

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, GQEBERHA

Case No.: 1453/2021

Date Heard: 10 February 2022

Date Delivered: 15 March 2022

In the matter between:

ADV H J VAN DER LINDE NO

obo M ROBIYANA

Excipient/Defendant

and

ROAD ACCIDENT FUND

Respondent/Plaintiff

JUDGMENT

EKSTEEN J:

[1] The defendant, Advocate H J van der Linde NO, raised an exception to a summons issued by the plaintiff, the Road Accident Fund (the RAF), and contended that it did not disclose a cause of action and, in any event, was vague and embarrassing. The RAF resisted the exception.

[2] The dispute has a lengthy and disturbing history. Mr Robiyana had been seriously injured in a motor vehicle collision and Advocate van der Linde was appointed

as the *curator ad litem* to assist him in a claim to recover damages from the RAF, under case number 5741/2019. The claim was finalised, or so the *curator ad litem* believed, on 18 June 2020, when this court granted judgment in favour of Mr Robiyana. The material portion of the judgment, for purposes of the exception, recorded:

“Having heard Adv A Frost and B Westerdale, Counsel for the Plaintiff, and Mr Johnstone, Senior Manager for the Defendant, and having read the documents filed of record.

IT IS ORDERED (BY AGREEMENT):

1. The Defendant is hereby directed to pay Plaintiff 100 % of his damages, as agreed upon between the parties, arising from the bodily injury sustained by the Patient in the motor vehicle accident, which occurred on 22 April 2015, and at M17 Road, Swartkops, Port Elizabeth, Eastern Cape.
2. The Defendant is to pay to Plaintiff in his representative capacity the agreed sum of R11 489 922.00 in full and final settlement of Plaintiff's claim for damages.
3. ...
4. ...
5. Defendant shall furnish the Patient (Sinesipho Robiyana) with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, Act 56 of 1996, for 100 % of the cost of future accommodation of the Patient in a hospital or nursing home, or treatment of or rendering of a service to the Patient, or supplying of goods to the Patient, and as further detailed in the reports filed by the parties to date, arising out of the injuries sustained by the Patient in the collision on 22 April 2015, after such costs have been incurred and upon proof thereof, such costs to include the costs of a curator bonis, if any, as well as the costs of security, if required.”

[3] Almost a year later, on 1 June 2021, the RAF issued summons to set aside the order. As I have said, the *curator ad litem* raised an exception to its summons.

[4] I turn to the content of the pleadings. In its particulars of claim the RAF alluded to various statutory provisions¹ which required of it to ensure that a system of financial management and internal control was established. It then proceeded to allege:

“4.1 The Plaintiff’s system of financial management and control provided for a delegation of powers and functions.

4.2. In terms of the Plaintiff’s delegation of powers and functions approvals of offers in respect of merits and in respect of quantum of claims respectively above R10-million and below R20-million required approval of the Chief Executive Officer.

5.

5.1 The Defendant instituted action against the Plaintiff under case number 574/2019 in the High Court of South Africa, Eastern Cape Local Division, Port Elizabeth.

5.2 The Plaintiff obtained a High Court order on 18 June 2020 providing for (amongst other relief) payment of the amount of R11 489 922,00. A copy is attached as **Annexure “POC 1.”**

5.3 The granting of consent or agreement to the court order by employees and/or representatives was not approved by the Chief Executive Officer of the Plaintiff.

6.

¹ Section 50(1), 51(1), 57 and 81 of the Public Finance Management Act, 1 of 1999.

- 6.1 The lack of authority to consent or agree to the granting of the court order nullifies any consent or agreement to the granting of the court order.
- 6.2 In the further premises the required approval process which was not followed prior to the granting of the court order renders the order constitutionally invalid.”

[5] Accordingly, the RAF sought an order setting aside the court order dated 18 June 2020 and, in the alternative, an order declaring that the order is constitutionally invalid and is to be set aside.² The *curator ad litem* responded with a notice in terms of rule 23 of the Uniform Rules of Court (the rules of court) which culminated in the exception. The curator, in taking exception, contended:

- “4. In paragraph 5.3 of the particulars of claim the Plaintiff pleads that ‘*The granting of consent or agreement to the court order by employees and/or representatives was not approved by the Chief Executive Officer of the Plaintiff.*’
5. The Plaintiff fails to plead any particularity regarding when, where, and who represented the parties in relation to the agreement/settlement made an order of court, and furthermore the references to ‘*employees and/or representatives*’ of the Plaintiff whose identity must be within the knowledge of the Plaintiff, is insufficient and vague in the circumstances.
6. As a consequence of the foregoing, the particulars of claim are rendered vague and embarrassing for lack of particularity.
7. In addition to the above, Plaintiff pleads in paragraph 4.2 as follows:

² A number of ancillary orders were sought which are not material to the exception.

'In terms of the Plaintiff's delegation of powers and functions approvals of offers in respect of merits and in respect of quantum of claims respectively above R10-million and below R20-million required approval of the Chief Executive Officer.'

