IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MTHATHA)

CASE NO: 4442/2019

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL FOR
THE DEPARTMENT OF HEALTH, EASTERN CAPE Applicant

and

S[...] N[...] Respondent

JUDGMENT

RUSI J

[1] The respondent as plaintiff in the main action, and in her personal and representative capacities, sued the applicant as defendant for damages resulting from the negligence of her members in delivering her minor child on 24 October 2016 causing the minor cerebral palsy.

[2] The applicant was found liable for the respondent's damages; hence the matter was subsequently enrolled for the determination of the quantum of damages on 24 July 2023. Not uncommon in matters of this kind, on the date of the trial on quantum, the parties, legally represented by their respective counsel, negotiated a compromise in respect of certain heads of damages, and their negotiations culminated in a draft order entailing the intended compromise.

[3] On 25 July 2023 the parties' legal representatives presented the draft order encapsulating the compromise to the trial judge (the draft order). The total amount of the agreed damages was R10 008 477.10. One of the terms agreed by the parties in terms of the draft order was that a Trust would be established for the preservation and protection of the compromised damages amount and that its terms would be approved by the Master of the High Court. The agreed provisions regarding the establishment and administration of the Trust were accordingly set out by the parties in the draft order.

[4] On 11 October 2023 the trial court[1] made an order (the order) the contents of which, for reasons that will become clear in the course of this judgment, I partially reproduce so as not to overburden this judgment. The contents of the order are, in part, as follows:

> 'Having read the documents filed of record and having heard **Adv Kunju SC** with **Adv Gumede** Counsel for the Plaintiff and **Adv B. Dyke SC** Counsel for the Defendant,
>
> **IT IS ORDERED THAT:**
>
> 1. The defendant shall pay the plaintiff in her personal capacity and her representative capacity on behalf of A[...] N[...] (hereinafter referred to as "the minor child") the sum of R 10 008 447.10 (Ten Million Eight Thousand Four Hundred and Seventy-Seven Rand and Ten Cents) made up as follows:
>
> 1.2 . . .

[1] Per Dawood ADJP as she then was.

1.3 . . .

2. The amounts referred to in 1 above shall be paid in accordance with the provisions of Section3(3)(a)(i) of the State Liability Act 20 of 1957 as amended and shall be paid in the following instalments:

2.1 an amount of R 4 503 814. 70 shall be paid within 30 days of the service of this Order upon the Defendant;

2.2 an amount of R2 752 331. 20 shall be paid on or before 30 May 2024; and,

2.3 a last payment of R2 752 331. 20 shall be made on or before 30 May 2025.

. . .

5. The Defendant is directed to pay the Plaintiff's costs, as taxed or agreed, to date, such costs shall include but not be limited to:

5.1 preparation for pre-trial conferences and costs of attendance by the legal representatives for pre-trial conferences held;

5.2 experts' fees for their joint minutes and the attendance of pre-trial consultations between them and their legal representatives in preparation for trial that was scheduled to commence on 24 July 2023;

5.3 reserved trial costs for both the experts and legal representatives from 24 July 2023 to 25 July 2023

5.4 qualifying costs of the following experts:

(a) Architect – Mr Williams

(b) Industrial Psychologist – Ms Busisiwe Pepu;

(c) Clinical Psychologist – Ms R. M. Hardy;

(d) Mobility expert – Mr Dion Rademeyer; and

(e) Actuary – Mr Wim Loots

5.5 transport and accommodation costs of experts and Plaintiff's legal representatives for consultations and Court appearance (if any); and

5.6 costs of two Counsel where employed.

. . .

12. The defendant shall remain liable for the costs of the creation and administration of the trust at a rate of 7, 5%.

. . .

14. The remaining issues in regard to quantum are postponed *sine die.*

15. The attorney is not entitled to fees in terms of the contingency fee agreement but only ordinary attorney and own client fees.'

[5] This is an application in which the applicant seeks the rescission of the above quoted order. She relies on Uniform Rule 42(1)*(a)* alleging that the order was granted erroneously in her absence alternatively, that, under common law, there exists good cause for its rescission on the ground that there was no consensus between the parties regarding the exact terms of the Trust to be incorporated in it.

[6] The respondent opposes the application on the ground that the order sought to be rescinded was not granted in the applicant's absence and there was no error on the part of the court in granting it. According to the respondent, the trial judge was aware that there was no agreement between the parties regarding the terms of the Trust, and therefore the order was not granted by default. She further states that in as much as there was indeed no consensus between the parties regarding the terms of the Trust that were to be incorporated in the order, it is the court which determined its own terms of the Trust as it deemed appropriate for the protection of the minor's funds.

