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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 05715/2013

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

Date:

WHG VAN DER LINDE

In the matter between:

**Wie, Nolene Charlotte
(Obo [G.....], [A.....])**

Applicant

And

**The MEC for Health and Social Development
of the Gauteng Provincial Government**

Respondent

JUDGMENT

Van der Linde, J:

[1] This is the second judgment in the above application. On 3 May 2016 I gave a judgment but postponed *sine die* the application, which was argued on 3 May 2016, because the minor on whose behalf the applicant was claiming relief, had died before the applicant had accepted the settlement offered by the respondent, and before an executor had been appointed. In fact, when the matter was argued on 3 May 2016, the parties were under the impression that an executor had still not been appointed, and in view of that fact, I did not believe that I could make any order but to postpone the matter.

[2] On the very next day, however, a notice of substitution in terms of rule 15 (3) of the uniform rules of court was served on the attorney representing the respondent. In terms of that notice, the applicant now represents the estate of the minor [L.....] [A.....] [G.....], by virtue of Letters of Authority issued in terms of s.18(3) of the Administration of Estates Act 66 of 1965.

[3] The notice had attached to it as “A” the Letters of Authority dated 3 March 2016. These reflect that an inventory was submitted to the Master which reflected assets of the deceased to the value of R500. S.18 (3) of the Administration of Estates Act provides:

“(3) If the value of any estate does not exceed the amount determined by the Minister by notice in the Gazette, the Master may dispense with the appointment of an executor and give directions as to the manner in which any such estate shall be liquidated and distributed.”

The amount so determined by the Minister is R250 000.¹

[4] In the view that I have taken of the matter, when the minor died *litis contestatio* had occurred, and thus her claim was actively transmitted to her estate. That means that the estate had assets in the region of R4 982 625, represented by the claim which the respondent had offered to settle, and which offer of settlement the applicant had contended she had

¹ Government notice no. R. 920 in Government Gazette 38238 of 24 November 2014.

validly accepted. If that is correct, the Master did not have the power to dispense with the appointment of an executor as apparently occurred on 3 March 2016.

[4] But the parties have placed the application before me again, without further argument, for me to give my judgment on the arguments that were raised before me, and I do so accordingly. The parties may have adopted the attitude that until the Master's decision of 3 March 2016 is set aside, it stands; and they are probably right. It is on that basis that I proceed. As will appear below, portions of this judgment are lifted from the earlier judgment in which I had set out the background, and had made some *prima facie* remarks.

[5] The substantive application is by the mother and guardian of a deceased minor child for judgment in the amount of R4 982 625, and costs, against the respondent. The cause of action is contract; the applicant had sued the respondent in her capacity as guardian of her daughter Ammarah Genner who was born on 4 September 2009, afflicted with cerebral palsy. She alleged in the particulars of her claim that the negligence of the respondent's staff at a public hospital was the cause of her daughter's condition.

[6] On 24 July 2014 the respondent made a written offer in terms of uniform rules 34(1) and 34(5) to settle the claim, and on 6 August 2014 the applicant accepted the offer. It is the contract that came into existence through that acceptance that gives rise to the applicant's present claim for judgment in terms of the settlement pursuant to the provisions of rule 34 (7).²

[7] After the acceptance of the offer, and on 8 August 2014, the applicant notified the respondent that on 3 August 2014, three days before the offer was accepted on 6 August 2014, the applicant's daughter had passed away. The applicant, having taken advice from senior and junior counsel at the time, resolved that the offer could nonetheless be accepted,

² "In the event of a failure to pay or to perform within 10 days after delivery of the notice of acceptance of the offer or tender, the party entitled to pay or performance may, on five days' written notice to the party who has failed to pay or perform, apply through the registrar to a judge for judgment in accordance with the offer or tender as well as for costs of the application."

and that “... *should the Respondent hold a different view in this regard, its remedy would be to bring an application to have the offer of settlement set aside and that the Court could and should then speak the final word on this issue.*”³

[8] No interim curator under s.12 of the Administration of Estates Act had been appointed before acceptance of the offer, nor had an executor been appointed under s.18(1), or any person authorised under s.18(3) of the Act. As appears from what has been set out above, on 3 March 2016, some nineteen months later, the Master issued Letters of Authority under s.18(3) of the Administration of Estates Act, and now, subsequently, a notice in terms of rule 15(3) has been served. I revert below to the effect of that notice.

[9] In the circumstances of there not having been an executor when the offer was accepted, the court raised with the parties in advance of the hearing the question whether the applicant had legal capacity to accept the offer of 24 July 2014. As stated before, the court is indebted to counsel for the assistance afforded by them on short notice, and for the supplementary heads of argument provided by Mr Soni, SC who represented the respondent.

[10] In the earlier judgment I recorded that Mr Coetzer for the applicant submitted that the applicant, in her representative capacity, had given the attorneys a mandate which was not immediately terminated upon the death of the minor, but continued to afford them the authority to accept the offer, which they then did. He submitted that the offer was thus validly accepted. Mr Soni submitted that the applicant had instituted the action as guardian of the minor, and that upon the latter’s death, that guardianship was terminated. Thus, according to the submission, the acceptance of the offer was a nullity.

[11] I expressed the view earlier that Mr Soni was with respect correct; and I believe the same reasoning still applies, despite the notice of substitution. A minor cannot incur contractual liability without the assistance of her guardian.⁴ Since legal capacity to conclude contracts⁵

³ Applicant’s replying affidavit, p44 par 26 ln 13 – 15.

