

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – PORT ELIZABETH)**

CASE NO: 2804/2006

Date Heard: 07 November 2011

Date Delivered: 24 April 2012

In the matter between:

JACQUELINE LE ROUX

PLAINTIFF

And

GUY ANTHONY REID

FIRST DEFENDANT

THE TRUSTEES FOR TIME OF THE

FERNDALDE FAMILY TRUST

SECOND RESPONDENT

**JUDGMENT ON APPLICATION FOR WITHDRAWAL OF ADMISSION
MADE AT A RULE 37 CONFERENCE**

DAMBUZA J:

[1] In this application the applicant, being the plaintiff in the main proceedings, seeks to withdraw an admission made on her behalf by her legal representatives at a Rule 37 conference which preceded the trial. For the sake of convenience I refer to the parties as they are in the main proceedings.

[2] The trial in this matter proceeded before me from 9 March 2010, up to the close of the plaintiff's case. At the close of the plaintiff's case the defendants applied for absolution from the instance. I dismissed that

application. My judgment is part of the record in this application and a summary of the evidence led so far appears therein. I do however, in this judgment, set out, briefly, the background facts to place this application in a clear perspective.

[3] I may as well, at this stage, state that the plaintiff is now no longer represented by the attorneys and counsel who represented her up to the close of the plaintiff's case. It appears that the admission which is the subject of this application was the cause of the disagreement between the plaintiff and her erstwhile legal representatives.

[4] The plaintiff is the owner of a property known as the Remainder of the farm Saag Kuilen (the plaintiff's property). The first defendant is the owner of an adjoining property (to the south of the plaintiff's property) known as the farm Hol Rivier. He (the first defendant) is also a Trustee in the second defendant. The second defendant is the owner of a property, portion 3 of the farm Saag Kuilen which abuts the eastern boundary of the plaintiff's property.

[5] The dispute between the parties relates to whether the first defendant, his family and other people are entitled to traverse the plaintiff's property on a road that runs through the plaintiff's property. This road is described in the papers and the trial proceedings as a rough 4 x 4 track (it is also referred to as the remainder road or the Keurkloof road).

In the main action the plaintiff seeks an interdict restraining the defendant, in his personal capacity and as a Trustee of the second defendant and those entering the plaintiff's property through him, from entering her property without written consent from her. In the alternative, she seeks a declarator that the first defendant or anyone acting through him, may not utilise her property for recreational purposes.

[6] The first defendant pleads that he is entitled to traverse the plaintiff's property by virtue of a duly proclaimed minor public road numbered 119H traversing through the plaintiff's property to Hol Rivier. He pleads that he has, since he acquired Hol Rivier in 2001, used the road which traverses the plaintiff's property to access Hol Rivier from portion 3 of Saag Kuilen (the property owned by the Trust). It is common cause that the road that the defendants claim entitlement to traverse is the remainder road.

[7] Further to the plea the first defendant has filed a conditional counterclaim in which he claims that, if the court finds that the road in question is not a public road, he has (in any event) through his predecessors in title, acquired a prescriptive right (or a servitude) over the property. Alternatively, so claims the first defendant, the plaintiff should be ordered to register a right of way in his (the first defendant's) favour, over the plaintiff's property. The anticipated right of way shall be for use of the disputed road.

[8] Therefore the issues for determination at the close of pleadings were the following:

- i) whether there is a proclaimed minor public road over the plaintiff's property;
- ii) whether the first defendant has acquired a servitude over the plaintiff's property; and
- iii) whether the first defendant is entitled to a *via necessitas* over the applicant's property.

[9] When the trial commenced, counsel brought to my attention a supplementary Rule 37 minute in which is recorded, *inter alia*, that:

"Issue

1. The separated issue:

1.1 *The parties are in agreement that road 119H is a duly proclaimed minor public road.*

1.2 *The issue between the parties is whether road 119H traverses portions 1 and 2 of the farm Saag Kuilen (as contended by the plaintiff) or Remainder of farm Saag Kuilen to a point on the common boundary between Remainder of farm Saag Kuilen and the farm Hol Rivier (as is contended by the Defendants)."*

[10] It is further recorded in that Rule 37 minute that the parties agreed that

the plaintiff would amend her summons and particulars of claim to abandon the declaratory relief concerning the status of road 119H.

[11] The trial then proceeded on the premise that road 119H is a duly proclaimed minor public road, having been proclaimed as such in the Provincial Gazette 3675 on 23 June 1972. As a result, in my judgment on the application for absolution from the instance I refer to a proclaimed road 119H.

[12] In this application the plaintiff seeks to withdraw the admission made on her behalf that road 119H is a proclaimed road and the consequent limitation to the issues that would be dealt with at the trial.