[7] In tandem with its opposition, the respondent filed a counter application. In her notice of motion initiating the counter application, she seeks a declarator that the parties' agreement as set out in the draft order that was presented to the trial judge on 25 July 2023 is binding between them and it must be made an order court. She also seeks other ancillary relief. For convenience I will refer to the parties as they are in the main action. What follows below are the common cause facts forming the background of this application.

The common cause background facts

[8] When the matter came before the trial court on 24 July 2023, the plaintiff was represented by Mr *Kunju* on the instructions of Mjulelwa Attorneys, and Mr *Dyke* represented the defendant on the instructions of Norton Rose Fulbright Attorneys. Having reached the aforementioned compromise, and upon submitting the draft order to the trial judge, the matter was stood down in order for the trial judge to consider its terms. The parties had, in their draft order, also agreed that the defendant would be liable for the costs of the establishment and administration of the Trust at the rate of 7.5%. They also agreed that the defendant would pay the plaintiff's taxed or agreed costs, including costs of two counsel where employed.

[9] The trial judge directed the parties to incorporate into the draft order the exact terms of the Trust that was to be established for the preservation and protection of the minor's funds. In compliance with the directive of the trial judge, a revised draft order containing the terms of the Trust as proposed on behalf of the plaintiff was conveyed by letter dated 26 July 2023 to the defendant's attorneys. In response to this correspondence, and by electronic mail dated 14 August 2023, the respondent's attorneys proposed different terms of the Trust, stating that the terms that the plaintiff's attorneys proposed were not apposite for damages for personal injury where the beneficiary, as in the present case, was mentally incapacitated. In their view, those terms were appropriate for a commercial Trust as opposed to a preservatory Trust.

[10] With these views in their contemplation, the defendant's attorneys provided a sample of a Trust deed which they suggested should be utilized or modeled by the plaintiff's attorneys in order to 'more readily obtain the defendant's consent to the draft order.'

[11] There was no response from the plaintiff's attorneys to the defendant's letter dated 14 August 2023. On 11 October 2023 and without further notice to the respondent's attorneys, Mr Mjulelwa of Mjulelwa Attorneys presented to the trial judge a draft order containing the terms set out in part in the above quoted order which the

defendant now seeks to rescind. In terms of the order, the first payment was due by 11 November 2023, a date 30 days from the date on which the order was made.

[12] The defendant was not able to make the first payment on its due date, and it unsuccessfully sought an indulgence from the plaintiff's attorneys who instead served a demand on her for the payment of the full amount of the damages relying on the escalation clause contained in the order.[2] The defendant made an undertaking that payment would be made by no later than 14 November 2023.

[13] When that undertaking was not fulfilled, the plaintiff's attorneys persisted with the demand for the payment of the full amount of the agreed damages. The first payment was only made on 30 November 2023, after which the plaintiff's attorneys made a further demand for the payment of the full amount of the agreed damages on pain of execution against the assets of the defendant. It was at that time that the defendant's attorneys raised issue with the terms of the Trust that are stipulated in the order, stating that they are the same as those to which they objected by electronic mail dated 14 August 2023. They also took issue with the cost order made in paragraph 15 of the order.

[14] Mr *Dyke* subsequently made contact with his counterpart, Mr *Kunju*, and brought to his attention the fact that the order was obtained in circumstances where there was never any agreement between the parties regarding the terms of the Trust to be incorporated in it. He also brought to Mr *Kunju*'s attention that the order further purports that the parties agreed that the defendant would pay attorney and client costs when no such agreement was reached between them. In response, Mr *Kunju* wrote to Mr Dyke as follows:

> 'Herewith is the order I have received from my attorneys. I have not checked whether what terms were ei (sic) added or deleted by the Judge. Once more I confirm that we as the parties didn't agree on the terms to be incorporated. The

[2] As provided in paragraph 3 of the order.

Trust is to be established within six months from the date of the order. Some payments are due next year.'

[15] A further attempt via email dated 07 December 2023 was made by the defendant's attorneys, to inquire from the plaintiff's representative regarding the circumstances under which the court order was granted. Their correspondence in this regard was met by the following response from Mr Mjulelwa in an email dated 08 December 2023:

'We refer to the above email of the 7 December 2023 received at 1:00 pm. We would like to respond as follows:

1. We wish to correct you from your wrong perception that we do not have other work to do except this matter, where we expected (sic) when we receive correspondence from you, we must jump drop (sic) everything and respond within your time frames.
2. As far as we recall the parties agreed to the terms of the draft order that was handed in court.
3. We suggest that you advise your client to comply with the court order and this must be clear that should our client's money not paid on or before the 15th December 2023, sheriff will be instructed to attach and remove your client's property.
4. We place on record that we are not threatened by any intended urgent application, in fact we suggest that you bring such application immediately when you received this letter and such intendant (sic) application shall be opposed by client.
5. We hope that wisdom will prevail and your client shall do the right thing to comply with the court order and pay what is due to our client.
6. We hope the above is in order.'

