund* (463/2015) [2016] ZASCA 97 (2 June 2016).
Coram:	Leach, Saldulker, Dambuza JJA and Fourie and Victor AJJA
Heard:	18 May 2016
Delivered:	2 June 2016

Summary: Contract ─ agreement in settlement of claim for damages made an order of court ─ agreement concluded on the strength of a representation of fact made by appellant's attorney relied on by the respondent ─ agreement binding and not to be set aside under Uniform rule 42(1)(*c*).

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Hughes J, sitting as court of first instance):

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

Leach and Dambuza JJA (Saldulker JA and Fourie and Victor AJJA concurring):

[1] The issue in this appeal is whether the appellant is bound by a settlement agreement concluded with the respondent pursuant to a misrepresentation the appellant had made as to certain material facts. The agreement was made an order of court but the appellant subsequently applied for rescission or variation of that order under Uniform rule 42(1)(*c*). The application was dismissed. The appeal comes before us with the leave of the court a quo.

[2] The appellant and his wife sustained serious bodily injuries in a motorcycle accident. They then instituted separate actions against the respondent, the Road Accident Fund, for damages suffered as a result of their injuries. Both claims were defended by the respondent. On 3 March 2014, both cases came to trial before different judges in the Gauteng Division, Pretoria. The respondent conceded liability for whatever damages the appellant and his wife were able to prove. The appellant's wife's claim then went to trial before Pretorius J for determination of her damages. Judgment in that matter was reserved.

[3] In the meantime, parties entered into negotiations in regard to the appellant's claim which was due to be heard by Molefe J. As I have said, the respondent conceded liability leaving only the quantum of the appellant's damages in issue. The appellant's claim for general damages was agreed at R1 million and his claim for past hospital and medical expenses was settled in an amount of R236 922.70, this despite the claim at that stage only being one for R150 000. The respondent, however, was persuaded to accept liability for the higher amount in the light of vouchers and documentation presented by the appellant's attorney. The respondent also furnished an undertaking in respect of the appellant's future hospital and medical expenses in terms of provisions of s 17(4)(*a*) of the Road Accident Fund Act 56 of 1996. Thus the only outstanding item of damages related to the appellant's claim for loss of future earnings. The parties agreed to separate that claim from the other heads of damages under the provisions of Uniform rule 33(4), and to postpone the trial to determine those damages at a later stage. However, the respondent agreed to pay the appellant the sum of R1 236 922.70 in respect of his past medical expenses and general damages and to furnish the aforementioned undertaking. This agreement was embodied in the order Molefe J then issued by consent.

[4] Subsequent to payment by the respondent of the amounts agreed, the appellant's attorneys ascertained that the amount of R236 922.70 paid by the respondent in respect of the appellant's past hospital and medical expenses, represented only a portion of the actual expenses incurred by the appellant, which in fact totalled R784 278.78. On investigation, the appellant's attorney discovered that source documents relating to some of the expenses incurred in respect of the appellant's hospital and medical expenses had been placed in his wife's file and had not been presented to the respondent when the settlement was negotiated.

[5] The appellant's attorney then wrote to the respondent's attorneys advising them of this 'mutual error'. He proposed that the court order obtained on 3 March 2014 be rescinded by agreement and that it be replaced by a court order reflecting an amount of R784 278.78 for past medical and hospital expenses. The respondent refused to agree, stating that as the agreement had been made an order of court, it was res judicata.

[6] It is against this background that appellant's attorneys approached the court a quo seeking rescission or variation of the aforesaid court order under Uniform rule 42(1)*(c)*, contending 'there had been a mistake common to the parties' which rendered the settlement agreement void.

[7] The application was opposed by the respondent, who maintained that the appellant (or his attorney) had misrepresented the facts on which the settlement had been rendered. The court a quo dismissed the application and found that the source documents relating to the unclaimed portion of the expenses constituted evidence that 'came to the fore after the court [had] considered the vouchers and given judgment on same'. Consequently, the court held, the mistake relied upon by the appellant was a 'retrospective mistake by means of fresh evidence'.

[8] In seeking relief under Uniform rule 42(1)*(c)*, the appellant was obliged to show that the settlement agreement had been concluded as a result of a mistake common to both himself and the respondent as to the correct facts. In attempting to do so the appellant relied heavily on this court's decision in *Tshivhase Royal Council & another v Tshivhase & another;* [1992] ZASCA 185; 1992 (4) SA 852 (A). In that case Nestadt JA, writing for the court, described a mistake common to the parties as envisaged by the rule as a 'common mistake' as understood in the field of contract, which occurs where both parties are of one mind and share the mistake.[1] He held further that where both sides had assumed a state of affairs that turned out to be wrong, the court was entitled to set aside an order made on the basis of their common mistake.

