REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

In the matter between: Case No: 2589/2010

HAWKWIND CC **Applicant**

And

SALOMIE GODDARD **Respondent**

Coram: **Chetty, J**

Date Heard: **16 September 2010**

Summary: *Practice – Order of court – Application to set aside previous court order – Circumstances under which permissible to do so – Applicant's instructions to attorney not incorporated in founding affidavit – Whether attorneys omission amounting to just error – Omission constituting a reasonable mistake vitiating agreement of compromise – Order set aside*

JUDGMENT

Chetty, J

[1] The applicant conducts business repairing accident damaged vehicles and trades under the name *Auto Bodyworks* in Port Elizabeth. Although the respondent, somewhat disingenuously, denied being employed by the applicant it is apparent from the plethora of documentation annexed to the affidavits that she was. It is furthermore not in issue that during the currency of her employment she forged symbiotic relationships with the principals and staff of various brokerages

accustomed to referring work to the applicant.

[2] The respondent ceased her employment with the applicant in May 2010. During August 2010 the applicant sought an order as one of urgency, restraining and interdicting the respondent from soliciting business from any of the brokers with whom it conducted business contending that the respondent was contractually precluded from doing so by virtue of a covenant in restraint by trade. It is common cause that although the respondent, as adumbrated hereinbefore, denied being in the employ of the applicant and furthermore specifically denied the existence of a written contract of employment, agreed to an order being granted in the following terms:-

> "1. That the Respondent is restrained and interdicted from directly or indirectly conducting any business dealings related to the panel beating industry with the brokerages referred to by the Applicant in paragraph 20 of the affidavit of David Bernard Mandel until the 4th of May 2011 insofar as such business dealings are conducted within the magisterial district of Port Elizabeth.
> 2. That each party pay their own costs.
> 3. That the Applicant undertakes not to intercept or monitor "data" directed to the respondent in contravention of section 86 (1) of Act 25 of 2002 and not to cause same to be intercepted or monitored.
> 4. This order by consent settles all outstanding issues to date between the parties."

[3] On 3 September 2010 the applicant once more sought relief on an urgent

basis for:-

"1. . . .

2. . . .

3. An order setting aside the Order granted by consent by this Honourable Court on the 17th of August 2010, in Case No 2270/2010;

4. An order restraining and interdicting the Respondent, for a period of (24) twenty four months, calculated from the 4th of June 2010, and within the Magisterial District of Port Elizabeth, either for her own benefit or for the benefit of any other person, from soliciting panel beating work for any person from:-

   1. ABEX Brokers
   2. AIG
   3. Alexander Forbes
   4. Asset Insurance Brokers
   5. AON
   6. Ballast Insurance Brokers
   7. Bonnie Slabbert Brokers
   8. Bouwer Collins
   9. Breakaway Brokers
   10. Brian Kemsley Brokers
   11. Broadrisk Services
   12. Brolink
   13. David Rensburg
   14. DHL Supply Chain
   15. Fanie Du Preez Brokers
   16. FCG
   17. FNB Insurance Division
   18. Glynis Baudin Brokers
   19. Groch & Associates
   20. Hannes Scheepers Brokers

21. Indwe
22. Leonie Hunt Brokers
23. Linette Jacobs Brokers
24. Maxifin
25. Meudene Steyn
26. Mutitt Insurance Brokers
27. Noel Harvey
28. PSG Consult
29. Robin van Rensburg
30. Scotrho Insurance Brokers
31. Skybound
32. Spectrum
33. Spectrum Brokers
34. St Francis Brokers
35. STB
36. Susan Brophy
37. Telesure / Auto & General
38. Walmer Insurance Brokers
39. Wener Vosloo Brokers
40. Zurich"

[4] In the founding affidavit, the deponent, *David Bernard Mandel* (*Mandel*) proffered an explanation as to the circumstances under which paragraph 1 of the previous order was limited to the twenty three entities referred to herein and attributed such limitation to an error on the part of his instructing attorney. In his supporting affidavit attorney *Schoeman* contended that the brokerages ought not to have been limited to the twenty three entities reflected therein but should have included a further seventeen entities as per the instructions which he had received from *Mandel*. As corroborative evidence, he annexed a copy of an e-mail received from *Mandel's* professional assistant, Mrs. *Elize Beattie* (*Beattie*),

which contained a list of some thirty one entities under the rubric *Par 52.1.1/52.1.2*. This e-mail, as I shall elaborate upon, was sent on Mandel's instructions in response to matters highlighted by *Schoeman* in *Mandel's* affidavit in draft form.