[16] When there was no resolution to this impasse, the defendant's attorneys filed an urgent application that would interdict an execution against the defendant's assets as

heralded by the plaintiff's attorneys. That urgent application was halted by an agreement that was reached between the parties that the defendant launches the present application, with an undertaking by plaintiff that she would not proceed with the intended execution against her assets.

[17] Below I set out the evidence presented by the parties in this application and the counter application.

The defendant's case

[18] In assailing the order, the defendant asserts that on the conspectus of the facts of this application, the order does not conform to the agreements between the parties. In this regard, the defendant contends that the order does not reflect any of the issues that her legal representatives raised with the applicant's attorneys pertaining to the appropriateness of the Trust terms that they proposed on behalf of the plaintiff. According to the defendant, the plaintiff's refusal to accept the terms that her attorneys proposed was not reasonable in the circumstances. This, says the defendant, goes against the stance that the courts in this Division and elsewhere have maintained in assisting the parties determine the content of preservatory Trusts in order to protect the funds of the Trust beneficiaries.

[19] The defendant further contends that none of the legal representatives whose names appear in the order were aware of the order being taken, and none were present when the order was taken. The order, so the contention continues, suggests that there was an agreement regarding the defendant's liability for attorney and client costs, and it makes provision of such costs over and above the cost order made at paragraph 5 thereof.

The plaintiff's case

[20] Mr Mjulelwa who deposed to the plaintiff's answering affidavit, confirms that there was no agreement between the parties regarding the terms of the Trust, and that 'none of the parties were present' when the trial judge determined the appropriate terms of the Trust in the order granted on 11 October 2023. He further states that he had brought to the attention of the trial judge the opposing terms of the Trust as proposed by the plaintiff and defendant, respectively.

[21] According to Mr Mjulelwa, the trial judge considered the respective proposed terms of the Trust and determined, as she was entitled to, that the terms as set out in the order were appropriate for the protection of the award, hence in his view this application is ill-conceived. He also states that it would be unjust to rescind the order in circumstances where the agreed damages in respect of the plaintiff in her personal capacity are not affected by the establishment of the Trust.

[22] Further according to Mr Mjulelwa, it is not open to the defendant to state that the order was granted in her absence. In this regard, he states that when counsel submitted the draft order to the trial judge on 25 July 2023, the defendant was aware that the draft order would not be 'endorsed' by the trial judge on that same day. According to Mr Mjulelwa 'this was akin to a situation where the parties argued the matter and judgment was reserved'. Furthermore, he says, as of 14 August 2023 when the defendant's attorneys proposed different terms of the Trust, they were aware that there was still no agreement between the parties regarding what terms would be appropriate, hence their invitation to the plaintiff's attorneys for comments on their proposed terms.

[23] It is the plaintiff's evidence further that, in any event, the defendant made a payment on R4 503 814.70 as envisaged in the order, albeit this payment was made out of the time frames stipulated in the said order. For these reasons, so the plaintiff contends, it is disingenuous of the defendant to cry foul regarding the circumstances in which the order was made when held to its obligation to make payments as set out in the order. The plaintiff also contends that it is not the defendant's place to question who

has been appointed as the Trustees since this was one of her objections to the plaintiff's proposed terms of the Trust.

[24] As regards the relief sought in the notice of motion initiating the counter application, Mr Mjulelwa states that it would not be just for the order to be rescinded. On this score he states that the order was a culmination of a compromise reached by the parties in respect of various heads of damages where the plaintiff and defendant were both legally represented, following this Court's determination of liability in favour of the plaintiff, and that agreement is binding between them as it has not been set aside.

The defendant's reply

[25] In reply, the defendant raised a point *in limine* that contrary to Uniform Rule 6(1), the plaintiff has not filed any affidavit in support of her counter application but filed an answering affidavit ostensibly in support of both the rescission and counter applications. Other than this, the defendant contends that the counter application was unnecessary, and it is an abuse of court process, in that if the rescission sought is refused, it follows that the order will stand. Regarding the merits of the application, the defendant states that she has shown good reason for the rescission sought.

The parties' submissions

[26] On behalf of the plaintiff, Mr *Kunju* principally submitted that if regard is had to the fact that the order was ultimately not granted as a consent order, the notion that there was no consensus between the parties regarding the terms of the Trust must fail. Moreover, so the submission went, the trial judge was aware that there was no agreement between the parties regarding the terms of the Trust, hence it imposed the terms of the Trust it deemed appropriate for the protection of the minor's funds, and there was no error in granting the order.