[9] *Tshivhase*, however, is clearly distinguishable from the present matter. There both parties had acted in error on the strength of a representation made by a third party. Theirs was thus a common mistake of fact which vitiated their agreement. That is not here the case. In the present matter the error may be described as being a 'unilateral mistake' in that it was made by the appellant's attorney who, through his misrepresentation, induced the respondent to contract on the terms they did. And this difference is fatal to the appellant's claim.

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[1] *Tshivhase Royal Council v Tshivhase supra* at 863A-B.

[10] Under the so-called reliance theory, if there is a material mistake by one party to a contract and therefore no actual consensus, the contract will be valid if the other party reasonably relied on the impression that there was consensus.[2] This was recognised by this court in *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* [1992] ZASCA 56;1992 (3) SA 234 (A) at 239A. In that case, a mistake made by a firm of attorneys representing the appellant (a lessor of property) resulted in an erroneous reduction of the term of a property lease from 20 to 15 years. The respondent (the lessor) insisted that no mistake had been made. This led to the appellant seeking an order of rectification of the agreement by replacing the term of 15 years with 20 years. On appeal against the dismissal of that claim, this court found that there had been no common intention to agree on the 20 year term. More relevant for the issues at hand, the court defined mistake as implying a 'misunderstanding, misrepresentation, and resultant poor judgment',[3] Harms AJA expressed the test as to whether reliance on a mistake entitles a party to resile from a resultant agreement as follows:

'. . . did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? . . . To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby? . . . The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled?'[4] (Footnotes omitted.)

[11] In this case the answers to these questions are self-evident. It was not suggested that a reasonable man would not have accepted the facts presented to the respondent's attorneys, or that a reasonable man would have realised that there was a real possibility of a mistake in the amount of expenses the appellant's attorney requested to be paid. The misrepresentation by the appellant misled the respondent, and this resulted in the conclusion of the settlement agreement. The appellant cannot rely on his own mistake to avoid the contract which was solely his fault. As stated by Christie: [5]

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[2] S W van der Merwe et al *Contract: General Principles* 4 ed (2012) at 33.
[3] At 238H.
[4] This test being an adaptation of a dictum by Blackburn J in *Smith v Hughes* (1871) LR 6 QB 597 at 607 (at 239I-240B).
[5] R H Christie & G B Bradfield *Christie's the Law of Contract in South Africa* (2011) 6 ed at 329-330.

'However material the mistake, the mistaken party will not be able to escape from the contract if his mistake was due to his own fault. This principle will apply whether his fault lies in not carrying out the reasonably necessary investigations before committing himself to the contract, that is, failing to do his homework; in not bothering to read the contract before signing; in carelessly misreading one of the terms; in not bothering to have the contract explained to him in a language he can understand; in misinterpreting a clear and unambiguous term, and in fact in any circumstances in which the mistake is due to his own carelessness or inattention, . . . '

[12] In the light of this, the appellant sought refuge in an argument that both parties had assumed that the documents supporting the figure agreed in respect of past hospital and medical expenses were the only documents that were relevant and consequently that the compromise was concluded based on an incorrect assumption. However, as pointed out by this court in *Van Reenen Steel (Pty) (Ltd) v Smith NO & another* [2002] ZASCA 12; 2002 (4) SA 264 (SCA), this was no more than an assumption based on an unilateral mistake.[6] And as Harms JA said in that case:[7]

'The first problem facing the appellants is that they are unable to rely on a unilateral mistake because, as mentioned, the respondents were not the cause of the mistake in the sense discussed in *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) (Ltd) v Pappadogianis*; 1992 (3) SA 234 (A). The next problem is that it is common cause that the written contract expresses the parties' consensus.'

The argument that there was a mutual mistaken assumption is no more than an attempt to clothe a unilateral mistake in another garb. For the reasons already set out the appellant's mistake does not void the agreement.

[13] Confronted with all these difficulties the submission on behalf of the appellant was that this court should use its discretion under rule 42(1) to set aside the judgment although the settlement agreement was binding. In *Theron NO v United Democratic Front (Western Cape Region)& others* 1984 (2) SA 532 (C) at 536G this court held that a court has a discretion whether or not to grant an application for

[6] Paragraph 9.
[7] Paragraph 7.

rescission under rule 42(1). But where, as here, the court's order recorded the terms of a valid settlement agreement,[8] there is no room for it to do so.

[14] The appeal is dismissed with costs including the costs of two counsel.

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L E LEACH

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N DAMBUZA

JUDGES OF APPEAL

[8] *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319; (C) 2016 (3) SA (CC).

APPEARANCES:

For the Appellant:	J C Bergenthuin Instructed by: Van Zyl Le Roux & Hurter, Pretoria c/o Honey Attorneys, Bloemfontein
For the Respondent:	N G D Maritz SC; J Lingenfelder Instructed by: Diale Mogashoa Attorneys, Pretoria c/o McIntyre & Van der Post, Bloemfontein