[5] In her opposing affidavit, the respondent refuted any notion that *Mandel* had instructed *Schoeman* as suggested and stated:-

> "On these affidavits and documents filed herein, there was clearly never an instruction to the Applicant's attorney to insert the firms listed as 1-17 in paragraph 6, into paragraph 20 of the affidavit filed in the Application under case number 2270/2010 and accordingly this particular aspect could have had no relevance /bearing on the settlement reached between the parties in the Application under case number 2270/2010"

[6] *Schoeman's* affidavit, annexed to *Mandel's* replying affidavit, affords conclusive proof that the omission of the further entities was entirely attributable to his fault. The draft affidavit which was forwarded to *Mandel* for his further instructions dispels any notion that *Mandel* had not instructed *Schoeman* as he alleged. In the draft paragraph 52.1.1 he solicited instructions from *Mandel* concerning "the brokers that we want to protect". The response from *Beattie* in the e-mails sent to *Schoeman* reflected the names of the thirty one entities referred to hereinbefore. This refutes any suggestion that *Mandel* had instructed *Schoeman* to limit the entities to the twenty three reflected in paragraph 20 of his

founding affidavit in the main application. It is not in issue that the relief sought in the main application was not confined to specified brokers but widely stated to include "any broker who at any time has dealt with the applicant". The clear wording of paragraph 20 suggests quite unequivocally that it was never intended to constitute a *numerous clausus* of entities in respect of which the restraint was sought. Paragraph 20 merely specified the brokers with whom the applicant had engendered close business relationships and nothing more.

[7] The question which falls for determination therefore is whether *Schoeman's* mistake, which the applicant contends amounts to *just error*, provides a legal basis for the setting aside of the court order dated 17 August 2010.

[8] In argument before me counsel were in agreement that *just error* may in law constitute a basis for rescission of a judgment entered by consent and referred to the oft quoted dictum in **Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills and Produce Co (Pty) Ltd and Others**[1] where Miller JA stated the following[2]:-

> "It appears to me that a *transactio* is most closely equivalent to a consent judgment. (Cf. *Cachlia's* case, *supra* at p. 464.) Such a judgment could be successfully attacked on the very grounds which would justify rescission of the agreement to consent to judgment. I am not aware of any reason why *justus error* should not be a good ground for setting aside such a consent judgment, and therefore also an agreement of compromise, provided that such error vitiated

1 1978 (1) SA 914 (A)
2 At 922H

> true consent and did not merely relate to motive or to the merits of a dispute which it was the very purpose of the parties to compromise." (emphasis added)

The judgment recognizes that an agreement of compromise may likewise be set aside on the ground of *justus error*. That the court order was the product of a compromise is self evident and in fact admitted by the respondent. The further question is whether the omission on the part of *Schoeman* to have included the names of all the entities advocated by *Mandel* was a reasonable mistake on his part. I accept *Schoeman's* evidence relating to the omission and whilst his conduct amounted to an infraction of his duty *vis-à-vis Mandel*, such remissness ought not, in my view, to be visited upon the applicant. In my judgment therefore the compromise agreement was vitiated by the reasonable mistake on the part of *Schoeman* which warranted the setting aside of the court order.

[8] A decision in favour of the applicant thereanent does not, as a corollary, justify the grant of the relief foreshadowed in paragraph 4 of the notice of motion, in the adjudication of which, the respondent must be afforded due process. These then constitute the reasons for the order which issued on 16 September 2010 which read:-

> "1. That the order of court dated 17 August 2010 under case number 2270/10 be and is hereby set aside.
> 2. That the matter is postponed to 14 October 2010.
> 3. That pending the finalization of the matter the Respondent is interdicted and restrained from directly or indirectly conducting any business dealings with the panel beater

brokerages referred to in paragraph 20 of the affidavit of David Bernard Mandel.

4. That the costs are to stand over."

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D. CHETTY

JUDGE OF THE HIGH COURT

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