

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 3299/2007

In the matter between:

ELIZABETH MBAMBUS

PLAINTIFF

and

MOTOR VEHICLE ACCIDENT FUND

DEFENDANT

Neutral citation: *Mbambus v Motor Vehicle Accidents Fund* (Case No I 3299-2007) [2013] NAHCMD 2 (14 January 2013)

Coram: VAN NIEKERK J

Heard: 17 November 2011

Delivered: 14 January 2013

Flynote: **Contract** – Compromise – What constitutes – Effect is that it bars bringing of proceedings on original cause of action – Compromise must be properly concluded to have this effect – In context of public body like defendant this means

that defendant must have had power to conclude compromise – *In casu* defendant did not have statutory power to enter into settlement agreement to pay compensation for claims not arising from section 10 of Motor Vehicle Accidents Fund Act, 2001 (Act 4 of 2001) – Compromise null and void *ab initio*.

ORDER

The question to be adjudicated is therefore answered in favour of the defendant, with the result that the plaintiff's claim is dismissed with costs.

JUDGMENT

VAN NIEKERK J:

[1] This is a special case in terms of rule 33(1). The agreed statement of facts between the parties is as follows (the omissions and insertions are mine):

- 1.1 On 24 February 2005, the plaintiff's husband, the late Fillemon Mbambus, was killed in a Motor Vehicle Collision (*sic*), which occurred on the Western Bypass, in Windhoek.
- 1.2 The Defendant alleges the accident was caused by the negligent/unlawful driving of the deceased [in that he] was driving [in] the lane of the oncoming traffic and collided head on with a truck driven by a certain Mr. L. Jacobs.
- 1.3 Following the death of her [h]usband, the Plaintiff on behalf of herself and the minor children from the marriage between her and her late husband submitted a claim in terms of the Motor [V]ehicle Accidents Fund Act, 2001 [Act 4 of 2001].
- 1.4 The Defendant accepted the claim and on 23 January 2006 entered into an agreement with the plaintiff to compensate the Plaintiff and her three minor children in respect of the future damages which they suffered. A copy of the agreement is annexed hereto and marked as "A".
- 1.5 In the 03rd of October 2006 the Defendant wrote to the Plaintiff and informed her that the Defendant had made a mistake by accepting

liability and paying out her claims. The Defendant further informed the Plaintiff that the agreement concluded on 23 January 2006 was a nullity in that it ('the Defendant') did not have the power to conclude such an agreement. A copy of the letter is annexed hereto and marked as "B".

- 1.6 After the Plaintiff received the letter mentioned in paragraph 1.5 she issued summons against the Defendant claiming payment in the amount of N\$72 559-91. The Defendant entered notice to defend the action.
- 1.7 After the Defendant entered notice of intention to defend, the plaintiff invoked the provisions of Rule 32 of the High Court Rules and applied for summary judgment. The High Court of Namibia granted the Defendant leave to defend the action.
- 1.8 After this Honourable Court granted the Defendant leave to defend the action the parties agreed to in terms of Rule 33 of the High Court Rules present a stated case to the court for adjudication.'

[2] The issue which the parties require the Court to adjudicate is –

'whether the Defendant can escape liability in terms of the settlement agreement by relying on a defen[c]e pertaining to the original cause of action. In other words, can the Defendant rely on the Motor Vehicle [Accidents] Fund Act, 2001 to escape liability under the settlement agreement?'

[3] In terms of clause 2 of the agreement the defendant made a cash payment to the plaintiff for past loss of support. In clause 3 of the agreement the parties agreed that the defendant would be liable in respect of an undertaking, furnished in terms of section 10(5)(a) of the now repealed Motor Vehicle Accidents Fund Act (hereinafter 'the MVA Act'), to make certain payments for future loss of support. (The reference to subsection (5)(a) is a mistake. It clearly should have been subsection (5)(b)). As I understand it, plaintiff's claim relates to this aspect.

