REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION, MBOMBELA
(MAIN SEAT)

CASE NO: 718/2016

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

……………………… ……………………….

DATE SIGNATURE

In the matter between:

M M Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

Roelofse AJ:

[1] The defendant wants to withdraw from a compromise reached between it and the plaintiff. The plaintiff wants the defendant to remain bound by the compromise. Is the defendant entitled to resile from the compromise?[1] This is what I have to decide.

[2] On 15 July 2012, along the Halfway Trust Main Road Kabokweni, Mpumalanga, a pedestrian, Mr M M ("*Mr. M*"), met with a tragedy when he was hit by a motor vehicle. Mr. M was a major when the incident occurred.[2]

[3] Mr. M allegedly, suffered a severe head injury resulting in neuro-cognitive defects and neuro-behavioural defects, an injury to his left orbital and multiple abrasions. Allegedly, as a result of the injuries, Mr. M underwent hospitalisation, received medical treatment, is disabled and disfigured and is suffering from pain and a loss of amenities of life.[3]

[4] Mr. M is entitled to claim compensation from the Road Accident Fund (*"the Fund"*). The Fund was established in terms of section 2 of the Road Accident Fund Act (*"the Act"*)[4] for the payment of compensation in accordance with the Act for loss or damage wrongfully caused by the driving of motor vehicles.[5]

[5] Section 17 of the Act differentiates between loss caused where the identity of the owner or driver of the motor vehicle has been established and where their identities were not established (*"hit-and-run cases"*).[6]

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[1] Although this matter comes before me as an application, I shall refer to the parties as they are referred to in the action proceedings.

[2] Mr. Manzini was born on […]. In terms of Section 17 of the Children's Act No. 38 of 2005, the age of majority is 18. The Children's Act came into operation on 1 July 2007.

[3] As will appear from what is set out below, this remains in dispute.

[4] Act No. 56 of 1996.

[5] The objects of the Fund in terms of Section 3 of the Act.

[6] Section 17 of the Act, in relevant part, provides as follows:

> "*17. Liability of Fund and agents.—(1) The Fund or an agent shall—*

[6] The identity of neither the driver nor the owner of the vehicle that hit Mr. M was established. Mr. M' claim is therefore one under section 17(1)(b) of the Act.

[7] The Minister [7] is empowered to make regulations regarding any matter that is or may be prescribed in terms of the Act or which it is necessary or expedient to prescribe in order to achieve or promote the object of the Act.[8]The Minister made the Road Accident Fund Regulations.[9] Regulation 2 provides for liability of the Fund in hit-and-run cases. Regulation 2 provides as follows:

> *"Further provision for liability of Fund in terms of section 17 (1) (b):*
>
> *(1)(a) A claim for compensation referred to in section 17 (1) (b) of the Act shall be sent or delivered to the Fund in accordance with the provisions of section 24 of the Act, within two years from the date upon which the cause of action arose.*
>
> *(b) A right to claim compensation from the Fund under section 17 (1) (b) of the Act in respect of loss or damage arising from the driving of a motor vehicle in the case where the identity of neither the owner nor the driver thereof has been established, shall become prescribed upon the expiry of a period of two years from the date upon which the cause of action arose, unless a claim has been lodged in terms of paragraph (a).*
>
> *(c) In the event of a claim having been lodged in terms of paragraph (a)*

> *(a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;*
>
> *(b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,*
>
> *be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee:….."*

[7] Minister of Transport – section 1 of the Act.

[8] Section 26(1) of the Act.

[9] Regulation GNR.770 of 21 July 2008 (Government Gazette No. 31249) as amended. The amendment was published as Notice R.347 in Government Gazette 36452 on 5 May 2013.

> *such claim shall not prescribe before the expiry of a period of five years from the date upon which the cause of action arose.*
>
> *(2) Notwithstanding anything to the contrary contained in any law a claim for compensation referred to in section 17 (1) (b) of the Act shall be sent or delivered to the Fund within two years from the date upon which the cause of action arose irrespective of any legal disability to which the third party concerned may be subject.*

[8] The effect of Regulation 2 is that, in hit-and-run cases, the right to claim compensation from the Fund prescribes within two years of the accident[10] irrespective of any legal disability which the accident victim concerned may be subject to.[11] From the time the claim is lodged with the Fund, the claim shall not prescribe before the expiry of a period of five years from the date of the accident.

