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REPUBLIC OF SOUTH AFRICA



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

CASE: 16319/2013

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

.....22/02/18.....

Date

.....

ML TWALA

In the matter between:

ROAD ACCIENT FUND

APPLICANT

AND

Z., CT

FIRST RESPONDENT

Z., CT
Z., CT
Z., CT

SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT

JUDGMENT

TWALA J

- [1] The applicant brought an application seeking an order for the withdrawal of an admission on the merits of this case made at the pre-trial conference of the parties held on the 12th of June 2017. Further, the applicant sought an order that the case against it be proceeded with on both the merits and *quantum*.
- [2] The respondents have filed their opposing papers of this application and brought a counter application for the dismissal of the applicant's application for the withdrawal of the admission made at the pre-trial conference of the parties. Both the parties were late in filing their opposing papers – hence they applied for condonation for the late filing of the papers which condonation was, in the interest of justice, granted by the Court.
- [3] The first respondent, in her personal capacity and in her representative capacity as the mother of the second, third and fourth respondents instituted a claim for damages against the applicant arising from a motor vehicle accident that occurred on the 21st of September 2011 wherein her late husband and father of her children, B. M. M. died. The summons was issued in May 2013 and the case

was set down for trial on the 18th of May 2015 when it was removed from the roll and re-enrolled for the 8th of August 2017.

- [4] On the 12th of June 2017 the parties held a pre-trial conference in terms of rule 37 of the Rules of Court. In the pre-trial, the applicant agreed that the sole cause of the accident in which the respondent's husband died was the negligent driving of the insured driver. On the 6th of July 2017 and at the judicial pre-trial before Sutherland J, the matter was "*certified ready for trial on the computation of the quantum in the dependants' action.*"
- [5] Counsel for the applicant contended that the attorney who was dealing with this case was snowed under at the time he made the admission and did so without obtaining instruction from the applicant. The attorney made an error in admitting that there is no issue on the merits and conceded the merits. The respondents were awarded costs for the postponement of the case on the date of trial and therefore, so goes the argument, the prejudice which they may have suffered has been cured by the costs order. The Court should be mindful of the fact that the applicant is acting in a fiduciary capacity and should be careful in handling the public purse. The respondents will not suffer any prejudice if on the trial of the matter both merits and quantum are determined.
- [6] It is contended by counsel for the respondents that the applicant did not make an admission at the pre-trial but conceded the merits of the case. It should be borne in mind that, argued counsel for the respondents, the case between the parties is a dependants' claim whereupon the respondents have the onus to prove only 1% negligence on the part of the insured driver to succeed in their claim. The applicant, as the argument goes, has failed to furnish full particulars of the Durban claims which it alleges are similar to this case to warrant the application for the withdrawal of the concession it made at the pre-trial conference. Further,

there is a duty on the applicant to investigate cases before taking any decision as it is acting in fiduciary capacity and needs to be careful when handling the public purse.

- [7] It is contended further by counsel for the respondents that the applicant had ample time to investigate the matter – hence the attorney made the concession after he was satisfied that there was no issue with regard to the merits of the case. The respondents will suffer irreparable harm which cannot be cured by a costs order should the issue of merits be reopened. The case can only be enrolled and heard in eighteen months from now and the applicant will not pay the interest for that period. The respondents released their witnesses after the applicant conceded the merits and would have difficulty in tracing them. The applicant, it is so contended, made an offer to settle the merits which offer the respondents accepted. There is a contract between the parties with regard to the merits and it is not an admission in the true sense but a concession which was accepted and became a contract between the parties.
- [8] There is a plethora of decisions of our Courts that the purpose of rule 37 is to afford the parties an opportunity to endeavour to find ways of curtailing the duration of the trial by redefining the issues to be tried.
- [9] In the case of **MEC for Economic Affairs, Environment & Tourism; Eastern Cape v Klaas Kruizenga & Another 2010 (4) SA 122 (SCA)** the Court stated the following:
- “the rule was introduced to shorten the length of trials, to facilitate settlements between the parties, narrow the issues and to curb costs. One of the methods the parties use to achieve these objectives is to make admissions concerning the number of issues which the pleadings raise. Admissions of fact made at a rule 37 conference, constitute sufficient proof of those facts. The minutes of a pre-*

trial conference may be signed either by a party or his or her representative. Rule 37 is thus of critical importance in the litigation process. This is why this court has held that in the absence of any special circumstances a party is not entitled to resile from an agreement deliberately reached at a rule 37 conference. And when, as in this, the agreements are confirmed by counsel in open court, and are then made a judgment or order of a court, the principle applies with even more force.”