[4] The defendant was established as a juristic body by section 2(1) of the MVA Act. Its purpose is set out in section 2(2) as being to pay compensation to a person who has suffered loss or damage as contemplated in section 10. Section 10 determines the liability of the defendant. The relevant parts of section 10, for purposes of this case, are subsections (1) and (5)(b), which read as follows:

'10. (1) The Fund shall –

- (a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver of the motor vehicle has been established; or
- (b) subject to a regulation made under section 17, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the driver or the owner has not been established,

pay out compensation to a person who has suffered loss or damage as a result of bodily injury to himself or herself, or bodily injury to or the death of any person, in either case caused by or arising out of the driving of a motor vehicle by any person at any place in Namibia, if the injury or death was due to the negligence or other unlawful act of the driver of the motor vehicle in question, the owner of the motor vehicle in question or of an employee of the owner of the motor vehicle in the execution of that employee's duties as an employee of the owner of that motor vehicle.

(2), (3), (4)

(5) Where a claim for payment of compensation under subsection (1) is made and the claim includes a claim for –

(a)

(b) future loss of income or support, the Fund may by agreement with the claimant or after being ordered to do so by a competent court, give a written undertaking to the claimant to the effect that the amount will be payable by instalments and thereafter pay the amount in the form of instalments as agreed or as ordered by the competent court.

(6), (7)

[5] Mr *Namandje* on behalf of the plaintiff made it clear that the plaintiff's claim is not based on the original cause in terms of the MVA Act, but on the settlement agreement concluded by the parties. He submitted that the agreement amounts to a compromise. In essence his argument is that, as a compromise excludes a claim on the original cause of action, the defendant is precluded from relying on a defence based on the original cause.

[6] In this regard counsel relied on several authorities on the nature and effect of an agreement of compromise or *transactio*, e.g. *Gollach & Gomperts v Universal Mills & Produce Co.* 1978 (1) SA 914 (AD) at 921B-D:

'In *Cachalia v Herberer & Co.*, 1905 T.S. 457 at p. 462, SOLOMON, J., accepted the definition of *transactio* given by Grotius, *Introduction*, 3.4.2., as

"an agreement between litigants for the settlement of a matter in dispute".

Voet, 2.15.1., gives a somewhat wider definition which includes settlement of matters in dispute between parties who are not litigants and later, 2.15.10., he includes within the scope of *transactio*, agreements on doubtful matters arising from the uncertainty of pending conditions "even though no suit is then in being or apprehended". (*Gane's trans.*, vol. 1, p. 452.) The purpose of a *transactio* is not only to put an end to existing litigation but also to prevent or avoid litigation. This is very clearly stated by Domat, *Civil Law*, vol. 1, para. 1078, in a passage quoted in *Estate Erasmus v Church*, 1927 T.P.D. 20 at p. 24, but which bears repetition:

"A transaction is an agreement between two or more persons, who, for preventing or ending a law suit, adjust their differences by mutual consent, in the manner which they agree on; and which every one of them prefers to the hopes of gaining, joined with the danger of losing." ‘

[7] Another case on which counsel placed reliance is *Georgias v Standard Chartered Finance Zimbabwe Ltd* 2000 (1) SA 126 (ZSC) in which the following overview was given (at 138I-140D):

‘Compromise, or *transactio*, is the settlement by agreement of disputed obligations, or of 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. See *Cachalia v Harberer & Co* 1905 TS 457 at 462 *in fine*; *Tauber v Von Abo* 1984 (4) SA 482 (E) at 485G - I; *Karson v Minister of Public Works* 1996 (1) SA 887 (E) at 893F - G. 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. See *Nagar v Nagar* 1982 (2) SA 263 (ZH) at 268E - H. As it brings legal proceedings already instituted to an end, a party sued on a compromise is not entitled to raise defences to the original cause of action. See *Hamilton v Van Zyl* 1983 (4) SA 379 (E) at 383H. But 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 & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce*

Co (Pty) Ltd and Others 1978 (1) SA 914 (A) at 922H. Unlike novation, a compromise is binding on the parties even though the original contract was invalid or even illegal. See *Hamilton v van Zyl* (*supra* at 383D - E); *Syfreets Mortgage Nominees Ltd v Cape St Francis Hotels (Pty) Ltd* 1991 (3) SA 276 (SE) at 288E - F.'

(See also *Hamilton v van Zyl* 1983 (4) SA 379 (ECD) at 383D-384B; *Van Zyl v Niemann* 1964 (4) SA 661 (A); *Metals Australia Ltd and Another v Amakutuwa and Others* 2011 (1) NR 262 (SC) at [21].)