8. The Plaintiff thus contends that approvals for offers in respect of the merits and quantum in the range pleaded requires approval of the chief executive officer.

9. In Paragraph 5.3 the Plaintiff pleads:

'The granting of the consent or agreement to the court order by employees and/or representatives was not approved by the Chief Executive Officer of the Plaintiff.'

10. Nowhere does the Plaintiff plead that there is a requirement that *'the granting of consent or agreement to the court order'* must be approved by the Chief Executive Officer of the Plaintiff and the requirement pleaded in paragraph 4.2 is self-evidently different as such relates to the approval of offers and not to agreement to the wording of the court order which must *a fortiori* be premised on a prior agreement.

11. The Plaintiff also fails to plead any detail regarding any offer (or prior agreement of settlement), including:

- 11.1 when the offer was made;

- 11.2 who represented the Plaintiff in making the offer;

- 11.3 the terms of the offer;

- 11.4 that the Plaintiff's Chief Financial Officer did not provide approval for the offer;

11.5 whether the offer was accepted; and

11.6 if so, the terms of the settlement.

12. In addition to this, the crux of the Plaintiff's claim is set out in paragraph 6 as follows:

'6.1 *The lack of authority to consent or agree to the granting of the court order nullifies any consent or agreement to the granting of the court order.*

6.2 *In the further premises the required approval process which was not followed prior to the granting of the court order renders the order constitutionally invalid."*

13. The Plaintiff fails to allege any basis in fact or law that an alleged lack of authority to consent or agree to the granting of the court order nullifies any consent or agreement to the granting of the court order, or for that matter, any facts or legal basis that would render the court order constitutionally invalid.

14. In particular in the aforementioned regard, the Plaintiff fails to make any allegation that if effect were given to the terms of the court order, such would result in irregular expenditure or fruitless and wasteful expenditure or any losses, such not merely flowing from the alleged absence of an approval by the Chief Executive Officer.'

[6] It is convenient first to address the exception on the ground that the summons does not disclose a cause of action.³ In order for a plaintiff to avoid a successful exception to its summons it is required to allege every material fact (*facta probanda*)

³ Para 7-14 of the Exception

necessary to support the legal conclusion contended for with sufficient clarity and completeness to entitle it to judgment, if proved.⁴

[7] An excipient who contends that the summons fails to disclose a cause of action must establish that in all its possible meanings it fails to disclose a cause of action.⁵ In a proper case legitimate inferences may be drawn as to the meaning of the summons and a necessary implication may be supplied.⁶ Thus, it has been held that the tendency is to move away from formality to simplicity with the result that, if it is reasonably clear what the defendant is sued for, in the absence of prejudice, technical objections will not be upheld.⁷ Finally, where an exception is taken to a summons on the ground that it does not disclose a cause of action the court may look only at the summons. Unless the grounds for the exception appear from the summons the exception is bad in law.⁸

[8] I turn to the grounds of the exception. The first ground⁹, that the summons does not disclose a cause of action, is summarized in paragraph 10 of the exception quoted earlier. At the heart of the argument is the assumption that the “consent or agreement to the court order” is premised on an earlier settlement agreement. No basis for this conclusion is evident from the particulars of claim. The RAF’s case does not relate to

⁴ *Dusheiko v Milburn* 1964 (4) SA 648 (A) at 658A; *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 903A-B; and *Makgae v Sentraboer (Koöperatief) BPK* 1981 (4) SA 239 (T) at 245D

⁵ *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at 183E; *Trustees BUS Industry Restructuring Fund v Break Through Investments CC and Others* 2008 (1) SA 67 (SCA) at 71; *Vermeulen v Goose Valley Investments (Pty) Ltd* [2001] 3 All SA 350 (A).

⁶ *Goosen v Reed* 1955 (2) SA 478 (T) at 481F

⁷ *Goosen* at 481C-G; and *Joubert v Impala Platinum Ltd* 1998 (1) SA 463 (BH) at 471E.

⁸ *Becks in Theory and Principles of Pleading in Civil Actions* (6th ed) at 129 and the authority referred to therein.

⁹ Paragraph 7-13 of the Exception

the wording of a court order but, on any reading of the summons, to the concession of the merits of the claim and the quantum of damages set out in the court order, which exceeded R10-million. The summons should be understood to allege that the “consent to judgment” constituted a compromise, or *transactio*, which had not been approved by the Chief Executive Officer of the RAF and was therefore unauthorised. This is a perfectly plausible, if not obvious, interpretation to give to paragraphs 5, 6 and 7 of the particulars of claim. If the *curator ad litem* contends that an earlier settlement agreement was concluded, separate from the consent to judgment, then it raises a factual dispute that should be pleaded and decided after evidence has been heard.