[27] Mr *Kunju* further submitted that it is incorrect that the order was granted in the absence of the parties as the trial judge, on 11 October 2023, endorsed the earlier agreements reached by the parties on 25 July 2023 on the various heads of damages. On this score, he submitted that the present application is an attempt by the defendant to resile from those agreements. Mr *Kunju* took the view that the appropriate recourse for the defendant is an appeal against the order. Regarding the impugned cost order which appears in paragraph 15 of the order, it was only submitted that there is no sound basis on which the said cost order is challenged by the defendant.

[28] As regards the point *in limine* that the plaintiff raised regarding the failure to file an affidavit supporting the counter application, Mr *Kunju* submitted that the point *in limine* is the defendant's attempt to insist on form above substance. In this regard, he submitted that the contents of the opposing affidavit make it clear that it deals with both the plaintiff's opposition to the rescission application and the facts set forth in support of the counter application.

[29] Mr *Dyke* submitted, on behalf of the defendant, that in the light of the fact that the parties never reached consensus regarding the terms of the Trust, it was not open to the trial court to conclude that agreement on their behalf by determining the terms that now appear in the order. In his view, the terms of the Trust appearing in the order are objectionable, hence the defendant previously raised concerns about them.

[30] It was Mr *Dyke*'s view that it is not plausible that the trial judge was made aware of the dissensus between the parties regarding the terms of the Trust. He further submitted that the court was bound, in the event it considered terms that were not agreed to by the parties, to hear them before making its own determination on the terms it deemed appropriate for the protection of the minor's funds. Mr *Dyke* further submitted that the cost order granting the plaintiff the entitlement to recover attorney and client costs was incompetent in circumstances where the defendant was not heard and never agreed to such costs.

The law

[31] The relevant part of Uniform Rule 42 which governs rescission applications provides as follows:

> '**Variation and rescission of orders**
>
> (1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:
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> *(a)* an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
>
> *(b)* . . .'

[32] Under the common law, a judgment may be rescinded under limited circumstances, including where it was obtained by fraud; where there was *iustus error*, where it was granted by default, and where just cause exists.

[33] For the present purposes, in order to obtain a rescission under Rule 42(1)*(a)*, the defendant must show that the order sought to be rescinded was erroneously granted in her absence. Should this Court hold that the order was erroneously granted in the absence of the defendant, it is enjoined to rescind or vary the order without further enquiry.

[34] In *Naidoo v Matlala*[3] it was held that in general terms, judgment is erroneously granted if there existed at the time of its issue a fact of which the court was unaware, which would have precluded the granting of the said judgment, and which would have induced the court, if aware of it, not to grant the judgment. With these legal principles in mind, in the discussion that follows, I deal with the issues placed before me by the parties in the papers filed of record.

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[3] *Naidoo v Matlala NO* 2012 (1) SA 143 (GNP) at 153E, see also *Nyingwa v Moolman NO* 1993(2) SA 508 (Tk).

Discussion

[35] It must be stated, as the starting point, that on the face of it, the order does not purport to have been granted by agreement between the parties. That being so, it does indeed purport that when it was granted, both parties were represented as set out therein.

[36] In the plaintiff’s opposing affidavit, Mr Mjulelwa confirms that none of the counsel recorded in the order were in attendance when it was granted, but states that both parties were aware that the terms of the draft would be considered by the trial judge at a later stage. On these bases, he states that the fact that the defendant or her counsel was not present in court when the order was ultimately considered by the trial judge, does not make it an order that was granted in her absence. Whether, as contended by the defendant, the order was granted in her absence, is the issue to which I now turn.

Was the order granted by default?

[37] Whether the defendant’s physical absence in court when the order was made ought to mean that it was granted in her absence, must be viewed against the milieu of the facts that I set out it the discussion that follows hereunder.

[38] It is beyond controversy that the defendant had, from the onset, intended to reach the compromise with the plaintiff pertaining to those heads of damages which are not affected by the ‘public health care defence’. This must necessarily be an integral part of the order. However, the terms of the preservatory Trust were equally paramount to the order that the court would ultimately make.

[39] While it was reasonable for the defendant’s attorneys to await a response from the plaintiff’s attorneys regarding their proposed terms of the Trust, it equally behooved them to do more instead of remaining supine. The defendant knew as of 14 August 2023 when it proposed different terms of the Trust, that there had not been any

consensus between the parties regarding the terms to be incorporated in the order and that no order was as yet made by the court.

[40] Granted, the matter could have been handled differently from how it was handled by the plaintiff's attorneys by *inter alia* responding to the proposal made by the defendant's attorneys regarding the Terms of the Trust. This would have enabled the defendant, if so advised, to set the matter down for the hearing by the trial judge, of the contentious issues as there may have been after her attorneys' proposal regarding the terms of the Trust.