[8] Mr *Ueitele* on behalf of the defendant stated that he had no quarrel with the law on compromise as set out by Mr *Namandje*. His problem was with the application of the law to the facts of this case. He submitted that the defendant, being a creature of statute, has only such powers as are conferred upon it by statute. He submitted with reference to section 2(2) and section 10(1) of the MVA Act that the defendant is by law only authorised to conclude agreements for compensating a victim if his or her claim is in respect of loss or injury occasioned by the negligent driving of a driver of a motor vehicle not being the victim or in relation to whom the victim is not a dependent. He submitted that if the defendant would agree to make payments to the dependent(s) of a negligent driver who caused the injury or loss, the defendant would be acting *ultra vires* and that such an agreement would be void *ab initio*.

[9] Counsel made the same argument when he appeared before Ndauendapo, J in the plaintiff's application for summary judgment. In this regard the following was stated by the learned judge:

'In *Skeleton Coast Safaris (Pty) Ltd v Namibia Tender Board and Others* 1993 NR 288 (HC) Hannah J at p 299J – 300A stated that:

'In these circumstances the only conclusion that can be arrived at is that the first respondent purported to exercise a power which it did not have. It acted *ultra vires*.'

Similarly, *in casu*, the respondent can only exercise a power conferred on it by the creative deed, ie The Motor Vehicle Accident Fund Act 2001 and, as indicated above, ss 10(1) as read with s 10(4) of Act 2001 preclude the respondent from paying compensation to a person who suffered damages if

the damages were caused by his or her own negligence. As Hoexter *Administrative Law in South Africa* 2007 at 227 observed:

'every incident of public power must be inferred from a lawful empowering source, usually legislation. The logical concomitant of this is that an action performed without lawful authority is illegal or *ultra vires* — that is to say beyond the powers of the administrator.'

[23] Mr *Ueitele* submitted that the defendant is a public authority and it exercises its power for the public benefit. It thus follows that when the defendant exercises its powers under the Motor Vehicle Accident Fund Act, including the signing of an agreement to compensate the plaintiff, it is performing an administrative act and that administrative act must comply with all the requirements of legality. I agree with that submission.'

(See *Mbambus v Motor Vehicle Accident Fund* 2011 (1) NR 238 (HC) at 246C-G).

[10] Plaintiff's counsel submitted that, by the parties settling the matter and by the defendant accepting liability to make payments in terms of section 10, the issue of whether the claim constitutes a claim which falls under section 10 was also irrevocably settled. I do not agree. In the *Metals Australia* case the Supreme Court made it clear that although the validity of an agreement of compromise does not generally depend on the validity of any contract it replaces, nevertheless, for it to be a binding contract, the compromise agreement must have been properly concluded (see [27]F-G). In the context of a public body like the defendant a properly concluded contract would mean a contract which it had the power to conclude. The principle is well-established and clear that a public body created for a particular purpose with statutory powers cannot validly exercise powers not expressly or impliedly authorised (*De Villiers v The Pretoria Municipality*, 1912 T.P.D. 626). The very purpose for which the defendant is constituted is to pay compensation to a person who has suffered loss or damage as contemplated in section 10. By virtue of section 3(1)(b) the defendant was given the function 'to investigate and settle, subject to this Act, claims arising under section 10.' It is significant that the defendant is granted the express power to settle claims, in other words, to enter into compromises of claims arising under section 10. By referring to section 10, the power to settle is limited to claims where the claimant is not the driver, or a dependant of the driver, by whose negligence the injury or damage was caused. By

incorporating the words 'subject to this Act' any conceivable doubt whether the defendant may settle claims which do not comply with section 10 is, to my mind, removed. Clearly the defendant may not do so. In view of the clear intention conveyed by the express provisions it is not necessary to consider whether such a power is impliedly given. I therefore agree with Mr *Ueitele*'s submission that the defendant did not have the statutory power to enter into the compromise concerning a claim which did not comply with section 10. As such the compromise is null and void *ab initio*.

[11] The question to be adjudicated is therefore answered in favour of the defendant, with the result that the plaintiff's claim is dismissed with costs.

K van Niekerk

Judge

APPEARANCE

For the plaintiff:

Mr S Namandje

of Sisa Namandje & Co Inc

For the defendant:

Mr S F I Ueitele

of Ueitele & Hans Legal Practitioners