[9] On 28 June 2016, Mr. M's mother, Ms. L Sindi M ("*Ms. M*"), issued summons commencing action out of this court against the Fund. The Fund was served with the summons on 6 July 2016.

[10] In the particulars of claim it is mistakenly alleged that Mr. M was born on 20 June 1996.[12] This would have made Mr. M 16 years old at the time of the accident and 20 years old when the action was instituted. Therefore, on both Mr. M's correct and incorrect date of birth, Mr. M was major when the action was instituted. Mr. M therefore had the requisite legal standing to institute the action. Despite this, Ms. M alleges in the particulars of claim that the institutes the action in her *"... representative capacity on behalf of her child*".[13] In the answering affidavit, Ms. M alleges that she has assisted Mr. M to lodge a claim with the Fund because "….*he* [Mr. M] *is no longer mentally stable, as a result of the injuries he sustained in the*

[10] The cause of action arises generally when the accident occurs – see: *Road Accident Fund and Another v Mdeyide* 2011 (2) SA 26 (CC), at paragraph 52.

[11] In respect of other accidents, the period of prescription is three years and, in respect of persons under legal disability, such as minors, mental patients and persons under curatorship, prescription is stayed – section 23 of the Act.

[12] Paragraph 1.1 of the particulars of claim.

[13] Paragraph 1 of the particulars of claim.

accident.....".

[11] To have lodged the claim with the Fund is one thing – to have instituted the action is another. Even if Mr. M's injuries were of such a nature that he could not act on his own behalf, Ms. M has no standing in the matter merely by virtue of being Mr. M's mother.[14] Despite this, the Fund did not challenge Ms. M's standing and, as the proceedings progressed, it appears that Mr. M was regarded by the parties as the plaintiff.[15] In my view, the manner in which the proceedings was instituted first by Ms. M and apparently later proceeded with by Mr. M, may have contributed significantly to the current dispute.

[12] Ms. M alleges in the particulars of claim that the plaintiff duly complied with the provisions of section 24 of the Act before the institution of the proceedings.[16]

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[14] See: *Madalane v Van Wyk (87/2015) [2016] ZASCA 25 (18 March 2016).*

[15] I could find no formal substitution of Ms. Manzini as plaintiff with Mr. Manzini.

[16] Paragraph 10 of the particulars of claim. Section 24 of the Act provides as follows:

> *"24. Procedure.—(1) A claim for compensation and accompanying medical report under section 17 (1) shall—*
>
> *(a) be set out in the prescribed form, which shall be completed in all its particulars;*
>
> *(b) be sent by registered post or delivered by hand to the Fund at its principal, branch or regional office, or to the agent who in terms of section 8 must handle the claim, at the agent's registered office or local branch office, and the Fund or such agent shall at the time of delivery by hand acknowledge receipt thereof and the date of such receipt in writing.*
>
> *(2) (a) The medical report shall be completed on the prescribed form by the medical practitioner who treated the deceased or injured person for the bodily injuries sustained in the accident from which the claim arises, or by the superintendent (or his or her representative) of the hospital where the deceased or injured person was treated for such bodily injuries: Provided that, if the medical practitioner or superintendent (or his or her representative) concerned fails to complete the medical report on request within a reasonable time and it appears that as a result of the passage of time the claim concerned may become prescribed, the medical report may be completed by another medical practitioner who has fully satisfied himself or herself regarding the cause of the death or the nature and treatment of the bodily injuries in respect of which the claim is made.*
>
> *(b) Where a person is killed outright in a motor vehicle accident the completion of the medical report shall not be a requirement, but in such a case the form referred to in subsection (1) (a) shall be accompanied by documentary proof, such as a copy of the relevant inquest record or, in the case of a prosecution of the person who allegedly caused the deceased's death, a copy of the relevant charge sheet from which it can clearly be determined that such person's death resulted from the accident to which the claim relates.*

[13] From the papers there is a material dispute of fact over whether there was indeed compliance with the provisions of section 24 of the Act.