Separation of issues

[13] It has been brought to my attention in this application that I omitted to make an order on the agreement reached between the parties that the issues to be dealt with at that stage of the trial be separated. As it appears in the extract from the supplementary Rule 37 minute, and as was submitted before me, the issue that the parties sought to bring before me for adjudication at that stage of the trial was as set out in 1.2 of the minute set out in the paragraph above. The defendant's counterclaim relating to *via necessitae* would be determined at a later stage. I was agreeable to granting the order separating the issues and in fact indicated as much to counsel when the submission was made. The omission was an error on my part. The trial proceeded on the basis that I had granted the order. I shall therefore grant an

order accordingly at the end of this judgment.

Withdrawal of the admission made at Rule 37 conference.

[14] The approach in determining whether a party should be permitted to withdraw an admission made at a Rule 37 conference is set out comprehensively in **MEC v Kruizenga** 2010 (4) SA 122 (SCA) to which **Mr Ford**, who appeared on behalf of the plaintiff, referred me during argument. I can do no better in setting out the history of the development of the principles relating to this issue than **Cachalia JA** did in **Kruizenga**. At 126 E to 127B of the judgment the Learned Judge of Appeal held:

“The rule (rule 37) 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 parties use to achieve these objectives is to make submissions 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. The rule is of critical

importance in the litigation process. This is why this court has held that in the absence of special circumstances a party is not entitled to resile from an agreement deliberately reached at a Rule 37 conference. And when, as in this case, the agreements are confirmed by counsel in open court and are then made a judgement or order of court, the principle applies with even more force.

It is settled law that a client's instruction to an attorney to sue or to defend a claim does not generally include the authority to settle or compromise a claim a defence without the client's approval. The rule has been applied to a judgment consented to by an attorney without his client's authority and also when the attorney did so in the mistaken belief that his client has authorised him to do so. The principle accords with the rule in the law of agency that where an agent exceeds the express or implied authority in

transacting, the principal is not bound by the transaction”¹

[15] At 129 the Learned Judge of Appeal held:

“To summarise, it would appear that our courts have dealt with questions relating to the actual authority of an attorney to transact on a client’s behalf in the following manner: attorneys generally do not have authority to settle or compromise a claim without the consent of the client. However, the instruction to an attorney to sue or defend a claim may include the implied authority to do so, provided the attorney acts in good faith. And the courts have said that they will set aside a settlement or compromise that does not have the client’s authority where, objectively viewed, it appears that the agreement is unjust and not in the client’s best interests. The office of the state attorney, by virtue of its statutory authority as a representative of the

¹ See also the authorities cited in the judgment.

government, has a broader discretion to bind the government to an agreement than that ordinarily possessed by ordinary practitioners, though it is not clear just how broad the ambit of this authority is”.

[16] The applicant’s case in this application is that she never gave any instructions to her legal representatives to make the contentious admission. She further contends that the admission is contrary to her pleadings and that if the admission is to stand, the trial will proceed on an incorrect factual basis which can only lead to injustice against her.

[17] On the other hand the defendants contend that the plaintiff is not *bona fide*. She was aware of the admission during the trial and the evidence of her witnesses accords with the admission. The defendants also highlight the absence in the plaintiff’s case, of a contention that the defendants’ legal representatives were aware that the plaintiff’s legal representatives lacked authority to make the admission. That being the case, it does not matter whether the plaintiff’s legal representatives exceeded their actual authority or made the admission against the plaintiff’s express instruction. The defendants were entitled to assume that the plaintiff’s legal representatives “*clothed with an aura of authority and had the necessary authority to do what (legal representatives) usually do at a rule 37 conference*”.²

² Kruizenga at paragraph [20].

[18] This argument does not account for the approach set out in **Kruizenga**³ for dealing with questions relating to actual authority of an attorney to transact on a client's behalf; namely, that attorneys generally do not have implied authority to settle or compromise a claim without the consent of the client.

[19] I do not understand it to be the defendant's case that the admission was *bona fide* and in the plaintiff's interests. In this regard I was referred to the opening remarks made by the plaintiff's erstwhile counsel, at the start of the trial, to the effect that :

*“One should be careful of usage of words, I know the parties in these proceedings and in Rule 37 talk about a proclaimed road, whether they use that word or not is of no consequence, because the road is not proclaimed in the sense that it is a proclaimed road, it is something different”.*⁴

[20] I agree that this demonstrates an uncertainty on the part of the plaintiff's legal representative as to the propriety of making the admission. And in this context I cannot find that the admission was *bona fide*. It is also significant, in my view that this remark was made in the plaintiff's presence

³ At [11]

⁴ At page 20 of the record.

because it did place on record her view and instructions that she was not admitting that a proclamation exists in respect of road 119H.

[21] At paragraph [16] **Kruizenga, Navsa JA** remarks that:

“It is well established that to hold a principal liable on the basis of the agent’s apparent authority, the representation must be rooted in the words or conduct of the principal, and not merely that of his agent”.

The pleadings give a clear indication of the plaintiff’s instructions regarding the alleged proclamation as pleaded by the first defendant. In her summons, the plaintiff pleaded that:

“The first defendant, in his personal capacity and in his capacity as Trustee of the Trust, contends that he, and others acting through him, are entitled to enter upon the plaintiff’s property and traverse the property by means of vehicles, based on the contention that there exists and there

has been proclaimed a minor public road, which traverses the property.