[41] I may add that the above quoted content of the letter written by Mr Mjulelwa could have been moderated in keeping with decorum between adversaries in litigation. Mr Mjulelwa would indeed be well advised to avoid communication with a tone such as the one that appears from the letter. With this said, it is not without significance that despite the knowledge that at a time before 11 October 2023 no agreement had been reached regarding the terms of the Trust, Mr Mjulelwa presented a draft order to the trial judge without informing his counterparts for the opposition. This, in circumstances where it was clearly in the contemplation of the parties that there would be further engagement on the terms of the Trust as directed by the trial judge.

[42] I readily accept that the order, regrettably perhaps, suggests that on 11 October 2023 when it was made, counsel therein recorded were present. It must also be accepted that the trial judge would have been mindful that an integral part of the draft order presented to her, namely, the agreed damages, remained so from the time the matter served before her on 25 July 2023 when both parties were represented by their respective counsel. From the contentions made by the parties in their respective affidavits filed of record in this application, nothing suggests the contrary regarding the status of those compromised damages as of 11 October 2023.

[43] It may very well be so that the court was entitled, in the absence of an agreement between the parties, to determine the terms of the Trust that it deemed appropriate for

the protection of the minor's funds. Equally incontrovertible is the fact that the court is clothed with the discretion to grant costs on attorney and own client scale in a deserving case. But it would certainly exercise its discretionary powers in both instances after hearing both parties.

[44] On the issue of physical presence in court, the Court in *Zuma*[4] said the following:

> '[57] At the outset, when dealing with the "absence ground", the nuanced but important distinction between the two requirements of rule 42(1)(a) must be understood. A party must be absent, and an error must have been committed by the court. At times the party's absence may be what leads to the error being committed. Naturally, this might occur because the absent party will not be able to provide certain relevant information which would have an essential bearing on the court's decision and, without which, a court may reach a conclusion that it would not have made but for the absence of the information. This, however, is not to conflate the two grounds which must be understood as two separate requirements, even though one may give rise to the other in certain circumstances. The case law considered below will demonstrate this possibility.
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> [58] In *Lodhi 2*, for example, it was said that "where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him, such judgment is granted erroneously". And, precisely because proper notice had not been given to the affected party in *Theron N.O.*, that Court found that the orders granted in the applicants' absence were erroneously granted. In that case, the fact that the applicant intended to appear at the hearing, but had not been given effective notice of it, was relevant and ultimately led to the Court committing a rescindable error.

[4] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021).

[59] Similarly, in *Morudi*, this Court identified that the main issue for determination was whether a procedural irregularity had been committed when the order was made. The concern arose because the High Court ought to have, but did not, insist on the joinder of the interested applicants and, by failing to do so, precluded them from participating. It was because of this that this Court concluded that the High Court could not have validly granted the order without the applicants having been joined or without ensuring that they would not be prejudiced. This Court concluded thus:

"[I]t must follow that when the High Court granted the order sought to be rescinded without being prepared to give audience to the applicants, it committed a procedural irregularity. The Court effectively gagged and prevented the attorney of the first three applicants – and thus these applicants themselves – from participating in the proceedings. This was no small matter. It was a serious irregularity as it denied these applicants their right of access to court."

[60] Whilst that matter correctly emphasizes the importance of a party's presence, the extent to which it emphasizes actual presence must not be mischaracterized. As I see it, the issue of presence or absence has little to do with actual, or physical, presence and everything to do with ensuring that proper procedure is followed so that a party can be present, and so that a party, in the event that they are precluded from participating, physically or otherwise, may be entitled to rescission in the event that an error is committed I accept this. I do not, however, accept that litigants can be allowed to butcher, of their own will, judicial process which in all other respects has been carried out with the utmost degree of regularity, only to then, ipso facto (by that same act), plead the "absent victim". If everything turned on actual presence, it would be entirely too easy for litigants to render void every judgment and order ever to be granted, by merely electing absentia (absence).' (footnotes omitted).

[45] Although the above quoted case of *Zuma* is distinguishable from the present case on the facts, the principle therein annunciated finds application in the instant case regarding the correct interpretation of Rule 42(1)*(a)*.

[46] I have already observed, for the present purposes, that as of 14 August 2023, it was known to the defendant that no consensus had been reached between the parties regarding the terms of the Trust, hence her attorneys invited those representing the plaintiff for comments on their proposed terms of the Trust. This fact was equally known to the plaintiff's attorneys who also failed or neglected to respond to the defendant's invitation for comments on the terms of the Trust that her legal representatives proposed.

[47] The plaintiff's attorneys inexplicably, and regrettably so, made an abrupt turn away from the settlement-oriented approach that the parties adopted which culminated in the compromised damages. This is the *volte-face* that Madlanga J referred to in *Eke*, albeit in different circumstances, when he described the defendant's conduct in turning away from agreements made in settling the matter.[5] It ought not be accepted without further ado, that the plaintiff's attorney allegedly presented the proposals of the defendant's attorney to the trial judge, all the more so that he strangely did so without the knowledge of the defendant's attorneys.