[14] Ms. M alleges that Mr. M's claim was lodged on 30 September 2012 when she attended to the Fund's offices in Mbombela. There she allegedly signed forms. Ms. M alleges that she was thereafter not contacted by the Fund as she expected would happen.[17] Ms. M alleges that she consulted her present attorneys on 9 November 2015 after there was no contact from the Fund. Ms. M states that her attorneys submitted the RAF1[18] claim form with the Fund on 17 November 2015. In addition, Ms. M attaches what she regards as documentary proof that the claim was lodged in September 2012.

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(3) A claim by a supplier for the payment of expenses in terms of section 17 (5) shall be in the prescribed form, and the provisions of this section shall apply mutatis mutandis in respect of the completion of such form.

(4) (a) Any form referred to in this section which is not completed in all its particulars shall not be acceptable as a claim under this Act.

(b) A clear reply shall be given to each question contained in the form referred to in subsection (1), and if a question is not applicable, the words "not applicable" shall be inserted.

(c) A form on which ticks, dashes, deletions and alterations have been made that are not confirmed by a signature shall not be regarded as properly completed.

(d) Precise details shall be given in respect of each item under the heading "Compensation claimed" and shall, where applicable, be accompanied by supporting vouchers.

(5) If the Fund or the agent does not, within 60 days from the date on which a claim was sent by registered post or delivered by hand to the Fund or such agent as contemplated in subsection (1), object to the validity thereof, the claim shall be deemed to be valid in law in all respects.

(6) No claim shall be enforceable by legal proceedings commenced by a summons served on the Fund or an agent—

(a) before the expiry of a period of 120 days from the date on which the claim was sent or delivered by hand to the Fund or the agent as contemplated in subsection (1); and

(b) before all requirements contemplated in section 19 (f) have been complied with:

Provided that if the Fund or the agent repudiates in writing liability for the claim before the expiry of the said period, the third party may at any time after such repudiation serve summons on the Fund or the agent, as the case may be."

[17] Paragraphs 2.5 and 2.10 of the answering affidavit.

[18] The form prescribed for the lodgment of a claim with the Fund.

[15] The Fund says that Mr. M's claim was lodged on 17 November 2015, i.e. the date upon which Ms. M's attorneys lodged the claim. The Fund denies that the claim was lodged in September 2012. The Fund repudiated the claim on 4 December 2014.[19]

[16] I am unable to resolve the dispute over the date of the lodgement of the claim with the Fund on the papers. It is a matter rather to be dealt with after hearing oral evidence. In addition, it is not necessary for me to make a finding in this regard in light of the conclusion that I reach regarding the Fund's wish to resile from the compromise.

[17] Mr. M's matter was assigned to Ms. Shirindza Mmakoma ("*Ms. Mmakoma*"). Ms. Mmakoma is a claims handler at the Fund.

[18] On 7 December 2017, Ms. Mmakoma received an e-mail from the Fund's attorneys. They requested the Fund to make an offer to settle the "*merits*". Ms. Mmakoma says that when she obtained the file and perused it, she mainly had regard to the particulars of claim. Ms. Mmakoma says that she observed that the *"... plaintiff was a minor and that the insured driver was unidentified*" … *Due to the plaintiff's alleged minority status in the particulars of claim, I was not concerned with prescription*. This observation was wrong both in law and in fact. Mr. M's claim would have been prescribed, even if, at that stage, Ms. Mmakoma had regard to the error in Mr. M's date of birth in the particulars of claim by virtue of the provisions of Regulation 2.

[19] The next step Ms. Mmakoma says she took was to consider whether the fund had a version to rebut the plaintiff's version and concluded that, since the insured driver was unknown, the fund would not be able to rebut the Mrs. M's version.[20] Ms.

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[19] The Fund's Registration Report – annexure "SM1" to the founding affidavit.

[20] Ms. Mmakoma refers to Mr. Manzini being the plaintiff. At the time Ms. Mmakoma perused and considered the particulars of claim, Ms. Manzini was the plaintiff.

Mmakoma, as a result, conceded liability on behalf of the Fund and communicated her decision to the fund's attorneys on the same date.

[20] If Ms. Mmakoma had properly considered the particulars of claim having regard to the provisions of Regulation 2, she should not have given instructions to the Fund's attorneys to settle. She made a mistake. Was this mistake reasonable? I shall deal with this question hereunder.