⁴ Boberg’s Law of Persons and the Family, 2nd ed, Belinda van Heerden et al, p781 fn 68.

terminates on death, the guardian has no capacity after the death of the minor to provide the contractual capacity which the minor lacked in life. Since the applicant had no capacity to accept the offer, she could not have given her attorneys any power to do so either. The conclusion that the acceptance of the offer was not lawfully competent, at least not when it purported to have occurred, is inescapable.⁵

[12]The notice under rule 15 (3) has not in my view changed this conclusion. It is merely a rule of court; it cannot change the substantive law relative to the lack of contractual capacity which the applicant experienced before the issue of Letters of Authority to her.⁷ It follows that no binding settlement was reached, because the applicant had no capacity to represent the deceased estate when the notice of acceptance was sent on 6 August 2014.⁸ For this reason the application cannot succeed.

[13]A second point was raised why the application could not succeed. In view of the conclusion to which I have come on the first issue, it is not strictly necessary that I express my view on this second issue. Nonetheless, if I am wrong on the first issue, I indicate that I would in any event have dismissed the application on the basis of the second point. This point concerns the application of s.4 of the Contingency Fees Act 66 of 1997 (“CFA”).

[14]That section provides as follows:

“4 Settlement

(1) Any offer of settlement made to any party who has entered into a contingency fees agreement, may be accepted after the legal practitioner has filed an affidavit with the court,

⁵ Wille & Millin’s Mercantile Law of South Africa, 18th ed by JF Coaker and DT Zefferdt, p58, sub nom “Capacity to contract.”

⁶ It is unnecessary to consider whether the offer, upon the death of the minor, lapsed; or whether the offer remained open for acceptance until after an executor will have been appointed. None of that occurred, and those issues are better left for when they may be raised in the future.

⁷ I accept that the appointment of the applicant in her representative capacity occurred *nunc pro tunc*; Erasmus, Superior Court Practice, 2nd ed., Van Loggerenberg, pD1-160. But it could not have had any effect before the Letters of Authority were issued on 3 March 2016.

⁸ Pp 12,13.

if the matter is before court, or has filed an affidavit with the professional controlling body, if the matter is not before court, stating-

- (a) the full terms of the settlement;*
- (b) an estimate of the amount or other relief that may be obtained by taking the matter to trial;*
- (c) an estimate of the chances of success or failure at trial;*
- (d) an outline of the legal practitioner's fees if the matter is settled as compared to taking the matter to trial;*
- (e) the reasons why the settlement is recommended;*
- (f) that the matters contemplated in paragraphs (a) to (e) were explained to the client, and the steps taken to ensure that the client understands the explanation; and*
- (g) that the legal practitioner was informed by the client that he or she understands and accepts the terms of the settlement.*

(2) The affidavit referred to in subsection (1) must be accompanied by an affidavit by the client, stating-

- (a) that he or she was notified in writing of the terms of the settlement;*
- (b) that the terms of the settlement were explained to him or her, and that he or she understands and agrees to them; and*
- (c) his or her attitude to the settlement.*

(3) Any settlement made where a contingency fees agreement has been entered into, shall be made an order of court, if the matter was before court."

[15] In this case the attorneys representing the applicant acted on a contingency fee basis as envisaged in the CFA.⁹ The respondent's argument is that the settlement offer could, in view of the word "*after*" in ss.4(1) of the CFA, only be accepted after the two affidavits referred to s.4 had been executed. Since these affidavits only came much later, in the replying affidavit, and were dated 24 and 23 July 2015 respectively long after the offer was purportedly accepted, the offer could not have been accepted when it was, according to the argument.

[16] The applicant argues that the affidavits need only be handed up at court when an order in terms of rule 34(7) was being sought, as was the case here.¹⁰

[17] It seems that ss.4(3) really answers the point. That subsection requires that a settlement "*shall*" be made an order of court where a contingency fee agreement had been entered into; there is no choice in the matter. Rule 34 (7) on the other hand is triggered by default; that does not apply here.

[18] The essential argument on behalf of the applicant was however that within s.4 lay an insurmountable conundrum. The section requires, ostensibly, acceptance of the settlement offer only after the affidavits will have been produced. But if one considers the requirements of the contents of the affidavits, one sees that the subsection refers to a "*settlement*" as if the "*settlement*" had already been entered into by the time the affidavits come into existence.

[19] There is, grammatically, much force in the argument. But I think the sense of the section is to ensure that the client is properly informed before the client actually accepts the offer of settlement. Once accepted, there is no going back; a binding agreement will have been concluded. The section seeks to ensure that, as it were, there is no buyer's remorse.

[20] The mischief against which the legislation was aimed, was no doubt the abuse that was often manifested when ill-informed claimants found out after the settlement that the payout to them was in fact much less than they had anticipated. In these circumstances the

⁹ P40, paras 14, ff.

¹⁰ The FA expressly makes the case on the basis of rule 34 (7); see p5 para 4.

sequence envisaged in ss.4(1) must, as a matter of statutory interpretation, be honoured.

The acceptance of the offer of settlement can only come after the affidavits will have been filed.

[21]For these reasons the application cannot succeed. I make the following order:

The application is dismissed with costs, including the costs reserved on 3 May 2016.

WHG van der Linde
Judge, High Court
Johannesburg

For the applicant: Adv. M Coetzer (083 409 8077)
Instructed by Wim Krynauw Attorneys
6th Floor, Marble Towers
208/212 Jeppe Street
Johannesburg
Tel: 011 955 5454
Ref: W Krynauw/MEC0011

For the respondent: Adv V Soni, SC (083 560 0824)
Instructed by The State Attorney
10th Floor, North State Building
95 Albertina Sisulu Street, Cnr. Kruis Street
Johannesburg
Tel: 011 330 7602
Ref: 1767/13/P42/KG Lekabe

Date argued: 3 May 2016
Date of second judgment: 19 May 2016.