11 The plaintiff contends that no such public road over the property has ever been proclaimed, nor does it exist, nor is there any evidence of the proclamation of such public road in the plaintiff's title deed or in the office of the Surveyor General or in any of the records of Department of Roads and Transport for the Province of the Eastern Cape."

[22] Further, the plaintiff pleads in her replication that the document which the defendants presents as a publication of the proclamation, is in fact only "*a schedule of minor roads in the Humansdorp Division approved by the Administrator*".

[23] It is not in dispute that, on the pleadings, the defendant's case is founded on the road traversing the plaintiff's property being road 119H, a duly proclaimed public road. It is also not in dispute that the plaintiff has, in the pleadings denied that the road is a proclaimed public road and that she denied that the document annexed to the defendant's plea is a publication of a proclamation of the Remainder Road.

[24] Even after the agreement or admission which is the subject of this application, the pleadings, in so far as they define the issues between the parties, remain as they were; in essence, the plaintiff still denies that the track that traverses her property is a proclaimed public road. There is no mention in the papers, of the defendants amending or withdrawing their averments that the proclaimed road 119H entitles them to traverse the plaintiff's property.

[25] The plaintiff states that she does not know the reason why his erstwhile legal representatives made the admission. She insists that her instructions to them was to deny the existence of a proclamation. This much is evident from a copy of her written instructions to them on 15 January 2008 when she instructed them regarding particulars for trial. In the plaintiff's written instructions which form part of the record, the plaintiff refers to the discrepancy in the length of road 119H as listed in the publication and the length of the remainder road when she measured it. She specifically states "*I certainly do admit to the publication of a minor road listing. Not a proclamation.*" It is also significant that during the trial each of the parties identified on the maps or diagrams a different road as road 119H. It seemed to me that none of the two roads fitted the description of road 119H as it appears in the Provincial Gazette and I expressed my concern to counsel.

[26] Reverting to the plaintiff's instructions, the minutes of a Rule 37 conference held on 27 March 2007, almost three years prior to the admission

being made, it is recorded that according to the plaintiff “ *no proclamation is in existence in respect of the relevant road. There is a Provincial Notice only dealing with it.*”

[27] Neither on the papers nor during argument could the defendants refer to particular aspects of evidence tendered on behalf of the plaintiff which supports the admission as they contended in argument. I also could not find any such evidence.

[28] I also consider to be of relevance the fact that the issue whether the document in which is listed road 119H is a proclamation or not, to be both a factual and a legal argument. In so far as a proclamation is a legal document which has to conform to certain prescripts it cannot, in my view, be “agreed into existence”. If the contested document is not a proclamation then the agreement cannot be valid. I agree with the submission on behalf of the applicant that whether the relevant proclamation exists or not, is a relatively limited issue and that the defendants stand to suffer no prejudice as a result of the withdrawal of the admission. Further, it does seem to me that, contrary to the principle that promotes full and proper ventilation of issues between parties, the agreement rather obfuscates the issues.

[29] Having considered the context in which the admission was made I am of the view that the agreement reached by the parties is unjust and is not in the plaintiff’s best interests.

[31] It was submitted on behalf of the defendants that even if I find for the plaintiff in this application I should nevertheless not grant the order sought because the absence of a document styled "*Proclamation*" is merely a redherring, given the plaintiff's admission that the road is listed in the 1972 Provincial Gazette. I do not think that it is proper for me to make a finding as to whether the existence of a proclaimed road has been sufficiently established at this stage of the proceedings.

Costs

[32] In considering the question of costs I take into account that the trial proceeded on the basis of the agreement to the close of the plaintiff's case. I am unable to find that the defendants acted unreasonably in opposing the application. I take the view that as in applications for amendments the proper costs order would be that the applicant pay the defendants' costs of opposing the application. Both parties employed the services of two counsel and I am satisfied, regard being had to the complexity and importance of the issue under consideration to both parties, that such use of two counsel was wise and reasonable.

[33] The following order shall therefore issue:

- 1 The first defendant's conditional counterclaim is separated from all other issues and ordered to stand over for determination on a later date if needs be.
- 2 The applicant is granted leave to withdraw the implicit admission

at paragraph 1.1 of the supplementary Rule 37 Minute dated 19 February 2010 to the effect that Road 119H is a duly proclaimed road.

3 The plaintiff is granted leave to withdraw from the agreement recorded at paragraph 1.2 of the supplementary Rule 37 Minute dated 19 February 2010._

4 The plaintiff is ordered to pay the defendants' costs for this application; such costs to include the costs of two counsel.__

N. DAMBUZA
JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff: Mr. Ford SC Instructed by Goldberg & De Villiers INC.
Central, Port Elizabeth.

For the first and second respondents: Mr M.W. Randell Instructed by Micheal
Randell Attorneys, Central, Port Elizabeth.