[48] Furthermore, paragraph 15 of the order provides that the plaintiff's attorney 'is not entitled to fees in terms of the contingency fee agreement but only ordinary attorney and own client fees.' Properly construed, that paragraph provides for the attorney's entitlement to fees that the plaintiff would pay to him beyond what is recoverable from her opponent on a party and party scale. These are the costs that the plaintiff would in turn be entitled to recover from the defendant. On the common cause facts of this application, it must be accepted that this cost order was granted by the trial court without hearing the defendant.

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[5] *Eke v Parsons* (CCT214/14) [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) (29 September 2015), para 41.

[49] It is not availing to the plaintiff to contend that the defendant has no say in how she protects the damages award that is due to the minor. In terms of the same order, the defendant is liable for 7.5% of the costs of the establishment and administration of the Trust. This vests her with in a material interests in the matter. The result is that the defendant was not given an opportunity to present whatever facts and/or argument that would inform the court's decision both in regard to the terms of the Trust and the cost order made in paragraph 15 of the order.

[50] All of the above notwithstanding, it is beyond dispute that after the order was made, and almost 3 months after the defendant's attorneys proposed its preferred terms of the Trust, which the plaintiff's attorneys disregarded, the defendant made a payment towards the compromised damages. On this score, a contention was made on behalf of the plaintiff that the defendant acquiesced to the order. In the discussion that follows, I deal with whether this contention should stand.

Did the defendant acquiesce to the order?

[51] In *Mhlontlo Local Municipality and Others v Ngcangula and Another*[6], the SCA referred to *Hlatshwayo* and held as follows:

> '[13] The principle of peremption safeguards the integrity of the judicial process by preventing litigants from oscillating between contradictory positions, ensuring judicial consistency and fairness. It ensures finality and stability in legal proceedings, which is essential for maintaining public trust in the justice system. The underlying principle of the doctrine of peremption is that a litigant cannot take two inconsistent positions. Accordingly, an unsuccessful litigant cannot appeal a judgment it has acquiesced to. In order to succeed on peremption a respondent must demonstrate with reference to the facts before court that an

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[6] *Mhlontlo Local Municipality and Others v Ngcangula and Another* (1154/2022) [2024] ZASCA 5 (17 January 2024) *("Ngcangula")*.

appellant's unequivocal conduct after having obtained leave to appeal, is inconsistent with an intention to appeal. In *Qoboshiyane NO v Avusa Publishing Eastern Cape* the test to determine whether an appeal had become perempted was set out as follows:

> "Where, after judgment, a party unequivocally conveys an intention to be bound by the judgment any right of appeal is abandoned. The principle can be traced back to the judgment of this court in *Dabner v South African Railways & Harbours*, where Innes CJ said:
>
> "The rule with regard to peremption is well settled and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven."'

[52] In countering the contention that she acquiesced to the order, the defendant asserts that the payment that was made was made in error in circumstances where no suspicion arose from a reading of the order when it was conveyed to her attorneys after it was made. On the defendant's showing its discontent with the terms of the Trust arose when the plaintiff's attorneys persisted with the enforcement of the order after she made the first payment.

[53] To my mind, an unequivocal act by the defendant would entail an act which she performed as a clear demonstration of her intent. What becomes clear from the facts of the present case is that the defendant operated from an incorrect premise that the order presented to her for payment of the first instalment of the damages accorded well with the settlement stance that she adopted from 25 July until 14 August 2023.

[54] Regard must also be had to the fact that in their letter dated 14 August 2023, the defendant's attorneys indicated that 'it would be once the terms of the Trust similar to those proposed by them have been considered by the plaintiff's attorneys that the defendant's consent to the order will be more readily obtained'. I hold the view that the undisputed enquiry by the defendant's attorneys into the circumstances under which the order was taken establishes that at the time of making the payment ostensibly in terms of the order, the defendant acted on the wrong premise that the order was obtained by consent between the parties. It serves to establish that at the time of making the payment, the defendant was not aware of the material fact that the order was no longer granted by agreement.

[55] However, it must be noted that in any event, once the agreement was reached between the parties on the settlement of the various awards of damages, there was axiomatically an obligation on the defendant to fulfil the terms of the agreement. Therefore, on this ground as well, the first payment that was made by the defendant cannot have been an acquiescence to the order – it followed the agreement reached to settle the various heads of damages.