[21] On 8 December 2017, and in accordance with the practice in this Division, the matter came before Her Ladyship Ms. Justice Mphahlele for a judicial pre-trial conference to be held. In the pre-trial minutes and directives ("*the directives*"), it was recorded by the parties that merits were settled.[21]

[22] On 16 January 2018, the Fund's attorneys delivered an offer of settlement in terms of the provisions of Rules 34(1) and (5) of the Uniform Rules to Mrs. M's attorneys. The offer of settlement, *inter alia*, records as follows:

> *"**KINDLY TAKE NOTICE THAT** without prejudice or admission of liability and by way of an offer in full and final settlement of the Plaintiff's claim, the Defendant hereby offers the following:*
>
> *MERITS 100% Concession in favour of Plaintiff."*
>
> The Fund also tendered, in the event of the offer of settlement being accepted by Ms. M, to pay Ms. M's taxed costs on High Court scale as between party and party, to the date of service of the notice.

[23] On 17 January 2018, Ms. M's attorneys accepted the offer by delivering a notice to that effect to the fund's attorneys. The compromise was reached.

[24] On 7 August 2018, a case management was held before His Lordship Mr.

[21] Paragraph 2.2 of the directives.

Justice Legodi JP. A case management directive was issued. The matter was enrolled for the trial week of 26 August 2019 on merits as well as quantum despite the previous pre-trial minutes and directives recording that the merits have been settled. It is recorded in manuscript under paragraph 9 of the directive as follows:

> *"The plaintiff will serve and file his replication to the defendant's special plea on the [sic] 11 December 2018."*

In paragraph 10, also in manuscript, the following is recorded:

> *"The plaintiff will also subsequently serve and file his notice to amend the particulars of claim on the 23 [sic] November 2018."*

These recordals were made by the parties despite the compromise and the parties' agreement at the pre-trial conference on 8 December 2017 that the merits were settled.

[25] On 1 November 2018, the Fund's attorneys delivered a notice of intention to amend its plea. In the notice of amendment, the Fund raised 2 special pleas. In paragraph 2 of the notice of intention to amend under the heading, "***FIRST SPECIAL PLEA***", the Fund records as follows:

> *"**AD NON-COMPLIANCE***
>
> *Plaintiff failed to exhaust the process and remedies available to him in that plaintiff failed to lodge a claim with or submit his claim to the defendant within 2 (two) years from date upon which the claim arose as required by Regulation 2(3) of the Act. The plaintiff has thus failed to comply with Regulations 2(3) of the RAF Act as amended."*

The Fund sought to raise the issue of prescription of Mr. M's claim for the first time.

[26] On 17 November 2018, Mrs. M delivered a notice of objection to the Fund's Attorneys. The notice objected to the Fund's notice of intention to amend its plea.[22] The objection did not squarely raise the issue of the compromise.

[27] On 12 November 2018, the Fund delivered its special plea. In the special plea, the Fund raises the issue of prescription of the claim.[23]

[28] On 14 December 2018, Mr. M's attorneys delivered a notice in terms of Rule 30(1). The notice sought to set aside the filing of the Fund's special plea.[24] The notice raises the issue of the compromise.

[29] On 23 November 2018, Mr. M's attorneys delivered a notice in terms of Rule 30(2)(b). The Rule 30(2)(b) notice raised an issue that the fund proceeded to effect an amendment of its plea by delivering its special plea of prescription on 12 November

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[22] *" - Matter is ready certified trial ready for 12 November 2018*
- The defendant had already served an offer of settlement on the merits (concession of liability) 100%.
-The notice is short served."

[23] The Fund pleaded as follows:

> *"1. The Plaintiff is suing the Defendant for damages arising out of a motor vehicle in as envisaged [sic] by Section 17 of the Road Accident Fund Act, 1996.*
>
> *1.1. The Plaintiff that he was involved in a motor vehicle accident on 15th of July 2012.*
>
> *1.2. The Plaintiff further alleged that [sic] vehicle and the driver of the vehicle is unknown to him.*
>
> *2. The Plaintiff lodge [sic] the claim with the Defendant by submitting RAF1 Form on 17 November 2015.*
>
> *2.1. The Plaintiff was required by the Road Accident Fund Act, Regulation 2 to lodge the claim within two years of the date of the accident.*
>
> *2.2. In this respect the Plaintiff was required to lodge the claim on or before 14 July 2014.*
>
> *2.3. In the premise the plaintiff [sic] claim has prescribed [sic] and is unenforceable against the Defendant."*