[10] In the case of Kruizenga quoted above, the Court continued and stated the following:

“it is well established that to hold a principal liable on the basis of the agent’s authority the representation must be rooted in the words or conduct of the principal, and not merely that of the agent. Conduct may be express or inferred from the ‘particular capacity in which an agent has been employed by the principal and from the usual and customary powers that are found to pertain to such an agent as belonging to a particular category of agents’. It may also be inferred from the ‘aura of authority’ associated with a position which a person occupies, at the principal’s instance, within an institution.

Properly understood the representation from the principal in this case relates only to the appointment of the State Attorney to defend the claim and to instruct counsel in this regard. The further conduct relied on is not that of the principal but of the agent himself and cannot in and of itself bind the principal. The respondents’ true case is that by appointing the State Attorney to defend the claim, the appellant represented to them, and they reasonably believed, that the State Attorney had the usual and customary powers associated with the appointment. These included instructing counsel to defend the claim, to draft the plea and to attend all pre-trial procedures, including rule 37 conferences. In other words the appellant represented to the respondents and the outside world that the State Attorney had the authority not only to conduct the trial but also to

make concessions at the conferences and to conclude the settlement agreement from which he now wishes to resile.”

- [11] In the case of **Tolstrup NO v Kwapa NO 2002 (5) SA 73 (W)** the Court stated the following:

“where parties have agreed that the merits and the quantum of a dispute are to be separately determined, and the defendant afterwards concedes the merits, which concession is accepted by the plaintiff, the parties have reached an agreement of compromise (transactio). By compromising the merits the defendant precludes himself from being able to revisit the merits as surely as if a judgment had been given thereon.

The concession on the merits is more than an admission; it is an agreement of compromise on that part of the action from which not even a court could release one party without the consent of the other.”

- [12] In the Rule 37 conference the applicant responded to the following submission as follows:

“that the collision which forms the subject matter of this action was caused solely by the negligent driving of the insured driver, who caused the death of Mr M., the deceased.

Defendant’s Answer: agreed.”

- [13] I am unable to disagree with counsel for the respondents that an agreement was reached between the parties at the Rule 37 conference from which agreement the applicant cannot be resiled without the consent of the respondents. I hold the view that the applicant did not make an admission on a particular aspect on the merits of the case but made an offer conceding the merits which offer was accepted by the respondents. Although the offer was not made in terms of Rule 33 (4) nor was it made an order of Court, it was confirmed before the

Judge at the judicial pre-trial that the matter was to proceed only on computation of the quantum of the dependants' claim. It is my respectful view therefore that the applicant is precluded from withdrawing from the agreement it concluded with the respondents in the Rule 37 conference.

[14] I am mindful of the fact that the applicant is acting in a fiduciary capacity and has the duty to protect public funds. At the same time the applicant has a duty to compensate road accident claimants fairly, reasonably and without delay. The applicant cannot escape liability on the basis that its attorneys acted without a mandate. It is on record that the attorney was instructed to handle more than 40 files/matters of the applicant which were scheduled for trial around the time the rule 37 conference was held. It is on record that the attorney had instructions from the applicant to concede and settle merits in most of the files.

[15] It is my considered view that the applicant cannot resile from the agreement concluded by its attorney since it presented to the respondents and to the outside world that its attorney has the necessary authority not only to conduct the trial but also to make concessions at the conferences preceding the trial such as the rule 37 conference which is part of the trial procedures.

[16] I find myself in disagreement with counsel for the applicant that the attorney made an error when he made the concession in the rule 37 conference. The attorney continued in front of the Judge in the judicial pre-trial that the merits of the matter are not in issue but only the quantum stands to be determined. Further, it is my view that attorneys do not just concede merits without investigating the matter. There is nothing before this Court which suggests that the merits of this case were different and complicated that the attorney mistook it for another matter. There is no cogent reason placed before this Court as to how the attorney made the mistake.

[17] I am satisfied that the attorney, having been ceased with the matter for some time, assessed the merits of the matter and was satisfied that the merits cannot be an issue in this case. The attorney deliberately made the concession in both pre-trial conferences and allowed the matter to proceed only for the determination of quantum in the trial.

[18] I cannot agree with the counsel for the respondents that the applicant should be mulct with a punitive costs order for bringing an application of this nature. I am unable to find any mala fides on the part of the applicant in bringing this application for the withdrawal of an admission.

[18] In the circumstances, I make the following order:

- I. The application is dismissed;
- II. The applicant is liable to pay the respondents' costs of both the application and counter-application.

TWALA J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: 13 February 2018

Date of Judgment: 22 February 2018

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