[56] Furthermore, despite the undertaking that the defendant made to make payment no later than 14 November 2023, she launched urgent proceedings to halt an execution against her assets when it appeared that the plaintiff's attorneys persisted with the enforcement of the order for the payment of the full amount of the agreed damages based on the escalation clause contained in the order. In *Ngcangula*, the Court went further and said:

> '[15] Peremption, like waiver, is not lightly presumed and the onus rests on the party alleging peremption to establish conduct that clearly and unconditionally demonstrates acquiescence to abide by a judgment or order. . .'[7]

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[7] Id.

[57] I make the finding that the present case is one of the cases where acquiescence appears doubtful. I am not satisfied that the plaintiff has established that the defendant has acquiesced to the order in accordance with the legal principles I have discussed in the preceding paragraphs. This leads me to the plaintiff's counter application.

The counter application

[58] The defendant raised a point *in limine* that the plaintiff failed to file an affidavit in support of her counter application but impermissibly relied on her affidavit filed in opposition of the rescission application. The provisions of Uniform Rule 6(1) are indeed trite – every application must be brought on notice of motion supported by the facts upon which the applicant relies for the relief sought.

[59] A proper reading of the contents of the opposing affidavit suggests without any room for doubt, that in it the plaintiff traverses her opposition and simultaneously sets out facts on which she relies for the relief that she seeks in the counter application. What the defendant contends is in keeping with the kind of formalism that the court cautioned against in *Eke* when it said:

> '[W]ithout doubt, rules governing the court process cannot be disregarded. They serve an undeniably important purpose. That, however, does not mean that courts should be detained by the rules to a point where they are hamstrung in the performance of the core function of dispensing justice. Put differently, rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rules. That, even where one of the litigants is insistent that there be adherence to the rules. Not surprisingly, courts have often said "[i]t is trite that the rules exist for the courts, and not the courts for the rules.'[8] (footnotes omitted).

[8] Id, para 39.

[60] And it has been held that '[t]echnical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.'[9] I note that the defendant was able to answer to the counter application based on the same facts as they appear from the plaintiff's answering affidavit. The defendant's point *in limine* must accordingly fail.

[61] In the counter application, the plaintiff seeks an order declaring that the terms embodied in the draft order dated 24 – 25 July 2023 are binding between the her and defendant under Case Number 4442/2019. Alongside this relief, she asks that the parties' agreement as set out in that same draft order be made an order of court with effect from 25 July 2023; and other ancillary relief.

[62] That the plaintiff and defendant reached a compromise (*transactio*) regarding the aforementioned various heads of damages is not the subject of controversy. I digress to mention that in this case, litigation commenced, and the defendant was held liable for the damages that the plaintiff suffered in personal and representative capacities as a result of the negligence of her (defendant's) employees.

[63] It is trite that a settlement or compromise is in and of itself a contract which has as its object the prevention, avoidance or termination of litigation.[10] It exists independently of the cause that gave rise to it. Furthermore, its validity is not dependent upon it being made an order of court. Hence, if breached, the aggrieved party will be entitled to recourse under the principles of the law of contract.

[64] Importantly, once concluded the only basis upon which a compromise may be set aside is if it was obtained fraudulently or on the grounds of mistake, provided that the

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[9] *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278F; see also unreported decision of Tokota J in *Cape Law Society v Mlindazwe* (2857/18) [2020] ZAECMHC 8 (10 March 2020) para 3.

[10] *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Company (Pty) Ltd and Others* 1978 (1) SA 914 (A) at 921C-D, referred to in *Moraitis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd and Others* 2017 (5) SA 508 (SCA), para 14; *Chapmans Peak Hotel (Pty) Ltd v South Peninsula Municipality* 1998 (4) All SA 619 (C) at 633 *i-j* and 634 *a-b*.

error vitiated true consent and did not merely relate to the motive of the parties or the merits of the dispute, which was the purpose of the parties' compromise.[11]

[65] Against this background, I proceed to consider whether the relief that the plaintiff seeks in the counter application is competent in the present matter.

[66] Regard must first be had to the fact that the daft order dated 24 – 25 July 2023 consisted in two components – the compromised damages and the terms of the preservatory Trust that would protect the minor's funds. Significantly, the parties were in agreement that the establishment of the Trust was necessary to protect the compromised award of damages that is due to the minor.