[24] The main thrust of the notice of application in terms of Rule 30(1) is that:

> *"2. The Applicant [plaintiff] objected to the proposed amendment on the 07th of November 2018, on the grounds that the proposed amendment seeks to re-open an issue of liability which was settled between the parties and that the matter was already certified trial ready and is set down on the trial roll of 12th of November 2018, for the determination of quantum of the Plaintiff's claim only.'*

2018 without authorised by the court to do so upon application in terms of Rule 28(4).

[30] The Rule 30 application was ultimately set down on the unopposed motion roll. On 17 July 2019, the Fund delivered to Mr. M's attorneys a notice withdrawing its special plea.

[31] On 23 July 2019, the Fund delivered a notice further notice of its intention to amend its plea. The amendment seeks to raise the issue of Mr. M's failure to lodge his claim within the prescribed two-year period and presicription.

[32] On 1 August 2019, Mr. M delivered a notice of objection to the Fund's notice of amendment.[25] The objection raises the issues of the compromise and *res judicata*.

[33] On 26 August 2019, a civil trial case management directive was issued by Her Ladyship Ms. Kgoele J. In terms of this directive, the matter was enrolled for the trial week of 24 March 2020 on quantum only. In paragraph 2.2 of the directive, it is recorded that the defendant intends to bring an application for leave to amend its plea. Such application to be heard/enrolled on the opposed roll of 29 October 2019.

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[25] The notice of objection records as follows:

> *"KINDLY FURTHER TAKE notice that the basis of the plaintiff's objections are:*
>
> 1. *The proposed amendment is way out of time as it was raised for the first time after the Defendant conceded liability in favour of the Plaintiff, when the matter was set down for the determination of quantum.*
> 2. *The proposed amendment is not bona fide and seeks to delay the finalisation of the Plaintiff's claim, because the same amendment was proposed at the previous hearing and subsequently withdrawn by Defendant.*
> 3. *The proposed amendment seeks to re-open the issue of liability which was settled by way of compromise/agreement between the parties.*
> 4. *The Plaintiff will be prejudiced by the proposed amendment on the aforementioned grounds."*

[34] In paragraphs 9 to 11 of the pre-trial directive, in manuscript, it was recorded as follows:

> *"9. The defendant to file its application for leave to amend on or before the 10th September 2019. The plaintiff to [sic] its answering affidavit on or before the 20th September 2019. The defendant to file its answering affidavit if so advised, and its heads of arguments [sic] on or before 2nd of October 2019. The plaintiff to file its heads of argument on or before 8th October 2019.10.30.*
>
> *10. Defendant is ordered to pay the costs occasioned by the postponement on a punitive scale on an attorney and client scale [sic].*
>
> *11. The defendant's attorney is ordered to file an affidavit in terms of paragraphs 7.1 and 7.2 of this form on or before the 12th September 2019."*

Yet again, this was acceded to despite the compromise and the parties' agreement at the pre-trial conference on 8 December 2017 that the merits were settled. Therefore, at that stage, any settlement was off the table as if the parties were oblivious of the compromise and that the matter was enrolled on quantum only.

[35] The Fund launched this application on 15 October 2019. The Fund seeks the following relief:

> *"a) The applicant/defendant is granted leave to withdraw from the agreement it entered into with the respondent/plaintiff conceding merits;*
>
> *b) The applicant/defendant is granted leave to amend its plea in accordance with defendant's notice of intention to amend;*
>
> *c) The applicant/defendant is to deliver its amended pages within 5 days of the granting of this order;*
>
> *d) Condonation of non-compliance with the Uniform of Rules of Court; and*
>
> *e) Further and/or alternative relief."*

[36] Obviously, only in the event the Fund is granted leave to resile from the compromise will the issue of granting leave to the Fund to amend its plea arise.

[37] Can the Fund resile from the compromise? I proceed to deal with this question.