[9] I was referred in argument to the judgment in *Moraitis*,¹⁰ which contains a useful discussion of the legal principles at play in a matter such as this. In *Moraitis* the SCA referred to *Gollach and Gomperts*¹¹ where the following had been said:

“A *transactio*, whether extra-judicial or embodied in an order of court, has the effect of *res judicata* ... It is obvious that, like any other contract (and like any order of court), a *transactio* may be set aside on the ground that it was fraudulently obtained. There is authority to the effect that it may also be set aside on the ground of mistake, where the error is *justus*.”¹²

[10] In *Gollach and Gomperts* the court had referred, with approval, to *Childerley*¹³ where the following had been said:

¹⁰ *Moraitis Investments (Pty) Ltd and Others v Montic Diary (Pty) Ltd* 2017 (5) SA 508 (SCA)

¹¹ *Gollach and Gomperts (1967)(Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others* 1978 (1) SA 914 (A)

¹² *Gollach and Gomperts* at 922B-E

¹³ *Childerley Estate Stores v Standard Bank of South Africa Ltd* 1924 OPD 163

“The matter then before the court was an action to set aside a judgment delivered in a defended case. Concerning judgments entered by consent, the learned Judge-President accepted that they could “under certain circumstances”, be set aside “on the ground of just error”. It appears to me that the *transactio* is most closely equivalent to a consent judgment ... 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 true consent and did not merely relate to motive or to the merits of a dispute which was the very purpose of the parties to compromise.”

[11] In *Moraitis* Wallis JA went on to explain that the judgment (*Gollach and Gomperts*) could not be taken to say anything more than that fraud or *justus error*, where sufficient to set aside a judgment, would also be sufficient to set aside a compromise that gave rise to that judgment. He accentuated, however, that where the agreement was embodied in an order of court the order operates as *res judicata*. Thus, unless and until the judgment has been set aside, there can be no question of attacking the compromise agreement.

[12] The judgment in *Moraitis* proceeded, however, to distinguish an attack on a compromise agreement from an alleged lack of authority to conclude the settlement agreement on behalf of a litigant. In the latter circumstances a different principle comes into play, namely, that the court can only grant a consent judgment if the parties to the

litigation consented to the court granting it. If they did not do so, but the court was misled into thinking that they did, the judgment must be set aside.¹⁴

[13] As adumbrated earlier, the proper construction, or at least a plausible construction, of the summons is that the consent to judgment constituted a concession of the merits and an agreement to the quantum. The consent to judgment constituted the *transactio*. The RAF did not seek to rely on any earlier separate *transactio* and its case was that the consent to judgment was not authorised. It seems to me to be sufficiently clear that this is what the *curator ad litem* is sued for. In the event that these facts are established at a trial the RAF will, in the absence of any special defence pleaded, be entitled to judgment, at least to the extent that the order is set aside. I shall revert to the constitutionality issue.

[14] Mr Nepgen, on behalf of the *curator ad litem*, argued that setting aside the judgment, without attacking the settlement, would leave the underlying *transactio* unscathed and it would continue to operate as *res judicata*. The contention misconstrues the nature of the RAF's case. The RAF did not seek to attack a settlement agreement on the grounds of fraud, duress, misrepresentation, or the like. As Wallis JA explained in *Moraitis*:

“In those cases the injured party has an election to abide by the agreement. When one is concerned with an absence of authority to conclude the agreement in the first

¹⁴ *Moraitis* at para [17]

place, that is not a matter of avoiding the agreement, but of advancing a contention that no agreement came into existence.”

[15] If the order is set aside on the ground that no underlying agreement existed the *curator ad litem* is at liberty to proceed with his case. The particulars relating to the *transactio* listed in paragraph 11 of the exception are entirely irrelevant to the RAF’s case. Its case is that only the Chief Executive Officer could approve the *transactio*, and he did not do so.

[16] No argument was presented to me in respect of the alleged constitutional invalidity of the court order. I shall accept, for purposes of this judgment, that no facts or legal basis has been pleaded to render the order constitutionally invalid. An exception cannot, however, be taken to one of multiple claims that are alleged to arise from the same cause of action.¹⁵ For these reasons the argument that the summons did not disclose a cause of action cannot be sustained.

[17] In paragraph 4 to 6 of the exception the *curator ad litem* contended that the lack of particularity regarding the settlement agreement, or offer, renders the particulars of claim vague and embarrassing. As I have said there is no foundation for the contention that a separate, or different, settlement agreement came into existence prior to the consent to judgment. The RAF did not rely on any contract for the relief it sought and the provisions of rule 18(6) of the rules of court, which requires of a party to set out particulars of a contract relied upon, finds no application. Mr Nepgen referred me to

¹⁵ *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 706B-F

*Wessels*¹⁶ as support for the contention that the summons must contain sufficient particulars of the agreement to set aside the compromise. However, the facts in *Wessels* were markedly different. *Wessels* was a case in which the plaintiff sought to attack the compromise agreement on the ground of misrepresentation. As explained in *Moraitis* the principle relied upon by the RAF is different.

[18] For these reasons, the exception is dismissed with costs.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Excipient/Defendant: Adv J Nepgen instructed by Meyer Inc, Gqeberha

For Respondent/Plaintiff: Adv Ramabulana-Mathiba instructed by Mpoyana
Ledwaba Incorporated c/o Rwexana Attorneys,
Gqeberha

¹⁶ *Wessels v Badenhorst* 1939 (TPD)