[67] The defendant has not, in this application, mounted any challenge to the parties' agreements as set out in the said draft order which they presented to the trial judge on 25 July 2023. She contented herself with the point in limine that I have discussed above. This is apart from rejecting the terms of the Trust that the plaintiff subsequently proposed following the directive of the trial judge,

[68] It bears reiterating that the purpose of a Trust is to ensure that the protected funds are used for the benefit of the plaintiff's maintenance, care and other needs.[12] As correctly contended on behalf of the defendant the court's function includes determining whether in a given case, the protection of the damages award is necessary and if so, what form of protection would be appropriate.[13] In keeping with its duty to ensure that it makes competent and practical orders, the court is entitled, where necessary, to insist that the parties effect the necessary changes to the proposed terms as a condition for the making of the order.[14]

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[11] *Gollach v Gomperts* supra footnote 10, at 922C-D; *Wilson Bayly Holmes (Pty) Ltd v Maeyane and Others* 1995 (4) SA 340 (T), at 344B-C.
[12] *In Re Protection of Certain Personal Injury Awards (Pretoria Society of Advocates and Others, Amici Curiae)* 2022 (6) SA 446, para 5.
[13] Id, para 3.
[14] *Eke*, para 34.

[69] In as much as there was no disagreement between the plaintiff and the defendant *inter se*, regarding the terms of the draft order, to my mind, making it an order of court would amount to this Court impermissibly overturning the decision of the trial judge in directing that the precise terms of the Trust be included in the draft order before it was made an order of court. Two consequences would follow from that – firstly, the defendant would yet again be denied a hearing regarding the terms of the Trust that her attorneys proposed. Secondly, the trial court would then have been stripped of the very obligation that the plaintiff and the defendant acknowledge (which the Court emphasized in *Eke*), to ensure that it issues competent and practical orders notwithstanding the parties' agreement.

[70] Put differently, this Court would impermissibly be substituting the order of 11 October 2023 for an order as set out in the parties' draft order dated 24 – 25 July 2023, a power that an appeal court would have had the defendant appealed against the order.

[71] Neither the plaintiff nor the defendant challenged the trial judge's decision to insist on the incorporation of the precise terms of the Trust in the draft order. The opposite is true – both parties accepted the trial judge's entitlement to so direct, and they set out to comply with the directive. Their dissensus ensued regarding the terms of the Trust that were subsequently proposed on behalf of the plaintiff.

[72] While I agree that the parties' agreement on the settlement of various heads of damages is binding between them, a fact that the defendant has not disputed, I must decline the plaintiff's invitation that I make that agreement an order of court on the terms as they appeared in the consent draft order that the parties submitted to the trial judge on 25 July 2023. It will be available to the parties to approach the trial court on properly considered terms of the Trust for the purposes of making whatever agreement they may subsequently reach in that regard an order of court.

Costs

[73] The defendant seeks a punitive cost order as this Court's mark of disapproval of what she describes in essence as the plaintiff's intransigence and unreasonableness in her conduct of this litigation. On the other hand, the plaintiff seeks a punitive cost order against the defendant on the basis that its application for the rescission of the order was ill-conceived and is an abuse of court process. In the light of the finding that I made that the terms of the Trust and the impugned cost order were granted without hearing the defendant, the plaintiff's contention cannot be sustained.

[74] Costs are awarded in the discretion of the of the court in accordance with what is fair between the parties. Punitive costs will be warranted where the court finds unconscionable conduct of one sort or the other on the part of a litigant in its conduct of the litigation. In the present matter, none of the parties are free of blameworthy conduct in relation to how litigation in this matter was handled. I have made these observations elsewhere in this judgment. However, a punitive cost order against one party and not the other is not justified.

[75] Fundamentally, a successful litigant ought to be awarded its costs, unless there are grounds for deviation from this rule. In the present case, the defendant has been wholly successful in the rescission of application. She must be awarded her costs. The plaintiff's counter application was partially successful, in so far as it must indeed be declared that the parties' settlement agreement on various heads of damages is binding between them.

[76] Elsewhere in this judgment, I made an observation that the parties' agreement to settle the various heads of damages was an integral part of the consent order that they presented to the trial judge on 25 July 2023. As far as can be ascertained from the facts of this application, the defendant has not disavowed this agreement. This must *per force* mean that the plaintiff's counter application was substantially successful. Therefore, I find no reason why the plaintiff must be deprived of her costs in the counter application despite partial success.

[77] For all the aforegoing reasons, I make the following order:

1. The court order dated 11 October 2023 is hereby rescinded, and the plaintiff shall pay the defendant's costs of the rescission application.
2. It is declared that the agreement reached between the plaintiff and defendant on 25 July 2023 whose terms are embodied in the draft order dated 24 – 25 July 2023 is valid and binding between the parties.
3. The defendant shall pay the plaintiff's costs in the counter application, those costs include costs of two counsel, where employed.

L. RUSI
JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff	:	Adv. *V Kunju SC*
		Adv. *N Gumede*
Instructed by	:	Mjulelwa Inc Attorneys , Mthatha
For the defendant	:	Adv. *B Dyke SC*
Instructed by	:	Norton Rose Fullbright South Africa Inc
		c/o Smith Tabata Attorneys, Mthatha

Date heard	:	28 November 2024
Date delivered	:	10 June 2025