[38] A compromise is a *transactio*, the nature of which is an agreement between two or more persons to end litigation or to prevent litigation resulting from the difference between them. In *Gollach & Comperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others*, [26] Miller JA, says the following:

> "*The purpose of a transactio is not only to put an end to existing litigation but also to prevent or avoid litigation. This is very clearly stated by Domat, Civil Law, vol. 1, para. 1078, in a passage quoted in Estate Erasmus v Church, 1927 T.P.D. 20 at p. 24, but which bears repetition:*
>
> *"A transaction is an agreement between two or more persons, who, for preventing or ending a law suit, adjust their differences by mutual consent, in the manner which they agree on; and which every one of them prefers to the hopes of gaining, joined with the danger of losing.* A compromise is closely equivalent to a consent judgment and has the effect of *res judicata*."

[39] A compromise has the effect of *res judicata* and may be set aside on account of fraud or a mistake provided the mistake constitutes a *justus error*.[27]

[40] The Fund relies on Ms. Mmakoma's mistake not to properly consider the issue of prescription of Ms. M's claim before she instructed the Fund's attorneys to settle the matter.

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[26] *1978 (1) SA 914 (A) at 921 B-D*

[27] See: Gollach *supra*, at 922 C-D where it is said as follows:

> *"A transactio, whether extra-judicial or embodied in an order of Court, has the effect of res judicata. (See Western Assurance Co. v Caldwell's Trustee, 1918 AD 262 at p. 270; Van Zyl v Niemann, 1964 (4) SA 661 (AD) at p. 669H, read with p. 668D; Cachalia's case, supra at p. 464; Estate Erasmus v Church, supra at p. 28.) 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.*

[41] In her affidavit, Ms. Mmakoma acknowledges that, prior to withdrawing from the compromise, she has to obtain the court's leave after satisfying the court that the agreement came about by mistake; that the mistake was not the Fund's fault; and that the mistake was reasonable. Ms. Mmakoma, says that she made a material mistake and that she would not have made the offer if it was known to her that the claim had been repudiated before it had prescribed and that she heavily relied on the particulars of claim for her decision to make the offer. The Fund relies on a unilateral mistake.

[42] In our law, a party may resile from a contract entered into under certain circumstances. If there is no misrepresentation by the other party, the scope for a party wishing to resile from a contract on the ground of a unilateral mistake is narrow. Such a party has to plead that he mistake was reasonable (*justus*).[28]

[43] In the case of an unilateral error "*....the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? . . . To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby? . . . The last question postulates two possibilities: Was he actually misled and would reasonable man have been misled?"*[29]

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[28] See: *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board 1958 (2) SA 473 (A)* at 479F-H where the following was said:

> *"Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (error) would have to be reasonable (justus) and it would have to be pleaded."*

[29] See: *Sonap Petroleum (SA) (Pty) Ltd v Pappadogiani*s 1992 (3) SA 234 (A) at 239I-240B.

[44] I turn to the facts in order to determine whether Ms. Mmakoma's mistake was reasonable.

[45] In paragraph 19.2 of her affidavit, Ms. Mmakoma alleges as follows:

> *"Had I known that the plaintiff was not a minor, I would have been more vigilant regarding prescription but for the incorrect information on the particulars of claim I was blind-sighted. I had no reason to question the particulars of claim at the time."*

[46] This allegation must be seen in against the context of with what of what Ms. Mmakoma says in paragraph 11.4 of her affidavit (and which is common cause):

> *"On the 17th of June 2018, the plaintiff sought to amend its particulars of claim by deleting paragraph 1 of its particulars of claim and its entirety and stating that its date of birth was 20 June 1993. The defendant did not object to this amendment and therefore the plaintiff effected the amendment by delivering the amended pages."*

[47] In respect of fault, Ms. Mmakoma says as follows:[30]

> *"I submit that the mistake I made was not the defendant's fault, but the mistake I made because of the particulars of claim that contained incorrect information."*

[48] The amendment whereby Mr. M's date of birth was amended to three years earlier[31] was effected after the compromise. Even with Mr. M's incorrect date of birth, Mr. M's claim would have prescribed by virtue of the provisions of Regulation 2.

[49] Ms. Mmakoma also says as follows in paragraph 30 of the founding affidavit:

> *"I have stated above that due to the urgency of the matter and that the matter was already before the courts and wanting to expedite the matter I relied heavily on the summons and particulars of claim together with the executive*

[30] Paragraph 21 of the founding affidavit.

[31] 1996 to 1993.

summary from TMC."

[50] In paragraph 23 of the replying affidavit, Ms. Mmakoma states as follows:

> *"I deny that I was negligent and that there was dereliction of duty on my part as stated in paragraph 8 of the answering affidavit. I have already stated that the particulars of claim caused me to commit a reasonable mistake."*

[51] With regards to the reasonableness of the mistake, Ms. Mmakoma records as follows:[32]

> *"I submit that given the circumstances of this matter the mistake was reasonable and that any reasonable person confronted by this situation would have made the same mistake more so because the particulars of claim made it clear that the plaintiff was a minor and as such is trite that prescription does not run against minors."*

[52] Ms. M alleges that Ms. Mmakoma's conduct in restricting herself to the particulars of claim when making the decision to settle the merits, was negligent and amounted to a dereliction of her duties.[33] Ms. M further alleges that the fund fails to meet the requirement of *justus error* as it seeks to rely on unilateral, unreasonable and negligent mistake which cannot be justified.

[53] Ms. M admits that Ms. Mmakoma made a mistake but alleges that her mistake can at the very least, be described as grossly negligent which is not one of the grounds for setting aside a compromise.[34]

[54] I agree with Ms. M. Ms. Mmakoma was negligent in instructing the Fund's attorneys to enter into the compromise. The error was therefore not reasonable. The Fund has not cleared to threshold for it to resile from the compromise.

[32] In paragraph 23 of the founding affidavit.

[33] Paragraph 8 of the answering affidavit.

[34] Paragraph 10.1 of the answering affidavit.

[55] The last thing I must to say is that, in my view, the provisions of Regulation 2(2) may be unconstitutional insofar as it includes persons suffering from a legal disability for whom it is impossible to comply with the prescripts of Regulation 2. Camron JA, in *Geldenhuys & Joubert* supra, [35] said as follows:

> *"Although the test for invalidity is objective, I should point out that the minor children in the present case had the plaintiff as their guardian. On the facts she pleaded, she was able to and indeed tried to comply with the two-year period in her own and their behalf, but was thwarted by the attorneys' culpable conduct. We were not asked to determine either the application or the validity of the regulation where the interests of a minor claimant are not so protected (as for instance when a minor has no guardian). I express no view on such a case, where different considerations may apply (see Gassner NO v Minister of Law and Order).*

[56] In my view, Regulation 2, insofar as it includes persons suffering from a legal disability for whom it is impossible to comply with the prescripts of Regulation 2, is at odds with sections 9, 12 and 34 of the Bill of Rights - it is simply wrong. It is a sad reality that in our society there are many vulnerable persons such as households headed by children and must be many mentally ill persons (who are not formally institutionalized) for whom it may simply be impossible to comply with the prescripts of Regulation 2.

[57] I called upon the parties to make representations on the constitutionality of Regulation 2 insofar as it relates to persons under a legal disability for whom it is impossible to comply with its prescripts. They did so for which the court is indebted to them. The plaintiff submitted that Regulation 2 is unconstitutional - the Fund submitted that I am barred from deciding the issue.

[58] A declaration of unconstitutionality of Regulation 2 was not before me and was not pleaded. In addition, the Minister is not party to the proceedings and, in any event, Mr. M (even if it is accepted that he suffers from a legal disability), was fortunate

[35] At paragraph 29.

enough to be assisted by his mother. It is not difficult to appreciate that many of the most vulnerable members of our society do not have a similar benefit. For this reason, I hope that a proper opportunity to challenge to the constitutionality of Regulation 2 in this regard will soon arise.

Order:

1. The application is dismissed.

2. The defendant shall pay the plaintiff's costs.

Roelofse AJ
Acting Judge of the High Court

DATE OF HEARING:	29 October 2019
DATE OF JUDGMENT:	25 November 2019

APPEARANCES

FOR THE APPLICANT/ DEFENDANT:	Mr Ngwenya
INTSTRUCTED BY:	TM Chauke Incorporated
FOR THE PLAINTIFF/ RESPONDENT:	Mr RB Mphela and MS. Netshiozwi
INSTRUCTED BY:	QQ Mkhatshwa Attorneys